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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

Joseph Story

Thomas M. Cooley

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.

BY

JOSEPH STORY, LL.D.

IN TWO VOLUMES.

VOL. I.

FOURTH EDITION, WITH NOTES AND ADDITIONS

BY THOMAS M. COOLEY.

"Magistratibus igitur opus est; sine quorum prudentiâ ac diligentiâ esse civitas non potest; quorumque descriptione omnis Reipublicæ moderatio continetur."
CICERO, DE LEG., lib. 3, cap. 2.

"Government is a contrivance of human wisdom to provide for human wants."
BURKE.

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CAMBRIDGE.

TO THE

HONORABLE JOHN MARSHALL, LL.D.,

CHIEF JUSTICE OF THE UNITED STATES OF AMERICA.

SIR,

I ASK the favor 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 labors 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 everywhere display. Other judges have attained an elevated reputation by similar labors, in a single department of jurisprudence. But in one department, (it need 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 clamor; no eager reaches for popular favor. 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 of 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 labors, of 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 labors 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.

EDITOR'S PREFACE

TO THE FOURTH EDITION.

In preparing for the press a fourth edition of Mr. Justice Story's Commentaries on the Constitution, it has been thought proper to preserve the original text without alteration or interpolation, and to put into notes all discussions by the editor, as well as all references to subsequent adjudications, public papers, and events, tending to illustrate, support, or qualify the positions assumed in the text. The new amendments, however, seemed to demand treatment in the body of the work, and additional chapters are given for that purpose. In preparing them, the editor has not been ambitious to enter upon original discussions, or to advance peculiar views; and he has contented himself with a brief commentary on the provisions and purposes of the amendments, aiming, as far as possible, to keep in harmony with the opinions and sentiments under the inspiration of which they were accepted and ratified in the several States. So far as it was possible to derive assistance from adjudicated cases, he has sought to do so, but he has carefully abstained from the expression of partisan views on disputed points, and he has not in general deemed it necessary to anticipate the judgment of the country upon any such decisions of inferior federal

courts as might seem to him chargeable to the disorders and excitements of the times, and to be unwarranted by the Constitution. In the main, therefore, such decisions have been passed over by him without notice.

The liberty has been taken in this edition to retain the benefit of a portion of Judge Bennett's labors upon the last, but credit is in all cases given by adding his initials. Notes by the editors are distinguished from those of the author by being included in brackets.

University of Michigan, Ann Arbor, 1873.

PREFACE.

I NOW offer to the public another portion of the labors 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 doubted by any persons 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 labor 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 important masses a few facts or a solitary argument. Indeed, it required no small labor, 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 Judgments 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 of 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 favor. Topics, therefore, having a natural connection 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 endeavored 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 subtilties 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. Upon 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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CONSTITUTION

OF

THE UNITED STATES OF AMERICA.

We, the people of the United States, in order to form a more perfect union, establish justice, insure 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 of 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 honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

Section 4.

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 behavior, 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 repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8.

The Congress shall have power, —

1. 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:

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

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 hereinbefore 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 anything 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.

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows: —

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 President, 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.

1. 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 of the state of the Union, and recommend to their consideration such measures

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

Section 4.

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 III.

Section 1.

1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their offices during good behavior, 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 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 labor, but shall be delivered up on claim of the party to whom such service or labor 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 of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

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, anything 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, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE 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 favor; 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 re-examined 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.

1. 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 the 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 Vice-President, 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 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 Vice-President 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.

ARTICLE XIII.

1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the Unied States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection and rebellion, shall not be questioned.

But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, or claims shall be held illegal and void.

5. The Congress shall have power to enforce by appropriate legislation the provisions of this article.

ARTICLE XV.

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation.

COMMENTARIES 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 everywhere discernible in the actual jurisprudence of each State; and are silently or openly referred to in several of the provisions 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 neighbors 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 Venetian, then settled in England, to proceed on a voyage of discovery, and to subdue and take possession of any lands unoccupied by any Christian Power, in the name and for the benefit of the British Crown.[3] In the succeeding year Cabot sailed on his voyage, and having first discovered the islands of Newfoundland and St. John's, 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.[4]

[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.

[3] 1 Haz. Coll. 9; Robertson's Hist. of America, B. 9.

[4] Marshall, Am. Colon. 12, 13; Robertson's America, B. 9.

§ 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 of benefit in proportion to 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 cisatlantic 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

[1] *Johnson* v. *M'Intosh*, 8 Wheat. R. 543, 572, 573; 1 Doug. Summ. 110.

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.

§ 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 recognize 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 propagating the Catholic religion,[2] 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.[3]

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

[2] "Ut fides Catholica, et Christiana Religio nostris præsertim temporibus exaltetur, &c., ac barbaræ nationes deprimantur, et ad fidem ipsam reducantur," is the language of the Bull. 1 Haz. Coll. 3.

[3] 1 Haz. Collect. 3; Marshall, Hist. Col. 13, 14.

§ 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.[1] 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 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. *M'Intosh;* 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,

[1] Chalmers, Annals, 676, 677; 1 Doug. Summ. 213.

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, 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 Acadie, 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

[1] 8 Wheat. 543. See also *Worcester* v. *Georgia*, 6 Peters's R 515; 4 Jefferson's Corresp. 478; Mackintosh's History of Ethical Philosophy, (Phila. 1832,) 50; *Johnson* v. *M'Intosh*, 8 Wheat. R. 574 - 588. [Wheat. Int. Law, pt. 2, ch. 4, § 5; *Jackson* v. *Wood*, 7 Johns. 290; *Clark* v. *Williams*, 19 Pick. 499; *Godfrey* v. *Beardsley*, 2 McLean, 412; *Coleman* v. *Doe*, 4 S. & M. 40; *Jones* v. *Evans*, 5 Yerg. 323; *Rowland* v. *Ladiga*, 9 Port. 488; *Sparkman* v. *Porter*, 1 Paine, 457.]

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 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 sea-coast 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 warranto;* 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 lying 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 prov-

ince 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, where 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 Madrid 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. Betweeen 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 1703, 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 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 ante bellum*, did not remove this subject of controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful arguments in favor 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 centre 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 sea-coast, 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 guaranteed 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 irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the lakes Maurepas and Pontchartrain, 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 discovery 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 exclusive 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 *bonâ 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 of 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 of 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.[1] 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 his life in the fruitless labor.[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 followed up the original plan under a new patent from the crown.[4] To him we are indebted for the first plantations in the South;[5] 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.[6] But notwithstanding the bright prospects thus held out, three successive

[1] Robertson's America, B. 9; Doug. Summ. 110, &c.
[2] 1 Haz. Coll. 24.
[3] Marshall's Colon. 15, 16; Robertson's America, B. 9.
[4] 1 Haz. Coll. 33; Robertson's America, B. 9.
[5] 1 Haz. Coll. 38–40; 2 Doug. Summ. 385.
[6] Marsh. Colon. 17; Robertson's America, B. 9.

attempts under the auspices of Raleigh ended in a ruinous disaster, and seemed but a presage of the hard fate and darkened fortunes of that gallant, but unfortunate gentleman.[1]

§ 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 England[2] (in 1606). 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.[3] The second assumed the name of the Plymouth Company, from the residence of the original grantees; and New England was founded under their auspices.[4] Each colony had exclusive propriety in all the territory within fifty miles from the first seat of their plantation.[5]

§ 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 one 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 socage only, and not *in capite;* and were authorized to grant the same to

[1] Robertson's America, B. 9.
[2] Marsh. Colon. 25; 1 Haz. Coll. 50; Robertson's America, B. 9.
[3] 1 Haz. Coll. 99; Robertson's America, B. 9.
[4] Robertson's America, B. 9.
[5] 1 Haz. Coll. 50.

the inhabitants of the colonies in such manner and form and for such estates, as the council of the colony should direct.[1]

§ 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 intruders, 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 pretence of trade from the mother country to the colonies.[2]

§ 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 offences were to be sent to England for punishment; and subordinate offences 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.[3] 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,[4] 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 found any favor in the eyes either of the proprietors or of the people. By placing the whole legislative and executive powers in a council nominated by the

[1] 1 Haz. Coll. 50; Marsh. Colon. 25, 26; Robertson's Amer. B. 9.
[2] 1 Haz. Coll. 50; Marsh. Colon. 26.
[3] Marsh. Colon. 27, 28.
[4] 1 Haz. Coll. 58, 72; Marsh. Colon. 44, 45, 47; Robertson's America, B. 9.

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 forms 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 functions of legislation.[2] 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 country was never lost sight of, but was ever afterwards cherished throughout America, as the dearest birthright 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.[3] 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

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

[2] Robertson's America, B 9; Marsh. Colon. ch. 2, p. 54.

[3] Henning, Stat. 111; Stith's Virg. App. No. 4, p. 321; 1 Chalm. Annals, 54.

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.[1] 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 offence to King James; and the disasters, which accomplished an almost total destruction of the colony 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.[2] The demand was resisted by the company; a *quo warranto* 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.[3]

§ 47. It does not appear that these proceedings, although they have 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 a reign remarkable for no great or noble objects. Dr. Robertson has observed, that the company, like all unprosperous societies, fell unpitied;[4] 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.

[1] Robertson's America, B. 9; Marsh. Colon. ch. 2, p. 56; 1 Haz. Coll. 131.

[2] In 1623. See 1 Haz. Coll. 155.

[3] Robertson's America, B. 9; 1 Haz. Coll. 183; Marsh. Colon. ch. 2, p. 60, 62; Chalmers's Annals.

[4] Robertson's America, B. 9.

§ 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 appointing a governor and twelve counsellors, 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 the First, 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 meditating 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, Virginia continued 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 a part 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 oppressions, that the king was brought to more considerate measures. He did not at once yield 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,

[1] 1 Haz. Coll. 189.

[2] Marsh. Colon. ch. 2, p. 63, 64; 1 Haz. Coll. 189.

[3] 1 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.

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 flourished 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 "endeavored, in all things, as near as the capacity and constitution of this country would admit, to adhere to those excellent and often refined laws of England, to which we profess and acknowledge all due obedience and reverence."[2] 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 very 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;[3] and its doctrines and discipline were strictly enforced. All non-conformists 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,

[1] Robertson's America, B. 9; Marsh. Amer. Col. ch. 2, pp. 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.

[2] 2 Henning, Stat. 43. Sir William Berkeley, 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."

[3] [Jefferson, Works, I. 38; Life of Madison by Rives, I. 42; Bancroft, Hist. of U. S., I. 206; *Terrett* v. *Taylor*, 9 Cranch, 43.]

and other aids. Non-residence was prohibited, and a 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 William and Mary. Subject to this, the Church of England seems to have maintained an exclusive supremacy 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 its steady attachment to entails. By an act passed in 1705, it 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 £200 sterling in value,[3] yet the general policy continued down to the American Revolution. In this respect, the zeal of the colony to secure entails 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 a privilege 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

[1] I 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 Hen. Stat. 400; 5 Hen. Stat. 414; 1 Tuck. Black. Comm. App.

[4] 1 Henning, Stat. 248; 2 Hen. Stat. 98; 3 Hen. Stat. 321.

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 guaranteed 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 *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."[3] 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.[4]

[1] 1 Henning, Stat. 290.

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

[3] 2 Hen. Stat. 511, 512, 514, 517; 1 Chalm. Annals, 328; 3 Hutch. Collect. 496.

[4] 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 though 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. Captain John Smith, so well known in the history of Virginia by his successful adventures under their authority, lent a transient lustre 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, afterwards 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 corresponding charity for differences of religious opinion. Each successive sect entertained not the slightest doubt of its 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

[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.

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 received with acclamations by the crowd, and found an ample vindication from the learned and the dogmatists; 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 prelate, 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 to 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.[2] 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.

[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. *Dissertation on the Progress of Ethical Philosophy* (Phila. 1832), p. 36.

[2] Robertson's America, B. 10; 1 Belknap's New Hampshire, ch. 3; 1 Chalm. Annals, p. 143, 145, 169, 189, 190, 191; 3 Hutch. Hist. Coll. 42.

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

§ 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 we owe the foundation of the now widespread 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.[1] After remaining there 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.[2] 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.[3] 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;[4] 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; but 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 example of it in primitive and almost patriarchal simplicity.

[1] Belknap's New Hampshire, ch. 3; 1 Doug. Summ. 369.

[2] Morton's Mem. 1 to 30.

[3] Robertson's America, B. 10; Marsh. Amer. Col. ch. 3, p. 79, 80; Morton's Mem. 31 to 35.

[4] 1 Haz. Coll. 87, 88; Morton's Mem. App. 373.

§ 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, for 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 increased to seven.[3] 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.[4] The number of settlements having increased, and being at a considerable distance from each other, a house of representatives was established in 1639;[5] 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

[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); 1 Haz. Coll. 404, 408.

[3] Morton's Mem. 110; Prince's Annals, 225; 2 Hutch. Hist. 463, 465; 1 Haz. Coll. 404, 408, 411, 412.

[4] Robertson's America, B. 10; 2 Hutch. Hist. 467; 1 Haz. Coll. 408, 411, 412, 414.

[5] 2 Hutch. Hist. 463.

stern notions of the absolute authority and universal obligation of the Mosaic institutions.[1]

§ 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.[2] This patent, besides a grant of the territory upon the terms and tenure of the original patent of 1620, 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."[3]

§ 57. This patent or charter seems never to have been confirmed by the crown;[4] 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.[5]

[1] Robertson's America, B. 10; 2 Hutch. Hist. 462, 463, 464; Hubbard's Hist. ch. 10, p. 62; Chalmers's Annals, p. 88.

[2] 2 Hutch. Hist. 464, 479; 1 Haz. Coll. 298, 404, 468; 1 Chalmers's Annals, 97, 98; 1 Holmes's Annals, 201.

[3] 1 Haz. Coll. 298, 404.

[4] Chalmers says (1 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. Colon. ch. 3, 82, 83.

[5] Marsh. Hist. Colon. ch. 3, p. 82; 1 Chalm. Annals, 87, 88, 97.

§ 58. The charter of 1629 furnished them, however, with the color 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 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 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 evi-

[1] 2 Hutch. Hist. 464, 465, 467; Chalm. Annals, 88. [Palfrey, Hist. of New England, I. 542.]

[2] 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.

dence 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 offences were enumerated, without any discrimination, idolatry, blasphemy, treason, murder, witchcraft, bestiality, sodomy, false witness, man-stealing, cursing or smiting father or mother, rape, wilful burning of houses and ships, and piracy; while certain other offences 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 offences. 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 was carefully provided for.[2]

§ 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] 1 Haz. Coll. 473; Plymouth Colony Laws (1688), p. 16.

[2] 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, (1620,) James the First, with a view to promote more effectually the interests of the second or northern company, granted [1] 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 mainland 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 counsellors 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 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

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

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 be holden of the crown, as of the royal manor of East Greenwich, in Kent County, in free and common socage, 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] The charter also authorized the council to transport to the plantation any subjects, or strangers who were willing to become subjects and live under the king's allegiance. But it prohibited papists to be transported, by requiring all persons going there to take the oath of supremacy, and authorizing the president of the council to administer the oath.[4]

§ 62. Some of the powers granted by this charter were alarming to many persons, and especially those which granted a monopoly of trade.[5] The efforts to settle a colony within the territory were again renewed, and again were unsuccessful.[6] 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 Mr. White, a distinguished non-conforming 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

[1] 1 Haz. Coll. 109, 110, 112, 113, 141.
[2] Ibid. 111.
[3] Ibid. 117.
[4] Ibid. 117.
[5] Marsh. Colon. ch. 3, p. 83; Chalm. Annals, p. 81, 83.
[6] Robertson's America, B. 10; Chalm. Annals, 90.

three miles north of Merrimack River, extending from the Atlantic to the South Sea.[1]

§ 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 the 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 be holden of the crown, as of the royal manor of East Greenwich, "in free and common socage, 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 be 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,

[1] 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.

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 be exercised at such a distance as would render 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.[3] 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.)[4] It gave authority to

[1] Hutch. Coll. p. 1–23; 1 Haz. Coll. 239; 1 Chalm. Annals, p. 137.
[2] Chalm. Annals, 81; Robertson's Hist. America, B. 10.
[3] Robertson's America, B. 10; 1 Chalm. Annals, 141.
[4] 1 Chalmers's Annals, 141; Robertson's America, B. 10, and note.

the governor and other officers to administer the oath of supremacy, thereby probably intending to discourage the settlement of papists in the colony.[1] But there is nothing in it which exhibits on the part of the monarch any disposition to relax in favor of the Puritans 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 actual settlers.[5] 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."[6] 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 ascendency among the New England settlements, and awakened the jealousy, distrust, and vigilance of the parent country.

[1] But see 1 Grahame, Hist ch. 1, p. 245, note.

[2] Robertson's America, Book 10, and note; 1 Chalm. Annals, 141.

[3] Robertson's America, B. 10; Hutch. Coll. 201; 1 Chalm. Annals, 143, 144, 145.

[4] 1 Chalmers's Annals, 94, 95.

[5] 1 Hutch. Hist. 12, 13; 1 Chalmers's Ann. 150, 151.

[6] 1 Hutch. Hist. 13; Hutch. Coll. 25, 26; Robertson's America, B. 10; Marsh. Colonies, ch. 3, p. 89; 1 Holmes's Annals, 197; 1 Chalm. Annals, 150.

§ 66. It has been justly remarked, that this transaction stands alone in the history of English colonization.[1] The power of the corporation to make the transfer has been seriously doubted, and even denied.[2] 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 right. The subsequent struggles between the crown and the colony, down to the overthrow of the charter, under the famous *quo warranto* 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.[3] It is true, as Dr. Robertson has observed,[4] 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.[5] 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.[6]

[1] Robertson's America, B. 10.

[2] See 1 Hutch. Hist. 410, 415; 1 Chalmers's Annals, 139, 141, 142, 148, 151, 173.

[3] 1 Hutch. Hist. 25; Hutch. Coll. 199, 200, 203, 205, 207.

[4] Robertson's America, B. 10.

[5] Hutch. Coll 199, 203.

[6] 1 Hutch. Hist. 35, 36, 37, 410, 507, 529; Hutch. Coll. 196, 199, 200, 203, 205, 207, 329, 330, 417, 418, 420, 477; 1 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 malecontents, 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 of 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 moneys and taxes, and to 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, wherein every freeman was to give his own vote.[2] The system thus proposed was immediately established by common consent,[3] although it is nowhere provided for in the charter; and thus was formed the second house of representatives (the first being in Virginia) in

[1] 1 Hutch. Hist. 145, 146; Hutch. Coll. 199, &c. [See Palfrey, Hist. of New England, II. 174.]

[2] Robertson's America, B. 10; 1 Hutch. Hist. 35, 36, 203; 1 Haz. Coll. 320.

[3] Col. and Province Laws (1814), ch. 35, p. 97; Hutch. Coll. 203, &c.; 1 Hutch. Hist. 449.

any of the colonies.[1] 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 length, in 1644, they separated into two distinct and independent bodies, each of which possessed a negative upon the acts of the other.[2] 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 in 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 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.[3] 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.[4]

§ 71. After the fall of the first colonial charter in 1684,[5] 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

[1] 1 Hutch. Hist. 35, 36, 37, 94, note, 449; 1 Holmes's Annals, 222; 1 Haz. Coll. 320, 321; 1 Chalmers's Annals, 157. [Palfrey, Hist. of New England, I. 371.]

[2] 1 Hutch. Hist. 449; 1 Chalmers's Annals, 166; Col. and Province Laws (1814), ch. 31, p. 88; Hutch. Coll. 205; 1 Doug. Summ. 431.

[3] 1 Holmes's Annals, 227; 1 Haz. Coll. 390, 393; 1 Chalmers's Annals, 94, 95, 99.

[4] 1 Holmes's Annals, 227; Hutch. Coll. 101, 104; 2 Haz. Coll. 423, 425; 3 Chalmers's Annals, 161.

[5] 1 Holmes's Annals, 412.

Massachusetts Bay, the colony of New Plymouth, the province of Maine, the territory called Acadie, 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, corporations, colleges, towns, villages, and schools. It reserved to the crown the appointment of the governor, and lieutenant-governor, and secretary of the province, and all the officers of the Court of Admiralty. It provided for the appointment annually of twenty-eight counsellors, 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 authority, with the advice and consent of the council, to nominate and appoint "judges, commissioners of oyer and terminer, sheriffs, provosts, marshals, justices of the peace, and other officers to the council and courts of justice belonging." The governor was also invested with the command of the militia, and with power to appoint any chief commander or other officer or officers; to train, instruct, exercise, and govern the militia, to lead them in war, and to use and exercise the law martial in time of actual war, invasion, or rebellion. 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 lieutenant-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 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.[2]

§ 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

[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.

[2] 1 Hutch. Hist. 415, 416.

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." [1] 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.[2] All conveyances were to be by deed acknowledged and recorded in the public records.[3] All lands and hereditaments were declared free from all fines and forfeitures. Courts of law were established, and local processes provided for.[4] The trial by jury in civil and criminal cases was secured.[5] Wager of law was not allowed but according 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." [6] Treason, murder, poisoning, arson, witchcraft, sodomy, idolatry, blasphemy, man-stealing, adultery, false witness, conspiracy and rebellion, cursing or smiting of parents by children, being a stubborn or rebellious son, burglary, and rape (in particular circumstances) were offences punishable with death.[7] 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";[8] and many other crimes of a heinous nature were suffered to pass with a moderate punishment.[9] Hutchinson has well observed, that "in punishing offences they professed to be governed by the judicial laws of Moses, but no further than those laws were of a moral nature." [10] Marriages were celebrated exclusively by magistrates during the

[1] Hutch. Coll. 201.

[2] Ant. Col. and Prov. Laws, ch. 4, p. 44; ch. 104, p. 204.

[3] Ant. Col. and Prov. Laws, ch. 1, p. 41; ch. 28, p. 85; 1 Hutch. Hist. 455.

[4] Hutch. Coll. 203, 205.

[5] 1 Hutch. 450; Hutch. Coll. 203, 205.

[6] Hutch. Coll. 205.

[7] 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.

[8] Hutch. Coll. 205.

[9] 1 Hutch. Hist. 442, 443, 444; Ant. Col. and Prov. Laws, ch. 17, p. 56.

[10] 1 Hutch. Hist. 435, 439.

first charter; though afterwards there was a concurrent power given to the clergy.[1] 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 granted. Female adultery was a sufficient cause; but male adultery not.[2] In tenderness to the marriage state, a man who struck his wife, or a woman her husband, was liable to a fine.[3]

§ 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,[4] and the daughters, where there were no sons, inheriting as coparceners, unless the court otherwise should determine.[5] 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.[6]

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,"[7] when in reality he had only a double portion, and the estate was partible among all the children. Their land being by the charter held, as of the manor of East Greenwich, in free and common socage, they attributed to it the gavelkind quality of not being forfeited for felony or treason; and the convict might, therefore, even after sentence, dispose of it by will.[8] 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.[9]

[1] 1 Hutch. Hist. 444.
[2] 1 Hutch. Hist. 445.
[3] 1 Hutch. Hist. 445.
[4] 1 Hutch. Hist. 446.
[5] Ant. Col. and Prov. Laws, ch. 104, p. 205.
[6] 1 Hutch. Hist. 446.
[7] Hutch. Coll. 207; 1 Hutch. Hist. 447; Ant. Col. and Prov. Laws, ch. 104, p. 205.
[8] 1 Hutch. Hist. 447.
[9] 1 Hutch. Hist. 447.

§ 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.[1] 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 offences, and "the liberty to see the peace, ordinances, and rules of Christ observed."[2] 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."[3] 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 condemning 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.[4] 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.[5] 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."[6]

§ 75. But the most striking, as well as the most important part

[1] Hutch. Collect. 201; Ant. Colon. and Prov. Laws, ch. 39, p. 100; 1 Haz. Coll. 488.

[2] Ant. Col. and Prov. Laws, ch. 39, p. 100, 101.

[3] 1 Hutch. Hist. 420, 421, 422, 423, 424, 434; 1 Belk. New Hamp. ch. 4, p. 70, 71.

[4] Robertson's America, B. 10; 1 Belk. New Hamp. ch. 4, p. 70 to 77; Ant. Col. and Prov. Laws, ch. 57, p. 120, &c.; Hutch. Coll. 215, 216; 1 Hutch. Hist. 431; 2 Hutch. Hist. 42; 1 Haz. Coll. 538; 1 Chalmers's Annals, 163, 164, 165, 167, 169, 189, 190, 191, 194.

[5] 1 Hutch. Hist. 427; Ant. Col. and Prov. Laws, ch. 39, p. 103, 104.

[6] 1 Hutch. Hist. 431.

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,[1] "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 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.[2] A *habeas corpus* act was also passed at the same session; but it seems to have been disallowed by the crown.[3] 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.[4]

§ 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

[1] Ant. Col. and Prov. Laws, ch. 88, p. 186.
[2] 2 Hutch. Hist. 64; Ant. Col. and Prov. Laws, ch. 2, p. 214.
[3] 2 Hutch. Hist. 64.
[4] 1 Chalm. Annals, 56, 74.

religious intolerance was in some measure checked, if not entirely subdued. Among the earliest acts of 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 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] Ibid. 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 view 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, Captain John Mason obtained a grant from the Council of Plymouth of all that part of the mainland in New England "lying upon the sea-coast, 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 threescore 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 threescore miles be finished; and from thence to cross overland to the end of the threescore miles accounted from Piscataqua River, together with all islands and islets within five leagues' distance of the premises."[1] This territory was afterwards called New Hampshire. The land so granted was expressly subjected to the conditions and limitations in the original 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

[1] 1 Haz. Coll. 289; 1 Holmes's Annals, 199; 1 Belk. N. Hamp. ch. 1, p. 13.

from thence to proceed eastwards along the sea-coast to Cape Ann and round about the same to Piscataqua harbor"; and then covering much of the land in the prior grant, and giving to the whole the name of New Hampshire.[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 Massachusetts 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.[4] 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.[5] 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."[6] The legislative power was intrusted to the president,

[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.

[4] 1 Chalm. Annals, 477, 484, 485, 504, 505; Marsh. Colon. ch. 4, p. 109, ch. 6, p. 167, 168; Hutch. Coll. 422; 1 Belk. N. Hamp. ch. 2, p. 49, 50.

[5] 1 Chalm. Annals, 489, 490; 1 Hutch. Hist. 319; 1 Holmes's Annals, 395; Marsh. Colon. ch. 6, p. 168; Rob. America, B. 10; 1 Belk. N. Hamp. ch. 6, p. 137, 138; 1 Doug. Summ. 28; N. Hamp. Prov. Laws, (edit. 1771,) p. 1, &c.

[6] N. Hamp. Prov. Laws, (edit. 1771,) p. 1, 3.

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 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] New Hampshire 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, 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 provincial state, partook very much of the character of those of the neighboring province of Massachusetts.[5] 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 gram-

[1] 1 Chalm. Annals, 489, 490; 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 Chalm. Annals, 491, 492, 493, 508.

[4] N. Hamp. Prov. Laws, (edit. 1771,) p. 61, and Id.

[5] N. Hamp. Prov. Laws, (edit. 1771,) 19, 22, 55, 90, 104, 105, 137, 143, 157, 163, 166.

mar 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.[1] 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.

[1] N. Hamp. Prov. Laws, (edit. 1771,) p. 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 Captain 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 Kennebec 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 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 and 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 those of the Lord High Admiral of England. And the inhabitants, being subjects of the crown, were

[1] 1 Hutch. Hist. 6, 104; Rob. America, B. 10; 1 Doug. Summ. 366, 380, 386.
[2] 1 Hutch. Hist. 316; 1 Holmes's Annals, 180; 1 Belk. N. Hamp. ch. 1, p. 14.
[3] Holmes's Annals, 254; 1 Chalm. Annals, 472, 473, 474; 1 Doug. Summ. 386, &c.

to enjoy all the rights and privileges of natural-born subjects in England.

§ 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 vigor 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 Massachusetts 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.[5] 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 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.[6]

[1] 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; Hutch. Coll. 422.

[5] 1 Chalm. Annals, 485, 504, 505; 1 Holmes's Annals, 388.

[6] 1 Chalm. Annals, 486, 487; 1 Holmes's Annals, 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 sea-shore 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 at 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 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

[1] Hutch. Hist. 98, 99; 2 Hutch. Hist. 202; 1 Haz. Coll. 321; 1 Holmes's Annals, 220, 228, 231, 232, 251, 269; 1 Chalm. Annals, 286, 287, 289; 2 Doug. Summ. 158, &c.; 1 Hutch Hist. 100.

The substance of this frame of government is given in 1 Holmes's Annals, 251; and a full copy in 1 Haz. Coll. 437, 441.

[2] 2 Hutch. Hist. 203; 1 Haz. Coll. 318; 1 Holmes's Ann. 208; 1 Chalm. Ann. 299.

[3] 1 Chalm. Annals, 288, 289, 290, 300; 2 Hutch. Hist. 203; 1 Haz. Coll. 395, 396; 1 Holmes's Annals, 229; 1 Hutch. Hist. 47; 1 Winthrop's Jour. 170, 397; Hutch. Coll. 412, 413.

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 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;[4] 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."[5] 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 or criminal cases. All matters of facts were determined by the court.[6]

§ 86. Soon after the restoration of Charles the Second to the

[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.

[4] 3 American Museum, 523.

[5] 1 Hutch. Hist. 83, note.

[6] 1 Hutch. Hist. 84, note; 1 Chalm. Annals, 290.

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.[1] 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, and have ever since remained under one general government.[2]

§ 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 offences "according to the course of other corporations within this our kingdom of England," to assemble the inhabitants in martial array for the common defence, 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 socage. 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 Narraganset 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 colony running from east to west, that from Narraganset Bay to the South Sea, was granted and confirmed to the colony.[3] The charter is silent in regard to religious rights and privileges.

[1] 1 Haz. Coll. 586; 1 Chalm. Ann. 292, 293; 1 Holmes's Ann. 320; 2 Doug. Summ. 164.

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

[3] 2 Haz. Coll. 597 to 605; 1 Holmes's Ann. 320; 1 Chalm. Annals, 293, 294; Marsh. Colon. ch. 5, p. 134.

§ 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 Edward Andros, in 1687, went to Hartford, and in the name of the crown declared the government dissolved.[1] 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.[2] 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.[3] 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 honor 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 or children; no man's goods or estate shall be taken away from him, nor any way endangered under color 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."[4] 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.[5] 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

[1] 1 Holmes's Ann. 415, 421, 429, 442; 1 Chalm Ann. 297, 298, 301, 304, 306; 1 Hutch. Hist. 339, 406, note.

[2] Ibid.

[3] 2 Doug. Summ. 171 to 176, 193 to 202.

[4] Colony Laws of Connecticut, edition by Greene, 1715–1718, folio, (New London,) p. 1.

[5] Id, p. 2. The practice continued down to the establishment of the new constitution in 1818.

voice in the election of assistants and other public officers.[1] 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.[2]

§ 90. In respect to offences, 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 offences were idolatry, blasphemy of Father, Son, or Holy Ghost, witchcraft, murder, murder through guile by poisoning or other devilish practices, bestiality, sodomy, rape, man-stealing, false witness, conspiracy against the colony, arson, children cursing or smiting father or mother, being a stubborn or rebellious son, and treason.[3]

§ 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 householders 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.[4]

§ 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 neighboring 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.[5] Quakers, Ranters, Adamites, and other notorious heretics, (as they were called,) were to be committed to prison or sent out of the colony,

[1] Colony Laws of Connecticut, edition by Greene, 1715-1718, folio, (New London,) p. 27, 30.

[2] Id. p. 41. [3] Id. 12.

[4] 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.

[5] Id. p. 29.

by order of the governor and assistants.[1] Nor does the zeal of persecution appear at all to have abated until, in pursuance of the statutes of 1 William and Mary, dissenters were allowed the liberty of conscience without molestation.[2]

§ 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.[3]

The process in courts of justice was required to be in the name of the reigning king.[4] 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.[5] Depositions were allowed as evidence in civil suits.[6] No person was permitted to plead in behalf of another person on trial for delinquency, except directly to matter of law,[7] 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.[8]

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.

Towns were required to support public schools under regulations similar, for the most part, to those of Massachusetts;[9] and an especial maritime code was enacted, regulating the rights and duties and authorities of ship-owners, seamen, and others concerned in navigation.[10]

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. 49.
[2] Id. p. 134.
[3] Id. p. 33, 61, 164.
[4] Id. p. 41.
[5] Id. p. 6.
[6] Id. p. 116.
[7] Id. p. 26.
[8] Id. p. 7.
[9] Id. p. 84.
[10] 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, Newport, and Portsmouth, for the absolute government of themselves, but according to the laws of England.[3]

§ 95. Under this charter an assembly was convened in 1647, consisting of the collective freemen of the various plantations.[4] The legislative power was vested in a court of commissioners of six persons, chosen by each of the four towns then in existence.

[1] 1 Hutch. Hist. 72; 1 Holmes's Annals, 225, 233, 246; 1 Chalm. Annals, 269, 270; Hutch. Coll. 413, 414, 415; Marsh. Colon. ch. 3, p. 99, 100; Robertson's America, B. 10; 2 Doug. Summ. 76 to 90; 1 Pitkin's Hist. 46. Mr. Chalmers says, 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. 39, note; Walsh's Appeal, 429; 1 Pitk. Hist. 46, 47, 48; 2 Doug. Summ. 80.

[3] 1 Chalm. 271, 272; Hutch. Coll. 415, 416; [1 R. I. Hist. Rec. 143; Arnold, Hist. of Rhode Island, I. 114, 200.]

[4] 1 Chalm. Annals, 273; 1 Holmes's Annals, 283; Walsh's Appeal, 429; 2 Doug. Summ. 80.

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.[1] 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.[2] 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.[3]

§ 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 usual powers of corporations. The executive power was lodged in a governor, deputy-governor, and ten assistants, chosen by the freemen.[4] 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 defence, 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

[1] 1 Chalm. Annals, 273; 1 Holmes's Annals, 283.

[2] 1 Chalm. Annals, 274; 1 Holmes's Annals, 297; Marsh. Colon. ch. 5, p. 133.

[3] 1 Chalm. Annals, 274; 1 Holmes's Annals, 329; [Arnold, Hist. of Rhode Island, I. 290; Palfrey, Hist. of New England, II. 565.]

[4] 2 Haz. Coll. 612 to 623; 2 Doug. Summ. 81.

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 straight 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 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 straight line due north till it meets the Massachusetts line.[1] The territory was to be holden as of the manor of East Greenwich in free and common socage. 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 travail, 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 religion according to the liturgy, form, and ceremonies of the Church of England, or

[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.

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 anywise 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, 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 examples of any other of the New England colonies.

§ 98. Rhode Island enjoys the honor 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 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.[3] 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, (1644,) 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.[4] The first laws, however, declared that no

[1] 2 Haz. Coll. 613; [Arnold, Hist. of Rhode Island, I. 292.]

[2] Walsh's Appeal, 429.

[3] Hutch. Coll. 413, 415; 1 Chalm. Annals, 276, 284; 1 Holmes's Annals, 336.

[4] On this subject, see 1 Chalmers's Annals, 276, 284; and Dr. Holmes's valuable note to his Annals, vol. i. p. 336, and Id. p. 341; Hutch. Coll. 413, 415; Walsh's Appeal, 429 to 435.

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.[1]

§ 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.[2] 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 their charter, and passed an act for that purpose which was afterwards suppressed.[3] In December, 1686, Sir Edmund 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.[4] 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.[5]

§ 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 New England.[6] 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

[1] 1 Chalm. Annals, 276; 1 Holmes's Annals, 336; R. Island Colony Laws (1744), p. 3.

[2] 1 Chalm. Annals, 278.

[3] 1 Chalm. Annals, 280, 281; 2 Doug. Summ. 85.

[4] 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.

[5] R. Island Colony Laws (1744), 24.

[6] Id. p. 1, 147.

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.[1] Every town was a corporate body, entitled to choose its officers, and to admit persons as freemen.[2] Sports and labor on Sunday were prohibited.[3] Purchases of land from the Indians were prohibited.[4] 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.[5] About the same period the English navigation laws were required, by an act of the colonial legislature, to be executed.[6] 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;[7] 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.[8] A system of redress, in cases of abuses of property devoted to charitable uses, was established;[9] 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.[10] Witchcraft, however, was, as in the common law, punished with death. At a later period, lands of persons living out of the colony or concealing themselves therein were made liable to the payment of their debts.[11] 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 I., 1718) which divided the estate among all the children, giving the eldest son a double share.[12] But the common

[1] R. Island Col. Laws (1744), p. 1, 4. [2] Id. p. 9.
[3] Id. 18. [4] Id. 4. [5] Id. 28. [6] Id. 28.
[7] Id. 46. [8] Id. 87, 133. [9] Id. 108. [10] Id. 115.
[11] Id. 192.
[12] Colony Laws of Rhode Island (edit. 1719, printed at Boston), pp. 95, 96.

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.[1]

§ 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 he,[2] "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 common-law rules of descents were adhered to in its policy with singular zeal, down to the year 1770, as necessary to prevent the destruction of family estates, while the neighboring colonies adopted a rule dividing the inheritance among all the children.[3]

§ 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.[4] 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 New England, and entered into a perpetual league of friendship and amity, for offence and defence, and mutual advice and succor. 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,

[1] Rhode Island Colony Laws (1719), p. 5, 8. [2] 1 Chalm. Annals, 296.

[3] *Gardner* v. *Collins*, 2 Peters's Sup. Ct. Rep. 58.

[4] 1 Holmes's Annals, 269, 270; 1 Winthrop's Jour. 237, 284; [Palfrey, Hist. of New England, I. 630.]

the others were to furnish a certain proportion of armed men for its assistance.[1] Commissioners, appointed by each colony, were to meet and determine all 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; and with some few alterations, it subsisted down to 1686, when all the charters were prostrated by the authority of King James.[2] 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.[3]

[1] 2 Haz. Coll. 1 to 6; 2 Winthrop's Jour. 101 to 106; 1 Hutch. Hist. 124, 126.

[2] 1 Holmes's Annals, 270 and note; 1 Hutch. Hist. 126, note; 2 Haz. Coll. 7, *et seq.*

[3] 1 Holmes's Annals, 287 and note; 1 Hutch. Hist. 124; 2 Haz. Coll. 99, 100. [The application of Rhode Island and its rejection are given in Hutch. Coll. 226, 227]

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 honor of his queen, Henrietta Maria, the daughter of Henry the Fourth of France, to be held of the crown of England, he yearly, forever, rendering two Indian arrows. The territory was bounded by a right line drawn from Watkin'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 farther bank to its confluence with the Chesapeake; and thence to Watkin'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 to the crown, with all the rights, regalities, 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 socage, and not *in capite*, or by knight's 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

[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; 1 Chalm. Annals, 202; Charters of N. A. Provinces, 4to, London, 1766.

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 regalities, 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 subjects. And 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 unrivalled honor 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."[3] 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.[4]

§ 106. The first emigration made under the auspices of Lord Baltimore was in November, 1632, and consisted of about two hundred gentlemen of considerable fortune and rank, and their adherents, being chiefly Roman Catholics. "He laid the foundation of this province," says Chalmers,[5] "upon the broad basis of security to property and of freedom of religion, granting in absolute fee fifty

[1] 1 Haz. Coll. 317, &c.; 1 Chalm. Annals, 202; Marsh. Colon. ch. 2, p. 69.
[2] 1 Chalmers's Annals, 203, 204, 205.
[3] Id. 200.
[4] Id. 203.
[5] Id. 207, 208.

acres of land to every emigrant; establishing Christianity agreeably to the old common law, of which it is a part, without allowing pre-eminence to any particular sect. The wisdom of his choice soon converted a dreary wilderness into a prosperous colony." It is certainly very honorable to the liberality and public spirit of the proprietary, that he should have introduced into his fundamental policy the doctrine of general toleration and equality among *Christian* sects (for he does not appear to have gone further); 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 further, 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,[3] 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 the proprietary.[4] In 1649 an act was passed, pun-

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

[3] [That is to say, none were agreed upon by the assembly and the proprietary; but acts appear to have been passed by the assembly which were rejected by the proprietary, and others were proposed by the proprietary which the assembly refused to adopt. See Bozman, History of Maryland, 295, 300–318. This author conjectures, though the records are silent on the subject, that the difficulty between the proprietary and the assembly was that each claimed the right to originate the laws.]

[4] 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.

ishing blasphemy, or denying the Holy Trinity, with death and confiscation of goods and lands;[1] 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.[2] 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.[3] 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 toleration for dissenters, however, as was provided for in the act of 1 William and Mary.[4] And the introduction of the test and abjuration acts, in 1716, excluded all Roman Catholics from office.[5]

§ 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.[6] 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,[7] which made the estate part-

[1] 1 Chalm. Annals, 223, 365; Bacon's Laws of Maryland, 1649.

[2] Bacon's Laws of Maryland, 1649, ch. 1; 1 Chalmers's Annals, 218, 219, 235.

[3] Bacon's Laws of Maryland, 1654, ch. 4; Marsh. Colon. ch. 2, p. 75; Chalm. Ann. 218, 235.

[4] Bacon's Laws of Maryland, 1702, ch. 1.

[5] Bacon's Laws of Maryland, 1716, ch. 5; Walsh's Appeal, 49, 50; 1 Holmes's Annals, 476, 489.

[6] Bacon's Laws of Maryland, 1674.

[7] Bacon's Laws of Maryland, 1715, ch. 39.

ible 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,[1] 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.[2]

[1] Bacon's Laws of Maryland, 1650, ch. 25; 1 Chalm. Ann. 220.
[2] Bacon's Laws of Maryland, 1692, 1716.

CHAPTER X.

NEW YORK.

§ 111. NEW YORK was originally settled by emigrants from Holland, at least as early as 1614.[1] Trading-houses were established on Manhattan Island by them, under the auspices of the Dutch West India Company, about 1621.[2] But the permanent establishment of a Dutch colony there does not appear to have been fixed until about 1629, when it seems to have acquired the name of the New Netherlands.[3] 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.[4] 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 the Connecticut to the eastern shore of the Delaware, together with Long Island, and conferred on him the powers of government, civil and military.[5] 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 of rebellion, insurrection, mutiny, and invasion.[6] A part of this tract was afterwards conveyed by

[1] 1 Chalmers's Annals, 567, 568. [2] Id. 570. [3] Ibid.

[4] 1 Chalmers's Annals, 568, 569, 570, 572; Marsh. Colon. ch. 5, p. 143; 2 Doug. Summ. 220, &c.

[5] Smith's New Jersey, 35, 59; 1 Chalmers's Annals, 573; Smith's New York, p. 31 [10]; Smith's New Jersey, p. 210 to 215.

[6] 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.

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 Cæsarea, or New Jersey.[1] 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.[2] 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 contrary to those of England were allowed; and taxes were to be levied by authority of a general assembly.[3] The peace of Breda, in 1667, confirmed the title in the conquerors by the rule of *uti possidetis*.[4] In the succeeding Dutch war the colony was reconquered; but it was restored to the Duke of York upon the succeeding peace of 1674.[5]

§ 113. As the validity of the original grant to the Duke of York, while the Dutch 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.[6] It confirmed the former grant, and empowered him to govern the inhabitants by such ordinances as he or his assigns should estab-

[1] Smith's New York, 31, 32 [10, 11]; 1 Chalmers's Annals, 613.

[2] Smith's New York, 44, 45 [19, 20]; 1 Chalm. Ann. 574; Smith's New Jersey, 36, 43, 44; 2 Doug. Summ. 223.

[3] 1 Chalmers's Annals, 575, 577, 579, 597; Smith's New Jersey, 44, 48.

[4] 1 Chalmers's Annals, 578; 2 Doug. Summ. 223.

[5] 1 Chalmers's Annals, 579; 1 Holmes's Annals, 364, 366.

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

lish. It authorized him to administer justice according to the laws of England, allowing an appeal to the king in council.[1] 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.[2] 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 proprietary.[3] Upon the Revolution of 1688, the people of New York immediately took side in favor of the Prince of Orange.[4] 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.[5]

§ 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.[6] It enacted that the supreme legislative power shall forever 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 socage according to the tenure of East Greenwich in England; that in all criminal cases there should be a trial by jury; that estates of femes covert should be conveyed only by deed upon privy examination; that wills in

[1] 1 Chalmers's Annals, 579, 580.

[2] 1 Chalmers's Annals, 581, 583; Smith's New York, 123, 125, 126 [72, 75].

[3] 1 Chalm. Annals, 584, 585; Smith's New 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.

[4] 1 Holmes's Annals, 429; Smith's New York, 59.

[5] 1 Chalm. Annals, 585, 590, 591, 592.

[6] 1 Holmes's Annals, 435; Smith's New York, 127 [75, 76]; Acts of 1691.

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 enabling 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 historians[3] 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] 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.[5] 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

[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 New York, 127 [76]; 2 Kent's Comm. Lect. 25, p. 62, 63.

[3] Mr. Smith.

[4] Art. 42.

[5] 2 Kent's Comm. Lect. 25, p. 62, 63.

exclusively followed;[1] and perhaps New York was more close in adoption of the policy and legislation of the parent country before the Revolution than any other colony.

[1] 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 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.[3]

§ 116. This constitution continued until the province was di-

[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.

[3] Smith's New Jersey, 512, 514.

vided, 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.[1] 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 declared 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"; [2] that no person shall be anyways 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, 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." [3]

§ 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 Jerseys; and these were not settled until after the Duke, in 1680,[4] finally surrendered all right to both by letters-patent granted to the respective proprietors.[5] In 1681, 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.[6] There were 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 inca-

[1] Smith's New Jersey, 61, 79, 80, 87; 1 Chalm. Ann. 617.
[2] Smith's New Jersey, 80, App. 521, &c.
[3] Ibid.
[4] Chalmers says in 1680, p. 619. Smith says in 1678, p. 111.
[5] Smith's New Jersey, 110, 111; 1 Chalm. Ann. 619, 626.
[6] Smith's New Jersey, 126.

pable 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.[1]

§ 118. Carteret died in 1679, and being the 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 proprietaryship; and to the twenty-four thus formed, the Duke of York, in March, 1682, made his third and last grant of East Jersey.[2] 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 New England; 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.[3]

§ 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; and by commission appointed a governor over it. 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 tests 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 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 dis-

[1] Smith's New Jersey, 154.
[2] Smith's New Jersey, 157; 1 Chalmers's Annals, 620, 621; Marshall's Colon. 180.
[3] 1 Chalm. Ann. 621, 622; Smith's New Jersey, 209, 210, 211, &c.

sent 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]

[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. See *Arnold* v. ———, 1 Halsted's Rep. 1, as to the rights of the proprietaries in the soil after surrender of the government to the crown.

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 honor 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 said river 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 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 New Castle, 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.[3]

§ 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

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

[2] 1 Chalm. Annals, 634, 635.

[3] 1 Proud, Penn. 172.

the inhabitants,) to be holden of the crown, as of the castle of Windsor, in Berks, in free and common socage, 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.[1] 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."[2] 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.[3] It also authorized the proprietary to appoint judges and other officers; to pardon and 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 its products 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.[4] 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.[5] Chalmers[6] has observed that

[1] 1 Proud, Penn. 176; Laws of Pennsyl., ed. of Franklin, 1742, App.
[2] 1 Proud, Penn. 175, 176, 177.
[3] 1 Proud, Penn. 177, 178.
[4] 1 Chalm Annals, 636, 637.
[5] 1 Graham's Hist. of Colon. 41, note; 1 Chalm. Annals, 639, 658.
[6] 1 Chalm. Annals, 639, 658.

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;[1] and under his benign and enlightened policy a foundation was early laid for the establishment of a government and laws which have been justly celebrated for their moderation, wisdom, and protection of the rights and liberties of the people.[2] 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."[3] 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.[4] 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.[5] Among other things truly honorable 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 concessions, as well as in various other public documents, and were exemplified in his subsequent conduct.[6] In August, 1682, in order to secure his title against adverse claims, he procured a patent

[1] 1 Proud, Penn. 192; 2 Proud, Penn. App. 1; 2 Doug. Summ. 300, 301.
[2] 1 Chalm. Annals, 638, 642; Marsh. Colon. ch. 6, p. 182, 183.
[3] 1 Proud, Penn. 197, 198; 2 Proud, Penn. App. 7.
[4] 1 Proud, Penn. 200; 2 Proud, Penn. App. 19.
[5] 2 Proud, Penn. App. 15, 20; 1 Chalm. Annals, 641, 642.
[6] 1 Chalm. Annals, 644; 1 Proud, Penn. 194, 195, 212, 429; 2 Proud, App. 4.

from the Duke of York, releasing all his title derived under any of his patents from the crown.[1]

§ 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.[2] 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.[3] A third frame of government was established in 1696.[4] 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.[5] 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 to be subject to the approbation of the governor, who had a council of state to assist him in the government.[6] 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.[7]

§ 125. In the legislation of Pennsylvania, early provision was made (in 1683) for the descent and distribution of intestate estates, by which they were to be divided among all the children, the eldest son having a double share; and this provision was never afterwards departed from.[8] 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.[9]

[1] 1 Proud, Penn. 200.
[2] 1 Proud, Penn. 239; 2 Proud, Penn. App. 21; 2 Doug. Summ. 302.
[3] 1 Proud, Penn. 377, 403.
[4] 1 Proud, Penn. 415; 2 Proud, Penn. App. 30; Marshall, Colon. ch. 6, p. 183.
[5] 1 Proud, Penn. 443 to 450; 2 Doug. Summ. 303.
[6] 1 Proud, Penn. 450.
[7] 1 Proud, Penn. 454, 455; 1 Holmes's Annals, 485.
[8] Laws of Penn., ed. of Franklin, 1742, App. 5; Id. p. 60; 1 Chalm. Annals, 649.
[9] Laws of Penn., ed. of Franklin, 1742, p. 4 [1705].

CHAPTER XIII.

DELAWARE.

§ 126. 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 New Castle, 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] The first settlement by the Swedes seems to have been earlier than 1638;[3] and no permanent settlements were attempted by the Dutch until a later period (1651).[4]

§ 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.[5] 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.[6] Difficulties 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

[1] 1 Proud, Penn. 201, 202; 1 Chalm. Annals, 643; 2 Doug. Summ. 297, &c.

[2] 1 Chalmers's Annals, 631, 632, 633, 634, 643; 1 Holmes's Annals, 295, 404; 1 Pitk. Hist. 24, 26, 27; 2 Doug. Summ. 221. See 1 Chalm. Annals, 571, 572, 630, 631.

[3] Chalm. Annals, 631.

[4] Id. 632, 633, 634.

[5] 1 Proud, Penn. 206; 1 Holmes's Annals, 404; 1 Chalm. Annals, 645, 646.

[6] 1 Chalm. Annals, 646; 1 Dall. Penn. Laws, App. 24, 26; 2 Colden's Five Nations, App.

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]

[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 theatre 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 socage, and not *in capite*, or by knight service, subject immediately to the crown, as a dependency, forever.[2]

§ 129. The grantees were created absolute lords proprietaries, saving the faith, allegiance, and supreme 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 honor, to erect forts, to make war, and in cases of necessity to exercise martial law, to build harbors, to make ports, to erect manors, and to enjoy customs and subsidies im-

[1] 1 Chalmers's Annals, 513, 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.

posed 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 government.[4] 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.[5] 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.[6]

[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.

[4] 1 Chalm. Annals, 515.

[5] 1 Chalm. Annals, 518, 553; Marsh. Colon. ch. 5, p. 152.

[6] 1 Chalm. Annals, 521; 1 Williams's N. Car. 230, 231; 1 Holmes's Annals, 340; Carolina Charters, 4to, London.

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 and common socage, 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, provided 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, and his memory has often been reproached with the illiberal character of some of the articles, the oppressive servitude of others, and the general disre-

[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. 1 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. 83.

gard 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 allowed 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 a 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

[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. 155; 1 Ramsay's South Car. 31, 32.

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." [1]

§ 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 colonists. 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.[2] 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 labors 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.[3] 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 government 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

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

[2] 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.

[3] 1 Chalmers's Annals, 552.

to surrender their charter, and thereby gained time.[1] Before anything 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 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,[2] 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."[3]

§ 137. There was at this period a space of three hundred miles between the southern and northern settlements of Carolina;[4] 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.[5] The respective territories were designated 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.[6]

§ 138. By the surrender of the charter, the whole government of the territory was vested in the crown; (it had been in fact ex-

[1] 1 Chalmers's Annals, 549; 1 Holmes's Annals, 416.

[2] 1 Hewatt's South Carol. 45.

[3] 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.

[4] 1 Williams's N. Car. 155.

[5] Marsh. Colon. ch. 9, p. 246, 247; 1 Hewatt's South Carol. 212, 318.

[6] 1 Williams's N. Car. 161, 162; 1 Ramsay's South Carol. 56, &c. 88, 95; 1 Hewatt's South Carol. 212, 318; 1 Holmes's Annals, 523, 525; Marsh. Colon. ch. 9, p. 246.

ercised 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.[1] This change of government was very acceptable to the people, and gave a new impulse to their industry and enterprise. At a 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.[2]

§ 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.[3] He possessed also the powers of the court of chancery, of the 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 the year 1712, a large body of the English statutes was, 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 full 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.[4] This liberty of conscience did not amount to a right to deny the Trinity.[5]

[1] Marsh. Colon. ch. 9, p. 247.
[2] Marsh. Colon. ch. 9, p 237; 1 Holmes's Annals, 544.
[3] 2 Hewatt's South Car. ch. 7, p. 1, *et seq.*; 1 Ramsay's South Car. ch. 4, p. 95.
[4] Grimke's South Carolina Laws (1712), p. 81, 98, 99, 100.
[5] Id. Act of 1703, p. 4.

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.[1] 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 assemblymen was shortly afterwards repealed.

§ 141. The laws of descents of intestate real estates, of wills, and of uses, existing in England, seem to have acquired a permanent foundation in the colony, and remained undisturbed, until after the period of the American Revolution.[2] 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.[3] 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 were a silent result of their common origin and government.

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

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

[3] 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, etc., 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-councilmen might, with the increase of the corporation, be increased to twenty-four. The charter further granted to the corporation 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 Altamaha, 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 socage, and not *in capite*. It then erected all the territory into an independent province by the name of Georgia. It authorized the

[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.

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 further 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 labors, and the complaints of the people, in June, 1751, 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]

[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.

§ 145. In respect to its ante-revolutionary jurisprudence, a few remarks may suffice. The British common and statute law lay at the foundation.[1] 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 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.

[1] Stokes's Hist. of Colon. 119, 136.

CHAPTER XVI.

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 cession under treaties. There is, however, a difference between these two species of colonies in respect to the laws by which 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 inconsistent with their comfort and prosperity. There is, therefore, this necessary limitation implied, that they carry with them all the laws applicable to their situation, and not repugnant to the local and political circumstances in which 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 a present state of things, or are at liberty to apply the laws in future by adoption, as the growth

[1] 1 Bl. Comm. 107.

[2] 2 P. Will. 75; 1 Bl. Comm. 107; 2 Salk. 411; Com. Dig. Ley. C.; *Rex* v. *Vaughan*, 4 Burr. R. 2500; Chitty on Prerog. ch. 3, p. 29, &c.

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 which 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 impolitic.[2] It is not perhaps easy to settle what parts of the English laws are or are not in force in any such colony, until either by usage or judicial determination 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, the old laws and customs of the country remain in full force, unless so far as they are contrary to our religion, or enact anything 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.[3] 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 authority of parliament. He cannot make any 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 privileges exclusive of other subjects.[4]

§ 151. Mr. Justice Blackstone, in his Commentaries, insists that the American colonies are principally to be deemed conquered, or ceded countries. His language is, "Our American plantations are principally of this latter sort, [i. e. ceded or conquered countries,] being obtained in the last century either by right of conquest and driving out the natives, (with what natural

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

[2] 1 Bl. Comm. 107; 1 Tucker's Black. note E, 378, 384, *et seq.*; 4 Burr. R. 2500; 2 Merivale, R. 143, 157, 158; 2 Wilson's Law Lect. 49 to 54.

[3] *Blankard* v. *Galy*, 4 Mod. 222; s. c. 2 Salk. 411, 412; 2 Peere Will. 75; 1 Black. Comm. 107; *Campbell* v. *Hall*, Cowp. 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.

[4] *Campbell* v. *Hall*, Cowp. R. 204, 209; Chitty on Prerog. ch. 3, p. 29, &c.

justice I shall not at present inquire,) or by treaties. And, therefore, 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 dominions." [1]

§ 152. There is great reason to doubt the accuracy of this statement in a legal view. We have already seen that the European nations by whom America was colonized treated the subject in a very different manner.[2] They claimed an absolute dominion over the whole territories afterwards occupied by them, not in virtue of any conquest of, or cession by, the Indian natives, but as a right acquired by discovery.[3] Some of them, indeed, obtained a sort of confirmatory grant from the papal authority. But as between themselves they treated the dominion and title of territory as resulting from priority of discovery; [4] and that European power which had first discovered the country and set up marks of possession was deemed to have gained the right, though it had not yet formed a regular colony there.[5] We have also seen that the title of the Indians was not treated as a right of propriety and dominion, but as a mere right of occupancy.[6] As infidels, heathen, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations.[7] The territory over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals. There is not a single grant from the British crown, from the earliest 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 re-

[1] 1 Bl. Comm. 107; Chitty on Prerog. ch. 3, p. 29.

[2] See ante, p. 4 to 22; 1 Chalm. Annals, 676; 3 Wilson's Works, 234.

[3] Vattel, B. 1, ch. 18, § 205, 206, 207, 208, 209.

[4] *Johnson* v. *McIntosh*, 8 Wheat. R. 543, 576, 595.

[5] *Penn* v. *Lord Baltimore*, 1 Ves. 444, 451.

[6] 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.

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

spectively 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 that they did not interfere with the paramount rights of the European discoverers.[3]

§ 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 object 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.[4]

[1] 4 Wheaton, 575, 576, 588. 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.

[3] 4 Wheat. R. 590, 591, 596; 1 Grahame's Hist. of America, 44; 2 Kent's Comm. 311; *Worcester* v. *State of Georgia*, 6 Peters's Sup. Ct. Rep. 515. [*Mackey* v. *Coxe*, 18 How. 104; Wheat. Int. Law, pt. 1, ch. 2, § 14.]

[4] 2 Salk. 411, 412. See also *Hall* 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.

§ 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, 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 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 clearness and force by Lord Mansfield, in his celebrated judgment in *Hall* v. *Campbell*.[4] In a still more recent case it

[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, 15, 658; 2 Wilson's Law Lect. 48, 49; 3 Wilson's Law Lect. 234, 235.

[3] *Roberdeau* v. *Rous*, 1 Atk. R. 543, 544; Vaughan, R. 300, 400; Show. Parl. Cas. 31; 8 Wheat. R. 595; 1 Tuck. Black. Comm. App. 382, 383; Dummer's Defence, 1 American Tracts, 18.

[4] Cowp. R. 204, 211, 212.

was laid down by Lord Ellenborough that the law of England might properly be recognized 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. There is also in all of them an express restriction that no laws shall be made repugnant to those of England, or that as near as may be conveniently, they shall be consonant with and conformable thereto; and either expressly or by necessary implication it is provided that the laws of England so far as applicable shall be in force there. 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]

§ 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.[4]

[1] *Rex* v. *Brampton*, 10 East, R. 282, 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 Tuck. Black. Comm. App. 383, 384; Chitty, Prerog. 32, 33.

[4] 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.

§ 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

This *narrow notion* was a *favorite* in the first moment of rallying to our rights against Great Britain. But it was that of men who felt their rights, 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. Opinions, 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; 1 Tuck. Black. Comm. App. 380 to 384; *Van Ness* v. *Packard*, 2 Peters's Sup. R. 137, 144.

[Mr. Jefferson, as will be seen from the quotation above, did not question, but expressly asserted, that the English common law was in force in the colonies; but he speaks of it as having been accepted by the colonists, who might on the other hand have chosen to reject it. Further on in the same letter (to Judge Tyler, Jefferson's Works, VI. 65) he says: "The state of the English law at the date of our emigration constituted the system *adopted* here." And in his notes on Virginia he says: "The laws of England seem to have been *adopted* by consent of the settlers, which might easily enough have been done whilst they were few and living all together. Of such adoption, however, we have no other proof than their practice till the year 1661, when they were expressly adopted by an act of the assembly, except so far as 'a difference of condition' rendered them inapplicable." Jefferson's Works, VIII. 374. See also Ibid. IX. 282. When, at the breaking out of the Revolution, the laws were revised by a commission, of which Mr. Jefferson was a member, the common law of England was made the basis of the revision. Jefferson's Works, VIII. 379. The true rule as to the extent to which the common law prevailed in the colonies is thus stated by Mr. Justice Story, in one of his judicial decisions. "The common law of England," he says, "is not to be taken, in all respects, to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition." *Van Ness* v. *Packard*, 2 Pet. 144. See also *Chisholm* v. *Georgia*, 2 Dall. 435; *Town of Pawlett* v. *Clark*, 9 Cranch, 292; *Wheaton* v. *Peters*, 8 Pet. 541. The acts of Parliament passed after the settlement of the American colonies were not in force therein, unless made so by express words or by adoption. *Commonwealth* v. *Lodge*, 2 Grat. 579; *Pemble* v. *Clifford*, 2 McCord, 31. See also *Baker* v. *Mattocks*, Quincy, 72; *Cathcart* v. *Robinson*, 5 Pet. 280; *Swift* v. *Towsey*, 5 Ind. 196. For the different views taken by English and American statesmen upon the subject of this note prior to the Revolution, see Works of Franklin, by Sparks, IV. 271.]

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 recognized 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]

[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 of 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 ingrafted 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 hitherto 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 the 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 it. 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.

["It is clear," says Mr. Justice McLean, in *Wheaton* v. *Peters*, 8 Pet. 658, "that there can be no common law of the United States. The Federal government is composed of twenty-four sovereign and independent States; each of which may have its local usages,

customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated." See to the same effect, *Kendall* v. *United States*, 12 Pet. 524; *Lorman* v. *Clarke*, 2 McLean, 568. Therefore the United States cannot exercise a common-law jurisdiction in criminal cases. Congress must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence, before such court can take cognizance thereof. *United States* v. *Hudson*, 7 Cranch, 32; *Same* v. *Lancaster*, 2 McLean, 433; *Same* v. *New Bedford Bridge*, 1 Wood. & M. 435; *Same* v. *Wilson*, 3 Blatch. 435. But the national courts, after jurisdiction is conferred, are to look to the common law, in the absence of statutory provisions, for rules to guide them in the exercise of their functions, in criminal as well as civil cases. Conklin's Treatise, 82.]

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; namely, 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, vice-admiral, 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 assemblies 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 agree-

[1] 1 Bl. Comm. 108; Stokes's Hist. Colon. 20, 23, 149, 184, 185; Cowper's R. 207, 212; Com. Dig. Navigation, G. 1; 2 Doug. Summ. 163, note; Id. 251; 1 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. See 2 Hewatt's History of South Carolina and Georgia, and Account of the Provincial Governments.

[3] Stokes's Hist. Colon. 155, 237, 240, 241, 242, 251; 1 Pitk. Hist. 71; 1 Chalmers's Annals, 683. See in Parliamentary Debates, Vol. II., for 1785 (old edition), in Appendix, copies of the Charters of the American Colonies.

able thereto, subject to the ratification and disapproval of the crown. The governors also had power, with the 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 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 convened under their authority; and indeed all the usual prerogatives were exercised which in provincial governments belonged to the crown.[4] Three only existed at the period of the American Revolution, namely, the proprietary governments of Maryland, Pennsylvania, and Delaware.[5] The former had this peculiarity in its character, 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.[6]

§ 161. *Thirdly*, charter governments. Mr. Justice Blackstone describes them 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

[1] Stokes's Hist. of Colonies, 157, 158, 184, 264. [2] 1 Doug. Summ. 207.
[3] 1 Black. Comm. 108; Stokes's Hist. Colon. 19. [4] Stokes's Hist. of Colon. 22.
[5] 1 Ptk. Hist. 55; Stokes's Hist. of Colon. 19; 2 Doug. Summ. 207.
[6] 1 Chalmers's Annals, 203, 637. [7] 1 Bl. Comm. 108.

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. They could not properly be 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 Rhode Island, the charter governments were organized altogether upon popular and democratical principles; the governor, council, and assembly being annually chosen by the freemen of the colony, and all other officers ap-

[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.

pointed 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 difference of interpretation, the common law, as 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 a 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

[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. 1; 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).

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 declaratory act, acknowledging and confirming them.[3] 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.[4] 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.[5] In Massachusetts, Connecticut, New Hamp-

[1] 1 Chalmers's Annals, 139, 140, 671, 675, 684, 687; 1 Tucker's Black. Comm. 38, App.; 2 Wilson's Law Lect. 49, 50; 1 Doug. Summ. 213; 1 Pitk. Hist. 108; Mass. State Papers, 345, 346, 347, 351 to 364, 375, 390; Dummer's Defence, 1 American Tracts, 65, &c.

[2] Stokes's Colon.

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

[4] 1 Doug. Summ. 213 to 215.

[5] Robertson's America, B. 9.

shire, and Rhode Island the same course was pursued.[1] 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 representation in framing the laws, and in assenting to burdens being 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.[2]

§ 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 recognized as a funda-

[1] 1 Tucker's Black. Comm. App. 386.

[2] 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 a 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 is no color 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 proceedings submitted to the magistracy (it must, however, be remembered, that it was annually elected) without a jury; yet in matters 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. Barbadoes 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 1645, the assembly was called, and no reason given but this, viz.: That, by the grant of 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 representation of the people, nor any attempt to deprive the colonies of this privilege, except in the arbitrary reign of King James the Second."

mental 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 favor 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 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.[5]

§ 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.[6] It was the object of the

[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.

[5] In Virginia also the assemblies were septennial. The Federalist, No. 52.

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

latter to subject them only to the undefined and arbitrary power of taxation by *Parliament*. The colonists, with a firmness and public spirit which strikes 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 found 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.[1] The general opinion held by them was, that Parliament had no authority to tax them, because they were not represented in Parliament.[2]

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

§ 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."[4] Mr.

[1] 1 Pitkin's Hist. 89, 90, 91; 2 Holmes's Annals, 133, 134, 135; 2 Doug. Summ. 251; 1 Doug. Summ. 213; 3 Hutch. Coll, 529, 530.

[2] 1 Pitkin, 89, &c., 97, 127, 129; Marsh. Colon. 352, 353; Appx. 469, 470, 472; Chalm. Annals, 658.

[3] 6 Geo. 3, ch. 12; Stokes's Colon. 28, 29. See also Marshall on Colon. ch. 13, p. 353; Vaughan, R. 300, 400; 1 Pitkin's Hist. 123.

[4] 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, a 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

Burke, who may justly be deemed the leader of the colonial advocates, maintained the supremacy of Parliament to the full extent

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 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 favorite 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 so 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 the 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 life-blood, these ideas and principles. Their love of liberty, as 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 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 anything 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 way worn out or impaired; and their mode of professing it is

of the declaratory act, and as justly including the power of taxation.[1] But he deemed the power of taxation in Parliament as an

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 favorable 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 favor 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 interests 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 colonists 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 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, a 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 kind 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 a 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 educa-

[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.

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

tion. 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 Congress were lawyers. But all who read — and most do read — endeavor 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 Blackstone's 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 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 honorable and learned friend [the Attorney-General] 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 honors 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 a 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 must 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 Crimea and Algiers which he has at Brusa and Smyrna. Despotism itself is obliged to truck and huckster. The Sultan 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 vigor of his authority in his centre, is derived 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 provinces; of manners in the Southern; of education; of the

former purposes. 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 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 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 the 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 differences in the organization of the colonial governments.[2] 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 socage, and not *in capite*,

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

[2] 1 Doug. Summ. 215.

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.[1] All the slavish and military part of the ancient feudal tenures was 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.[2] Our tenures thus acquired a universal simplicity; and it is believed that none but freehold tenures in socage ever were in use among us. No traces are to be found of copyhold, or gavelkind, 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 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 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.

[1] 1 Grahame's Hist. 43, 44.

[2] Stat. 12 Car. 2, ch. 24.

§ 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, it 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 local legislature in 1719.[3] It was treated by the crown as an inherent right of the subject, independent of any such reservation.[4] And so in divers cases it was held by the courts of England. The reasons given for the opinion that writs of error lie to all the dominions

[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.

[3] New Hampshire Prov. Laws, edit. 1771, p. 7, Act of 11 Will. 3, ch. 4; Rhode Island Laws, edit. 1744, p. 78.

[4] 1 P. Will. 329; Chitty on Prerog. ch. 3.

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.[1]

§ 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.[2] 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.[3] Rhode Island soon after surrendered her opposition.[4] But Connecticut continued it to a later period.[5] 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.[6]

§ 177. (6.) Though the colonies had a common origin, and owed a common allegiance, and the inhabitants of each were

[1] Vaughan's Rep. 290, 402; Show. Parl. Cases, 30, 31, 32, 33; 1 Vez. 444; Stokes's Colon. 26, 222, 231; 2 Ld. Raym. 1447, 1448; 1 Chalm. Annals, 139, 304, 671, 678, 684; *Christian* v. *Corver*, 1 P. Will. R. 629; *Att. Gen.* v. *Stewart*, 2 Merivale, R. 143, 156; *Rex* v. *Cowle*, 2 Burr. 834, 852, 854, 856; *Fabrigas* v. *Mostyn*, Cowp. 174; 1 Doug. Summ. 216; 3 Wilson's Works, 230; 2 Chalm. Opin. 177, 222.

[2] 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.

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

[4] 2 Doug. Summ. 97; 3 Hutch. Coll. 412, 413.

[5] 2 Doug. Summ. 194; 1 Pitk. Hist. 123 to 125.

[6] I have in my possession a printed case, *Thomas Forsley* v. *Warddel 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, and therefore as well those which took place after as those which were in force before Magna Charta.

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, further than they could be in any independent foreign state. As colonies, they were also excluded from all connections 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.[1] 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 and temporary nature, and were allowed as an indulgence rather than 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.[2] 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 of 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

[1] 1 Chalm. Annals, 686, 689, 690.

[2] 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.

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 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]

[1] *Chisholm* v. *State of Georgia*, 2 Dall. 470. [It is plain that the several American States were never fully and in all respects, as regards each other, independent States, as that term is applied in the law of nations. On the contrary, the learned author takes pains to point out that our present government is the successor, with modified powers, of that which formerly possessed authority over them all. Prior to the Revolution, certain powers of government were exercised over all the colonies, either as pertaining to the crown of Great Britain or the Parliament; but the rightful extent of those powers and how far possessed by the Parliament, and how far resting in the crown, were the questions in dispute which led to the Revolution. That the home government possessed authority over the subjects of peace and war, and had the general direction of commercial intercourse with other nations, was often formally conceded by the colonies. And the disputes between them and the home government related principally to other matters which the colonists insisted were within the exclusive control of the local legislatures.

The tendency among the colonists to establish a more intimate and voluntary union among themselves might form the subject of one of the most interesting chapters in American history. The New England Confederacy of 1643, the temporary Congress of 1690, the plan of Union agreed upon in the Convention of 1754, the Stamp Act Congress of 1765, and finally the Continental Congress of 1774, were all the offspring of a desire among the scattered colonies of Great Britain in America to strengthen and extend the common ties for their mutual safety and protection. To all this the jealousy of the home government constituted a serious impediment, but the difficulty in reaching an arrangement as to the proper measure of authority to be conceded to any proposed confederacy or congress, was an obstacle still more serious. The history of the Convention of 1754 is particularly instructive. See Mr. Everett upon its work, N. A. Rev., Vol. XXXVIII. p. 73, *et seq.* At last the colonies, by formal declaration, threw off allegiance to the crown; but even then they did not cease to have a common national head, for it was through the revolutionary Congress that independence was declared, and that body had already, by common consent, taken upon itself those powers of external control which before had been conceded to the crown or the Parliament, together with such others as the emergency seemed to call for. Those powers being undefined, the Congress as a national authority could answer a temporary purpose only, but what was done thereafter, in establishing the Articles of Confederation, and then in substituting for these the work of the Convention of 1787, was not for the purpose of creating for the first time a common authority for States before wholly independent of each other, but was done by way of modifying, defining, strengthening, and rendering more efficient

§ 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 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. New Hampshire, 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]

and enduring an existing authority, through which alone they were known in the family of nations.

"The Union," it is said in the inaugural address of President Lincoln, "is much older than the Constitution. It was formed in fact by the Articles of Association of 1774. It was matured and continued by the Declaration of Independence of 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual by the Articles of Confederation in 1778, and finally, in 1787, one of the declared objects in ordaining and establishing the Constitution was '*to form a more perfect Union.*'"

For a brief account of the Colonial Confederacies, the reader is referred to Mr. Towle's Analysis of the Constitution, p. 298, *et seq.*]

[1] To 1770, *Gardner* v. *Collins*, 2 Peters's Sup. Ct. R. 58.

§ 180. In all the colonies, where 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 connection 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 inheritances pervades the Union, is a strong proof of the general sense, not merely of its equity, but of its political importance.

§ 181. A very curious question was at one time[1] agitated before the king in council, upon an appeal from Connecticut, how far the statutes of descents and distributions, dividing the estate among all the children, was conformable to the charter of 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]

[1] In 1727.

[2] 1 Pitk. Hist. 125, 126.

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

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

§ 183. In respect to the political relations of the colonies with

[1] 1 Chalm. Annals, 692, 693.

[2] *Telfair* v. *Stead*, 2 Cranch, 407.

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 king, as their sovereign liege lord, though the nature of the powers which he might exercise, as sovereign, were still undefined.[1]

§ 184. In the silence of express declarations we may resort to the doctrines maintained by the crown-writers, 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 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. Everywhere he was the head of the Church and the fountain of justice; everywhere he was entitled to a share in the legislation (except where he had expressly renounced it); everywhere 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

[1] Marshall's Colon. ch. 13, p. 353; 3 Wilson's Works, 236, 237, 238, 241, 242, 243.

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 moneys, treasure-trove, 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 to 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 a new 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 themselves 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.[6]

§ 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.[7] An extreme reluctance was shown by Massachusetts to any parliamentary interference as early as 1640;[8] 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.[9] Massachusetts, in

[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 Stokes 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; 1 Pitk. Hist. 255.

[3] 3 Wilson's Works, 205; 1 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.

[6] 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.

[7] 1 Pitk. Hist. 91; 1 Chalm. Annals, 443.

[8] 2 Winthrop's Jour. 25.

[9] 1 Chalm. Annals, 277, 280, 407, 440, 443, 448, 452, 460, 462, 639, 698; Hutch. Coll. 496; Mass. State Papers [1818], Introduction; Id. 50; 2 Wilson's Works, 62.

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."[1] However, Massachusetts, as well as the other New England 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 colonies.[2] 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."[3] 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.[4] 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.[5]

§ 189. "In the Middle and Southern provinces," (we are informed by a most respectable historian,)[6] "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 America, as well as those for the regulation of com-

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

[2] 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.

[3] 3 Hutch. Hist. 66; Mass. State Papers, 337.

[4] 3 Hutch. Hist. 92; App. 463; Marshall's Colon. No. 5, p. 472.

[5] 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.

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

merce, 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 New York, 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 "colonies 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."[4]

§ 191. We here observe that the superintending authority of

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

[2] 1 Chalmers's Annals, 638, 658; 2 American Tracts, Rights of Parlia. Vind. 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.

[4] Marsh. Hist. Colonies, ch. 13, pp. 360, 470, 471; 1 Pitk. Hist. 178, 179, 180, 446.

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.[1] 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, the legislature."[2] 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."[3] And in the petition of the same body to the House of Commons, there is the following declaration: "We most sincerely recognize 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."[4] 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";[5] thus admitting the former to be rightful, while denying the latter.[6]

§ 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 very different opinions as to parliamentary authority.

[1] Marsh. Hist. Colon. p. 471, note 4.

[2] Pitk. Hist. 448, 450.

[3] 1 Pitk. Hist. 453, 454.

[4] 4 Amer. Museum, 89.

[5] 4 Amer. Museum, 89, 90.

[6] 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.

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 prostrating 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 writers[2] 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 allegiance to the crown. The latter was admitted; but the former was resolutely opposed.[4] 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 connection 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.[5]

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

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

[3] 1 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 351, 352 to 364; 4 Debrett's Parl. Debates, 251, &c., note; Marsh. Hist. ch. 14, p. 412, 483; 1 Jefferson's Corresp. 6, 7, 12, 100, 104 to 116.

[4] Mass. State Papers, edit. 1818, p. 342 to 365, 384 to 396; 1 Pitk. Hist. 250, 251, 453, 454.

[5] 1 Jefferson's Corresp. 6, 7, 12, 100 to 116.

§ 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 [1] 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.[2] An utter denial of all parliamen-

[1] 1 Pitk. Hist. 235, 286, 340, 344; Journ. of Congress, 1774, p. 28, 29; Marsh. Colon. ch. 14, p. 412, 483. [Botta's American War, b. 4.]

[2] 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 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 vindicating 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. C. 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 are not represented, and from their local and other circumstances cannot properly be represented in the British Parliament, they are entitled to a free and ex-

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

§ 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 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

clusive 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 external, for raising a revenue on the subjects in America without their consent.

"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 of 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 New York 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.

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]

§ 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.[3] 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.

[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. 199, 200, 201, 208, 209, 211, 219, 285 to 288, 311, 443, 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.

[3] 1 Pitk. Hist. 217, 219, &c. [Botta's American War, b. 3.]

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 a 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 affections more and more, as its excellences 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 congress 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;[2] 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.[3] 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 superseded by the confederated government under the articles finally ratified, as we shall hereafter see, in 1781.[4]

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

[2] All the States were represented, except Georgia.

[3] 9 Dane's Abridg. App. p. 1, § 5, p. 16, § 13, p. 23.

[4] Sergeant on Const. Introd. 7, 8 (2d ed.).

§ 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.[1] 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 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."[2] They adopted a declaration of rights, not differing in substance from that of the congress of 1765,[3] 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 neighboring 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.[4] 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.[5] In a few instances the choice by the legisla-

[1] [Equality of representation and authority was also insisted upon by the weaker colonies in the confederacy of 1643, and was the principal source of the controversies which arose to weaken its efficiency. Palfrey, Hist. of New England, II. 243; Bancroft, Hist. of U. S., I. 420; Towle, Analysis of the Constitution, 302, *et seq.*]

[2] 1 Jour. of Cong. 21.

[3] See ante, p. 133.

[4] Georgia did not send delegates until the 15th of July, 1775, who did not take their seats until the 13th of September.

[5] 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.

tive body was confirmed by that of a convention, 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 separation. 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.[4]

§ 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 of gov-

[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.
[4] Journals of Congress of 1775, p. 177.

ernment.[1] 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.[2] They adopted rules for the regulation of the navy and for the division of prizes and prize money.[3] 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.[4] 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 prohibited goods.[5] 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."[6]

§ 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 connection between them and the state of Great Britain is, and ought to be, dissolved."[7] On the 11th of June a committee was appointed to

[1] Journals of Congress of 1775, p. 231, 235, 279.
[2] Journals of Congress of 1775, p. 259, 260, &c.
[3] Journals of Congress of 1776, p. 13.
[4] Journals of Congress of 1776, p. 106, 107, 118, 119.
[5] Journals of Congress of 1776, p. 122, 123.
[6] Journals of Congress of 1776, p. 166, 174.
[7] Journals of Congress of 1776, p. 205, 206.

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.[1] On the 28th of June the committee appointed to prepare a declaration of independence brought in a draft. On the 2d of July Congress 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 connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that as free and independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

§ 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.[2] 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*,[3] the absolute right to govern. A state or nation is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength.[4] 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.[5] A state which pos-

[1] Journals of Congress of 1776, p. 207.
[2] 3 Dall. 110, per Blair, J.; 9 Dane's Abridg. App. § 2, p. 10, § 3, p. 12, § 5, p. 16.
[3] 1 Bl. Comm. 49; 2 Dall. 471, per Jay, C. J.
[4] Vattel, B. 1, ch. 1, § 1; 2 Dall. 455, per Wilson, J.
[5] Vattel, B. 1, ch. 1, § 2.

sesses this absolute power, without any dependence upon any foreign power or state, is in the largest sense a sovereign state.[1] 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.[2] 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."[3] 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 king of England the attribute of sovereignty or pre-eminence,"[4] because, in respect to the powers confided to him, he is dependent on no man, 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.[5] 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 and noblest that can be known. They form that moral person, which in one of my

[1] 2 Dall. 456, 457, per Wilson, J.

[2] Vattel, B. 1, ch. 1, § 2, 3.

[3] 1 Bl. Comm. 46. See also 1 Tucker's Black. Comm. App. note A., a commentary on this clause of the author's text.

[4] 1 Bl. Comm. 241.

[5] *Penhallow* v. *Doane*, 3 Dall. R. 93, 94, per Iredell, J.; *Chisholm* v. *Georgia*, 2 Dall. 455, per Wilson, J.; 2 Wilson's Lect. 120; Dane's Appx. § 50, p. 63. See Dr. Lieber's Political Ethics, B. 2, ch. 4, p. 163.

former lectures[1] 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."[2] But there is a more limited sense in which the word is often used, where it expresses merely the positive or actual organization of the legislative, executive, or judicial powers.[3] 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.[4] 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 be 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.[5] Strictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the

[1] 1 Wilson's Lect. 304, 305.

[2] 2 Wilson's Lect. 120, 121.

[3] 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."

[4] 2 Dall. 433, Iredell, J.; Id. 455, 456, per Wilson, J.

[5] 3 Dall. 93, per Iredell, J.; 2 Dall. 455, 457, per Wilson, J.

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]

§ 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.[3] 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 appoint-

[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, 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 individual State, as such, has any claim to independence. She is independent only in a union with her sister States in Congress." 1 Amer. Museum, 8, 9. 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 Amer. Museum, 13, 14.

[3] 2 Dall. 471, per Jay, C. J.

ment of their superior officers; and a right of revision, by way of appeal, of the judgments of their courts.[1] 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 freeborn 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.[2] So far as respects foreign states, the colonies were not, in the sense of the laws of nations, 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.[3] 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.[4]

§ 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.[5] 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 govern-

[1] See Marshall's Hist. of Colonies, p. 483; Journals of Congress, 1774, p. 29.

[2] Journal of Congress, 1774, p. 27, 29, 38, 39; 1775, p. 152, 156; Marshall's Hist. of Colonies, ch. 14, p. 412, 483.

[3] 1 Chalmers's Annals, 686, 687; 2 Dall. 470, per Jay, C. J.

[4] Journal of Congress, 1776, p. 282; 2 Haz. Col. 591; Marsh. Colonies, App. No. 3, p. 469.

[5] 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.

ment. 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."[1] New Jersey, too, established a frame of government on the 2d of July, 1776; but it was expressly declared that it should be void upon a reconciliation with Great Britain.[2] 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."[3] But the declaration of 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.[4] 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.[5] It was not an act 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 one, 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 any 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 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 connection with, and allegiance to, Great

[1] 2 Belk. N. Hamp. ch. 25, p. 306, 308, 318; 1 Pitk. Hist. 351, 355.
[2] Stokes's Hist. Colon. 51, 75.
[3] Stokes's Hist. Colon. 105; 1 Pitk. Hist. 355.
[4] Journal, 1776, p. 241; Journal, 1774, pp. 27, 45.
[5] 2 Dall. 470, 471, per Jay, C. J.; 9 Dane's Abridg. App. § 12, 13, p. 23, 24.

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 statesman[2] used the following language: "This admirable manifesto (that is, the Declaration of Independence) sufficiently refutes the doctrine of the individual sovereignty 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 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."[3]

[1] 2 Dallas, R. 470.

[2] Mr. Charles Cotesworth Pinckney.

[3] 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 rep-

§ 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 co-operation. 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 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; they established a national

resentatives, constituted themselves one moral person before the face of their fellowmen. 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."

[1] 3 Dall. R. 80, 81, 90, 91, 109, 110, 111, 117.

[2] 3 Dall. R. 91.

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 over all 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]

§ 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 gen-

[1] This whole subject is very amply discussed by Mr. Dane in his Appendix to the ninth volume of his Abridgment of the Laws; and many of 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.

eral 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 were binding on all the States. And though they constantly admitted the States to be "sovereign and independent communities,"[3] 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.[4]

§ 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*,[5] Mr. Chief Justice Jay, who was equally distinguished as a Revolution-

[1] See *Penhallow* v. *Doane*, 3 Dall. R. 54; *Ware* v. *Hylton*, 3 Dall. 190, 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.

[3] See Letter of 17th Nov., 1777, by Congress, recommending the Articles of Confederation; Journal of 1777, p. 513, 514.

[4] 1 Amer. Museum, 15; 1 Kent, Comm. 197, 198, 199.

[5] 3 Dall. 419, 470.

ary 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 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*,[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 coextensive with the object to be attained. Congress was the general, supreme, and controlling council of the nation, 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 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*,[2] Mr. Justice Chase (himself also a

[1] 3 Dall. 54. [2] 3 Dall. 199.

Revolutionary statesman) said: "It has been inquired, what powers Congress possessed from the first meeting in September, 1774, until the ratification 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 exercised by Congress before that period were rightfully exercised on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant; and that all the powers exercised by the State conventions or State legislatures were also rightfully exercised on the same presumption of authority from the people." [1]

§ 217. In respect to the powers of the Continental Congress exercised before the adoption of the Articles of Confederation, few questions were judiciously 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

[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.

[An exceedingly interesting account of the controversy with Pennsylvania over the jurisdiction of Congress in prize causes, and of the part taken by that eminent lawyer, Mr. A. J. Dallas, in sustaining the Federal authority, will be found in the Life of Mr. Dallas, by his son George M. Dallas, page 95 *et seq.*]

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 respect to national objects, furnished the best exposition of its constitutional authority, since they emanated from the representatives as the people, and were acquiesced in by the people.

CHAPTER II.

ORIGIN OF THE CONFEDERATION.

§ 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 reconquest 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 neighboring 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 foreign or domestic 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 at a very early period have occurred to the great and wise men who assembled in the Continental Congress.

§ 220. It will be an instructive and useful lesson to us to trace

[1] 2 Haz. Coll. 1, etc.; Id. 521; 2 Holmes's Annals, 55 and note; Marshall, Colon. 284, 285, 464; 1 Kent, Comm. 190, 191.

historically the steps which led to the formation and final adoption of the Articles of Confederation and perpetual union between the 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 ardor 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 foresee 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 a 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 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

[1] The first volume of the United States Laws, published by Bioren and Duane, 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.

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,[1] which was in the handwriting 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 committee of the whole, reported a new draft, which was ordered to be printed for the use of the members.[2]

§ 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 of 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 of 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 adapted 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

[1] 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.

[2] Secret Journals, 1776, p. 304.

many sovereign and independent communities, under 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 forever bound and connected together by ties the most intimate and indissoluble. And, finally, let them be adjusted with the temper and the 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 1st 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 form in which it was presented to them, at least so far as those objections can be 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.[2] 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,

[1] Secret Journals, 401, 418, 423, 424, 426; 3 Kent's Comm. 196, 197.
[2] 2 Pitk. Hist. ch. 11, p. 19 to 36; 1 Kent's Comm. 197, 198.

by Massachusetts, Connecticut, New Jersey, and Pennsylvania.[1] There was also an abundance of jealousy of the power to keep up a standing army in time of peace.[2]

§ 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 those 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 of 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 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.[3] 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 tranquillity 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

[1] Secret Journals, 371, 373, 376, 378, 381; 2 Pitk. Hist. ch. 11, p. 19 to 32.
[2] Secret Journals, 373, 376, 383; 2 Pitk. Hist. ch. 11, p. 19 to 32.
[3] 2 Dall. R. 470, per Jay, C. J.; 2 Pitk. Hist. ch. 11, p. 19 to 36.

Articles of Confederation.[1] A cession was accordingly made by the delegates of New York on the 1st 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 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.[2]

[1] Secret Journals, 6 Sept., 1780, p. 442; 1 Kent's Comm. 197, 198; 2 Pitk. Hist. ch. 11, p. 19 to 36.

[2] The history of these cessions will be found in the Introduction to the Land Laws 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.

[This subject is considered somewhat by Mr. Rives in his Life of Madison, I. 257 *et seq.* See Hildreth, Hist. of U. S. III. 398.]

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 States 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 establishing 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

[1] "No treaty of commerce shall be made, whereby the legislative power of the States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." Art. IX.

right and power 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 not be infringed or violated; of establishing and regulating post-offices from one State to another, and exacting postage to defray the expenses; of appointing all 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 borrow money, and emit bills on the 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, moneys 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 improvements 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 imposts

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.

CHAPTER IV.

DECLINE AND FALL OF THE CONFEDERATION.

§ 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 to 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 sovereignty 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

[1] 2 Pitk. Hist. 16. [Tucker, Hist. of U. S. I. 311; Hildreth, Hist. of U. S. III. 398.]

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]

§ 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 regu-

[1] Dr. Rush, in apologizing for the defects of the confederation, has observed, "The confederation, together with most of our State constitutions, 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." 1 Amer. Museum, 8. See also 1 Amer. Museum, 270. The North American Review, for Oct., 1827, contains a summary of some of the prominent defects of the confederation. Art. I. p. 249, &c. [And see History of the Constitution by Curtis, B. II.]

lating 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 ministers at a foreign court. They could contract debts, but they were without means to discharge them. They could 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 vigor. 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 everything, but do nothing.*"[2]

§ 247. Strong as this language may seem, it has no coloring beyond what the naked truth would justify.[3] Washington himself,

[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*, 3 Dall. 176, after remarking that Congress, under the confederation, had no coercive authority, 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."

[Mr. Jefferson was of opinion that the confederation possessed powers of coercion by

that patriot without stain or reproach, speaks in 1785 with unusual significancy 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 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

means of which the obligations of the several States might be enforced. Jefferson's Works, IX. 291. But as such powers, if possessed, could only be exercised against the States as States, the process of coercion must necessarily be such as independent nations resort to under similar circumstances, that is to say, the display or exercise of military or naval force, the seizure and confiscation of property, the laying of embargoes upon commerce or intercourse, &c.; and the very exercise of such coercive authority, with a view to enforce the objects of the Union, would almost of necessity result in its overthrow. See Life and Correspondence of James Iredell, II. 193.]

[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.

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 States; and in some instances the exercise of its powers was 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.[3] 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

[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.

[3] Journals of Congress, 6th of March, 1779, 5th vol. p. 86, &c. to 90.

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.[1]

§ 251. The Federalist speaks with unusual energy on this subject:[2] "The great and radical vice in the construction of the confederation is in the principle of legislation for States or governments in their corporate 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 delinquencies of the States 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 further illustration of this topic may be gathered from the palpable defect in the confederation of any power to give a *sanction* to its laws.[3] Congress had no power to exact obedience, or punish disobedience to its ordinances. They could neither impose fines, nor direct imprisonment, nor divest privileges, nor declare forfeitures, nor suspend refractory officers. There was in

[1] *Penhallow* v. *Doane*, 3 Dall. 54; *Carson* v. *Jennings*, 4 Cranch, 2. [See note to § 217, *ante*.]

[2] 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*.

[3] 1 Kent's Comm. 200.

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 evils resulting from this source, even during the Revolutionary War, were of incalculable extent;[5] 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.[6] 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 burdens.[7]

§ 254. But this consideration sinks into utter insignificance in

[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 ed.,) 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, Nos. 22, 32.

[5] 5 Marshall's Life of Washington, 55; 1 Amer. Museum, 449.

[6] 2 Pitk. Hist. 158, 159, 160, 163; 1 Tucker's Black. Comm. App. 237, 243 to 246; 1 U. S. Laws, 37, 54.

[7] The Federalist, Nos. 21, 30.

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.[1] Indeed, from the moment that the peace of 1783 secured the country from the distressing calamities of war, a general relaxation 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.[2] 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.[3] An attempt was made by Congress, during the war, to procure from the States 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.[4] The treasury was empty, the credit of the confederacy was sunk to a low ebb, the public burdens 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;[5] eight millions of

[1] 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, Nos. 21, 31.

[2] See 1 U. S. Laws, (Bioren & Duane's ed. 1815,) from page 37 to 54.

[3] 5 Marshall's Life of Washington, p. 35, 36, 37.

[4] 5 Marshall's Life of Washington, 37; Jour. of Congress, 3d Feb. 1781, p. 26; Id. 16th Dec. 1782, p. 38; Id. 26th April, 1783, p. 194, 203.

[5] [Rives, Life of Madison, III. 73.] 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.

which were 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.[1] Congress, conscious of its inability to discharge 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 public creditors. 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.[2]

§ 256. The measure thus adopted was strongly urged 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 patriotism of the nation.[3] 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

[1] 2 Pitk. Hist. 180; 5 Marsh. Life of Wash. 33.

[2] 2 Pitk. Hist. 180, 181; 5 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.

[3] 2 Pitk. Hist. 181, 182; 5 Marsh. Life of Wash. 32, 38, 39.

power, — namely, 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, everything 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 Revolution, 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 so many 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

[1] 5 Marsh. Life of Wash. 46, 47, 48; 2 Pitk. Hist. 216, 217. See also 2 American Museum, 153 to 158, Mr. Pinckney's Speech. See also 1 Kent, Comm. Lect. 10, p. 212 to 247 (2d edition).

[2] Journals of Congress, 1786, p. 34. See also 2 American Museum, 153. The

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;[1] and from November, 1784, to January, 1786, four hundred and eighty-three thousand dollars only had been received at the national treasury.[2] But for a temporary loan negotiated in Holland there would have been an utter prostration of the government. In this state of things the value of the domestic debt sunk down to about one tenth of its nominal amount.[3]

§ 258. In 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 moneys 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 honorably contended."[4] After the adoption of this report, three

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.

[1] 2 Pitk. Hist. 184.

[2] 5 Marsh. Life of Wash. 60.

[3] 2 Pitk. Hist. 185.

[4] 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.

States which had hitherto stood aloof came into the measure. New York alone 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 co-operation 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. If one State should deem a navigation act favorable to its own growth, the efficacy of such a measure might be defeated by the jealousy or policy of a neighboring State. If one should levy duties to maintain its own government and resources, there were many temptations for its neighbors 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 the restrictive system with the navigating States. And, at all events, each State would legislate according to its estimate of its own interests, the importance

[1] 2 Pitk. Hist. 184, 222; 5 Marsh. Life of Washington, 62, 63, 124; 1 Tuck. Black. App. 158. The speech of Colonel Hamilton, then in the 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. 1 Amer. Museum, 445, 448.

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] Like evils existed in our colonial state.[3]

§ 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.[4] 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,

[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; 1 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 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.

[3] 2 Graham's Hist. Appx. 498, 499.

[4] 5 Marsh. Life of Washington, 69, 72, 75, 79, 80.

had free admission into our ports, American ships and exports were loaded with heavy exactions, or prohibited from entry into British ports.[1] We were therefore the victims of our own imbecility, and reduced to a complete subjection to the commercial regulations 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 endeavored to treat 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 guarantee the faithful observance of any commercial regulations; and there must in such cases be reciprocal obligations.[2] "America (said Washington) must appear in a very contemptible point of view to those with whom she was endeavoring 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?"[3]

§ 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 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

[1] 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, 554 to 557, 562; North American Review, Oct. 1827, p. 249, 257, 258.

[2] 5 Marsh. Life of Wash. 71, 72, 73; 2 Pitk. Hist. 189, 190; 3 Amer. Museum, 62, 64, 65.

[3] 5 Marsh. Life of Wash. 73; North American Review, Oct. 1827, p. 257, 258; Atcheson's Coll. of Reports, p. 55.

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 interests.[2] 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.[3]

§ 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

[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 its 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; [Rives, Life of Madison, II. 10 *et seq.*]

[2] 2 Pitk. Hist. 192; 5 Marsh. Life of Wash. 70.

[3] 5 Marsh. Life of Washington, 80, 81.

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.[1]

§ 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 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.[2] 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.[3] 3. The want of a direct power to raise armies, which was objected to as unfriendly to vigor and promptitude of action, as well as to economy and a just distribution of the public burdens.[4] 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.[5] 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 functions.[6] It was objected, that either the whole su-

[1] 5 Marsh. Life of Washington, App. note 1.

[2] The Federalist, No. 21; 3 Amer. Museum, 62, 63, 64.

[3] The Federalist, No. 21; 3 Amer. Museum, 62, 65.

[4] The Federalist, No. 22.

[5] The Federalist, No. 22; 1 Amer. Museum, 275; 3 Amer. Museum, 62, 66.

[6] 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].

perstructure 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.[1] 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.[2] 8. The want of judiciary power coextensive with the powers of the general government.

§ 266. In respect to this last defect, the language of the Federalist[3] contains so full an exposition that no further 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 ingredients 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

[1] 1 Amer. Museum, 8, 9; Id. 363. [See Van Buren, Political Parties, 55; Life of Samuel Adams, II. 480.]

[2] 1 Amer. Museum, 8, 9; 3 Amer. Museum, 62, 66.

[3] The Federalist, No. 22.

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 honor, 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]

§ 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.[2] "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."[3]

§ 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 infrac-

[1] See *Chisholm* v. *Georgia*, 2 Dall. R. 419, 447.
[2] The Federalist, No. 22.
[3] The Federalist, No. 43.

tions of its legitimate sovereignty.[1] "A list of the cases (says the Federalist) in which Congress have been betrayed or forced by the defects of the confederation into violations of their chartered authorities, would not a little surprise those who have paid no attention to the subject."[2] 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 color of constitutional authority. Yet no blame has been whispered, no alarm has been sounded."[3]

§ 270. Whatever may be thought as to some of these enumerated defects, whether they were radical deficiencies 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.[4] 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 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 labor 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.*

[1] The Federalist, No. 43; 1 Kent's Comm. Lect. 10, p. 201 [2d edit. p. 214, 215].

[2] The Federalist, No. 42.

[3] The Federalist, No. 38.

[4] 5 Marsh. Life of Washington, 33. [See Van Buren, Political Parties, 82; Hammond, Political Hist. of N. Y. I. 2.]

§ 271. If this language should be thought too figurative to suit the sobriety of historical narration, we might avail ourselves of language as strongly colored 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]

[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 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 fulfilment of our treaty stipulations.

[In some instances, however, Mr. Jefferson appears to have spoken of the confederation as possessing considerable vitality, energy, and vigor.

In a letter to John Adams, of the date of February 23, 1787, referring to what Mr. Adams had said of the Congress, that it "is not a legislative but a diplomatic assembly," Mr. Jefferson says: "Separating into parts the whole sovereignty of our States, some of these parts are yielded to Congress. Upon these I should think them both legislative and executive, and that would have been judiciary also, had not the confederation required them for certain purposes to appoint a judiciary. It has accordingly been the decision of our courts that the confederation is a part of the law of the land, and superior in authority to the ordinary laws, because it cannot be altered by the legislature of any one State. I doubt whether they are at all a diplomatic assembly." Jefferson's Works, II. 128; Works of John Adams, VIII. 433. Elsewhere Mr. Jefferson expressed the opinion that the confederation had the power to coerce the performance by individual States of national duties, and that it was implied in the compact. Jefferson's Works, IX. 291; Life of Madison, by Rives, I. 302.]

BOOK III.

THE CONSTITUTION OF THE UNITED STATES.

CHAPTER I.

ORIGIN AND ADOPTION OF THE CONSTITUTION.

§ 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 at Alexandria in Virginia 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.[1] 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."[2]

§ 273. These resolutions were communicated to the States, and

[1] [Rives, Life of Madison, I. 548; II. 57.]

[2] 5 Marsh. Life of Wash. 90, 91; 1 Kent's Comm. 203; [Rives, Life of Madison, II. 60.]

a convention of commissioners from five States only, namely, New York, New Jersey, Pennsylvania, Delaware, and Virginia, met at Annapolis in September, 1786.[1] 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.[2] 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."[3]

§ 274. On receiving this report, the legislature of Virginia passed an act for the appointment of delegates to meet such as

[1] 1 Amer. Museum, 267; 2 Pitk. Hist. 218; [Rives, Life of Madison, II. 98, 117, 125.]

[2] 5 Marsh. Life of Wash. 97; 2 Pitk. 218; 1 U. S. Laws, (Bioren & Duane's edit. 1815), p. 55, &c. to 58.

[3] 1 Amer. Museum, 267, 268; [Rives, Life of Madison, II. 127. The preamble of this act is worthy of preservation as a recognition of the immediate and imperative necessity for radical changes in the bond of union. "Whereas the General Assembly of this Commonwealth, taking into view the actual situation of the confederacy, as well as reflecting on the alarming representations made, from time to time, by the United States in Congress, particularly in their act of the 15th day of February last, can no longer doubt that the crisis is arrived at which the good people of America are to decide the solemn question whether they will, by wise and magnanimous efforts, reap the just fruits of that independence which they have so gloriously acquired, and of that Union which they have cemented with so much of their common blood; or whether, by giving way to mutual jealousies and prejudices, or to partial and transitory interests, they will renounce the auspicious blessings prepared for them by the Revolution, and furnish to its enemies an eventual triumph over those by whose virtue and valor it has been accomplished: and whereas the same noble and extended policy, and the same fraternal and affectionate sentiments which originally determined the citizens of this Commonwealth to unite with their brethren of the other States in establishing a Federal government, cannot but be felt with equal force now, as motives to lay aside every inferior consideration and to concur in such further concessions and provisions as may be necessary to secure the great object for which that government was established, and to render the United States as happy in peace as they have been glorious in war." The careful wording of this preamble was due to a desire, as Mr. Madison says, "to give this subject a very solemn dress, and all the weight that could be derived from a single State." Letter to Washington, Rives's Life of Madison, II. 135.]

might be appointed by other States, at Philadelphia.[1] The report was also received in Congress. But no step was taken until the legislature of New York 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.[2] 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 in 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."[3] 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 and their political weakness.[4]

§ 275. At the time and place appointed, the representatives of twelve States assembled. Rhode Island alone declined to appoint any on this momentous occasion.[5] 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 submitted to a convention of delegates chosen in each State by the *people* thereof, under a recommendation of its legislature for their *assent* and *ratification*";[6] 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,

[1] Marsh. Life of Wash. 98; [Rives, Life of Madison, II. 132.]

[2] It was carried in the senate of the State by a majority of *one* only. 5 Marsh. Life of Wash. 125.

[3] 2 Pitk. Hist. 219; 5 Marsh. Life of Wash. 124, 125; 12 Journ. of Congress, 12, 13, 14; 2 Pitk. Hist. 219, 220, 222.

[4] 2 Pitk. Hist. 220, 221; Journ. of Congress, Oct. 1786; 1 Secret Journ. 268.

[5] 5 Marsh. Life of Wash. 128; [Arnold, Hist. of Rhode Island, II. 537.]

[6] 5 Marsh. Life of Washington, 128, 129; Journal of Convention, 370; 12 Journ. of Congress, 109; 2 Pitk. Hist. 224, 264; [Rives, Life of Madison. II. 477.]

and a day on which the electors should assemble and vote for the president, and 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.

§ 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 a difference among the several 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]

§ 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]

[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; [Rives, Life of Madison, II. 480.]

§ 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,[1] passed a resolution appointing the first Wednesday in January following for the choice of electors of president; 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 and commenced proceedings under the new Constitution. 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.[2] On the 30th of April President Washington was sworn into office, and the government then went into full operation in all its departments.

§ 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.[3] 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.[4]

[1] Journ. of Convention, App. 449, 450, 451; 2 Pitk. Hist. 291.

[2] 5 Marsh. Life of Wash. 133, 151, 152; 2 Pitk. Hist. 317, 318; 1 Lloyd's Debates, 3, 4, 5, 6.

[3] 2 Pitk. Hist. 283; Journ. of Convention, App. 452; 1 Kent's Comm. 204, 205.

[4] 2 Pitk. Hist. 265; Journ. of Convention, App. 452, 458. [By setting aside the Articles of Confederation, which by their terms were to be articles of "perpetual union," and by substituting instead thereof a Constitution to which two of the States had not assented, those States were at once and effectually excluded from the Union, by a revolution in the government, which, though peaceful, was only to be justified on grounds similar to those on which any revolution can be defended when the established government has ceased to accomplish the purposes of its creation. But though these States were thus cut off from constitutional affiliation, they were not put, in their intercourse with the government and in commercial regulations, on the footing of foreign nations; but, on the other hand, the utmost kindness and forbearance was exercised in the expecta-

§ 280. Thus was achieved another and still more glorious triumph in the cause of national liberty than 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 matured strength and vigor; 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.[1]

tion that they would not long continue to resist the necessities of their situation and persevere in their refusal to take their proper places in the American family. Hildreth, Hist. of United States, IV. 147, 149; Pitkin, Hist. of United States, II. 336.]

[1 LOCAL SELF-GOVERNMENT. — At this point it may not be inappropriate, in view of the discussions and controversies which have arisen since this work was published, and which still demand some portion of the attention of both the statesman and the jurist, to call attention to certain principles and usages in American constitutional government, which, though pertaining more particularly to State than to Federal policy, are nevertheless necessarily had in view when a complete survey of our political system is desired and sought. We allude here to the system of local self-government, which, in respect to local concerns, prevails universally.

In another work the present editor has had occasion to say, that, "in the examination of American constitutional law we shall not fail to notice the care taken and the means adopted to bring the agencies by which power is to be exercised as near as possible to the subjects upon which the power is to operate. In contradistinction to those governments where power is concentrated in one man, or in one or more bodies of men, whose supervision and active control extend to all the objects of government within the territorial limits of the State, the American system is one of complete *decentralization*, the primary and vital idea of which is, that local affairs shall be managed by local authorities, and only general affairs by the central authority. It was under the control of this idea that a national Constitution was formed, under which the States, while yielding to the national government complete and exclusive jurisdiction over external affairs, conferred upon it such powers only, in regard to matters of internal regulation, as seemed to be essential to national union, strength, and harmony, and without which the purpose in organizing the national authority might have been defeated. It is this, also, that impels the several States, as if by common arrangement, to subdivide their territory into counties, towns, road and school districts, and to confer upon each the powers of local legislation, and also to incorporate cities, boroughs, and villages wherever a dense population requires different regulations from those which are needful for the rural districts. This system is one which almost seems a part of the very nature of the race to which we belong. A similar subdivision of the realm for the purposes of municipal government has existed in England from the earliest ages. Crabbe's History of English Law, ch. 2; 1 Bl. Comm. 114; Hallam's Middle Ages, ch. 8, pt. 1; 2 Kent, 278; Vaughan's Revolutions in English History, b. 2, ch. 8. And in America the first settlers, as if instinctively, adopted it in their frame of government, and no other has ever supplanted it, or even found advocates." Cooley, Const. Lim. 189.

The writers upon our civil polity, who have carefully studied its philosophy, have not only taken notice of this primary fact, but they have invariably attributed to it the liber-

ties we enjoy. De Tocqueville discusses it with clearness, and contrasts it forcibly with the French idea of centralization under which constitutional freedom has never become an established fact. Democracy in America, ch. 5.

The same comparison is made by Dr. Lieber, who shows that a centralized government, though it be by representatives freely chosen, must be despotic, as any other form of centralization necessarily is. Civil Liberty and Self-Government, ch. 21. Mr. Jefferson in his retirement writes thus to a friend: "The way to have good and safe governments is not to trust all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to. Let the national government be intrusted with the defence of the nation, and its foreign and federal relations; the State governments with the civil rights, laws, police, and administration of what concerns the State generally; the counties with the local concerns of the counties; and each ward direct the interests within itself. It is by dividing and subdividing these republics, from the great national one down through all its subordinations, until it ends in the administration of every man's farm by himself; by placing under every one what his own eye may superintend, that all will be done for the best. What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or of France, or of the aristocrats of a Venetian Senate..... The elementary republics of the wards, the county republics, the State republics, and the republic of the Union would form a gradation of authorities, standing each on the basis of law, holding every one its delegated share of powers, and constituting truly a system of fundamental balances and checks for the government. Where every man is a sharer in the direction of his ward republic, or of some of the higher ones, and feels that he is a participator in the government of affairs, not merely at an election one day in the year, but every day; when there shall not be a man in the State who shall not be a member of some one of its councils, great or small, he will let the heart be torn out of his body sooner than his power be wrested from him by a Cæsar or a Bonaparte." Letter to Cabell, Jefferson's Works, VI. 543. Mr. Burke also indicates the fatal defect in the French system when he says, "The hand of authority was seen in everything and in every place. All, therefore, that happened amiss, even in domestic affairs, was attributed to the government; and as it always happens in this kind of officious universal interference, what began in odious power ended always, I may say without exception, in contemptible imbecility." Thoughts and Details on Scarcity; Works (Little, Brown, & Co.'s ed. 1869), V. 168.

Regarding the usual division of authority between the States and the lower municipalities, De Tocqueville, speaking of New England township government, says: "In this part of the Union the impulsion of political activity was given in the township, and it may almost be said that each of them originally formed an independent nation. When the kings of England asserted their supremacy, they were contented to assume the central power of the State. The townships of New England remained as they were before, and, although they are now subject to the State, they were at first scarcely dependent upon it. It is important to remember that they have not been invested with privileges, but that they seem on the contrary to have surrendered a portion of their independence to the State. The townships are only subordinate to the States in those interests which I shall term social, as they are common to all citizens. They are independent in all that concerns themselves, and among the inhabitants of New England I believe that not a man is to be found who would acknowledge that the State has any right to interfere in their local interests." Democracy in America, ch. 5. Mr. Palfrey goes more into detail; speaking of the New England colonies collectively, he says: "While the superior magistrates were elected by the votes of the freemen of the whole colony counted together, the deputies were chosen for each town by a majority of its voters..... The

share which, through their delegated voice in the general courts, the towns had in the general legislation, was not the chief of the functions which belonged to them. The municipal jurisdictions present a peculiarity of the social system of New England, than which none more attracts at this day the attention of intelligent strangers, or has had more influence on the condition and the character of the people through the eight generations of their history. The territory of these States, with the exception of that small portion at the north which remains unoccupied, is laid off into districts of moderate extent, and the inhabitants of each form a little body politic, with an administration of its own, conducted by officials of its own choice, according to its own will, within certain limits imposed by the higher common authority. With something of the same propriety with which the nation may be said to be a confederacy of republics called *States*, each New England State may be described as a confederacy of minor republics called *towns*. The system is the extreme opposite of a political centralization. To the utmost extent consistent with the common action and the common welfare of the aggregate of towns that make the State, the towns severally are empowered to take care of those interests of theirs which they respectively can best understand, and can most efficiently and most economically provide for; and these are identical with the interests which most directly concern the public security, comfort, and morals. Thus it belongs to them, and they are compelled by general laws of the States within which they are severally included, to protect the public health and order by means of a police; to maintain safe and convenient communication about and through their precincts by roads and bridges; to furnish food, clothing, and shelter to their poor; to provide for the education of all their poor at their common charge. By force of this institution every man in New England belongs to a small community of neighbors known to the law as a corporation, with rights and liabilities as such, capable of suing and subject to be sued in the courts of justice, in disputes with any parties individual or corporate. Once a year the corporation chooses the administrators of its affairs, and determines the amount of money with which it will intrust them, and how this shall be raised. If the State levies a general tax, it is the town treasuries that must pay it; and the State fixes the proportion due from each town, leaving it to the town to distribute the burden of its share in the assessment among its own people. As to matters of their own interest, the towns present their petitions, and as to matters of general concern they send their advice to the central authorities. By their magistrates they exercise a responsible supervision of the elections of officers of the town, the county, the State, and the nation." And he very justly adds: "The experience of later times dictated improvements of detail in the municipal system of New England; but its outline was complete when it was first devised." Hist. of New England, II. 11 – 13.

The political organizations under the State were less perfectly formed, less completely endowed with corporate life and vigor, and brought local affairs less generally under local control in the Southern colonies than in the Northern; but the same principle of decentralization was recognized, and the difference of application was due to a difference of circumstances which need not here be gone into. So far as there was difference Mr. Jefferson lamented it, and sought to put an end to it in Virginia through a division of the counties into hundreds. "These little republics," he says, "would be the main strength of the great one. We owe to them the vigor given to our Revolution in its commencement in the Eastern States." Letter to Governor Tyler, Jefferson's Works, V. 527. In this Mr. Jefferson was historically and literally correct. The effective resistance to the inroads of tyranny in New England was through the local municipalities, and the first hostile blow struck by the crown was aimed at the liberties possessed and exercised by Boston and the other towns in the meetings of their freemen. Pitkin, Hist. of United States, I. 265 – 267; Bancroft, Hist. of United States, VI. 518; Life of Samuel Adams, II. 142. The earlier attempts under the Stuarts to introduce arbitrary

authority through taking away the colonial charters proved wholly ineffectual while the lower municipal governments remained. When the charter of Rhode Island was suspended it is said that "*the American system of town governments*, which necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the liberty of the individual citizen when that of the State or colony was crushed." Arnold, Hist. of Rhode Island, ch. 7. In Massachusetts, where the civil polity had a theological basis, it was even insisted by the deputies that to surrender local government was contrary to the Sixth Commandment; for, said they, "Men may not destroy their political any more than their natural lives." So they clung to "the civil liberties of New England" as "part of the inheritance of their fathers." Palfrey, Hist. of New England, III. 301 – 303; Bancroft, Hist. of United States, II. 125 – 127; Mass. Hist. Coll. XXI. 74 – 81. The contest with Andros, as well in New England as in New York and New Jersey, was a struggle of the people in defence of the right of local government. "Everywhere the people struggled for their rights and deserved to be free." Dunlap, Hist. of New York, I. 133: see Trumbull, Hist. of Connecticut, I. 15.

If we question the historical records more closely we shall find that this right of local regulation has never been understood to be a grant from any central authority, but it has been recognized as of course from the first: just as much of course, and just as much a necessary part of the civil polity, as the central authority itself. Sometimes it was one and sometimes the other which first assumed form and organized vitality, but the precedence was determined by the circumstances which made the one or the other the more immediate need. For all practical purposes they may be regarded as having been simultaneous in origin, and as having sprung from an unquestioning conviction among the people that each was essential, and that both were to run parallel to each other indefinitely.

Such was the system which was found in force when the Constitution of the United States superseded the Articles of Confederation. Thirteen States were in existence, each of which had its subdivisions of counties, towns or parishes, cities, boroughs, and villages; and all these possessing powers of local control more or less extensive. The most of the States had established new constitutions which recognized these subdivisions, without, however, as a rule, making their perpetuation in express terms imperative. With this recognition they remained and still remain a part of the American system as in colonial times.

It may be well now to see what is the theory of State constitutional law regarding these political entities. Upon this subject it has not often been needful to examine very closely the limitations, if any there are, upon State power, because the State has generally abstained from asserting any unusual authority, and has confined itself to that immemorially exercised. Certain principles, however, have been often laid down by the courts, to which attention may be here directed.

1. The Federal government is one of *enumerated powers*, the Constitution being the measure thereof, and the powers not delegated thereby being reserved to the individual States or to the people. This we need not enlarge upon here, or cite other authority for than the book before us.

2. The powers of sovereignty not thus delegated rest in the people of the individual States, who confer the same for ordinary exercise, with such exceptions and limitations and under such regulations as they see fit to establish, upon the departments and officers of government which by their constitutions they create for the States respectively.

3. The municipal organizations exercise a delegated authority under the State, and may also be regarded as governments of enumerated powers. The State legislative authority shapes their charters according to its view of what is proper and politic, and it determines their territorial extent. And upon both these subjects it exercises a discretion to enlarge, diminish, or wholly take away what it has conferred.

In the eye of the law they are mere agencies of the State, created and employed for

the convenience of government, and the State may therefore set aside their action when the purpose of their creation is being disregarded, or exercise a compulsory authority over them whenever duties are neglected or unwisely, negligently, or dishonestly performed. See *Booth* v. *Woodbury*, 32 Conn. 118; *Frost* v. *Belmont*, 6 Allen, 152; *Petersburg* v. *Metzker*, 21 Ill. 205; *Ottawa* v. *Walker*, 21 Ill. 605; *Commonwealth* v. *Pittsburg*, 34 Penn. St. 496; *Abendroth* v. *Greenwich*, 29 Conn. 356; *New London* v. *Brainard*, 22 Conn. 552; *Bailey* v. *New York*, 3 Hill, 531; *People* v. *Draper*, 15 N. Y. 532; *Weeks* v. *Milwaukee*, 10 Wis. 242; *Indianapolis* v. *Geisel*, 19 Ind. 344; *State* v. *St. Louis County Court*, 34 Mo. 572; *St. Louis* v. *Allen*, 13 Mo. 400; *State* v. *Cowan*, 29 Mo. 330; *McKim* v. *Odorn*, 3 Bland, 407; *Harrison Justices* v. *Holland*, 3 Grat. 247; *Mills* v. *Williams*, 11 Ired. 558; *Langworthy* v. *Dubuque*, 16 Iowa, 271; *State* v. *Branin*, 3 Zab. 484; *Aspinwall* v. *Commissioners*, &c., 22 How. 364. In none of the States, however, has it been hitherto understood that when a municipal charter was taken away, the exercise of local authority terminated with it; on the contrary, some general rule for local government has been universal; the special charters have only conferred special privileges, which when taken away remitted the corporators to their previous condition, which was one in which they exercised under well-understood principles the usual powers of local regulation. For a State wholly to take away from any of its people these powers would be not only unprecedented, but would be so entirely opposed to the common understanding of the manner in which the powers of government were to be apportioned and exercised within the State, that the authority to do so could not justly be regarded as within any grant which the people of the State have made of the legislative authority to their representatives. In other words, the right of local self-government is so universally understood and conceded; its exercise has always been so entirely without question; to dispense with it would require and accomplish so complete a revolution in the public administration, involving, as thoughtful men believe, the destruction of the chief prop and support of our liberties, — that its purposed continuance must be regarded as having been within the contemplation of the people of every State, when they framed their Constitution, and that instrument must be read and interpreted accordingly. Local self-government is consequently matter of constitutional right, and the State cannot abolish it and regulate the local affairs through agents of its own appointment.

4. Considered as corporations, the municipalities have a twofold aspect. They are agents of the State in government, and they also have capacity to make contracts and acquire property, as may be needful or desirable in providing such local conveniences for their corporators as may be contemplated by the laws under which they exist. 2 Kent, 275; Ang. & A. on Corp. § 145; *Reynolds* v. *Stark County*, 5 Ohio, 204. As mere corporations, buying, contracting, holding, and improving property, they are entitled to the same protection as all other corporations, and the State cannot take away what they acquire, nor devote to foreign uses that which they have provided for the convenience of their people. *Dartmouth College* v. *Woodward*, 4 Wheat. 663, 694, 695; *Trustees* v. *Tatman*, 13 Ill. 30. A change in corporate bounds, a modification of corporate authority, and sometimes other circumstances may make it necessary for the State to intervene, and by virtue of its sovereign power to take possession of corporate property with a view to its proper appropriation or division; but when she shall do so, it will be as trustee merely, and her duty will be to make the appropriation, not arbitrarily, but with due regard to the purposes of its acquisition, so that the people concerned shall still reap the benefit thereof so far as the circumstances and the nature of the case will admit.

But while the corporations exist, though the State may lay down rules for the regulation of their affairs and the management of their property, it is nevertheless a part of the right of self-government that the people concerned should choose their own officers who are to administer such rules and have the care of such property, and the State can-

not appoint such officers, as it might those who are to perform duties of a more general nature for the public at large, such as mustering or disciplining the State militia, enforcing the State health and police laws, and the like. See *Warner* v. *People*, 2 Denio, 275; *People* v. *Blake*, 49 Barb. 9; *State* v. *Kenyon*, 7 Ohio, N. S. 546.

Such we believe to be the true doctrine regarding these municipalities. Instances have perhaps occurred in which legislative bodies, under the belief that interference in local matters was essential to the correction of local abuses, have disregarded the usual bounds which limit their action in this direction, and taken upon themselves the performance of duties not properly pertaining to the central authority. Whether, if this might rightfully be done, it would be likely to result in correcting more abuses than it would create, is not for us to speculate; it is enough that our institutions rest upon an acceptance of the doctrine that matters purely local are best, most economically, honestly, and efficiently managed by the people immediately concerned, who can see and know and comprehend and personally supervise them, and that the local communities should be expected to rely upon themselves for the correction of local evils, and not upon any distant, imperfectly informed and slightly interested body, which, while open to the same temptations as the local authorities, would be neither under the like restraint of interest, nor subject to have its doings exposed to the same watchful observation of the parties concerned.]

CHAPTER II.

OBJECTIONS TO THE CONSTITUTION.

§ 281. LET it not, however, be supposed, that a Constitution, which is now looked upon with such general favor 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 reconciled some persons to the adoption of it, whose opinions had been strenuously the other way.[2] "In our endeavors," 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 independent republic, or decline from our Federal dignity into insignificant and withered fragments of empire."[3]

§ 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.

§ 283. Almost contemporaneously with the first proposition for

[1] 2 Pitk. Hist. 265, 268, 273, 279, 281; North Amer. Rev. Oct. 1827, p. 279 to 278.

[2] 2 Pitk. Hist. 266, 269, 281; 5 Marsh. Life of Wash. 132, 133, 188. [See Rives, Life of Madison, ch. 35; Hammond, Political History of New York, ch. 1; Life of Samuel Adams, ch. 60; Van Buren Political Parties, 57; Austin's Life of Gerry, II. ch. 2 and 3.]

[3] 5 Marshall's Life of Washington, 138.

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.[1]

§ 284. There was, besides, a very prevalent opinion that the interests of 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 were exhibited on this subject. The original draft submitted 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.[2] 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.[3] 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 labored 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

[1] 5 Marshall's Life of Washington, 130, 131; 4 Elliot's Debates, &c.
[2] 1 Secret Journals, 285, Art. 5.
[3] Id., 290.

which would enable the head to act in any respect independently of the members."[1] 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.

§ 285. The differences of opinion between these parties were too honest, too earnest, and too deep to be reconciled or surrendered. They equally pervaded 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 fears and illusions of the imagination.

§ 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,[2] "two great parties were formed in 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

[1] 5 Marsh. Life of Washington, 33.

[2] 5 Marsh. Life of Washington, 83.

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 favor 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 favor 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]

§ 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 prodigious 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 favor. 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.

§ 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.[2] It is understood

[1] See also 5 Marshall's Life of Washington, 130, 131.

[2] 2 Pitk. Hist. 225 to 260; Dr. Franklin's Speech, 2 Amer. Museum, 534, 538; 3 Amer. Museum, 62, 66, 79, 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.

that at several periods the convention were upon the point of breaking up without accomplishing anything.[1] 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.[2] 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.

§ 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 the 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."[3] 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 widespread fame, or no acquirements to justify it.

§ 290. On the other hand, if the votaries of the national government are fewer in number, they are likely to enlist in its favor men of ardent ambition, comprehensive views, and powerful genius. A love of the Union, a sense of its importance, nay, of its neces-

[1] 5 Marshall's Life of Washington, 128.

[2] 2 Pitk. Hist. 265 to 283; [Rives's Life of Madison, ch. 33 to 36.]

[3] Gen. Hamilton's Speech in 1786; 1 Amer. Museum, 445, 447. See also The Federalist, Nos. 17, 31, 45, 46.

sity, to secure permanence and safety to our political liberty; a consciousness that the powers of the national Constitution 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 insure tranquillity 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.

§ 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.

§ 292. The objections raised against the adoption of the Constitution were of very different natures, and, in some instances, of entirely opposite characters. They will be found 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.

§ 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 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 reargument 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."[3] Uniform experience (it was said) had demonstrated[4] "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."[5] Indeed, any scheme of

[1] The Federalist, Nos. 38, 39; 2 Amer. Museum, 422; Id. 543, 546.

[2] The Federalist, No. 39; Id. No. 38; 2 Pitk. Hist. 270, 272.

[3] Address of the Minority of Penn. Convention, 2 Amer. Museum, 542, 543. See also 2 Pitk. Hist. 272, 273.

[4] 2 Amer. Museum, 542.

[5] See also 2 Amer. Museum, 422, 423, 424.

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.[1] And others of equal eminence foretold that it would commence in a moderate aristocracy, and end either in a monarchy or a corrupt, oppressive aristocracy.[2] 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 behavior; and in these respects it bore an exact similitude to the State governments, whose republican character had never been doubted.[3]

§ 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.[4] 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, 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 fed-

[1] Yates and Lansing's Letter, 3 Amer. Museum, 156, 157; Mr. Jay's Letter, 1787, 3 Amer. Museum, 554, 562. The same objection is repeatedly taken notice of in the Federalist, as one then beginning to be prevalent. The Federalist, Nos. 1, 2, 9, 13, 14, 23; [Life of Samuel Adams, III. 251.]

[2] Mr. George Mason's Letter, 2 Amer. Museum, 534, 536.

[3] The Federalist, No. 39.

[4] Id.

eral; 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]

§ 295. Time has in this, as in many other respects, assuaged the fears and disproved the prophecies 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 burdens in times of peace.

§ 296. (2.) 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 prophecy could invent. Looking back, indeed, to that period with the calmness with which we naturally 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 coloring 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 correctness of theory was yielded to the interests or prejudices of particular States, and something of inequality of benefit borne for the common good.

§ 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

[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. § 14, p. 25, &c.; § 35, p. 44, &c.; 1 Tucker's Black. Comm. App. 146, &c.; the Federalist, No. 9; 3 Dall. R. 473.

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 imports. 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 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.[3] 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.[4]

§ 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 and unlimited 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 imposts upon commerce, they may impose what land taxes,

[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, Nos. 71, 72.

[3] See 2 Amer. Museum, 422, &c.; Id. 435; Id. 434; Id. 540, &c., 543, &c.; Id. 553; 3 Amer. Museum, 62; Id. 157; Id. 419, 420, &c.

[4] Many of the objections are summed up in the Federalist, No. 38, with great force and ability.

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 pretences." "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]

§ 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 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.[2]

§ 300. (3.) 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,

[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.

[2] The Federalist, No. 38.

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.

§ 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 recognize 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 conscience 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]

§ 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 it 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 to the people the

[1] 2 Amer. Museum, 422 to 430; Id. 435, &c.; Id. 534, &c. 536, 540, &c. 553, &c. 557; 3 Amer. Museum, 62; Id. 157; Id. 419, 420, &c.; The Federalist, No. 38; [Rives, Life of Madison, II. 607, 639; Jefferson's Works, III. 3, 13, 201; Life of Fisher Ames, I. 52, 53.]

enjoyment of the common law;[1] 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 finally, the want of drawing a clear and direct line between the powers to be exercised by Congress and by the States.[2]

§ 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 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.[3] 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.[4] The friends of the Constitution generally supported them upon the ground of a large public policy, to quiet jealousies and to disarm resentments.

§ 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 of that instrument.[5] In respect to a bill of rights, it was stated that several of the State constitutions contained none in form, and yet were not on that account thought objectionable. That it was not true that the Constitution of the

[1] Mr. Mason, 2 Amer. Museum, 534.

[2] 2 Amer. Museum, 426, 428; Id. 534, 537; Id. 549, 557; 3 Amer. Museum, 62; Id. 419, 420, &c.; 2 Pitk. Hist. 218, 267, 280, 282, 283, 284.

[3] 2 Pitk. Hist. 332, 334. [These amendments were proposed and advocated by Mr. Madison, through whose efforts in the main their passage through Congress was secured. See Rives, Life of Madison, II. 38 *et seq.*; Life, &c. of Fisher Ames, I. 52; Van Buren, Political Parties, 191 *et seq.*; Hamilton, History of the Republic, IV. 23.]

[4] 5 Marsh. Life of Wash. 209, 210.

[5] 5 Marsh. Life of Wash. 207, 208.

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 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]

§ 305. Notwithstanding the force of these suggestions, candor will compel 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

[1] The Federalist, No. 84; Mr. Jay's Address; 3 Amer. Museum, 554, 559; 2 Amer. Museum, 422, 425.

which the friends of the Constitution supported these amendments evince the good faith and sincerity of their opinions, and increase our reverence for their labors, as well as our sense of their wisdom and patriotism.[1]

[1] [The Constitution was accepted and put in force in anticipation of, and in reliance upon, the adoption of these amendments, and by them the instrument was completed. "I dwell," said Mr. Choate, "on that time from 1780 to 1789, because that was our age of civil greatness. Then first we grew to be *one*. In that time our nation was born. That which went before made us independent. Our better liberty, our law, our order, our union, our credit, our commerce, our rank among the nations, our page in the great history, we owe to this. Independence was the work of *the higher passions*. The Constitution was *the slow product of wisdom*." Lecture on Jefferson, Burr, and Hamilton, 1858.]

CHAPTER III.

NATURE OF THE CONSTITUTION, — WHETHER A COMPACT.

§ 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 approach 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.

§ 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 of discussion, 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.

§ 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 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.

§ 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.

§ 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 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.[2] But here the contracting parties, whether considered as States in their political capacity and character, or as individuals, are all equal; nor is there anything 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.

§ 311. It is a Federal compact.[3] Several sovereign and inde-

[1] 1 Tucker's Black. Comm. App. note D, p. 140 *et seq.*

[2] 1 Tucker's Black. Comm. App. note D, p. 141.

[3] 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." 4 Jefferson's Corresp. 415. 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

pendent 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 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

their adoption by Congress; and was adopted by State conventions, — the immediate representatives of the people. [Mr. Calhoun has enlarged upon the view here taken by Mr. Jefferson in two elaborate papers: the "Discourse on the Constitution and Government of the United States," Works, I. 111; and the "Address on the Relations of the States to the General Government," Works, VI. 59. See also the review of this work by Judge A. P. Upshur, (Petersburg, Va., 1840.) If, however, anything can be regarded as settled in the constitutional law of any people, it must now be looked upon as placed beyond further controversy, that the Constitution of the United States is an instrument of government, agreed upon and established in the several States by the people thereof, through representatives empowered for the purpose, operative upon the people individually and collectively, and, within the sphere of its powers, upon the government of the States also. And that the Union which is perfected by means of it is indissoluble through any steps contemplated by, or admissible under, its provisions or on the principles on which it is based, and can only be overthrown by physical force effecting a revolution. Such has been the view of the judicial department from the first, and the practice of the legislative and executive departments has corresponded thereto; Mr. Jefferson himself, as Mr. Calhoun mournfully concedes, (Calhoun's Works, I. 359,) having failed as President to offer practical resistance to this construction of the Constitution. And finally the people of the country, when some of the States endeavored to treat the Constitution as a compact from which they might withdraw when they deemed its provisions violated, have resisted this doctrine with the utmost expenditure of military force, and at an immense sacrifice of life and treasure have overthrown its adherents. In the courts, therefore, in the Cabinet, in the halls of legislation, and in the arbitrament of arms, the national view has invariably prevailed. It may be added, also, that the last great struggle has had the effect which able minds had anticipated as the result of the war, (see Life,&c., of Gouverneur Morris, III. 260; Calhoun's Works, I. 361,) — to strengthen considerably and in some directions to extend the national authority. Something of this has come from constitutional changes introduced for this express purpose; something from the great increase in Federal offices, patronage, and expenditures; but more than all from the public mind becoming familiarized with the employment by the Federal government of tremendous discretionary powers during the existence of hostilities, and of unusual and somewhat arbitrary measures afterwards in suppressing disorders in the territory lately in rebellion, and in reconstructing the shattered fabrics of State government. The constitution of any nation is practically what it has become by the practical construction of those in authority, acquiesced in by the people; and if doubtful points have been covered by that construction for purposes apparently beneficial, and under circumstances which incline the people to approval or indifference, there is very great probability that the ground thus occupied will be permanently possessed, and instead of being afterwards abandoned voluntarily, may not even be contested by those who might have done so with vigor and effect under other circumstances. How far this should be so we do not discuss; that it is so in fact is unquestionable.]

[1] 1 Tucker's Black. Comm. App. note D, p. 141.

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.

§ 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.[1] 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.

§ 313. It may be proper to illustrate the distinction between federal compacts and obligations and such as are social, by one or two examples.[2] A federal compact, alliance, or treaty is an act of the state or body politic, and not of an individual. On the contrary, a 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 quotas 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.[3]

§ 314. It is an original compact. Whatever political relation existed between the American colonies antecedent to the Revolu-

[1] 1 Tucker's Black. Comm. App. note D, p. 144. [2] Id. p. 145. [3] Id. 145.

tion, 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 States, possessing all the rights, 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.[1]

§ 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.[2]

[1] 1 Tuck. Black. Comm. App. note D, p. 150. These views are very different from those which Mr. Dane has, with so much force and perspicuity, urged in his Appendix to his Abridgment of the Law, § 2, p. 10, &c.

"In order correctly to ascertain this rank, this linking together, and 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 acts of this people*, first created *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 4, 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 the people thereof in that sovereign capacity. The *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."

[2] 1 Tucker's Black. Comm. App. note D, p. 153. There is an inaccuracy here; Con-

§ 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 tranquillity in each State; voluntarily, because the measure had its commencement in spontaneous acts of the State legislatures, prompted by a 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]

§ 317. It is a compact by which the several States and the people thereof 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, 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 all citizens 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.[3]

necticut did not form a constitution until 1818, and existed until that period under her colonial charter. Rhode Island framed and adopted a constitution in 1842. [But until such adoption the colonial charter must be considered as having been accepted for and as constituting a State constitution. This was the view taken by the Superior Court of Rhode Island in 1786, when in the case of *Trevett* v. *Weedon*, a legislative act was declared unconstitutional because in conflict with the royal charter. See also *Luther* v. *Borden*, 7 How. 1.]

[1] 1 Tucker's Black. Comm. App. note D, p. 155, 156.

[2] 1 Tucker's Black. Comm. App. note D, p 169.

[3] 1 Tucker's Black. Comm. note D, p. 170.

§ 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.[1] Its duties then become 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, therefore, 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.

§ 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.[2] That reasoning has been quoted at

[1] 1 Tucker's Black. Comm. note D, p. 170.

[2] [When, in 1861, the people of that section of the country in which the doctrines of Mr. Tucker had taken most root, attempted to withdraw from the Union and establish a government of Confederate States, they endeavored by their constitution to preclude forever such a construction of the instrument as had prevailed regarding the Constitution of the United States. The preambles of the two instruments placed side by side will show very distinctly the difference in the ends sought.

Preamble to the Constitution of the United States. "We, the people of the *United* States, in order to form *a more perfect Union*, establish justice, insure 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."

Preamble to the Constitution of the Confederate States. "We, the people of the *Confederate* States, *and each State acting in its sovereign and independent character*, in order to form a permanent *Federal* government, establish justice, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish this Constitution for the Confederate States of America."

The Confederate Constitution in the main was copied from that of the United States,

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]

but its framers were particular to state that the powers vested in the Congress were *delegated*, not *granted* to that body.

How far the purpose of these variations from the Constitution of the Union was accomplished may appear from the statement, doubtless somewhat exaggerated, of a prominent actor, who declares that "in less than a twelvemonth after this same boasted States-rights Constitution was put in operation, its very framers notoriously, and in spite of all remonstrances, succeeded in consolidating all governmental power in the central agency at Richmond, and, upon the stale plea of *military necessity*, shamelessly trod under foot all the reserved rights of the States and the people, and organized an irresponsible military despotism in the very bosom of the Ancient Dominion, as harsh and grinding in its character as has ever heretofore existed in any age of the world." The War of the Rebellion, by H. S. Foote, p. 49. The measures of which Mr. Foote complained were disapproved of by the Vice-President of the Confederacy, and were the subject of protests in some of the States, especially in Georgia; but in a life-and-death struggle no government is likely to inquire very carefully into paper limitations upon its powers.]

[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.

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, October, 1830, p. 501, 545. In the resolutions of the senate of South Carolina, in November, 1817, 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." In November, 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, reasserts 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. 3 Am. An. Reg.: Local History, 131. Mr. Vice-President Calhoun's letter to Gov. Hamilton of August 28, 1832, contains a very elaborate exposition of this among other doctrines.

Mr. Dane, in his Appendix, (§ 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

§ 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.

§ 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 operates 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 connection, 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 exigency of the case may require.[1]

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 side. Mr. Dane makes frequent references to it in his Appendix. 4 Elliot's Debates, 315 to 330. [See also Life of Webster, by Curtis, II. ch. 16 and 19.]

[1] Virginia, in the resolutions of her legislature on the tariff, in February, 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, § 14, p. 589. See also North American Review, October, 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 measures of redress.*" North American Review, October, 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 color 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. The report insists that the States are in the last resort the ultimate judges of the infractions of the Constitution. p. 6, 7, 8, 9.

These conclusions may not always be avowed; but they flow naturally from the doctrines which we have under consideration.[1] 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.

§ 322. If this be the true interpretation of the instrument, it has wholly failed 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 deliverance. 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.[2] "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

[1] 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, § 8. See the debates in the Senate on Mr. Foot's Resolution in 1830, and Mr. Dane's Appendix, and his Abridgment and Digest, Vol. IX. ch. 187, art. 20, § 13 to 22, p. 588 *et seq.*; North American Review for October, 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, August 28, 1832. [Also Constitutional View of the War between the States, by Alexander H. Stephens.]

[See Mr. Madison's explanation of the Virginia Resolutions, Writings of Madison, IV. 95; North American Review, October, 1830; Randall's Jefferson, II. 451. See also Mr. Madison's elaborate paper on Nullification, in his Writings, IV. 394. Compare, as to the right of the States to judge as to infractions of the Constitution, Report of the Hartford Convention of 1814, in Dwight's History thereof, p. 361; Niles's Register, Vol. VII. p. 308.]

[2] 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.

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."[1] Consequences like these, which place the dissolution 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.

§ 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";[2] 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.[3] Thus we say that one person has entered into a

[1] 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 of necessity that there can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated; and consequently, that, as the parties to it, they must themselves decide in the last resort such questions as may be of sufficient magnitude to acquire their interposition." Id. p. 8, 9.

[In the Report of the Hartford Convention of 1814, it was declared that "in cases of deliberate, dangerous, and palpable infractions of the Constitution affecting the sovereignty of a State and liberties of the people, it is not only the right but the duty of such a State to interpose its authority for their protection, in the manner best calculated to secure that end. When emergencies occur which are either beyond the reach of the judicial tribunals, or too pressing to admit of the delay incident to their forms, States *which have no common umpire* must be their own judges and execute their own decisions." Dwight, Hist. Hartford Convention, 361; Niles's Register, Vol. VII. p. 308.]

[2] Cited in Johnson's Dictionary, verb *Compact*. See Heinecc. Elem. Juris, Natur. L. 2, ch. 6, § 109 to 112.

[3] 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, § 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, § 1; art. 1, § 1. See 1 Black. Comm. 44, 45.

compact with another, meaning that the contracting parties have entered 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.

§ 324. A compact may, then, be said in its most general sense to import an 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.

§ 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;[3] 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

[1] Vattel, B. 2, ch. 12, § 152; 1 Black. Comm. 43.

[2] 2 Black. Comm. 442.

[3] Woodeson's Elements of Jurisprudence, 21, 22; 1 Wilson's Law Lect. 304, 305; Vattel, B. 1, ch. 1, § 1, 2; 2 Burlamaqui, part 1, ch. 2, 3, 4; 1 Black. Comm. 47, 48; Heinecc. L. 2, ch. 1, § 12 to 18; (2 Turnbull, Heinecc. System of Universal Law, B. 2, ch. 1, § 9 to 12;) Id. ch. 6, § 109 to 115.

of people united together by a common interest, and by common laws, to which they submit with one accord.[1]

[1] Burlamaqui, part 1, ch. 4, § 9; Heinecc. Elem. Juris. Natur. L. 2, ch. 6, § 107; [Maine, Ancient Law, ch. 9; Lecture on the Social Compact, at Providence, by John Quincy Adams, 1842.]

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 or government, they are thereby presently incorporated, and make one body politic, *wherein the majority have a right to act, and conclude the rest.*" Locke on Government, B. 2, ch. 8, § 95. 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." Locke on Government, B. 2, § 96, 97, 98, 99; Id. § 119, 120. Dr. 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. Paley on Moral and Political Philosophy, B. 6, ch. 3. 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 if 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 mere occasional interest may be dissolved at pleasure. But the State ought not to be considered as nothing better than a partnership agreement 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 be 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, cast 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.

§ 326. Mr. Justice Blackstone has very justly observed that the theory of 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 natual foundation as well 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 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, "Here we see the people acting as sovereigns of the whole coun

[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. [See Maine, Ancient Law, ch. 9.]

[2] *Chisholm* v. *State of Georgia*, 3 Dall. R. 419; see also 1 Wilson's Law Lect. 305.

try, 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]

§ 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 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

[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 were 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 forever 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.

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.

§ 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]

§ 329. In respect to the American Revolution itself, it is notorious that it 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 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

[1] See 1 Hume's Essays, Essay 12.

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.

§ 330. The truth is, that the majority of every organized society have 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 they decide for themselves, according to their 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 their means and power to make their will effectual.[2] The Declaration of Independence (which, it is historically known, was not the act of the whole American people) puts the doctrine 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

[1] 1 Tucker's Black. Comm. App. 168; Id. 172, 173; Burke's Appeal from the New to the Old Whigs; Grotius, B. 2, ch. 5, § 17.

[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 § 95 to § 100.

its foundation on such principles, and organizing its powers in such forms, as to them shall seem most likely to effect their safety and happiness.

§ 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]

§ 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 connec-

[1] It was the consideration of the consequences deducible from the theory of an original subsisting compact between the people, upon the first formation of civil societies and governments, that induced Dr. 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. Paley's Moral Philosophy, B. 6, ch. 3. Mr. Wilson (afterwards Mr. Justice Wilson) urged the same objection very forcibly in the Pennsylvania 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 Hume's Essays, Essay 12.

tion 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]

§ 333. Take, for instance, the constitution of Massachusetts, which in its 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 reassert 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 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

[1] 9 Dane's Abridg. ch. 187, art. 20, § 13, 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 or *quasi* compact. This theory is a material basis of political rights ; and as a theoretical point is not too difficult to be maintained, &c., &c. Not that such consent is subsequently revocable 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 ; see 1 Wilson's Lectures, 417, 418, 419, 420,) 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.

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.

§ 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 leges*. 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 constitution. 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.

§ 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 arbiter, *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.

§ 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.

§ 337. No such claim has ever (at least to our knowledge) been asserted by 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

[1] Dane's App. § 14, p. 25, 26.

by the government for such purposes; 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]

§ 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 of 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 contract. 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 incontestable, unalienable,

[1] Locke on Government, B. 2, ch. 8, § 95 to 100; ch. 19, § 212, 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. § 16, 17, p. 29, 30; Id. § 14, p. 25, 26.

[3] Heineccius, Elemen. Juris. Natur. L. 2, ch. 6, § 109 to 115; (2 Turnbull, Heinecc. p. 95;) &c.

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]

§ 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 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.[2] "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 anything at all."[3] 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 majority of 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.

§ 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

[1] Mr. Justice Chase, in *Ware* v. *Hylton*, 3 Dall. R. 199, 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 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, § 15, p. 590.

[2] 1 Black. Comm. 38, 44, 45. See also Burlamaqui, Part 1, ch. 8, p. 48, § 3, 4, 5.

[3] 1 Black. Comm. 45.

the Federalist) results from the very nature of political institutions. A law, by the very meaning of the terms, includes supremacy.[1] 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 intrusted 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.[2] 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 right 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.[3]

[1] The Federalist, No. 33. See also, No. 15. [2] The Federalist, No. 33.

[3] 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 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 self-contradiction, and goes to the destruction of the government and the Union. It is plain, from the whole reasoning of Mr. Adams, that when he 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.

§ 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 the 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 endeavored 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]

§ 342. It is well known that there was a most serious difference of opinion between the House of Peers and 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 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.[2] 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 anything 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

[1] 1 Black. Comm. 211, 222, 232.

[2] Parliamentary Debates, 1688, edit. 1742, p. 203 *et seq.*

king, lords, and commons in Parliament assembled shall have the power of making new laws and altering of old ones."[1] 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 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 lordships' 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.[2] 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."[3] 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."[4] 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.[5] 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. For it is a plain declaration by act and deed, though not in writing, that he who hath the trust, acting contrary, is a disclaimer of the trust."[6] 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,

[1] Parliamentary Debates, 1688, edit. 1742, p. 217, 218.
[2] Id. p. 221, 223, 224.
[3] Id. p. 225, 226.
[4] Id. p. 246.
[5] Id. p. 249.
[6] Id. p. 213.

and that abdication will confer a vacancy."[1] 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."[2]

§ 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.

§ 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 France by King Louis Philippe, upon the expulsion of the old line of the Bourbons. But in both these cases the constitution of

[1] Parliamentary Debates, 1688, edit. 1742, p. 213, 214. [2] Id. p. 220.

government was supposed to exist independent of, 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]

§ 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 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."[2]

§ 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.[3] 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.

§ 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 adopted by a people. If there were any analogy it would follow that every violation of the Con-

[1] 1 Black. Comm. 212, 213.

[2] 1 Black. Comm. 211, 212.

[3] 1 Black. Comm. 212, 213. The same doctrines were avowed by the great Whig leaders of the House of Commons on the trial of Dr. Sacheverell, 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.

stitution 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 favor by any ingenuity of reasoning or any vagaries of theory.

§ 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 provide 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 the 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.

§ 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 further 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 State (who are entitled to prescribe it), for the government and regulation of the whole people.[1] It binds them as a supreme rule ordained by the sovereign power, 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.[2] 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.

§ 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?

§ 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.

[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,) 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.

[2] Heineccius, Elem. Juris. Natur. L. 2, ch. 6, § 109 to 112; 2 Turnbull's Heinecc. p. 95, &c.

§ 352. There is nowhere found upon the face of the Constitution any clause intimating it to be a compact, or in any wise providing for its interpretation as such. 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, in their political capacity, a constitution, though originating in consent, becomes when ratified obligatory, as a fundamental ordinance or law.[3] 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 irrevocable form of government than the constitution of a state formed and ratified by the aggregate of the several counties of the state.[4]

[1] The words "ordain and establish" are also found in the third 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. 304, 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 opinions of the court in *McCulloch* 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. § 2, p. 11, § 14, p. 25, &c.; Id. § 10, p. 21; Mr. Martin's Letter, 3 Elliot, 63; 1 Tucker's Black. Comm. App. 146.

[3] 1 Wilson's Lectures, 417.

[4] See The Federalist, No. 9; Id. No. 15, 16; Id. No. 32; Id. No. 39.

§ 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.[1] 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.[2] And yet (as has been already seen) it was deemed a political heresy to maintain that under it any State had a right to withdraw from it at pleasure and repeal its operation; and that a party to the compact had a right to revoke that compact.[3] 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.

§ 354. But that which would seem conclusive on the subject (as has been already stated) is the very language of the Constitu-

[1] New England Confederacy of 1643; 3 Kent's 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 futuro*, 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?

[2] The Federalist, No. 15, 22, 39, 40, 43; *Gibbons* v. *Ogden*, 9 Wheaton's R. 1, 187.

[3] The Federalist, No. 22; Id. No. 43.

tion 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, *anything in the Constitution or laws* of any State to the contrary notwithstanding." 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?

§ 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 supersede 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 deliberations 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 na-

[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," [Journal of Convention, p. 83, 134, 139, 207; 4 Elliot's Debates, 49. See also 2 Pitkin's History, 232;] 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.

tional 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]

[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."

[Nowhere is the indissoluble character of the Federal Union more forcibly presented than in the following passages from the opinion of Chief Justice Chase, in *Texas* v. *White*, 7 Wal. 724.

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

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

"But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still all powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively or to the people, and we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union there could be no such political body as the United States.' *County of Lane* v. *The State of Oregon*, supra, p. 76.

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.

"When, therefore, Texas became one of the United States, she entered into an indissoluble relation: all the obligations of perpetual union and all the guaranties of repub-

§ 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."[1] 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*."[2] The forms of the convention of Massachusetts and New Hampshire are somewhat peculiar in their language. "The convention, &c., acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the universe 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."[3] 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 of those bodies, and of the people at large, it is remarkable that there is nowhere to be found the slightest allusion to the instrument as a confederation

lican government in the Union at once attached to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States.

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

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

[1] The Federalist, No. 38, p. 247; Id. No. 39, p. 256.

[2] See the forms in the Journals of the Convention, &c., (1819,) p. 390 to 465.

[3] Journals of the Convention, &c., (1819,) p. 401, 402, 412.

or compact of States in their sovereign capacity, and no reservation of any right, on the part of any State, to dissolve its connection, 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."[1]

§ 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 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.[2]

§ 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.[3] None of

[1] Journals of the Convention, &c., (1819,) 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.

[2] Articles of Confederation, 1781, art. 13. [The national view of the Constitution is very forcibly presented by that eminent lawyer, Mr. A. J. Dallas. Life and Writings, by G. M. Dallas, 100 – 107.]

[3] 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 Debates 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.

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.[1] In the North Carolina debates one of the members laid it down as a fundamental principle of every safe 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 monarchial 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."[2]

§ 359. Nor should it be omitted, that in the most elaborate expositions of 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 insisted on, as one of the strongest reasons why it should be adopted in lieu of the confederation.[3] It is matter of surprise, therefore, that 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.[4] 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

[1] 3 Elliot's Debates, 145, 257, 291; The Federalist, No. 32, 38, 39, 44, 45; 3 Amer. Museum, 422, 424.

[2] 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. 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.

[3] The Federalist, No. 15 to 20, 38, 39, 44; North Amer. Review, October, 1827, p. 265, 266.

[4] Rawle on the Constitution, ch. 32, p. 295, 296, 297, 302, 305.

in the principles on which our political systems are founded.[1] 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.

§ 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."[2] And this exposition has been sustained by opinions of some of our most eminent statesmen and judges.[3] It was truly remarked by the Federalist,[4] 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, dif-

[1] Dane's App. § 59, 60, p. 69, 71.

[2] 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 leading 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 himself. 'The convention were forming contracts!' With whom? I know no bargains that were there made, I am unable to conceive who the parties could be. The State governments make a bargain with each other. That is the doctrine that is endeavored 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, § 15, p. 589, 590; Dane's App. § 10, p. 21, § 59, p. 69.

[3] See *Ware* v. *Hylton*, 3 Dall. 199; *Chisholm* v. *Georgia*, 3 Dall. 419; 1 Elliot's Debates, 72; 2 Elliot's Debates, 47; Webster's Speeches, p. 410; The Federalist, No. 22, 33, 39; 2 Amer. Museum, 536, 546; Virginia Debates, in 1798, on the Alien Laws, p. 111, 136, 138, 140; North American Review, October, 1830, p. 437, 444.

[4] No. 39.

fering no otherwise from their ordinary assent than its being expressed, not by the legislative authority, but by that of the people themselves.

§ 361. But if the Constitution could, in the sense to which we have alluded, be deemed a compact, between whom is it to be deemed a compact? 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 Federal 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 later and more deliberate examinations.[3]

§ 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 for the same reasons the governor or senate or house of representatives or judges, either of a State or the

[1] 1 Tuck. Black. Comm. 169; Hayne'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; [Writings of Madison, IV. 95, 395.]

United States, are parties thereto. No State, as such, that is, the body politic, as it was actually organized, had any power to enter into 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 nowhere 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,

[1] 4 Wheaton, 404. [Obviously, State governments, created by the people and holding from them certain delegated powers in trust, which they exercised for the States severally, as members of a confederacy, had no authority under their delegation to set aside the confederation, inaugurate a revolution, and institute a new and more energetic government by which the States they represented as agencies would be shorn of many most important powers, and subjected, together with their people, to many restraints unknown before. Revolutions must originate with, and be effected by, the people; existing governments have only to confine themselves to a faithful execution of the trusts confided to them; and if the persons in authority go beyond this limit and take steps to set aside the instrument of government under which alone they have the right to represent the people, they may justify their conduct, perhaps, as individuals, if revolution shall be accomplished and prove beneficial; but it is an abuse of terms to speak of their act as that of the government of which they were members, when in truth it is something so far from being contemplated by, that it is actually repugnant to, the delegation of authority, and therefore, instead of being within the trust conferred, is necessarily subversive of it.

Mr. Buchanan appears to have fallen into this error when he assumed, in 1860, that to put forth the power of the government to retake the forts, arsenals, and other property of the United States, and to enforce the performance of national duties within one of the States, the members of whose legislative and executive departments had by formal acts and declarations announced its withdrawal from the Union, would be to wage war against such State. See his message of December 4, 1860, and his explanation thereof in his account of his administration, ch. 6.

The power "to coerce a State" was that which Mr. Buchanan was solicitous not to recognize. "Not for all the land of the continent of North America would I agree that the Federal government had power to coerce a State," said Mr. Senator Jefferson Davis, in addressing his constituents of Mississippi on the admission of Kansas. To this Governor Wise of Virginia replied: "This surely cannot be meant in an absolute sense, either that a State cannot be coerced, or that in some cases she ought not to be coerced. If so, a case can be put in which I presume every patriot ought to be willing to give the price of all the waste lands of the continent, if necessary, to coerce her." Or, as the context shows his meaning to be, to compel the persons in authority, as well

did in their political capacity, as contradistinguished from the people thereof, ratify the Constitution. They were not called upon to do it by Congress, and were not contemplated as essential to give validity to it.[1]

as the people of the State in general, to submit to such laws of Congress as, having been passed in pursuance of the Constitution, have become *the supreme law of the land.* Wise on Territorial Government and the Admission of States, p. 103.]

[1] 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 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, insure domestic tranquillity, 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 powers 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, and of deriving its powers directly from them, was felt and acknowledged by all.

"The government of the Union, then, (whatever may be the influence of this fact on

§ 363. The doctrine, then, that the States are parties is a gratuitous assumption. In the language of a most 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]

§ 364. But if it were admitted that the Constitution is a compact between the States, "the inferences deduced from it," as has been justly observed by the same statesman,[3] "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 gov-

the case,) is emphatically and truly a government of the people. In form and 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; [3 Webster's Works, 346. See also Id. 449 *et seq.*]

[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. 9 Dane's Abridg. ch. 189, art. 20, § 15, p. 589, 590; Dane's App. 40, 41, 42. 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? 9 Dane's Abridg. 590. 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.'"

[3] Webster's Speeches, 429; 4 Elliot's Debates, 324.

ernment 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 exclusively. 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." [1]

§ 365. Then is it a compact between the people of the several States, each contracting with all the people of the other States? [2] 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." [3] "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.

[1] 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 power 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.

[2] 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. Grimké filed a protest founded on different views of it. See Grimké's Address and Resolutions in 1828, (edition, 1729, at Charleston,) where his exposition of the Constitution is given at large, and maintained in a very able speech.

[3] The Federalist, No. 39; see *Sturgis* v. *Crowninshield*, 4 Wheat. R. 122, 193.

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."[1] But this would not necessarily 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.[2] 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.[3]

[1] Mr. Madison's Letter in North American Review, October, 1830, p. 537, 538.

[2] See Dane's App. § 32, 33, p. 41, 42, 43.

[3] *Chisholm* v. *Georgia*, 2 Dall. 419; *Martin* v. *Hunter*, 1 Wheat. R. 304, 324; Dane's App. p. 22, 24, 29, 30, 37, 39, 40, 41, 42, 43, 51.

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 passage, 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 viewed 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 anything 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 governments, without that limit,

§ 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 vindicates 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 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 an-

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 governments 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 governments do for 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 which ever 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."

nulled at the will of the States individually, as the constitution of a State may be at its individual will."[1]

§ 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.[2] 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."[3] 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.

[1] Mr. Madison's Letter, North American Review, October, 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?" Yates's Debates, 4 Elliot's Debates, 75. 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. § 10, p. 21.

The ordinance of 1787, for the government of the Northwestern territory, contains (as we have seen) certain articles declared to be "articles of *compact*"; but they are also declared to "remain forever 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. 269.

[2] 1 Tucker's Black. Comm. 169, 170. [3] 1 Tucker's Black. Comm. 170.

§ 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 of 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 contract, 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.

§ 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 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 jus-

[1] Debate 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. § 32, p. 41; Id. § 38, p. 46.

tified 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]

§ 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 nowhere 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.[2] 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 vigor.[3] A majority of the

[1] The following strong language is extracted from Instructions 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, governments 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. 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.

[2] Madison's Virginia Report, January, 1800, p. 6, 7, 8, 9; Webster's Speeches, 407 to 409, 410, 411, 419 to 421.

[3] 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. 8 Dane's Abridg. ch. 187, art. 20, § 13, p. 589, &c., 591; Dane's App. 52 to 59, 67 to 72; 3 American Annual Register, Local Hist. 131. It is

States, however, have never assented 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]

§ 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 behoove 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 to do. The question is whether they have done it. If they have, it becomes obligatory and binding upon all the States.

§ 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.

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. North American Review, October, 1830, p. 509, 512; 6 Wheat. R. 320, 358. 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. North American Review, id. 507, 508. The recent resolutions of her own legislature (in March, 1831) show that she now approves of the Supreme Court as the true and common arbiter. One of the expositions of the doctrine is, that if a single State deny 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. 4 Elliot's Debates, 321. 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 Governor 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." Dane's App. 58. Six other States, at that time, seem to have come to the same result. North American Review, October, 1830, p. 500. And on other occasions a larger number have concurred on the same point. Dane's App. 67; Id. 52 to 59. Similar resolutions have been passed by the legislatures of Delaware and Connecticut in 1831, 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"? Journals of Convention, 83; 4 Elliot's Deb. 59.

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.[1]

[1] [Besides the writers referred to by Mr. Justice Story, whoever desires to make himself familiar with the views opposed to those here presented will be likely to consult *Construction Construed and Constitutions Vindicated*, by John Taylor of Caroline (1820), *New Views of the Constitution of the United States*, by the same writer (1823), the Review of these Commentaries by Judge A. P. Upshur (Petersburg, Va., 1840), Professor Henry St. George Tucker's *Lectures on Constitutional Law* (Richmond, 1843), and the *Constitutional View of the War between the States*, by Alexander H. Stephens, 1867–70.]

CHAPTER IV.

WHO IS FINAL JUDGE OR INTERPRETER IN CONSTITUTIONAL CONTROVERSIES.

§ 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]

§ 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, with their functionaries, being also clothed with limited powers, subordinate to those

[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 may be 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.

"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."

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 before Congress,

[1] See the Federalist, No. 33.

[2] Mr. Jefferson carries his doctrine much further, and holds that each 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 Correspondence, 316, 317. See also 4 Jefferson's Corresp. 27; Id. 75; Id. 372, 374.

[In *Attorney-General* v. *Barstow*, 4 Wis. 587, the view of Mr. Jefferson was pressed still further. The facts were that Barstow, the governor of the State, was defeated by the people in a canvass for re-election. Certain spurious election returns were, nevertheless, placed on file with the State Board of Canvassers, which, together with the genuine returns, gave him an apparent majority over the opposing candidate. Thereupon he declined to surrender the office at the end of the term, and on *quo warranto* against him in the Supreme Court denied the authority of that court to consider and decide upon the title to the office. His position, as stated by his counsel, was as follows: —

"1. The three departments of the State government, the legislative, the executive, and judicial, are equal, co-ordinate, and independent of each other; and that each department must be and is the ultimate judge of the election and qualification of its own member or members, subject only to impeachment and appeal to the people.

"2. That this court must take judicial notice of who is governor of the State, when he was inaugurated, the genuineness of his signature, &c.; and therefore cannot hear argument or evidence upon the subject. That who is rightfully entitled to the office of governor can in no case become a judicial question, and

"3. That the Constitution provides no means for ousting a successful usurper of

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 re-examination 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 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.[2]

§ 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 favor 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

either of the three departments of the government; that that power rests with the people, to be exercised by them when they think the exigency requires it."

The startling doctrine so broadly stated received so little countenance from the court to which it was addressed as scarcely to be treated with the courtesy of a discussion.]

[1] See 4 Elliot's Debates, 315 to 320.

[2] The Federalist, No. 44. Mr. Madison, in the Virginia Report of January, 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.

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.[1]

[1] Dane's App. § 44, 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 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 coextensive 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 of liberty." 1 Kent's Comm. (2d ed. p. 296,) Lect. 14, 277.

[Our author speaks here of a decision for or against the constitutionality of a particular *act*. Upon such a question, as he truly remarks, the final arbiter is "the supreme judicial authority of the courts of the Union." The final decision of that authority is binding upon all the people, all the States, and all the departments of the general government.

But as between these several departments, there are and must be bounds to this conclusiveness of adjudication. The question that is judicial to-day may be political to-morrow. Judicial questions the courts decide; political are addressed to the wisdom of the legislature. To-day the question may be whether an existing act is constitutional. *That* is purely judicial. To-morrow the act may have expired, and the question may be whether it should be re-enacted. That question is political. Suppose there be no other objection to its re-enactment than doubts of its constitutionality, are legislators bound to defer to the judgment of the court in the exercise of the legislative function, and therefore to re-enact the law, though in their own view it may be a clear and dangerous infraction of the Constitution? This is a question quite aside from that here discussed by our author.

As illustrating this question a noted instance may be referred to. Previous to 1832 the Supreme Court of the United States had in a deliberate decision declared that Congress had the power to charter a Bank of the United States. But in 1832 the question of re-charter arising, and a bill having passed the two houses for the purpose, President Jackson vetoed it. In the course of his veto message he says: —

"It is maintained by the advocates of the bank, that its constitutionality, in all its features, ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, executive, and judicial opinions against the bank have been probably to those in its favor as four to one. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this government. The Congress, the exec-

§ 376. Let us examine the grounds on which this doctrine is maintained. The Constitution declares, (Art. 6,) that "*This Con-*

utive, and the court must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges; and, on that point, the President is independent of both.

"The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the executive, when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

Again: during the administration of President Buchanan the Supreme Court, in a case before it involving a question of personal liberty, denied the power of Congress to exclude slavery from the Territories. This opinion became of vital interest and importance in the Presidential election which followed, and President Lincoln thus referred to it in his inaugural: "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

"Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink, to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes. One section of our country believes slavery is *right* and ought to be extended, while the other believes it is *wrong* and ought not to be extended. This is the only substantial dispute. The fugitive-slave clause of the Constitution, and the law for the suppression of the foreign slave-trade, are each as well enforced, perhaps, as any law can ever be in a community where the moral sense of the people imperfectly supports the law itself. The great body of the people abide by the dry legal obligation in both cases, and a few break over in each. This I think cannot be perfectly cured; and it would be worse in both cases *after* the separation of the sections than before. The foreign slave-trade, now imperfectly suppressed, would be ultimately revived without restriction in one section; while fugitive slaves, now only partially surrendered, would not be surrendered at all, by the other."

Such were the views of Presidents Jackson and Lincoln. The first were strongly condemned by able statesmen, under the lead of Mr. Clay and Mr. Webster, and as earnestly defended. The second have also been subjected to sharp criticism, notably at the hands of Professor Samuel Tyler in his Memoir of Chief Justice Taney. We con-

stitution 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 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 Constitution 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.

§ 377. In the first place, the judicial power of the United States rightfully extending to all such cases, its judgment becomes *ipso*

tent ourselves here with a single remark: The boundary between legislative and judicial power is in general clear. To declare what the law *is*, is the province of the latter; to declare what it *shall be*, within the limits of the Constitution, pertains to the former. And when the question is, what are those limits, it is the duty of every party called upon to exercise an independent authority, carefully and conscientiously, on a full consideration of all the light he can obtain, to satisfy himself that he does not overstep the bounds which the people, in delegating their authority to him, have set to his power. That is a safe, proper, and just rule for every citizen, every officer, and every tribunal to apply wherever there is a discretion to exercise.]

[1] 4 Dane's Abridg. ch. 187, art. 20, § 15, p. 590; Dane's App. § 42, p. 49, 50; § 44, 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.

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.

§ 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 mere 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?

§ 379. It has been said "that however true it may be that the judicial 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 forever, 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 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.

[1] Madison's Virginia Report, Jan. 1800, p. 8, 9.

§ 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, twenty-four 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 arbiter; in 1829 she thought differently.[2] 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 neighboring 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

[1] See *Anderson* v. *Dunn*, 6 Wheaton's R. 204, 232.

[2] Dane's App. § 44, 45, p. 52 to 59, § 54, p. 66; 4 Elliot's Debates, 338, 339.

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, although every other State shall concur in a contrary opinion. Suppose Congress should lay a tax upon imports burdensome to a particular State, or for purposes which such State deems unconstitutional, and yet all the other States are in its favor; 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 twenty-four masters of different wills and different purposes, and yet bound to obey them all.[1]

§ 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 its 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 an oath to support it. If of the latter also, then it is obligatory upon the State legislatures, executives, and judiciaries. It binds them; and yet it does not bind the people of the States, or the

[1] Webster's Speeches, 420; 4 Elliot's Debates, 339.

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?

§ 382. Again, it is a part of this argument that the judicial interpretation is not binding "in relation to the rights of the parties to the constitutional compact." "On any other hypothesis the delegation of judicial power would annul the authority dele gating 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 power. 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 favor 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*

[1] There is vast force in the reasoning of 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.

on or ascertain the construction and sense of them." And the reasoning by which this opinion is supported seems absolutely unanswerable.[1] 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?

§ 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 be construed to extend not only over the citizens, but over the States.[2] This, however, is not left to implication, for it is declared to be the supreme law of the land, "anything 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

[1] Journals of Congress, April 13, 1787, p. 32, &c. Rawle on the Constitution, App. 2, p. 316, &c.

[2] The Federalist, No. 33.

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 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.

§ 384. There would be neither wisdom nor policy in such a doctrine; and it 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 discussions, 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.

§ 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?

§ 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 intrusted 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 were declared to be final and conclusive; and the appellate power in other cases was held to overrule all State decisions and State legislation.[2]

§ 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.

§ 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 Federalist[3] 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

[1] 2 Elliot's Debates, 248, 328, 329, 395; Grimké's Speech in 1828, p. 25, &c.; Dane's App. § 44, 45, p. 52 to 59; Id. § 48, p. 62.

[2] Dane's App. § 52, p. 65; *Penhallow* v. *Doane*, 3 Dall. 54; Journals of Congress, 1779, Vol. 5, p. 86 to 90; 4 Cranch, 2.

[3] The Federalist, No. 3.

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 residue 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]

§ 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 coextensive 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 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.[5]

[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).

[5] In the Federalist, No. 78 and 82, the same course of reasoning is pursued, and the

§ 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 existence 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]

§ 391. This is not all. The Constitution has now been in full

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 insure 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 insure 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 1778, printed by A. E. Miller, 1831, Charleston, p. 7.

[1] It would occupy too much space to quote the passages at large. Take, for 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 Federalist, No. 78.

[2] See Mr. Pinckney's Observations cited in Grimké's Speech in 1828, p. 86, 87.

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.[1] Their decisions upon these grave questions have never been repudiated or impaired by Congress.[2] No State has ever deliberately or forcibly resisted the execution of the judgments founded upon them; and the highest State tribunals have, with scarcely a single exception, acquiesced in and, in most instances, assisted in executing them.[3] During the same period,

[1] Dane's App. § 44, p. 53, 54, 55; Grimké's Speech, 1828, p. 34 to 42. [In this discussion it is assumed, of course, that the question arising under the Constitution has in some form become the subject of judicial controversy, so as to be brought to the notice of the court in a manner to demand its judgment. The court does not sit to declare principles of law except as they arise in actual litigation; it must have authority under the law to adjudicate upon some subject-matter in regard to which a controversy has arisen before it is warranted in laying down rules which are to govern any one in the construction of the Constitution or of any other law. It is, therefore, quite possible that questions of constitutional law may for a long period never be brought to the notice of the court in a form to justify the expression of its opinion; and a practical construction may come to be settled by the action of the other departments of the government, which it would be difficult and mischievous afterwards to disturb. Indeed, as the original jurisdiction of the Supreme Court is limited, and the appellate is by the Constitution expressly conferred, "with such exceptions and under such regulations as the Congress shall prescribe," (Ex parte Yerger, 8 Wal. 85; The Lucy, Id. 307,) it has been found possible by that body in a case in which a decision on a question of constitutional power was thought not desirable, and where the question could only arise on appeal, to preclude a decision by taking away the appellate jurisdiction. This was done in McCardle's Case, 7 Wal. 506, after the appeal had been taken; the question involved being the constitutionality of the Reconstruction Acts, so called. Of the propriety of such action we say nothing here.

The Federal courts have also held that though they may compel the performance of mere ministerial duties by an officer of the United States, (*Marbury* v. *Madison*, 1 Cranch, 137; *Kendall* v. *United States*, 12 Pet. 524; *United States* v. *Guthrie*, 17 How. 284,) yet they have no power to interfere, to require the performance of purely political duties, or to restrain or control the executive in the exercise of discretionary powers. The allegation that he is proceeding to put in force an unconstitutional law does not give a court a jurisdiction to interfere. *Mississippi* v. *Johnson*, 4 Wal. 475. The laws in question here were also the Reconstruction Acts. See also *Georgia* v. *Stanton*, 6 Wal. 51.]

[2] In the debates 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 596; 2 Lloyd's Debates, 284 to 327.

[3] 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

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 power, as a bond of union, in terms of the most unequivocal nature.[1] Whenever any 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

by the States. But see, on the other hand, the opinion of Chief Justice Spencer, in *Andrews* v. *Montgomery*, 19 Johns. R. 164.

[1] 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 court 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. § 44, 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 New Hampshire passed certain resolutions, (172 yeas to 9 nays,) drawn 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.

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 as satisfactory a testimony in favor 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.[2]

[1] Virginia and Kentucky denied the power in 1798 and 1800; Massachusetts, Delaware, Rhode Island, New York, Connecticut, New Hampshire, 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. § 55, 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 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.

[2] 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

§ 392. In this review of the power of the judicial department, upon a question of its supremacy in the interpretation of the Con-

are, also, prohibitions on the States. Some authority must, therefore, necessarily exist, having the ultimate 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 laws 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. 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," (Journal of Convention, 20th Aug. p. 265,) should, in connection with others giving a negative on State laws, establish the conclusion that the convention which framed the Constitution was opposed to granting the

stitution, it has not been thought 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 operations has proceeded upon the ground that, once made, the interpretation was conclusive, as well upon the States as the people.[1]

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, (Journal of Convention, 27th Aug. p. 298,) 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 Federalist, No. 80.

[1] *Martin* v. *Hunter*, 1 Wheat. R. 304, 334, &c., 342, 348; *Cohens* v. *The State of Virginia*, 6 Wheat. R. 264, 376, 377 to 392; Id. 413 to 423; *Bank of Hamilton* v. *Dudley*, 2 Peters, R. 524; *Ware* v. *Hylton*, 3 Dall. 199. 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 favor 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 coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the Constitution 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

§ 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

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 reposed, 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 opposing the acknowledged powers of the government, are extreme cases, and in the hope that they will never occcur; but we cannot help believing that a general conviction of the total incapacity 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 tribunals. 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 decision in such cases should be final!

"These collisions may take place in times of no extraordinary commotion. 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 self-preservation 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,

on the part of the government of the United States or its functionaries, and any power exercised by them not warranted by its

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 history 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 be 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 endeavor 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 determination 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 subdivision 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

true meaning? To this question a general answer may be given in the words of its early expositors: "The same as if the State legislatures should violate their respective constitutional authorities." In the first instance, if this should 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 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

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); *Osborn* v. *Bank of the United States* (9 Wheat. 738, 818, 819); and *Gibbons* v. *Ogden* (9 Wheat. 1, 210).

[1] The Federalist, No. 44; 1 Wilson's Law Lectures, 461, 462; Dane's App. § 58, p. 68.

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, 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 legislative, executive, and judicial departments should 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 at the 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 resort to the ultimate right of all human beings in extreme cases to resist oppression, and to apply force against ruinous injustice.[2]

§ 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

[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.

[2] See Webster's Speeches, p. 408, 409; 1 Black. Comm. 161, 162. See also 1 Tucker's Black. Comm. App. 73 to 75.

as his later labors, 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 connections 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.[1]

[1] 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 consolidated 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 independent 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 interpositions, 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 government 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, anything 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 shown, 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, anything 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 cancelled 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 of the 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 twenty-four, 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 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]

§ 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 dif-

[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.

ferent 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 favor 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 the other hand, give it an extent and elasticity subversive of all rational boundaries.

§ 399. Let us, then, endeavor 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 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.[2]

[1] 1 Black. Comm. 59, 60. See also Ayliffe's Pandects, B. 1, tit. 4, p. 25, &c.; 1 Domat, Prelim. Book, p. 9; Id. Treaties on Laws, ch. 12, p. 74.

[2] 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 rules in respect to interpretation. See his treatise on Laws, ch. 12, p. 74, &c., and Preliminary Discourse, tit. 1, § 2, p. 6 to 16.

§ 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.

§ 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 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 par-

[1] Book 2, ch. 7, § 8.

ticulars 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 interpretations 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]

§ 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

[1] The foregoing remarks are borrowed almost in terms from Rutherforth's Institutes of Natural Law, (B. 2, ch. 7, § 4 to 11,) which contains a very lucid exposition of the general rules of interpetation. The whole chapter deserves an attentive perusal.

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 operations 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]

§ 405 *a*. It will probably be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And perhaps the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.[2]

[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 (*Chisholm* v. *Georgia*, 2 Dall. 419); and another in the decision by the executive and the Senate, that the consent of the latter is not necessary to removal from office, although it is for appointments. The Federalist, No. 77.

[2] Per Mr. Justice Story in *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Peters's S. C. R. 210.

§ 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 favor. 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 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 favored 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 as 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 sug-

gestions. 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 *à fortiori*, to any commentary since made, under a very different posture of feeling and opinion, an authority which should operate as 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] We shall have

[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 leading 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 favor of the States in the former, if *possible* to be so construed." 4 Jefferson's Corresp. 373; Id. 391, 392; Id. 396. Now the very theory on which this canon is founded is contradicted by the provisions of the Constitution itself. In many instances authorities and powers are given which respect citizens of the respective States without reference to foreigners or the citizens of other States. 4 Jefferson's Corresp. 391, 392, 396. 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 favor 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 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

abundant reason hereafter to observe, when we enter upon the analysis of the particular clauses of the Constitution, how many loose interpretations 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 natâ* 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

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 favor of or against it, among the people)? Or are we to be governed by the opinion 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 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 statesman, 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 endeavoring 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 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?

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![1]

§ 409. But to return to the rules of interpretation arising *ex directo* from the text of the Constitution. 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 it were 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 or 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*

[1] [That a practical exposition of the Constitution long acquiesced in will not be departed from, see *Stewart* v. *Laird*, 1 Cranch, 299; *McCulloch* v. *Maryland*, 4 Wheat. 316; *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257; *West River Bridge Co.* v. *Dix*, 6 How. 507; *Bank of U. S.* v. *Halstead*, 10 Wheat. 63; *Ogden* v. *Saunders*, 12 Wheat. 290; *Union Ins. Co.* v. *Hoge*, 21 How. 66; *United States* v. *Gilmore*, 8 Wal. 330; *Hughes* v. *Hughes*, 4 T. B. Monr. 42; *Burgess* v. *Pue*, 2 Gill, 11; *Coutant* v. *People*, 11 Wend. 511; *Norris* v. *Clymer*, 2 Penn. St. 277; *Pike* v. *Megoun*, 44 Mo. 499; *Britton* v. *Ferry*, 14 Mich. 66; *State* v. *Parkinson*, 5 Nev. 15; *Hodgecote* v. *Davis*, 64 N. C. 652; *Plummer* v. *Plummer*, 37 Miss. 185; *Chambers* v. *Fisk*, 22 Texas, 504.]

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 section [3] 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 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 anything 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 sense? 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 interpreter should deem it odious or salutary. Nay, the words are to be deserted and a figurative sense adopted, whenever he deems it ad-

[1] 1 Tucker's Black. Comm. App. 151. [2] B. 2, § 305. [3] § 508.

visable, 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*."[1] He evidently supposes that this means "in all cases not *expressly* submitted to the new government"; yet the word "expressly" is nowhere 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 reasonable 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 cases. 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

[1] [See *Golden* v. *Prince*, 3 Wash. C. C. 313; *Calder* v. *Bull*, 3 Dall. 386; *Gilman* v. *Philadelphia*, 3 Wall. 713.]

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 necessarily arises. The strict, or the most 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 rules 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.

§ 415. In the next place, the powers given by the people to the general government are 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,

[1] Rawle on the Constitution, ch. 1, p. 31.

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, insure domestic tranquillity, 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 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 favorable 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

[1] *Martin* v. *Hunter*, 1 Wheat. R. 304, 325.

power 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 of 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 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*[2] 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.[3] 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 not, therefore, necessarily carved out of existing State sovereignties, nor a surrender of powers already existing in State institutions. For the powers of the State governments depend upon their own constitutions;

[1] The Federalist, No. 37.

[2] 1 Wheat. R. 304.

[3] 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.

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 recognized 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: "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

[1] See also *McCulloch* v. *Maryland*, 4 Wheat. R. 316, 402 to 406; [*Spooner* v. *McConnell*, 1 McLean, 337; *Rhode Island* v. *Massachusetts*, 12 Pet. 720.]

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 enure 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 connection with the purposes for which they were conferred." [1]

[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

§ 419. IV. From the foregoing considerations we deduce the conclusion that, as a frame or fundamental law of government, 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 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]

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.

["If we have a doubt relative to any power, we ought not to exercise it," was the declaration of Mr. Edward Livingston, as a member of Congress. Hunt's Life of Livingston, 285. This, as a maxim in constitutional government, had the approval of Mr. Jefferson. In the case of Louisiana, however, he did not deny that in his opinion he was exercising a power not conferred by the Constitution, and at first he looked to an amendment of the Constitution to ratify the acquisition. See letter to Mr. Breckenridge, 4 Jefferson's Works, 500, and to Lincoln, Id. 504. But surely no such ratification was necessary. A leader in Southern opinions of the next generation has presented the prevailing view very clearly: "It was absurd to say that the United States government could not acquire territory by purchase or by arms, as well as any other national sovereignty on earth. Were we to be circumscribed in our limits, and not to be allowed to make the necessity of outlet like that of the Mississippi River our own? Could other nations take territory by arms, to enforce indemnity, or purchase it for the sake of peace and safety, and a country like the United States be obliged to grow in confined boundaries, and be cramped to death, it might be, for want of the power of expansion? No; the President and Senate had the treaty-making power, and the Congress was expressly given the power to pass all laws necessary to carry that power, and all other powers vested in the government, into execution. This power of acquisition and expansion is an absolutely necessary power, resulting from the very existence of every nation, and essentially vital to our institutions, capable of bearing, like Atlas, a world in their embrace of freedom. The separate States could not acquire the territory; and if Congress could not, the progress of civil liberty itself was constrained and stopped within our infant dimensions." H. A. Wise, Treatise on Territorial Government and Admission of New States, 57.]

[1] See *Ogden* v. *Saunders*, 12 Wheat. R. 332, opinion of Mr. Chief Justice Marshall.

§ 420. This consideration is of great importance in construing a frame of government, and *à 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 favorably 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 favored it.

§ 422. But a constitution of government, founded by the people

[1] See *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 189. [Also *Perrine* v. *Chesapeake & Delaware Canal Co.*, 9 How. 172; The Binghamton Bridge, 3 Wall. 51.]

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] Language to the same effect will be found in other judgments of the same tribunal.[2]

§ 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 coextensive with the terms, unless some clear restriction upon it is deducible from the context. We

[1] *Hunter* v. *Martin*, 1 Wheat. R. 304, 326, 327.

[2] See *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 187, &c., 222, &c.

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 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 nowise 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

[1] See *Sturgis* v. *Crowninshield*, 4 Wheat. R. 112, 202.

society is not to be revolutionized at every critical period, and remodelled in every generation, there must be 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 somewhere, 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 power beyond the fair scope of its terms merely because the restriction is inconvenient, impolitic, or even mischievous.[2] 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

[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 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 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."

[2] See *United States* v. *Fisher*, 2 Cranch, 358.

powers is *pro tanto* the establishment of a new constitution. It is doing for the people what they have 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 forever.

§ 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.[1] 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.[2] This language has reference to a case where the words

[1] [See *People* v. *Fisher*, 24 Wend. 220; *Cochran* v. *Van Surlay*, 20 Wend. 381; *Wynehamer* v. *People*, 13 N. Y. 391, 453, 477; *People* v. *Gallagher*, 4 Mich. 244; *State* v. *Staten*, 6 Cold. 233; Dwarris on Statutes, by Potter, 202, 203.]

[2] *Sturgis* v. *Crowninshield*, 4 Wheat. R. 122, 202.

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 latter 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 connection. 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 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

[1] See Bacon's Abridg. Statute I.; Vattel, B. 2, ch. 17, § 277 to 285, 299 to 302.
[2] See *Bas* v. *Tingy*, 4 Dall. R. 37.
[3] *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 188, 189.
[4] 2 Dall. R. 419.
[5] Bacon's Abridg. Statute I. 8.

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 any other 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 be 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 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 carried 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 subjection. 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 law; and yet, this is not among

§ 431. Besides, if the power only is given, without pointing out the means, how are we to ascertain that any one means is exclusively within its scope rather than another? The same course of reasoning which 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 forever 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

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 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.

restriction to be found which allows the one and denies the other? A 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]

§ 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 intrusted 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 (as has been justly remarked) is not always so direct and palpable as to strike the eye of every observer.[2] If

[1] *McCulloch* v. *Maryland*, 4 Wheat. R. 316, 408.

[2] 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.

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.[1] 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.[2]

§ 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.[3] 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.[4] There is no phrase in it, which, like the Articles of Confederation,[5] excludes incidental and implied powers, and which requires that everything 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

[1] *McCulloch* v. *Maryland*, 4 Wheat. R. 316, 409, 410, 421, 423; *United States* v. *Fisher*, 2 Cranch, 358.

[2] The Federalist, Nos. 33, 44; *McCulloch* v. *Maryland*, 4 Wheat. R. 316, 423.

[3] 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 et contra*, in respect to implied powers. The reader will find a summary of the leading 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.

[4] *Anderson* v. *Dunn*, 6 Wheat. 204, 226.

[5] Article 2.

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 construction 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 designed, and the minor ingredients 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 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?[2] 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

[1] Per Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. R. 316, 406, 407, 421.

[2] The Federalist, No. 33.

thing is given, every particular power necessary for doing it is included. In every new application of a general power, the particular powers 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.[1] 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![2]

§ 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;[3] 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.

§ 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 concurrent jurisdic-

[1] The Federalist, No. 44. [2] Id. No. 44. [3] Id. No. 32.

tion 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 recognized by the Supreme Court.[1]

§ 437. The first two rules are so completely self-evident 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

[1] See *Houston* v. *Moore*, 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.

treaties in 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, anything 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, if, from its nature, or from the words of the grant, it is apparently intended to be exclusive; and 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 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 some time interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.[3]

[1] *Sturgis* v. *Crowninshield*, 4 Wheat. R. 122, 192, 193; *Gibbons* 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.

[3] *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

§ 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 States, 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 pass a law inconsistent with the Constitution of the United States, it is a mere nullity. If it pass a law clearly within its own constitutional powers, still if it conflict 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.[1]

§ 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.[2] Consequently, the inferior power becomes a nullity.[3]

§ 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

be found most ably stated in his learned Commentaries, Lecture 18. 1 Kent, Comm. 364 to 379, 2d edit. p. 387 to 405.

[1] *Ware* v. *Hylton*, 3 Dall. 199; *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. 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, 459.

[2] *McCulloch* v. *Maryland*, 12 Wheat. R. 316, 426.

[3] *Sturgis* v. *Crowninshield*, 4 Wheat. R. 1, 193.

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.[1] "Congress has 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."[2] 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

[1] Mr. Justice Washington, *Houston* v. *Moore*, 5 Wheat. R. 1, 21, 22.

[2] 5 Wheat. R. p. 22.

terms or in their operation contradictory and repugnant to each other." [1]

§ 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 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." [2]

It is not our intention to comment on these cases, but to offer them as examples of reasoning in favor 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

[1] 5 Wheat. R. p. 24. See also *Golden* v. *Prince*, 3 Wash. C. C. R. 313, 324, &c.

[2] *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. Justice 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.

the good of the whole by the will of the whole, and consistently with the interests of the whole; and that these objects can nowhere 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.[1] 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.

§ 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.[2] 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.[3] 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 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.[4] Thus a State may tax the mail, the mint, patent rights, custom-house papers, or judicial process of the courts of the United States.[5] 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 the militia as may be employed in the ser-

[1] *Houston* v. *Moore*, 5 Wheat. R. 1, 49, 55, 56.

[2] See *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 197, 210; *McCulloch* v. *Maryland*, 4 Wheat. R. 316, 527.

[3] *McCulloch* v. *Maryland*, 4 Wheat. R. 316, 431.

[4] Ibid.

[5] Id. 432.

vice 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 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.[4]

[1] *Houston* v. *Moore*, 5 Wheat. R. 1, 53.

[2] Id. 50, 51, 52.

[3] Id. 54, 55.

[4] *Sturgis* v. *Crowninshield*, 4 Wheat. 122, 193, 197, 199; *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 196, 197, 209.

§ 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 destroy 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 ingrafted 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 another 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 amendment of 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 reasoning.[3] 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.[4] One might with just as much propriety hold that because Congress has power " to declare war," but no power is expressly given to make

[1] See *Gibbons* v. *Ogden*, 9 Wheat. R. 203, 210.

[2] See the Federalist, No. 83, 84.

[3] *Cohens* v. *Virginia*, 6 Wheat. R. 395 to 401.

[4] The Federalist, No. 83.

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.[1] In relation, then, to such a subject as a constitution, the natural and obvious sense of its provisions, apart from any technical or artificial rules, is the true criterion of construction.[2]

§ 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 which can 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 cap-

[1] The Federalist, No. 83. See Vattel, B. 2, ch. 17, § 282.

[2] The Federalist, No. 83.

tures,' &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,' &c. Here the two 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 manifest scope of the instrument in which they are found,) are to be ascribed, sometimes to the purpose of greater caution, sometimes to the imperfections 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 Constitution. 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 of meaning, or for the exercise of philosophical acuteness or judicial research. 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.

[1] Mr. Madison's Letter to Mr. Cabell, 18th September, 1828.

§ 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 equivocally 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.[3] 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.[4] So, again, when it

[1] See Vattel, B. 2, ch. 17, § 262, 299. [2] The Federalist, No. 37.
[3] See Vattel, B. 2, ch. 17, § 276, 277. [4] *Ex parte Bollman & Swartwout*, 4 Cranch, 75.

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 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 connection in the Constitution with a definite sense, therefore the same sense is to be adopted in every other connection 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 favorite 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 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

[1] Vattel, B. 2, ch. 17, § 281.

[2] 5 Peters's Rep. 1, 19.

"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, abstractly 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 post-offices 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 recognize, 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 in-

[1] Mr. Madison's Virginia Report, January 7, 1800, p. 5; ante, § 208, p. 193.

quiries, 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.[1]

§ 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 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;[2] that we had frittered down a power, and at the same time had destroyed the Republic.

[1] See Vattel, B. 2, ch. 17, § 285, 286. [See *Henshaw* v. *Foster*, 9 Pick. 316, for forcible remarks on this subject by Chief Justice Parker.]

[2] Burke's Letter to the Sheriffs of Bristol in 1777. [Mr. Jefferson said of our government in his Inaugural that it was "the strongest government on earth," — "the only one where every man, at the call of the law, would fly to the standard of the law, and would meet invasions of the public order as his own personal concern." The events of 1861 – 1865 demonstrated the truth of this remark. But to make and continue it such we must not confine its powers within the limits of a narrow and partisan construction. "We are to suppose that those who are delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies; so that words competent to the then existing state of the community and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce." *Henshaw* v. *Foster*, 9 Pick. 317, per Parker, Ch. J.]

CHAPTER VI.

THE PREAMBLE.

§ 457. HAVING disposed of these preliminary inquiries, we are now arrived at that part of our labors 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 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."

§ 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 præmio, cessat et ipsa lex.*[1] Probably it has a foundation in the expression of every code of written law, from the universal principle of interpretation, that the will and intention of the legislature are 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.

[1] Bac. Abridg. Statute I.; 2 Plowden, R. 369; 1 Inst. 79.

§ 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.[1]

§ 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.[2]

§ 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 of the 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.[3] 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,

[1] See *Chisholm* v. *Georgia*, Chief Justice Jay's opinion, 2 Dall. 419.

[2] Journal of Convention, 67; Id. 88.

[3] Yet, strangely enough, this objection was urged very strenuously against the adoption of the Constitution; 1 Elliot's Debates, 293, 300.

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?

§ 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 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

[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. 1 Wilson's Lectures, 417. [See Jameson, Constitutional Convention, § 63.]

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.

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 flow 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 favor 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 to consider and trace the relations which each of these objects bears to the others, and to show that, collectively, they comprise everything requisite, with the blessing of Divine Providence, to render a people prosperous and happy."[3] In *Martin* v. *Hunter's Lessee*,[4] 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.[5]

§ 464. But this point has been so much dwelt upon in the discussion of other topics,[6] that it is wholly unnecessary to pursue it

[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.

[3] *Chisholm* v. *Georgia*, 2 Dall. 419. [4] 1 Wheat. R. 305, 324.

[5] See *McCulloch* 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.

[6] Ante, p. 318 to 322.

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 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

[1] The debates in the Virginia Convention are very pointed on this subject. Mr. Henry 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. 370; 3 Amer. Museum, 536, 546.

dangerous evils; and thus to 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, forever 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 become, with reflecting minds, the solid foundation on which the adoption of the Constitution was originally rested, 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]

§ 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

[1] *Chisholm* v. *Georgia*, 2 Dall. R. 419. We shall freely use the admirable reasoning of the Federalist on the subject of the Union, without in every instance quoting the particular citations, as they would encumber the text.

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 exist upon any dismemberment (with a view 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 slaveholding from the non-slaveholding 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 neighbors, 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,

[1] The Federalist, Nos. 1, 2, 9, 13, 14; 3 Wilson's Works, 285, 286; Paley's Moral and Political Philosophy, B. 4, ch. 6.

[2] The Federalist, Nos. 13, 14.

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 independent legislation?[1] The experience of the whole world is against any reliance for security and peace between neighboring nations under such circumstances. The Abbe Mably has forcibly stated in a single passage the whole result of human experience on this subject. "Neighboring states," says 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 neighborhood occasions, extinguishing that secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors." 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 any solid ob-

[1] The Federalist, Nos. 2, 5, 6, 7; 3 Wilson's Works, 286; Paley's Moral and Political Philosophy, B. 4, ch. 6.

[2] The Federalist, No. 6.

The remarks which Tacitus puts in the mouth of Calgacus, in his Life of Agricola, are here applicable: "Nostris illi discessionibus ac discordiis clari, vitia hostium in gloriam exercitus sui vertunt; quem contractum ex diversissimis gentibus, ut secundæ res tenent, ita adversæ dissolvent; nisi si Gallos et Germanos et (pudet dictu) Britannorum plerosque, licet dominationi alienæ sanguinem commodent, diutius tamen hostes quam servos, fide et affectu teneri putatis: metus et terror est, infirma vincula caritatis; quæ ubi removeris, qui timere desierint, odisse incipient." — Tacitus, Vita Agricolæ, cap. xxxii.

[3] The Federalist, Nos. 5, 6, 7. It was so in our colonial state. See 2 Grahame's Hist. App. p. 498, 499.

jection 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 in 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

[1] 1 Montesquieu's Spirit of Laws, B. 9, ch. 1. See also Beccaria, ch. 26.

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.[1] 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 neighbors, 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 insure general happiness to its own citizens, and perpetuate the principles of liberty and preserve the substance of justice, is a great problem in the theory of government, which America is now endeavoring 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. the extent of territory is not incompatible with a just spirit of patriotism; 2. nor with a general representation of all the interests and population with 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 economize 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

[1] The Federalist, No. 9; 1 Wilson's Works, 347 to 359; 3 Wilson's Works, 276 to 278.

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 particular 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.

[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 self-appointed 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 so 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, 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 or States, oppressive combinations of a majority will be facilitated; the best security, under the republican form, for the rights of every class of

§ 475. The union of these States, "the more perfect union," is, then, and must forever be, invaluable to all, in 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 neighboring or dis-

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."

tant 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 neighborhood of the colonies and dependencies of other governments on this continent. Their very weakness would invite 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 theatre 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 favorable to their interests, or most commanding over their resources.[2]

§ 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 the security as well as the prosperity of the Western States. How, otherwise than by a general union, could this be maintained or guaranteed?[3]

§ 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 protection could be given to

[1] The Federalist, Nos. 2, 3, 4; 3 Wilson's Works, 290.
[2] The Federalist, Nos. 3, 4, 5.
[3] The Federalist, No. 15.

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 neighbors.[2] But this topic, though capable of being presented in detail from our past experience in such glowing colors 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 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 agri-

[1] The Federalist, No. 12.

[2] The Federalist, Nos. 11, 12.

[3] The Federalist, Nos. 5, 7, 11, 12; 3 Wilson's Works, 290; 1 Elliot's Debates, 74, 144; 1 Tucker's Black. Comm. App. 248, 249; *Brown* v. *Maryland*, 12 Wheat. R. 419, 445, 446.

cultural 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 neighboring 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 everywhere openly encouraged or secretly connived at. The vital interests of a State would lie in many instances at the mercy of its neighbors, who might, at the same time, feel that their own interests were promoted by the ruin of their neighbors. 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 neighbors 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 neighboring 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 through the period between the peace of 1783 and the adoption of the Constitution.

[1] The Federalist, No. 7. The like course in our colonial state, 2 Grahame's Hist. App. 498, 499.

[2] The Federalist, Nos. 4, 5, 11.

§ 482. But not to dwell further on these important inducements "to form a more perfect union," let us pass to the next object, which is to "establish justice." This must forever be one of the great ends of every wise government; and even in arbitrary governments it must, to a great extent, be practised, at least in respect to private persons, as the only security against rebellion, 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, privileges, 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 favor 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.

§ 484. 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 heartburnings and discontents, which were not easily appeased.

§ 485. 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 sank 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

[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. 419, 474.

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 sanction, independently of State legislation and State courts.[1]

§ 486. 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.

§ 487. 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 favor 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 and depreciating paper currency in payment of debts were generally, if not universally, prevalent. Laws authorizing the payment of debts by instalments,

[1] See 1 Wait's State Papers, 226 to 388; *Ware* v. *Hylton*, 3 Dall. R. 199; *Hopkins* 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.

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 had so few guards against frauds of every kind by the debtor, that in practice they amounted to an absolute discharge from any debt, without anything 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, instalment 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 of the times.[2] It is well known, that Shay'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.[3]

§ 488. The Federalist speaks on this subject with unusual emphasis. "The loss which America has sustained from the pesti-

[1] See Chase, J., in *Ware* v. *Hylton*, 3 Dall. 199.

[2] The case of *Trevett* v. *Weeden*, in 1796, 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. [See this case and another one in Ohio, referred to in Cooley's Constitutional Limitations, 160, n.]

[3] 5 Marshall's Life of Washington, 111, 112, &c.; 2 Pitk. Hist. 214; Minot's History of the Insurrection in Massachusetts.

lent 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."[1] "Laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation."[2] 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 exemplary manner upon enormities of this sort, which she thought had been perpetrated by a neighboring 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."[3]

§ 489. 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.[4]

[1] The Federalist, No. 44. [2] Id. [3] Id. No. 7.

[4] The remarks of Mr. Chief Justice Jay in *Chisholm* v. *Georgia* (2 Dall. R. 419, 474) 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 favorable 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 perform-

§ 490. The next clause in the preamble is to "insure 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, 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 favorable in their views seem to have thought that the experience of the world had never yet furnished any conclusive proofs in its support.[3] 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 a majority of the whole, who are

ance 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 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." See also 2 Grahame's Hist. Appx. 498, 499.

[1] The Federalist, Nos. 6, 7, 12. [2] Id. No. 7.

[3] The Federalist, No. 9.

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.[1]

§ 491. 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 favor, — 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 forever 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.[2]

§ 492. There are but two methods of curing the mischiefs of faction: the one, by removing its causes, 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.[3]

[1] The Federalist, No. 10. [2] Id. No. 10. [3] Id. No. 10.

§ 493. 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.[1] 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 operations 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 neighboring 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.[2]

§ 494. One of the ordinary results of disunion among neighboring states is the necessity of creating and keeping up standing armies, and other institutions unfavorable 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.[3] 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 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

[1] The Federalist, No. 9.
[2] Id. Nos. 9, 10.
[3] The Federalist, No. 41.

peace, whose numbers constitute a preventive guard against all internal as well as external attacks.

§ 495. 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 neighbors 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.

§ 496. 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 subdivided 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 grievious public burden, 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 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.[2]

§ 497. 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.

§ 498. First, in respect to means. It is obvious, that from the local position and size of several of the States, they must forever 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 favorably 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 neighboring States; the facilities afforded by the numerous harbors, rivers, and bays which indent and intersect our coasts; the strong interest of for-

[1] The Federalist, No. 11.

[2] The Federalist, Nos. 24, 25.

eigners 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 seaport, surrounded on each side by jealous maritime neighbors with numerous ports? What could Massachusetts or Connecticut do with the intermediate territory of Rhode Island 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 neighbor, 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 cooperation 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.

§ 499. On the other hand, a general government, clothed with suitable authority over all the States, could easily guard the whole Atlantic coast, and make it the interest of all honorable 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.[2] 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

[1] The Federalist, No. 12.

[2] The Federalist, No. 12.

importations has steadily increased with the development of the other resources of the country.

§ 500. 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, 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.

§ 501. But if the means were completely within the reach 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 ameliorate those of another. The necessity of a

[1] The Federalist, Nos. 13, 14.

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 government, 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.

§ 502. 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. 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 everywhere 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

[1] The Federalist, No. 11.

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]

§ 503. 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 interests, its duties, 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 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 continent 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

[1] The Federalist, No. 14.

that before a single letter could reach New Orleans 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 burdens and the insecurity of the establishment would render it intolerable. With what admirable ease and expedition, and noiseless uniformity of movement, is the whole now accomplished through the instrumentality of the national government!

§ 504. 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 lighthouses, 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 harbors against the inroads of enemies.

§ 505. 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.

§ 506. 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.

§ 507. 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 be anything 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 objections 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

[1] The Federalist, No. 27.

continue to cherish the principles and the practice of liberty in perpetual freshness and vigor!

§ 508. 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.

§ 509. 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.

§ 510. 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

[1] 1 Elliot's Debates, 278, 296, 297, 332, 333; 2 Elliot's Debates, 47, 96, 136; 3 Elliot's Debates, 243, 257, 294; The Federalist, Nos. 39, 45, 17, 31.

[2] The Federalist, No. 17.

States. The State governments have a full superintendence and control over the immense mass of local interests of their respective States, which connect 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]

§ 511. 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. Everywhere 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?

§ 512. Besides, the perpetual organization of the State governments, in all their departments, executive, legislative, and judicial; their natural tendency to co-operate in cases of threatened danger to their common liberties; the perpetually recurring right of the elective franchise, at short intervals,—must present 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

[1] The Federalist, Nos. 14, 15. [2] Id. No. 45. [3] Id. No. 45.

can interpose any permanent protection. Each must submit to that public will which created and may destroy them.

§ 513. 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 exclusive power to regulate the descent, devise, and distribution of estates, (a power the most formidable to despotism, and the most indispensable in its right exercise to republicanism,) will forever give them an influence which will be as commanding as, with reference to the safety of the Union, they could deliberately desire.[2]

§ 514. 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.[3] 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.[4] The reasoning on this subject, which has been with so

[1] The Federalist, No. 45.

[2] Id. No. 31.

[3] Id. Nos. 17, 45, 46, 31.

[4] M. 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

much profoundness and ability advanced by the Federalist, will, in the mean time, deserve the attention of every considerate man in America.[1]

§ 515. 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 vigor 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 rights of the people.

§ 516. That there have been measures adopted by the general government which have not met with universal approbation, must be admitted. But was not this 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,

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 robbers and conquerors," &c., &c. Similar views seem to have occupied the mind of a distinguished American gentleman, who published a pamphlet in 1788, (edit. Worcester,) entitled "Thoughts upon the Political Situation of the United States of America," &c., p. 37, &c.

[1] The Federalist, Nos. 45, 46, 31.

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 construction. 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.[2] That any act has ever been done by

[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.

[2] 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. [See Cocke's Constitutional History, p. 209, 234. This author, alluding to this acquisition, and to Mr. Jefferson's opinion upon the power to make it, has not failed to remark the readiness of every party in power to exercise greater authority than they were willing to concede that the government possessed when in the hands of their opponents; and it might thence be argued that the tendency to a constant accretion of Federal authority was to be expected, if not inevitable. Using the terms "Federal" and "Republican" in their original sense, as applied to those who were respectively for a liberal and a strict construction of the powers of government, it might, by modifying a little Mr. Jefferson's famous aphorism, be said, "Out of power, we are all Republicans; in power, we are all Federalists."]

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."

§ 517. 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 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?*

CHAPTER VII.

DISTRIBUTION OF POWERS.

§ 518. 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 intrusted. It may be intrusted for any shorter period; and then it returns to them again, to be again delegated by a new choice.

§ 519. 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.

§ 520. In the establishment of a free government, the division of the three great powers of government, 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 forever 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 executive powers, or either of them; to the end it may be a government of *laws* and not of men."[2] Other declarations of a similar character are to be found in other State constitutions.[3]

§ 521. Montesquieu seems to have been the first who, with a truly philosophical eye, surveyed the political truth involved in

[1] Journals of Convention, 82, 83, 139, 207, 215.

[2] Bill of Rights, article 30.

[3] The Federalist, No. 47. It has been remarked by Mr. J. Adams, that the practicability or the duration of a republic, in which there is a governor, a senate, and a house of representatives, is doubted by Tacitus, though he admits the theory to be laudable. Cunctas nationes et urbes populus, aut priores, aut singuli regunt. Delecta ex his et constituta reipublicæ forma laudari facilius quam inveniri, vel si evenit, haud diuturna esse potest. Tacit. Ann. lib. 14. Cicero asserts, "Statuo esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, modice confusa." Cic. Frag. de Repub. 1 Adams's Amer. Constitutions, Preface, 19. 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.

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, 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, or 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 everything 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]

§ 522. 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, 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 intrust the latter with so large a power as may tend to the subversion of its own independence, and

[1] Montesquieu, B. 11, ch. 6.

[2] M. 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 honor when they deserve only disgrace." Letter to Dr. Price.

[3] 1 Black. Comm. 146.

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 common justice 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]

[1] 1 Black. Comm. 269. See 1 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 that, Parliaments being laid aside, the courts of Westminster Hall made their own laws; or, that the two houses 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 of 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 judicial and legislative power by any others." Paley's Moral Philosophy, B. 6, ch. 8.

§ 523. 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]

§ 524. The general reasoning by which the maxim is supported, independently of the just weight of the authority in its favor, 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 behavior; while it has limited each of the others to a term of years.

[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, (Jefferson's Notes, p. 195,) has expressed the same truth with peculiar fervor 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 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 (see 2 Pitkin's Hist. 298, 299, 300); and, notwithstanding this solemn warning by her own favorite 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 1 Adams's Def. of Amer. Const. 365 to 371.

§ 525. 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 connection 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, 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

[1] The Federalist, No. 42.

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]

§ 526. 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 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."[2]

§ 527. Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the bills 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;

[1] The Federalist, No. 47; De Lolme on the English Constitution, B. 2, ch. 3.

[2] 1 Black. Comm. 154.

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 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]

§ 528. 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 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.[2] The fact must be admitted, that such an occasional accumulation and mixture exist; 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 peo-

[1] The Federalist, Nos. 47, 48. [Many of these things are now otherwise.]

[2] 1 Amer. Museum, 536, 549, 550; Id. 553; 3 Amer. Museum, 78, 79.

ple would be proved their own worst enemies, by embodying in their own constitutions the means of overthrowing their liberties.

§ 529. 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, endeavored 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 the others, the degree of separation, which the maxim requires, as essential to a free government, can never in practice be duly maintained." [1]

§ 530. 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

[1] The Federalist, No. 48.

[2] Id.

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 coloring. And it has been accordingly found, 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 confederation. Usurpations of power have been notoriously assumed by particular departments in each; and it has often happened that these very usurpations have received popular favor and indulgence.[1]

§ 531. In the next place, in order to preserve in full vigor 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 forever, 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.

§ 532. 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 only 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 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

[1] The Federalist, No. 48. See also The Federalist, Nos. 38, 42.

legislative and executive powers. The latter may be confined, and is even more easily so, when undivided. The legislative, on the contrary, in order to its being restrained, should absolutely be divided."[1]

§ 533. 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 everywhere 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 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 so 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.[2]

[1] De Lolme, B. 2, ch. 3.

[2] The Federalist, Nos. 48, 49. [Mr. Gouverneur Morris expresses this very strongly: "What does it signify that men should have a written constitution, containing unequivocal provisions and limitations? The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power which it wishes to exercise, unless it be so organized as to contain within itself the sufficient check. Attempts to restrain it from outrage by other means will only render it more outrageous. The idea of binding legislators by oaths is puerile. Having sworn to exercise the

§ 534. 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 upon rights and cases, as they are brought by others before it. It can do nothing for itself. It must do everything 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 forever 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 devise 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.

§ 535. 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

powers granted according to their true intent and meaning, they will, when they feel a desire to go further, avoid the shame, if not the guilt, of perjury by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose." Life, &c., by Sparks, Vol. III. p. 323. And again: "Perhaps our experience will sufficiently prove, without reasoning on the subject, that paper constitutions are indeed but cobweb chains to the strong arm of legislation." Id. 251.]

[1] "Numerous assemblies," says M. Turgot, "are swayed in their debates by the smallest motives."

is easily moved and steadily moved by the strong impulses of popular feeling and popular odium. It obeys, without reluctance, the wishes and the will of the majority for the time being. The path to public favor 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 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]

§ 536. 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]

§ 537. 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 inconvenience 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 institutions, 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 frequent recurrence to questions respecting the fundamental principles of government.[5] 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

[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. Id. p. 207.

[2] The Federalist, Nos. 48, 49.

[3] See Jefferson's Notes on Virginia, 195, 196, 197.

[4] The Federalist, No. 48.

[5] Id. Nos. 48, 50.

majority to concur in the long-sighted 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 favor 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.[1] 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, 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.[2]

§ 538. On the other hand, if an appeal to the people, or to a convention, is to be made 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 favor, or combine extensive private interests, or have taken root in the habit of the government, it is obvious that the chances of any effectual redress will be essentially diminished.[3]

§ 539. But a more conclusive objection is, that the decisions upon all such appeals would not answer the purpose of maintain-

[1] 1 Adams's American Constitutions, 105, 106.

[2] The history of the former constitution of Pennsylvania, and the report of its council of censors, show the little value of provisions of this sort in a strong light. The Federalist, Nos. 49, 50. [The council of censors was abolished in Vermont in 1870, by a constitutional amendment proposed by the council itself.]

[3] The Federalist, No. 50.

ing 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 side 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 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 prepossessions. The former are generally objects of jealousy; and their administration is always liable to be discolored 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 connections 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 for a favorable 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 everything 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]

[1] The Federalist, No. 49. The truth of this reasoning, as well as the utter inefficacy of any such periodical conventions, is abundantly established by the history of Pennsylvania under her former constitution. The Federalist, No. 50. See 2 Pitkin's History, 305, 306.

§ 540. 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]

§ 541. There seems no adequate method of producing this result but by a partial participation of each 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 a revenue in other hands.

§ 542. The usual guard, applied for the security of the judicial

[1] The Federalist, Nos. 48, 50, 51.

department, has been in the tenure of office of the judges, who commonly are to hold office during good behavior. But this is obviously an inadequate provision, while the legislature is intrusted 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, nor appoint to offices. It is never brought into contact with the people by 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 favor, 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 have 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

[1] Montesq. Spirit of Laws, B. 11, ch. 6. [This is a truth which has often been remarked upon by writers upon government, and some forcible illustrations of it might be given from our own history, if it were important. Mr. Van Buren comments upon one of them in his Political Parties, 307 – 310.]

wholesome vigor in the laws, as well as a wholesome administration of public justice.

§ 543. 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.

§ 544. 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.

§ 545. 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.

§ 546. 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."

§ 547. 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 deemed a 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]

§ 548. 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.[2] 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

[1] The Federalist, No. 22.

[2] Jefferson's Notes on Virginia, 194; 1 Kent's Comm. 208; De Lolme on the Constitution of England, B. 2, ch. 3; 3 Amer. Museum, 62, 66, Gov. Randolph's Letter.

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.[1] Georgia, also, is said in her first constitution (since changed) to have confided the whole legislative power to a single body.[2] Vermont adopted the same course, giving, however, to the executive council a power of revision and of proposing amendments, to which she yet adheres.[3] 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 transcendent 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 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.[4]

§ 549. 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.[5] Sir James Mackintosh, in a work of a controversial character, written with a zeal and eloquence of youth, advocated the doctrine of a single legislative body.[6] Perhaps his mature life may have changed this early opinion. At all events, he can, in our day, count few fol-

[1] 1 Adams's Defence of American Constitutions, 105, 106; 2 Pitk. Hist. 294, 305, 316.

[2] 1 Kent's Comm. 208; 2 Pitk. Hist. 315.

[3] 2 Pitk. Hist. 314, 316; Const. of Vermont, 1793, ch. 2, § 2, 16. [Ante, p. 388, note 2.]

[4] President J. Q. Adams's Oration, 4th July, 1831. See also Adams's Defence of American Constitutions, *per tot*; 1 Kent's Comm. 208, 209, 210; 2 Pitk. Hist. 233, 305; Paley's Moral Philosophy, B. 6, ch. 7.

[5] 1 Adams's Defence of American Constitutions, 3; Id. 105; Id. 366; 2 Pitk. Hist. 233. Ante, p. 19, § 536.

[6] Mackintosh on the French Revolution, (1792,) 4th edit. p. 266 to 273.

lowers. 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.[1] Against all visionary reasoning of this sort, Mr. Chancellor Kent has, in a few pages of pregnant sense and brevity, condensed a decisive argument.[2] 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.[3]

§ 550. 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, *l'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 favor. 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 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 but its own will, it rarely has the firmness to insist upon

[1] 1 Kent's Comm. 209, 210. [2] 1 Kent's Comm. 208 to 210.

[3] 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.

holding a question long enough under its own view to see and mark it in all its bearings and relations on society.[1]

§ 551. 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 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. Honor 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 clamors of adversaries.[3] This is by no means an opinion peculiar to Mr.

[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. 4 Jefferson's Corresp. 1, 2, 3, 4. 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. Id. 149, 150. 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. Id. 151. [During the late civil war a great number of arrests were made without authority of law; some of them, doubtless, in the belief, which was sometimes avowed and justified, that to save the Constitution and laws it was necessary in the emergency that for the time being on some subjects they should be silent. Many of these cases never became the subject of judicial consideration; but in *Ex parte Milligan*, 4 Wal. 2, it was decided by the Supreme Court that the guaranties of individual liberty in the Constitution were intended for a state of war as well as a state of peace, and were equally binding upon rulers and people at all times and under all circumstances.]

[3] 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.

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 infirmities of the history and experience of mankind.[1] 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.[2]

§ 552. This subject is put in a very strong light by an eminent writer,[3] whose mode of reasoning can be best conveyed in his own words. "If," says he, "we should extend our candor 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 favor of justice, to compel all to respect the common right, the public good, the universal law in preference to all private and partial considerations."[4] 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

[1] See 1 Adams's Defence of American Constitutions, 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 Constitutions, Letter 6, p. 209, &c.

[2] Mr. Hume's thoughts are often striking and convincing; but his mode of a perfect commonwealth (1 Hume's Essays, Essay 16) contains some of the most extravagant vagaries of the human mind, equalled only by Locke's Constitution of Carolina. These examples show the danger of relying implicitly upon the mere speculative opinions of the wisest men.

[3] Mr. John Adams.

[4] 3 Adams's Defence of American Constitutions, Letter 6, p. 215, 216. See North American Review, Oct. 1827, p. 263.

changes are made in the seats around them. By superior art, address, and opulence, by more splendid birth, reputations, and connections, they will be able to intrigue with their 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 connections, and 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 favors 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 honors and offices of every kind, voted to friends and partisans, etc., etc. 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]

§ 553. Another learned writer has ventured on the bold declara-

[1] 3 Adams's Defence of American Constitutions, 284 to 286.

tion, 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." [1]

§ 554. 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.[2] 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.

§ 555. 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.

§ 556. 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 of its own rights, and independent of the influence of the leaders who favor a particular measure, by whom it must be scanned, and to

[1] 1 Wilson's Law Lect. 393 to 405; The Federalist, No. 22.

[2] See Sidney on Government, ch. 3, § 45.

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.

§ 557. 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 alternately, 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, while, in return, its own are to pass through a like ordeal.

§ 558. In the next 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 laws

[1] "Look," says an intelligent writer, "into every society, analyze public measures, and get at the real conductors of them, and it will be found that few, very few men in every 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.

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]

§ 559. 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 found 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

[1] Sidney's Disc. on Government, ch. 3, § 45.

[2] The Federalist, Nos. 15.

[3] Id. Nos. 62, 15.

[4] 1 Wilson's Law Lect. 396; The Federalist, Nos. 62, 63. Mr. Jefferson was decidedly in favor 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 this period when this subject was discussed. 2 Pitk. Hist. 283. 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 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.

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.

§ 560. 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 of the legislative 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.[4] 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.[5]

§ 561. 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.

[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.
[4] The Federalist, Nos. 22, 62, 63.
[5] The Federalist, No. 22; Id. Nos. 37, 38; Id. No. 39; Id. No. 62.

§ 562. 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 them 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 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]

§ 563. 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]

§ 564. 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 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

[1] The Federalist, No. 62.

[2] The Federalist, No. 62; Paley's Moral and Political Philosophy, B. 6, ch. 6, 7; 2 Wilson's Law Lect. 144 to 148.

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]

§ 565. 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 ardor 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]

§ 566. 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 were not observed, it must subject 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.[3]

§ 567. 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 be 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

[1] The Federalist, No. 62. [2] Id. No. 62. [3] Id. No. 63.

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 connection 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.[1]

§ 568. Lastly. A senate duly constituted would not only operate as a salutary check upon the representatives, 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.[2] It was thought to add great weight to all these considerations that history has informed us of no long-lived republic which had not a senate. Sparta, Rome, Carthage, were, in fact, the only states to whom that character can be applied.[3]

[1] The Federalist, No. 63.

[2] Id.

[3] 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, "must 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 burdens it lays on its constituents. It is subject to ambition; and after a series of years will be prompted to vote itself perpetual. The *Long Parliament* in England voted itself perpetual, and thereby for a time destroyed the political liberty of the subject. Holland was governed by 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

* It is contained in a 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. 388; The Federalist, Nos. 62, 63.

§ 569. It will be observed that some parts of the foregoing reasoning apply to the fundamental importance of an actual division of the legislative power, and other parts to the true principles 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 insure 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.

§ 570. 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, in the other the plebeian, predominated. And yet, during the coexistence of these two legislatures, the Roman republic attained to the supposed pinnacle of human greatness.[2]

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, Nos. 62, 63.

[2] The Federalist, No. 34.

CHAPTER IX.

HOUSE OF REPRESENTATIVES.

§ 571. 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."

§ 572. 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.

§ 573. 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 reverence 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

[1] The Federalist, No. 52; 1 Black. Comm. 158, 159; Paley's Moral Philosophy, B. 6, ch. 7; 1 Wilson's Law Lect. 429 to 433; 2 Wilson's Law Lect. 122 to 132.

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 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]

§ 574. 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

[1] 1 Tucker's Black. Comm. App. 28.

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.[1] And upon a subsequent motion to strike out the word "people," and insert in its place the word "legislatures," three States voted in the affirmative and eight in the negative.[2] 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 favor 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.[3] The result was not therefore obtained without much discussion and argument, though at last an entire unanimity prevailed.[4] It is satisfactory to know that a fundamental principle of public liberty has been thus secured to ourselves and our posterity, which will forever indissolubly connect the interests of the people with those of the Union.[5] 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.[6]

§ 575. We accordingly find, that in the section under consideration, the House of Representatives is required to be composed of

[1] Journal of Convention, May 31, 1787, p. 85, 86, 135; 4 Elliot's Debates, (Yates's Minutes,) 58.

[2] Journal of Convention, May 31, 1787, p. 103, 104; 4 Elliot's Debates, (1 Yates's Minutes,) 62, 63, 90, 91.

[3] Journal of Convention, June 21, 1787, p. 140, 141, 215; 4 Elliot's Debates, 90, 91 (Yates's Minutes).

[4] Journal of Convention, p. 216, 233.

[5] 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 representatives 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.

[6] The Federalist, No. 40.

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, spectatur*. 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.

§ 576. 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]

§ 577. 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 inquiry 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?

§ 578. 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 other 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;

[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.

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]

§ 579. 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, 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

[1] 1 Black. Comm. 171, 172. Mr. Justice Blackstone (Id. 171) has remarked, "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 electing those delegates to whose charge is committed the disposal of his property, his liberty, and his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications, whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose will may 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.

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 twenty-five 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 France a person arrives, for all purposes, at majority, only at thirty years, in Naples at eighteen, and in Holland at twenty-five?[2] 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 a 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?[3]

§ 580. 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.[4] It is difficult, even in the abstract, to conceive how it could have other-

[1] 1 Black. Comm. 463, 464. [2] Id. [3] Id. 171.

[4] 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.

wise 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 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.[1] 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, of 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 be vindicated, which does justify, or at least excuse, many other exclusions.[2] Government (to use the pithy language of Mr. Burke) has been deemed a practical thing, made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians.[3]

[1] But see Aristotle's Politics.

[2] See Paley's Moral Philosophy, B. 6, ch. 7, p. 392; 1 Black. Comm. 171; Montesquieu's Spirit of Laws, B. 11, ch. 6.

[3] Burke's Letter to the Sheriffs of Bristol in 1777.

§ 581. 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.[1] 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 do 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.[2] 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.

§ 582. It would carry us too far from the immediate object of

[1] See Locke on Government, p. 2, § 149, 227.

[2] Dr. Lieber's Encyclopædia Americana, art. *Constitution*.

these commentaries to take a general survey of 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.[1] 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;[2] the boroughs and cities are represented 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.[3] In these the right of voting is almost infinitely varied and modified.[4] 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;[5] 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.[6] 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;[7] and a like diversity has

[1] 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.

[2] 1 Black. Comm. 172, 173; Paley's Moral Philosophy, B. 6, ch. 7; The Federalist, No. 57.

[3] 1 Black. Comm. 172 to 275; 1 Tuck. Black. Comm. App. 209 to 212. See also Burke's Reflections on the French Revolution.

[4] See Dr. Lieber's Encyclopædia Americana, art. *Election; Great Britain, Constitution of.* [But since these commentaries were written the Reform Acts of 1832 and 1867 have changed the basis of suffrage in England very greatly, admitting large numbers to its exercise who were excluded before, and introducing uniformity in qualifications. See Cooley's Blackstone, 172, note; American Annual Cyclopædia for 1869, art. *Great Britain.*]

[5] See Jefferson's Notes on Virginia, 191; 1 Tucker's Black. Comm. App. 96 to 100.

[6] See Charter of Rhode Island, 1663, and Rhode Island Laws, (edit. 1798,) p. 114. See also Connecticut Charter, 1662, and Massachusetts Charters, 1628 and 1692.

[7] 2 Wilson's Law Lect. 132 to 138; 2 Pitkin's Hist. ch. 19, p. 294 to 316.

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 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 foster 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]

§ 583. It was under this known diversity of constitutional provisions in regard to State elections, that the convention which framed the Constitution of the Union 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

[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 20*l.* a year, and householders worth 500*l.* 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 Encyclopædia Americana, art. *Constitutions of the United States.* The Federalist, No. 52 to 54.

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 favor 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 representative, 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 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 well-founded 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.

§ 584. On the other hand, it might be urged in favor 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.[2] 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

[1] The Federalist, No. 52. [A change is introduced by the recent constitutional amendments. The fifteenth forbids the right to vote being denied or abridged on account of race, color, or previous condition of servitude; but except upon these grounds the people of the States establish such discriminations as they see fit.]

[2] The Federalist, No. 52.

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 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]

§ 585. 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 desirable or expedient, founded in sounder policy, or 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 places.[3] The representation is made up of persons chosen by electors having very different, and sometimes very discordant qualifications: in some cases,

[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," says he, "is a due and adequate representation of a state that does not represent its ability as well as its 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." Burke's Reflections on the French Revolution. See also Paley's Moral Philosophy, B. 6, ch. 7. In a subsequent page of his Reflections on the French Revolution, he discusses 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 and speculative statesmen.

[3] Paley's Moral Philosophy, B. 6, ch. 7, p. 380, 381 to 394; De Lolme, Const. of England, B. 1, ch. 4, p. 61, 62; 1 Kent's Comm. 219; 1 Tuck. Black. Comm. App. 209, 210, 211; 1 Wilson's Law Lect. 431.

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.[1] Yet this inequality has never of itself been deemed an exclusive evil in Great Britain.[2] And in every system of reform which has found public favor 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 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.[3] 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

[1] Mr. Jefferson in his Notes on Virginia, (192,) 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 same system in principle, and her present representation is apportioned upon an arbitrary and unequal basis. [Under the existing constitution of Virginia, (1872,) senators and representatives are apportioned by population.]

[2] Burke's Reflections on the French Revolution.

[3] Mr. Wilson in his Lectures (430 to 433) 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 doctrines essentially different in many points from Mr. Wilson. See also in Wynne's Eunomus, Dialogue 3, § 18, 19, 20, an ingenious defence of the existing system in Great Britain.

promote a wholesome restraint upon partial plans of legislation, and insure 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.[1]

§ 586. In the judgment of the convention this latter reasoning seems to have obtained a decisive influence, 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."[2] 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."[3] 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

[1] 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 them, 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.

[2] 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 August, p. 233.

[3] The Federalist, No. 52. See also 2 Elliot's Debates, 38; 2 Wilson's Law Lect. 123, 130, 131.

such.[1] In Maryland successive legislatures may change the form of government, and in other States amendments may be, and indeed have been, adopted, materially varying the rights of suffrage.[2] 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 unfavorably to popular rights.

§ 587. In the third place, the term of service of representatives. In order to insure 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.[3] 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.[4] 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 his acts and opinions, and produce a sympathy between him and his constituents.[5] If, when he is once elected, he holds his place for life, or during good behavior, 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,

[1] [The charter of Rhode Island continued to be its constitution of government until 1845, when a constitution was framed upon a more liberal basis of suffrage, and was adopted by the people.]

[2] See 2 Wilson's Law Lect. note (d), 136, 137. [This is no longer true of Maryland.]

[3] 1 Black. Comm. 189; Montesquieu's Spirit of Laws, B. 11, ch. 6.

[4] 1 Black. Comm. 189.

[5] The Federalist, Nos. 52, 57.

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.[1] But still, in a just sense, he ought to feel his responsibility to them, and to act for them in common with the rest of the people, and to deem himself, in an emphatic manner, their defender and their friend.[2]

§ 588. Frequent elections are unquestionably the soundest, if not the sole policy, by which this dependence and sympathy and responsibility can be effectually secured.[3] 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.[4]

[1] 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 candor 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 when 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.

[2] See Burke's Speech to the Electors of Bristol in 1774.

[3] The Federalist, Nos. 52, 57.

[4] 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 own 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 burden upon the subject, in which they do not share themselves. Nor scarcely can they adopt an advantageous relation, in which their own interests will not participate of the advantage." Paley's Moral Philosophy, B. 6, ch. 7.

§ 589. It has been a current observation that "where annual elections end tyranny begins."[1] But this remark, like many others of a general nature, is open to much question. There is no pretence that there is any natural connection 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 annually, 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.[2] 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.[3] 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?

§ 590. 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 of intercourse

[1] The Federalist, No. 53. See Montesquieu's Spirit of Laws, B. 2, ch. 3.

[2] The Federalist, Nos. 52, 53; Montesquieu's Spirit of Laws, B. 2, ch. 3; 1 Elliot's Debates, 30, 31, 39.

[3] The Federalist, No. 57; 2 Elliot's Debates, 42.

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 if they were frequent, since they would create little interest and would involve heavy charges and burdens. 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 labors 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]

§ 591. 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

[1] 1 Elliot's Debates, 33, Ames's Speech.

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 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.

§ 592. 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 neighbors, 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 vigor 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.

§ 593. 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 favor 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]

§ 594. 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.

§ 595. 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 occurred from royal contrivance, ambition, or policy.[3] 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.[4] To remedy these grievances it was provided by a statute passed in

[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; 1 Elliot's Debates, 30 to 42.
[3] The Federalist, No. 52.
[4] 1 Black. Comm. 189, and note.

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.[1] 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.[2] 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 influence in all the proceedings of the government than ever existed in any antecedent period.

§ 596. 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 South Carolina, biennial; in Massachusetts, annual; in Connecticut and Rhode Island, semiannual.[3] 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 everywhere 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 everywhere

[1] 1 Black. Comm. 189; The Federalist, Nos. 52, 53; 1 Elliot's Debates, 37, 39; 2 Elliot's Debates, 42.

[2] 1 Black. Comm. 189; The Federalist, No. 52.

[3] The Federalist, No. 52; 1 Elliot's Debates, 41, 42; 2 Elliot's Debates, 42; 3 Elliot's Debates, 40.

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 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 semiannually; in Rhode Island they are still chosen semiannually; in South Carolina, Tennessee, North Carolina, 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 these causes, from the States whose elections are different from both.

§ 597. 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 wisdom 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

[1] The Federalist, No. 52.

[2] Dr. Lieber's Encycl. Americana, art. *Constitutions of the United States*; 3 Elliot's Debates, 260; 1 Kent's Comm. 215.

[3] The Federalist, No. 53; 3 Elliot's Debates, 260.

[4] 1 Elliot's Debates, 40, 41, 42.

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]

§ 598. 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 Representatives 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 inconsiderable diversity of opinion was exhibited in the discussion 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.[2] 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.[3] In the subsequent revision the clause took the shape in which it now stands in the Constitution.

§ 599. The reasons which finally prevailed in the convention and elsewhere in favor of biennial elections in preference

[1] Mr. Ames's Speech, 1 Elliot's Debates, 30, 31; Ames's Works, 21; 2 Elliot's Debates, 44, 46.

[2] Journal of the Convention, p. 67, 115, 116, 135; 4 Elliot's Debates, (Yates's Minutes,) 70, 71.

[3] Journal of the Convention, p. 141, 207, 216; 1 Elliot's Debates, 30; 4 Elliot's Debates, (Yates's Minutes,) 91, 92.

to any other period may be arranged under the following heads: —

§ 600. 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.[1] 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 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.[2] 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.

§ 601. 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;[3] that maxim, if it applied at all to the government of the Union, was favorable 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.

[1] The Federalist, No. 53; 1 Elliot's Debates, 30, 40, 41, 42.
[2] The Federalist, No. 53; 1 Elliot's Debates, 40, 41, 42.
[3] The Federalist, No. 52; Montesquieu's Spirit of Laws, B. 2, ch. 3.

§ 602. 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 virtuous whilst they continue to hold their public trust. Frequent elections have, without question, a tendency to accomplish the latter object.[1] 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 councils, 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 patriots, 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.

§ 603. But the very nature and objects of the national government require far more experience and knowledge than what may be thought requisite in the 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

[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.

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]

§ 604. 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 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

[1] The Federalist, No. 53; 1 Elliot's Debates, 30, 37, 39, 40, 41; Id. 220; 2 Elliot's Debates, 42; 1 Kent's Comm. 215.

[2] The Federalist, Nos. 53, 56.

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 unfavorable 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]

§ 605. 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 insure 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 far more exact and comprehensive knowledge is now necessary to preserve its adjustments, and to carry on its daily operations, than

[1] The Federalist, Nos. 53, 56. [2] Id. [3] Id. [4] Id.

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 have required very many developments of its powers and duties which could hardly have occurred as practical truths to its enlightened founders.

§ 606. 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 connection between the several branches of public affairs, its co-operation 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 competent 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 intrusted 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?[2]

§ 607. 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

[1] The Federalist, No. 53. [2] Id.

or praise, for accusation or vindication, for legislative checks or legislative aids, for powerful appeals to popular favor or popular resentment, for the ardent contests of party, and even for the graver exercise of the power of impeachment.

§ 608. 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, requires 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 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]

§ 609. 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]

§ 610. 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 assemblies, will possess superior talents; will, by frequent re-elections, become mem-

[1] 1 Elliot's Debates, 34, Mr. Ames's Speech. [2] The Federalist, No. 53.

bers 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 disposed 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]

§ 611. 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. Experience has 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]

§ 612. 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; and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."

§ 613. 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

[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. 1, § 2, paragraph 3.

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 standard of superior excellence adapted to all ages and all nations.

§ 614. 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]

§ 615. 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]

[1] 1 Black. Comm. 176. See 4 Instit. 46 to 48.

[2] Dr. Lieber's Encycl. Americana, art. *Constitutions of the United States.*

§ 616. 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 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]

§ 617. 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 principles 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, develop their talents, enlarge their resources, and give them a practical insight into the business of life adequate 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;[4] and illustrious

[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.
[4] 1 Black. Comm. 162, 173, 175; 4 Instit. 46, 47.

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 hotbed 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.[1] In the State conventions it does not seem to have formed any important topic of debate.[2]

§ 618. 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 connections 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.[3] 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

[1] Journal of Convention, June 22, p. 143; Id. Aug. 8, p. 235; 4 Elliot's Debates, (Yates's Minutes,) 94.

[2] Lord 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, rancor, 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 favor, nor in judgment respect persons. Thirdly, that he should be of a ripe 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 be philanthropic, showing the way to every man. 4 Instit. 3. 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.

[3] The Federalist, No. 62.

alien, though naturalized, is capable of being a member of either house of Parliament.[1] 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 have been 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.[2] 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.[3]

§ 619. 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 statute of 14 Geo. 3, ch. 58.[4] 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

[1] 1 Black. Comm. 62, 175; 4 Inst. 146.
[2] Journal of the Convention, 8 August, 233, 234. [3] 2 Wilson's Law Lectures, 141.
[4] 1 Black. Comm. 175; 2 Wilson's Law Lect. 142.

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.

§ 620. 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 favor of it, six against it, and one being divided.[1] 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 the discussions on this subject.

§ 621. It is observable that no qualification, in point of estate, has been required on the part of members of the House of Representatives.[2] Yet such a qualification is insisted on by a considerable number of the States as a qualification for the popular branch of the State legislature.[3] 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 if, in their opinion, his integrity and ability will supply the want of estate, there is better reason for contending that it ought not to 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.[4] There is, doubtless, weight in each of these considerations. The first, however, is equally applicable to all sorts of qualifications whatsoever,

[1] Journal of Convention, 8 August, p. 224, 225.

[2] Journal of Convention, 26 July, p. 204, 205; Id. 12; Id. 241, 242.

[3] Dr. Lieber's Encycl. Americana, art. *Constitutions of the United States.* [The statement of the text is no longer (1872) correct.]

[4] 1 Tucker's Black. Comm. App. 212, 213; 1 Elliot's Debates, 55, 56.

and proceeds upon an 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 burdens. The possession of property has in this respect a great value 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]

§ 622. 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 cases have overturned, all the securities of public liberty. The right to burn heretics survived

[1] 1 Tuck. Black. Comm. App. 212, 213. [2] See 4 Black. Comm. 44, 45, 46, 47.

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 impracticable, from the known diversity of religious sects, if anything 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 feeling 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.

§ 623. 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 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.[2]

§ 624. 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.[3] 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,

[1] 4 Black. Comm. 49.

[2] The Federalist, No. 52.

[3] 1 Tucker's Black. Comm. App. 213.

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 moneyed 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 an 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 sole object of dissolving the Union, create qualifications so high and so singular that it shall become impracticable to elect any representative.

§ 625. 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 vary 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,

[1] 1 Tucker's Black. Comm. App. 213.
[2] Jefferson's Corresp. 238.
[3] Mr. Jefferson.

caution requires us not to be over-confident."[1] He intimates, however, that unless the case be either clear or urgent, it would be better to let it lie undisturbed.[2]

§ 626. 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?

§ 627. 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 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 recognized it. No State can say that it has reserved what it never possessed.

§ 628. 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

[1] Jefferson's Corresp, 239.

[2] 4 Jefferson's Corresp. p. 239.

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 proof, 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.

§ 629. 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.[1]

[1] [It is now universally conceded that a State cannot prescribe qualifications for members of Congress, or establish disabilities. The whole subject is beyond the sphere of its powers. Congress has always, with entire propriety, disregarded State regulations on the subject.]

§ 630. 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, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three."

§ 631. The first apportionment thus made, being of a temporary and fugacious character, requires no commentary.[1] The basis assumed was 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 a mere league of States to a government in any degree national.[4] And accordingly it formed, as it should seem, the basis

[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.
[4] Journ. of Convention, 111, 153, 159.

of what was called the New Jersey Plan.[1] 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 favor, and one being divided.[2]

§ 632. 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 burdens by the voice of those who were called to give most towards the common contributions.[3] That taxation ought to go hand in hand with representation, had been a favorite 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.[4] But it has been already seen that this mode of contribution was extremely difficult and embarrassing, and unsatisfactory in practice, under the confederation.[5] There do not, indeed, 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.

§ 633. 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

[1] 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.

[2] Journ. of Convention, 11th June, 111. See also Id. 153, 154; 4 Elliot's Debates, (Yates's Minutes,) 68.

[3] 4 Elliot's Debates, (Yates's Minutes,) 68, 69; Journ. of Convention, 11th June, 111; Id. 5th July, 158; Id. 11th July, 169.

[4] Confederation, art. 8.

[5] Journals of Congress, 17th Feb. 1783, Vol. 8, p. 129 to 133; Id. 27th Sept. 1785, Vol. 10, p. 328; 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.

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 intrusted 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 delegated powers of government.[1] By apportioning influence among each, vigilance, caution, and mutual checks are naturally introduced and perpetuated.

§ 634. 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 connection 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]

§ 635. The scheme, therefore, under all the circumstances, of making numbers the basis of the representation of the Union, seems to have obtained more general favor than any other in the convention, because it had a natural and universal connection with the rights and liberties of the whole people.[4]

§ 636. But here a difficulty of a very serious nature arose. There were other persons in several of the States than those who

[1] The Federalist. No. 54. [2] Id.

[3] The Federalist, No. 54; Resolve of Congress, 18th April, 1783 (8 Journals of Congress, 188, 194, 198); 1 United States Laws, (Bioren and Duane's edit.,) 29, 32, 35.

[4] The Federalist, No. 54.

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 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 other property. 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 to choose a representative as thirty thousand free persons in a non-slaveholding State.[4]

§ 637. 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 labor, 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

[1] 2 Pitk. Hist. 233 to 245.

[2] The Federalist, No. 54; 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. 24.

[4] 4 Elliot's Debates, (Martin's Address,) 24; Id. (Yates's Minutes,) 69.

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 labor 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.[1] 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 voters 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 ?[2]

§ 638. 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 forever must form, a sound ground for discriminating between them in every constitution of government.

§ 639. 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

[1] The Federalist, No. 54; 1 Elliot's Debates, 212, 213.

[2] The Federalist, No. 54; 1 Tuck. Black. Comm. App. 190, 191; 1 Elliot's Debates, 213, 214.

fact, this view of the subject constituted the basis of some of the representative departments in several of the State governments.[1]

§ 640. 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 have not an influence over other States, arising from the superior advantages of fortune, as 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.[2]

§ 641. It is obvious that these latter reasons have no just application to the subject. They are not only overstrained and founded in an ingenious attempt to gloss over the real objections, but they have this inherent vice, that, if well founded, 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 favor 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.

§ 642. 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.[3] It was agreed that slaves should be 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,

[1] The Federalist, No. 54; 1 Elliot's Debates, 213.

[2] The Federalist, No. 54.

[3] 1 Elliot's Debates, 212, 213; 2 Pitk. Hist. 233 to 244; Id. 245, 246, 247, 248; 1 Kent's Comm. 216, 217; The Federalist, Nos. 37, 54; 3 Dall. 171, 177, 178.

"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-slaveholding 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 constant and uniform; the levy of direct taxes is occasional and rare. In the course of forty years, no more than three direct taxes[4] 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.

§ 643. 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

[1] Journals of Congress, 1783, Vol. 8, p. 188; 1 Elliot's Debates, 56. [This provision is somewhat modified by the fourteenth amendment, which will be considered hereafter.]

[2] The Federalist, No. 54; Journal of Convention, 12th July, 171, 172; Id. 174, 175, 176, 179, 180, 210; Id. 235; 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.

[4] In 1798, 1813, 1815. The last was partially repealed in 1816.

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 favor the Northern States.[1] 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 objection. 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;[2] and in some of the State conventions it was strenuously resisted.[3] The wish of every patriot ought now to be, *requiescat in pace.*

§ 644. 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.[4] It was proposed to have the census taken once in fifteen years, and in twenty years; but the vote finally prevailed in favor of ten.[5] 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.[6]

[1] 1 Elliot's Debates, 212, 213.

[2] 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.

[3] 1 Elliot's Debates, 58, 59, 60, 204, 212, 213, 241.

[4] Journal of Convention, 163, 164, 167, 168, 169, 172, 174, 180.

[5] Journal of Convention, 12th July, 168, 170, 173, 180.

[6] 1 Black. Comm. 158, 173, 174; Rawle on Constit. ch. 4, p. 44.

§ 645. 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 the first apportionment; those of New Hampshire, Rhode Island, Connecticut, New Jersey, 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. The census of 1831 exhibits still more striking results. In 1790, the whole population of the United States was about three million nine hundred and twenty-nine thousand; and in 1830, it was about twelve million eight hundred and fifty-six thousand.[1] Ohio, in 1833, contained at least one million, and New York two million of inhabitants.[2] 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 favor of a national government in preference to a mere confederation of States.[3]

§ 646. 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.[4] The number fixed by the Constitution to constitute the

[1] [The population of the United States and Territories, as shown by the census of 1870, was 38,923,210. It is estimated that it would have been 3,000,000 more but for the war of 1861 – 1865. Indians not taxed are not included in this enumeration]

[2] [The population of New York, as shown by the census of 1870, was 4,382,759, and that of Ohio 2,665,260.]

[3] See Journal of Convention, 165, 168, 169, 174, 179, 180.

[4] The Federalist, No. 55; 3 Amer. Museum, 427; Id. 534; Id. 547; 4 Elliot's Debates, (Yates and Lansing's Letter to Gov. Clinton,) 129, 130.

body, in the first instance, and until a census was taken, was sixty-five.

§ 647. 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.[1]

§ 648. 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 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 was 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.

§ 649. The first objection was to the smallness of the number composing the House of Representatives.[2] It was said that it was unsafe to deposit the legislative powers of the Union with so small

[1] The Federalist, No. 58; 1 Elliot's Debates, 56; Id. 206, 214, 215, 218, 219, 220, 221 to 225; Id. 226 to 232.

[2] 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).

a body of men. It was but the shadow of representation.[1] 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 increase, but to diminish the present number.[2] 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.[3]

§ 650. 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.[4] 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 twenty-five 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.[5] In regard to the possible diminution of the number of representatives, it must be purely 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 State a greater relative power and influence than themselves.[6]

§ 651. 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

[1] 2 Amer. Museum, 247, 534, 547, 551, 554.
[2] 1 Elliot's Debates, 56, 57; Id. 204, 205, 206; 2 Elliot's Debates, 53, 54; Id. 99.
[3] 1 Elliot's Debates, 205; 2 Elliot's Debates, 53, 54, 132, 206; Id. 223, 224.
[4] 1 Elliot's Debates, 57, 249.
[5] The Federalist, No. 55; 1 Elliot's Debates, 214, 215, 227.
[6] 1 Elliot's Debates, 242, 249.

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]

§ 652. 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 Rhode Island, 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. 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.[2] It was a famous saying of Cardinal De Retz, that every public assembly consisting of more than one hundred members was a mere mob.[3] But surely

[1] The Federalist, No. 55. See also the State constitutions of that period. 1 Elliot's Debates, 214, 219, 220, 225, 228, 252, 253.

[2] 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.

[3] 2 Wilson's Law Lect. 150.

this is just as incorrect as it would be to aver that every one which consisted of ten members would be wise.

§ 653. The question then is, and forever 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 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 perform 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 anything 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 anything against their purity or patriotism.[5]

[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, namely, Rhode Island and Connecticut, they were chosen by the people. The Federalist, No. 40.

[5] The Federalist, No. 55; 1 Elliot's Debates, 254.

§ 654. 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]

§ 655. 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 extravagances 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]

§ 656. 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 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.[5]

§ 657. 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 further 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.[6] If the argument, indeed, required

[1] 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.
[5] 1 Elliot's Debates, 219, 220, 228, 232, 233, 241.
[6] The Federalist, No. 55; 1 Elliot's Debates, 228, 229; 1 Kent's Comm. 217.

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 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.

§ 658. 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.

§ 659. 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. Information of peculiar local interests is, consequently, of less value and importance than it would be in a State legislature, where the

[1] 1 Elliot's Debates, 229.

powers are general.[1] The knowledge required of a national representative is, therefore, necessarily of a 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.[2] 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.[3] 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.[4] 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.[5] 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.[6] 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 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.[7]

§ 660. The functions, too, of a representative in Congress re-

[1] The Federalist, No. 56.

[2] 1 Elliot's Debates, 228, 229, 253; 2 Lloyd's Debates, (in 1789,) 189; The Federalist, No. 56.

[3] 1 Elliot's Debates, 238.

[4] 1 Elliot's Debates, 228, 229, 253; The Federalist, No. 56.

[5] The Federalist, No. 56; 1 Elliot's Debates, 220, 241, 242, 246, 253.

[6] The Federalist, No. 56; 1 Elliot's Debates, 228, 229, 253.

[7] The Federalist, No. 56.

quire 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.[1] 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.

§ 661. 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.[2] And this half certainly have little or no claim to be deemed the guardians of the interests of the people, and indeed are notoriously elected by other interests.[3] 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.[4] 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 talents, 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

[1] The Federalist, No. 56; Id. No. 35.

[2] 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.

[3] The Federalist, No. 56; Paley's Moral Philosophy, B. 6, ch. 7.

[4] The Federalist, Nos. 56, 57. [Much of what is said in this chapter regarding Great Britain has, since the Reform Acts of 1832 and 1867, no longer any application. The house of commons is now much more nearly than formerly a representative body of the people. England, with a population, according to the census of 1871, of 22,704,108, has 493 members; Scotland has 60, representing 3,358,613 people; and Ireland has 105, representing 5,402,759 people. The average is one representative to about 48,000 inhabitants.]

of the house of commons of the true interests or circumstances of the people.[1]

§ 662. 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 burdensome; 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."[2] In their view a free government seems to 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?

§ 663. 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.[3] 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.[4]

§ 664. It was answered, that the objection itself is of a very

[1] The Federalist, No. 56. See also Dr. Franklin's Remarks, 2 Pitk. Hist. 242; 1 Wilson's Law Lect. 431, 432; Paley's Moral Philosophy, B. 6, ch. 7; 1 Kent's Comm. 219.

[2] Letter of Messrs. Yates and Lansing to Gov. Clinton, 1788 (3 Amer. Museum, 156, 158).

[3] The Federalist, No. 57; 1 Elliot's Debates, 220, 221. See also the Federalist, No. 35.

[4] 1 Elliot's Debates, 221, 222.

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 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 recognized in the Constitution; and, consequently, the people are free to choose from any rank of society according to their pleasure.[4]

§ 665. 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 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 favor by which they have been elevated. There is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and be-

[1] 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.

nevolent 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 honors 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; and 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?* Who shall keep watch over the people when they choose to betray themselves?

§ 666. 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.[4] 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.

§ 667. 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.[5] 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

[1] The Federalist, No. 57.
[2] The Federalist, No. 57.
[3] Id. No. 57; Id. Nos. 35, 36.
[4] Id. No. 57; Id. Nos. 35, 36.
[5] Id. No. 57.

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?[1] That the aggregate 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.[2] 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.[3] 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.[4] These are facts which 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

[1] The Federalist, No. 57.
[2] Id. No. 57.
[3] Id Nos. 56, 57.
[4] The Federalist, No. 57.

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]

§ 668. 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]

§ 669. 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 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.[4] In the next place there is a peculiarity in the Federal Constitution which must favor 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

[1] The Federalist, No. 57.

[2] The Federalist, No. 58; 1 Elliot's Debates, 204, 224

[3] The Federalist, No. 58 liot's Debates, 239.

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.[1]

§ 670. 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 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 favor augmentations of the representatives; and, indeed, the large States may compel it by making reapportionments and augmentations mutual conditions of each other.[2] In the third place, the House of Representatives will possess an exclusive power of proposing supplies for the support of government, or, in other words, it will hold the purse-strings of the nation. This must forever give it a powerful influence in the operations of the government, and enable it effectually to redress every serious grievance.[3] The House of Representatives will, at all times, have as deep a concern in maintaining the interest of the people as the Senate can have in maintaining that of the States.[4]

§ 671. 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 profound reasoning and mature wisdom enabled the people to see

[1] The Federalist, No. 58; 2 Lloyd's Debates, in 1789, p. 192.
[2] The Federalist, No. 58.
[3] The Federalist, No. 57; 1 Elliot's Debates, 226, 227.
[4] The Federalist, No. 58.

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]

§ 672. In the mean time the House of Representatives has silently acquired vast influence and power over public opinion by its immediate connection 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 any other manner. The representatives are not, and never have 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 everything but its own creed; or by a spirit of party, that remembered everything but its own duty. Such infirmities, however, are inseparable from the condi-

[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.

tion 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.

§ 673. It remains only to take notice of two qualifications of the general principle of representation, which are ingrafted 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 coextensive, 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]

§ 674. 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,

[1] Journal of Convention, 157, 158, 209, 215.

[2] Journal of Convention, 8th Aug. p. 236.

[3] Journal of Convention, 157, 217, 235, 352.

[4] Journal of Convention, 17th Sept. 1787, p. 389.

[5] 1 Lloyd's Debates in 1789, 427, 434; 2 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.

the more numerous any assembly may be, of whatever characters composed, the greater is known to be the ascendency 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 sceptre 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 forever 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]

§ 675. 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 favor 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

[1] The Federalist, No. 58. Mr. Ames, in a 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." 2 Lloyd's Debates, 183. Unfortunately, the experience of the United States has not justified the belief that large districts will always choose men of the greatest wisdom, abilities, and real dignity.

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.

§ 676. There yet remain two practical questions of no inconsiderable importance, connected with the 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.

§ 677. 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

[1] Journal of Convention, &c. Supp. 466 to 481.

[2] The debates in Congress on this amendment will be found in 2 Lloyd's Debates, 182 to 194; Id. 250.

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.

§ 678. 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 disregarded 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 rep-

[1] See 5 Marshall's Life of Washington, ch. 5, p. 319.

resentative 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.

§ 679. 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 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.

§ 680. 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

[1] "By the Constitution," says Mr. Chief Justice 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 thirty thousand 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." *Loughborough* v. *Blake*, 5 Wheaton's R. 317, 320. 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 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.

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 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 favor was only one."[2]

§ 681. 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 favor.[3] The President returned the bill with two objections: "1. That the Constitution 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

[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.

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 favor. It is understood that the President's cabinet was greatly divided on the question.[2]

§ 682. 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 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 *cy pres*, 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.

§ 683. This question, which a learned commentator has supposed to be now finally at rest,[3] has been (as has been already intimated) recently revived and discussed with great ability. In-

[1] 5 Marshall's Life of Washington, ch. 5, p. 324, note.

[2] Id. p. 323; 4 Jefferson's Correspondence, 466.

[3] Rawle on Constitution, 43; 5 Marshall's Life of Washington, 324.

stead 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.[1]

§ 684. 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."

§ 685. The propriety of adopting this clause does not seem to have furnished any matter of discussion, either in or out of the

[1] Mr. Jefferson's opinion, given on the apportionment bill in 1792, presents all the leading 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 New Hampshire 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 New Hampshire shall have three members, Massachusetts sixteen, &c. We are, therefore, to find by experiment what has been the principle of the 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, whether tried as between great and small States, or as between North and South, yields, in the present instance, a tolerably just result, and consequently could not be objected to on that ground, if it were obtained by the process prescribed in the Constitution; but, if obtained by any process out of that, it becomes inadmissible.
New Hampshire,	141,823	5	
Massachusetts,	475,327	16	
Rhode Island,	68,444	2	
Connecticut,	235,941	8	
New York,	352,915	11	
New Jersey,	179,556	6	
Pennsylvania,	432,880	14	
Delaware,	55,538	2	
Maryland,	278,513	9	
Virginia,	630,558	21	
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

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 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 circumstances of each State. Any general regulation would have worked with some inequality.

of each State, will give to them the number of representatives allotted in this bill; for, trying the several ratios of 29, 30, 31, 32, 33, the allotments would be as follows: —

	29	30	31	32	33	The bill.	
Vermont,	2	2	2	2	2	3	Then the bill reverses the constitutional precept; because, by it, representatives are *not* apportioned among the several States according to their respective numbers.
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	12	
South Carolina,	7	6	6	6	6	7	
Georgia,	2	2	2	2	2	2	
	118	112	109	107	105	120	

"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 favor 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,

[1] Journal of Convention, 217, 237, 352.

§ 686. The next clause is, that "the House of Representatives shall choose their speaker and other officers, and shall have the sole power of impeachment."

and Georgia; and that of 27,770 to the eight others; namely, Vermont, New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, North Carolina, and South Carolina. As follows: —

		Divided by 30,026, give		And		Divided by 27,770, give	
Rhode Island,	68,444		2	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		13
				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 allows representation 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 case, 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 State*, 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 became 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

§ 687. Each of these privileges is of great practical value and importance. In Great Britain the house of commons elect their

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 28,858.	Fractions.	
Vermont,	85,532	2	27,816	
New Hampshire,	141,823	4	26,391	
Massachusetts,	475,327	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 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 States 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

own speaker; but he must be approved by the king.[1] This approval is now altogether a matter of course; but anciently, it

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 never 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, while the most obvious construction is liable to no other, that of the bill incurs many and grievous ones.

			Fractions.
1st	45,000	2	15,000
2d	45,000	2	15,000
3d	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	44,999	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, this 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 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 representa-

[1] 1 Black. Comm. 181.

seems, the king intimated his wish previously, in order to avoid the necessity of a refusal; and it was acceded to.[1] The very

tives shall be *apportioned* among the States according to their numbers, that is, by some common ratio.

"Viewing this bill 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 never 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 bear 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; and, 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 amended. Seeing the difficulties which belong to the whole subject, they are fully convinced that the bill 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 attained. 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 3d 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

[1] Com. Dig. Parliament, E. 5; 4 Instit. 8, Lex. Parl. ch. 12, p. 74.

language used by the speakers in former times, in order to procure the approval of the crown, was such as would not now be

residuary members, after 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 New York, 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 the whole population of the United States, and would be bound to pay one sixth part of all her direct taxes. Yet neither of these is the case. The whole representative population of the United States 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 New York, 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,

tolerated; and indicated at least a disposition to undue subserviency.[1] A similar power of approval existed in the royal gov-

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; 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 and 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 examine, 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

[1] See Christian's Note to 1 Black. Comm. 181; Comm. Dig. *Parliament*, E. 5; 1 Wilson's Law Lect. 159, 160; 4 Co. Inst. 8.

ernors in many of the colonies before the Revolution. The exclusive right of choosing a speaker, without any appeal to, or

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 the 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 the denomination of money, the apportionment of taxes is capable of being made so exact that the 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 the apportionment of representative power can never be precise and 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 rule, which would be preferable, but which is found inapplicable, and

approval by, any other department of the government, is an improvement upon the British system. It secures a more in-

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 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 their 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, namely, 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, 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 bills, if either, apportions the representatives according to the numbers in 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 always be seen whether the result be that which has been aimed at, namely, the nearest practicable approach to precise justice and relative equality. The

dependent and unlimited choice on the part of the House, according to the merits of the individual, and their own sense of

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 two hundred and forty members, then the number two hundred and forty 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 New York is 38.59; 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 thirty-nine, 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 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 may 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 and 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.

duty. It avoids those inconveniences and collisions which might arise from the interposition of a negative in times of

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 bring the representation 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 members of Congress among those States, according to their respective number, *as 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 results 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 transcript 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 States receive less than their just share, it must necessarily follow that some other States have received more than their just share. If there be one State in the Union with less than its right, some other State has more than its

high party excitement. It extinguishes a constant source of jealousy and heartburning; and a disposition on one side to

right, so that the argument, whatever be its force, applies to the bill 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 but a part or remainder. If there be no necessity for fixing or establishing such previous number, then the fraction resulting from it is itself not matter of necessity, but matter of choice or 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 anything less than this is, therefore, called a fraction or a residuum, and cannot be entitled to a representative. But nothing of this is prescribed by 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 of 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 for the same district; and in some, again, as New Hampshire, Rhode Island, Connecticut, New Jersey, and Georgia, the entire representation of the State is 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 representedin 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 possess

exert an undue influence, and on the other to assume a hostile opposition. It relieves the executive department from all the

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 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 a member for a major fraction is a direct approximation towards justice and equality. 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 State must be divided by a fixed ratio, and

embarrassments of opposing the popular will ; and the House from all the irritation of not consulting the cabinet wishes.

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 it is 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 ; and it is still to be shown what there is in the Constitution which rejects approximation as the rule of apportionment. But suppose it 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 anything, 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 connection with the subject-matter then under consideration ; and in order to see what that subject-matter 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 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 of 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

§ 688. The other power, the sole power of impeachment, has a far wider scope and operation. An impeachment, as described

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 for 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 not 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 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 anything 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

in the common law of England, is a presentment by the house of commons, the most solemn grand inquest of the whole king-

objection. He required a proportion, or divisor. These 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 of 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 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 tomorrow. 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. [Although this report did not become the basis of the apportion-

dom, to the house of lords, the most high and supreme court of criminal jurisdiction of the kingdom.[1] The articles of impeachment are a kind of bill of indictment found by the commons, and tried by the lords, who are, in cases of misdemeanors, considered, not only as their own peers, but as the peers of the whole nation.[2] The origin and history of the jurisdiction of Parliament, in cases of impeachment, are summarily given by Mr. Woodeson; but little can be gathered therefrom which is now of much interest, and, like most other legal antiquities, they are involved in great obscurity.[3] To what classes of offenders this applies, will be more properly an inquiry hereafter. In the Constitution of the United States, the House of Representatives exercises the functions of the

ment in 1832, yet it was actually adopted as the basis, in the apportionment in 1842, under the new census. By the Act of 22d of June, 1842, the ratio was adopted of 70,680, and each State was declared entitled to as many representatives as its Federal population would give divided by that number, and also to one additional member upon the remaining fraction, if its population exceeded half of that number. — E. H. B.] [The apportionment for the ten years following the census of 1870 was not provided for until after the census had been made and returned, and was not then made on any basis which was declared or indicated therein. The apportionment fixed the whole number of representatives at two hundred and eighty-three, and then proceeded to apportion them as follows: To Maine, five; New Hampshire, two; Vermont, two; Massachusetts, eleven; Rhode Island, two; Connecticut, four; New York, thirty-two; New Jersey, seven; Pennsylvania, twenty-six; Delaware, one; Maryland, six; Virginia, nine; North Carolina, eight; South Carolina, five; Georgia, nine; Alabama, seven; Mississippi, six; Louisiana, five; Ohio, twenty; Kentucky, ten; Tennessee, nine; Indiana, twelve; Illinois, nineteen; Missouri, thirteen; Arkansas, four; Michigan, nine; Florida, one; Texas, six; Iowa, nine; Wisconsin, eight; California, four; Minnesota, three; Oregon, one; Kansas, three; West Virginia, three; Nevada, one; Nebraska, one. The States dissatisfied with this apportionment afterwards procured a supplementary act, which gave an additional representative to the following States respectively: New Hampshire, Vermont, New York, Pennsylvania, Indiana, Tennessee, Louisiana, Alabama, and Florida, making a total of two hundred and ninety-two representatives for a representative population of 38,113,253. Any test applied to this apportionment will show that it is made in disregard of the rule alike of Mr. Jefferson and of Mr. Webster, and that the inequalities under it are very serious.

The Act first named provided that in 1876 and thereafter elections throughout the Union for representatives should be held uniformly on the Tuesday next after the first Monday of November. It also declared that no State shall hereafter be admitted to the Union without having the necessary population to entitle it to at least one representative "according to the ratio of representation fixed by this bill." This is a prohibition which any subsequent Congress will obey or not at its option; but if an attempt should be made to conform to it, there might be room for serious difference of opinion regarding its construction. Does it mean that the new State must have at least 130,000 representative population, which is about the average for the whole Union, or would 93,824, which is the number for each representative in Florida, be sufficient?]

[1] 2 Hale's Pl. Cr. 150; 4 Black. Comm. 259; 2 Wilson's Law Lect. 165, 166.

[2] 4 Black. Comm. 260.

[3] 2 Woodeson's Lect. 40, p. 596, &c.

house of commons in regard to impeachments; and the Senate (as we shall hereafter see) the 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 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 presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence, or from the imperfect organization and powers of those 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 responsibility which is at once felt and reverenced by the whole community.[2] The notoriety of the proceedings, the solemn manner in which they are conducted, 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.

§ 689. 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.[3] 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 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 constituents.

[1] 4 Black. Comm. 260; Rawle on the Constitution, ch. 22, p. 210, 211; 2 Woodeson's Lect. 40, p. 596, &c.

[2] Rawle on the Constitution, ch. 22, p. 209.

[3] Journal of Convention, p. 69, 121, 137, 225, 226, 236; 3 Elliot's Debates, 43, 44 45, 46.

CHAPTER X.

THE SENATE.

§ 690. THE third section of the first article relates to the organization and powers of the Senate.

§ 691. In considering the organization of the Senate, our inquiries naturally lead us to ascertain, first, the nature of the representation and vote of the States therein; secondly, the mode of appointment; thirdly, the number of the senators; fourthly, their term of service; and, fifthly, their qualifications.

§ 692. 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 have one vote."

§ 693. 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 vote. 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.

§ 694. 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 be in proportion to the relative population of the States.[4] A compromise was, therefore, indispensable, 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.[5] 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.[6]

§ 695. 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 anni-

[1] Letter of the Convention, 17th of 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, 91, 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.

[5] 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.

[6] 1 Elliot's Debates, 67; Journal of Convention, 157.

hilated. 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 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.

§ 696. 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 found 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]

§ 697. 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.

§ 698. 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 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 pro-

[1] Mr. Madison. [See also Life and Writings of James Iredell, II. 258, 285.]

[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 92, 99 to 102, 107, 108, 112 to 127; 2 Pitkin's Hist. 233 to 248. See also The Federalist, No. 22.

portional 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 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;[2] and, on the other hand, the weight of the other branch counterbalances an undue preponderance of State interests, tending to disunion.

§ 699. 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.[3] 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 waking thoughts of statesmen or patriots. It may be safely asserted that, for all the purposes of liberty, and security, of stable 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;

[1] The Federalist, No. 62; 2 Amer. Museum, 376, 379.

[2] 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.

[3] 2 Wilson's Law Lect. 146, 147, 148.

and each will be led by the same common influence of ambition or intrigue or passion to the same disregard 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.

§ 700. It is a misfortune incident to a republican government, 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]

§ 701. No system could, in this respect, be more admirably contrived to insure 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 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.[2] 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 unequally or injuriously, its general operation will be salutary and useful.[3] The disease most incident to free governments is the

[1] The Federalist, No. 62.

[2] Id. No. 27.

[3] The Federalist, No. 69; Yates's Minutes, 4 Elliot's Debates, 63, 64; 2 Wilson's Law Lect. 146, 147, 148.

facility and excess of lawmaking;[1] 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.

§ 702. 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 organization, is well adapted 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.[2] 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.[3]

§ 703. 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 favor, nine States voting against it, and one being divided.[4] The second scheme, of an election by

[1] The Federalist, No. 62; 1 Kent's Comm. Lect. 11, p. 212, 213.

[2] 2 Wilson's Law Lect. 148.

[3] The Federalist, No. 62.

[4] See Mr. Randolph's fifth Resolution, Journ. of Convention, 67, 86; Yates's Minutes, 4 Elliot's Debates, 58, 59.

the people in districts or otherwise, seems to have met with as little favor.[1] The first scheme, that of an election by the legislature, finally prevailed by an unanimous vote.[2]

§ 704. 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.[3] 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 favoring 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."[4] This is very subdued praise, and indicates more doubts than experience has as yet justified.[5]

§ 705. 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.[6] As

[1] Journal of Convention, 105, 106, 130; Yates's Minutes, 4 Elliot's Debates, 58, 59, 63, 64, 99 to 103.

[2] Journ. of Convention, 105, 106, 147, 207, 217, 238; Yates's Minutes, 4 Elliot's Debates, 63, 64.

[3] Yates's Minutes, 4 Elliot's Debates, 62, 63, 64; 3 Elliot's Debates, 49.

[4] The Federalist, Nos. 62, 27; 1 Kent's Comm. Lect. 11, p. 211.

[5] See also The Federalist, No. 27.

[6] Rawle on Constit. 37; Kent's Comm. Lect. 11, p. 211, 212.

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.[1] 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.

§ 706. Thirdly, the number of senators. Each State is entitled to two senators. It is obvious that to insure competent knowledge and ability to discharge all the functions intrusted to the senate, (of which more will be said hereafter,) it is indispensable that it should consist of a number sufficiently large to insure 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 labors of 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.

[1] 1 Kent's Comm. Lect. 11, p. 211, 212. Mr. Chancellor Kent says, in his Commentaries, (1 Kent's Comm. Lect. 11, p. 212,) 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. [It is now regulated by act of Congress of July 25, 1866.]

§ 707. 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 colleagues having a common interest and feeling 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 laboring under the suspicion of any unfavorable 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 welfare, and none which calls for higher talents and more comprehensive attainments and more untiring industry and integrity.

§ 708. In the convention there was a considerable diversity of

[1] Mr. Tucker, (the learned Commentator on Blackstone,) in 1803, said: "The whole number of senators is at present limited to thirty-two. It is not probable that it will ever exceed fifty." (1 Tuck. Black. Comm. App. 223.) How strangely has our national growth already outstripped all human calculation!

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 burden or an infirmity inherent in the Constitution.[2]

§ 709. Fourthly, the term of service of the senators. It is for six years, although, as will be presently 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 opinion 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

[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. [In 1872, including eleven minors, it contained four princes of the blood, two archbishops, twenty dukes, nineteen marquises, one hundred and ten earls, twenty-three viscounts, twenty-four bishops, two hundred and thirty-two barons, nineteen Scottish representative peers, and twenty-eight Irish representative peers. Total, four hundred and eighty-nine, or, deducting the minors, four hundred and seventy-eight.]

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 behavior, 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 additional limitation that one third should go out biennially.[2]

§ 710. 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

[1] Journ. of Convention, 118, 130, 147, 148; Yates's Minutes, 4 Elliot's Debates, 70, 71, 103, 104, 105, 106.

[2] Journ. 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, 105, 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. (Montesquieu's Spirit of Laws, B. 5, ch. 7.) 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 behavior. (Journ. of Convention, p. 130; North American Review, Oct. 1827, 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. (North American Review, Oct. 1827, p. 265.) But in the convention, it is said that he was favorably inclined to Mr. Hamilton's plan. (2 Pitkin's Hist. 259, note.) In a question of so much difficulty and delicacy 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. [For Hamilton's views see, further, 2 Hamilton's Works, 398; 5 Elliot's Debates, 203 – 205; Curtis, Hist. of Const. Vol. 2, 100; and for Madison's, Life of Madison by Rives, Vol. 2, 367.]

was under their advisement.[1] 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 favorable to every stride it may be 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.[2] 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.

§ 711. 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.[3] 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.[4] The first superficial view may shock popular prejudices or errors, while the ultimate results may be as admirable 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?

[1] 2 American Museum, 547.
[2] 1 Tucker's Black. Comm. App. 196.
[3] See ante, § 589, &c. on the same point.
[4] The Federalist, No. 63.

§ 712. 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 intrusted 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.

§ 713. 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 are 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

[1] The Federalist, No. 62; 2 Wilson's Law Lect. 146, 147, 148.

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.[1] 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 ever-changing codes, but monuments 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,[2] of ignorance that knows not its own mistakes, or of overweening confidence which heeds not its own follies?

§ 714. 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.[3] 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 he struck down, they will be more ready to assume responsibility, and pretermit present popularity for future solid reputation.[4] 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 to aid their advancement or gratify their

[1] 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.

[2] The Federalist, No. 62.

[3] 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.

[4] See 1 Elliot's Debates, 263, 264, 269 to 278; 3 Elliot's Debates, 48 to 51.

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.

§ 715. 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 unreasonable advantage to the sagacious, the cunning, and the moneyed 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 laborer or the confiding artisan to enrich those who coolly look on to reap profit where they have sown nothing.[3] 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

[1] The Federalist, No. 62.
[2] Id. No. 62; 1 Kent's Comm. 212, 213.
[3] The Federalist, No. 62.

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.

§ 716. 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.[1] 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 melancholy distinction, perhaps, that nations with fewer benevolent emotions than individuals are under fewer restraints also from taking undue advantages of the indiscretions of each other.[2] 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,[3] 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."

§ 717. 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 guarantee 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 insure their execution on the part of the

[1] The Federalist, No. 62; 1 Elliot's Debates, 268, 269.

[2] The Federalist, No. 62; 1 Elliot's Debates, 269, 270 to 273; 1 Kent's Comm. 212, 213.

[3] The Federalist, No. 62.

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 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 favor of its prolonged term of service. A more 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.

§ 718. 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 preeminence 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.

§ 719. But the irresistible reply to all such reasoning is, that before such a revolution can be effected the 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

[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.

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 them against their own oppression of themselves?

§ 720. 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 teaches 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.

[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. [Many changes have been made in this regard since these Commenataries were written, but they have generally been in the direction of shortening the term.]

§ 721. If there were anything 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, 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 colorable 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 overmatch for a senate for life; the former 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 among the tribunes was indispensable. This fact proves the irresistible force possessed by that branch of the government which represents the popular will.[2]

§ 722. Considering, then, the various functions of the Senate, the qualifications of skill, experience, and information which are

[1] The Federalist, No. 63. [2] Id. No. 63; Id. No. 34.

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.[1]

§ 723. 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.

§ 724. 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 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.[2] 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 forever 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.[3]

[1] 1 Elliot's Debates, 64 to 66; Id. 91; 1 Kent's Comm. Lect. 11, p. 212, 213.

[2] Journ. of Convention, 26th June, 1787, p. 149; Yates's Minutes, 4 Elliot's Debates, 103 to 106.

[3] 1 Elliot's Debates, 64 to 66; Id. 91, 92; 1 Kent's Comm. Lect. 11, p. 213, 214. A

§ 725. 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 impulses 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.

§ 726. 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.

§ 727. 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 of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the

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 favor. 1 Elliot's Debates, 257, 258 to 264, 265 to 272; 3 Elliot's Debates, 303. Many potent reasons might be urged against it.

[1] 1 Journals of the Senate, 15th May, 1789, p. 25, 26 (edit. 1820).

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 means of knowledge and responsibility to insure a judicious appointment.[2]

§ 728. Fifthly, the qualifications of senators. The Constitution declares that "No person shall be a senator 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 requires 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.[3] 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

[1] Journal of Convention, 9th Aug. 237, 238.

[2] In the case 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 Senate 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 twenty-three to eighteen, 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.

[3] 1 Kent's Comm. Lect. 11, p. 214.

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.[1] It has since been varied, and the term diminished.[2]

§ 729. The age of senators was fixed in the Constitution at first by a vote of seven States against four, and finally by a unanimous vote.[3] 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 ardor and impetuosity and confidence of youth must be chastened 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.[4]

§ 730. 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 intrusted with such high and delicate functions.[5] 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

[1] 1 Black. Comm. 463, 464. [2] Code Civil, art. 388.

[3] Journ. of Convention, 118, 147.

[4] Rawle on the Constitution, 37; 1 Kent's Comm. Lect. 11, p. 214; 1 Tuck. Black. Comm. App. 223.

[5] The Federalist, No. 62.

main supports of republics. In the convention 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]

§ 731. 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.[3]

§ 732. 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, therefore, 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.[4]

§ 733. The next clause of the third section of the first article

[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.

[3] [The States cannot add to these qualifications nor impose disabilities. See note, to § 629, *supra*.]

[4] See The Federalist, No. 27.

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."

§ 734. The original article, as first reported, authorized the Senate to choose its own president and other officers; and this was adopted in the convention.[1] But the same draft authorized the president of the Senate, in case of the removal, death, resignation,[2] 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 favor, eight States voting in the affirmative and two only in the negative.[3]

§ 735. Some objections have been taken to the appointment of the Vice-President to preside in the Senate. It was suggested in the State conventions 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.[4] 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."[5]

§ 736. The propriety of creating the office of Vice-President

[1] Journal of Convention, p. 218, 240.

[2] Journal of Convention, 225, 226. [3] Journal of Convention, 325, 339.

[4] 2 Elliot's Debates, 359, 361; 3 Elliot's Debates, 37, 38.

[5] 1 Tucker's Black. Comm. Appx. 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 (1 Tuck. Black. Comm. App. 199, 200, 225): 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.

will be reserved for future consideration, when, in the progress of these commentaries, the constitution of the executive department comes under review.[1] The reasons why he was authorized to preside in the Senate belong appropriately to this place.

§ 737. 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, 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.[2] 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 alone 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 deemed worthy 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 intrusted with a vote.

§ 738. 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 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

[1] See 2 Amer. Museum, 557; The Federalist, No. 68.

[2] 1 Black. Comm. 181; 3 Black. Comm. 47; 1 Tuck. Black. Comm. App. 224.

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 hand, 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 have 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 the office little more than the barren honor of a place, without influence and without action.

§ 739. 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

[1] The Federalist, No. 68. [2] Id.

[3] 2 Elliot's Debates, 359, 360, 361; 3 Elliot's Debates, 37, 38, 51, 52.

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 self-protection 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 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 connection 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.

§ 740. 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."[2] 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.[3]

§ 741. The propriety of intrusting 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

[1] 1 American Annual Register, 86, 87; 3 American Annual Register, 99; 4 Elliot's Debates, 311 to 315.

[2] 3 American Annual Register, 99.

[3] See Jefferson's Manual, § 15, 17.

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 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 founded 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.

§ 742. 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."

§ 743. 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.

§ 744. The practice of impeachments seems to have been

[1] Rawle on Const. ch. 22, p. 209, 210.

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.*[1] 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.[2] 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 favorable hearing.[3] Montesquieu has deemed such a tribunal worthy of the highest praise.[4] Machiavel has ascribed the ruin of the republic of Florence to the want of a mode of providing by impeachment against those who offended 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."[5] 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.[6]

§ 745. 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 insure 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

[1] 4 Black. Comm. 260; Tacit. de Morib. Germ. 12.

[2] 4 Black. Comm. 261; 2 Wilson's Law Lect. 164, 165, 166.

[3] 4 Black. Comm. 261; but see Paley's Moral Philosophy, B. 6, ch. 8; 1 Wilson's Law Lect. 450, 451.

[4] Montesq. Spirit of Laws, B. 11, ch. 6.

[5] 1 Tucker's Black. Comm. App. 348.

[6] The Federalist, Nos. 65, 66.

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 intrusted with the authority? These are questions of the highest importance and of the most frequent occurrence. They arose in the convention, and underwent 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 vigor, 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.

§ 746. 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 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 con-

[1] 1 Tucker's Black. Comm. App. 200; Id. 335, 336, 337.

[2] 2 Amer. Museum, 549; 3 Amer. Museum, 71; The Federalist, Nos. 65, 66; 1 Tuck. Black. Comm. App. 337; Jour. of Convention, Supplement, p. 425, 437.

trol 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]

§ 747. 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 preoccupying 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 must, at the same time, admit that it is not free from all plausible objections.[3]

§ 748. 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 circumstance 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.[4]

[1] The Federalist, No. 65.
[2] Id. No. 65; 2 Wilson's Law Lect. 165.
[3] The Federalist, Nos. 65, 66.
[4] The Federalist, No. 66.

§ 749. 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.[1] 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 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.[2] 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.

§ 750. 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

[1] Ante, Vol. 2, § 524 to 540; Rawle on Constitution, ch. 22, p. 212.
[2] 1 Wilson's Law Lect. 451, 452.

experience and knowledge will bring them to the trial with a spirit of candor and intelligence, and an ability to comprehend 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 honor.

§ 751. 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 extraordinary cases, where a superior 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

[1] The Federalist, No. 66.

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 favorite 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.

§ 752. The next objection is, that the power is not efficient or safe in connection 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 intrust 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 favoritism of the appointor would always screen the misbehavior of the appointees. Yet no one doubts the fitness of intrusting 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

[1] The Federalist, No. 66.
[2] The Federalist, No. 66.
[3] Id. No. 66.

rarely occur that the persons who have concurred in the appointment will be members of the Senate at the time of the trial. As one third 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 appointment 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.

§ 753. 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 honor, 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]

§ 754. Such is the objection pressed with unusual earnestness, and certainly having a more plausible foundation than either of the preceding. It presupposes, however, a state of facts of a very extraordinary character, and, having put an extreme case, argues from 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 wher-

[1] 1 Tucker's Black. Comm. App. 335, 336. [2] The Federalist, No. 66.

ever 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 dishonor 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 favor of the deceiver.

§ 755. If, on the other hand, the Senate had corruptly assented to the appointment and treaty, it is certain that there would be 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 intrusted 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]

§ 756. But, passing by, for the present, this general reasoning on the objections stated, let us see if any other and better practical scheme for the trial of impeachments can be devised. One scheme might be to intrust it to the Supreme Court of the United States; another, to intrust it to that Court and the Senate jointly; a third, to intrust 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,) argument in favor of the Senate will acquire more persuasive cogency.

§ 757. First, the intrusting of the trial of impeachments to the Supreme Court. This was, in fact, the original project in the convention.[2] It was at first agreed that the jurisdiction of the national judiciary should extend to impeachments of national officers.[3] Afterwards this clause was struck out,[4] and the power to impeach was given to the House of Representatives;[5] and the jurisdiction of the trial of impeachments was also given to the Supreme Court.[6] Ultimately, the same jurisdiction was assigned to the Senate by the vote of nine States against two.[7]

§ 758. The principal reasons which prevailed in the convention in favor 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 influenced, the necessary

[1] The Federalist, No. 66.
[2] Journal of Convention, p. 69, 121, 137, 189, 217, 226, 324, 325, 326, 344, 346.
[3] Journal of Convention, p. 69, 121, 137.
[4] Id. 189.
[5] Id. 217, 236.
[6] Id. 226.
[7] Id. 324, 326, 346.

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 favor 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 honor 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.

§ 759. "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 honors, 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 anything 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]

§ 760. That there is great force in this reasoning all persons of common candor 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, is 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

[1] The Federalist, No. 65. But see Rawle on the Constitution, ch. 22, p. 211, 212.

may be discontinued from their seats merely from the effect of popular disapprobation, 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 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 death 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, etc. 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 behavior, and who could neither be presumed to have participated in the crime, nor to have prejudged the criminal?"[1]

§ 761. This reasoning also has much force in it; but in candor 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 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

[1] 1 Tuck. Black. Comm. App. 237.

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 misdemeanors, 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 connection 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 favor 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.

§ 762. Besides, it ought not to be overlooked that such an additional accumulation of power in the judicial department would not only furnish pretexts for clamor 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 behavior, though in some respects most favorable for an independent discharge of these

[1] The Federalist, No. 65.

functions and checks, is at the same time obnoxious to some strong objections as a remedy for impeachable offences.

§ 763. 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 ribunal to be invested with authority to try impeachments.

§ 764. 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 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 misdemeanors 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 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.

§ 765. In the next place, it is obvious that the strictness of the forms of proceeding in cases of offences at common law is 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 rules 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]

§ 766. In the next place, the very functions involving political interests and connections 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 circumstance that judges should be called to sit, as umpires, in the controversies of party, would inevitably involve them in the common

[1] Rawle on the Constitution, ch. 22, p. 212.

[2] 4 Black. Comm. 400, Christian's Note.

odium of partisans, 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 changes 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 shall have 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]

§ 767. 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 honor, 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

[1] 2 Woodeson, Lect. 40, p. 602.

advisers, are on trial, would have some tendency to diminish the public confidence in the impartiality and independence of the tribunal.

§ 768. 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]

§ 769. 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

[1] But see Rawle on the Constitution, ch. 22, p. 214.

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 favor cannot but be greatly strengthened and confirmed.

§ 770. 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.[1] 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 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

[1] The Federalist, No. 65.

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.

§ 771. A third scheme might be to intrust the trial of impeachments to a special tribunal, constituted for that sole purpose. But whatever arguments may be found in favor 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 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 de-

[1] The Federalist, No. 64.

[2] The Federalist, No. 65.

feat 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 guaranty 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?

§ 772. The Federalist has spoken with unusual freedom and directness on this subject. "The first scheme" (that is, of vesting the power in some permanent 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 of perfection, society would soon become a general scene of anarchy, and the world a desert." [1]

§ 773. 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 would be very serious, not only from the considerations already urged, but from the difficulty of impanelling 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 intrust the political interests of a whole people to a common panel? Would any jury in times of party excitement be found sufficiently firm to give a true verdict, unaffected by the popularity or odium of the measure, when the nation was the accuser? 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 favor in other States, furnishes decisive proof that it is not deemed better than others to which the national Constitution bears the closest analogy.

§ 774. 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*," [3] 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.[4] 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.

§ 775. The conclusion to which, upon a large survey of the whole subject, our judgments are naturally led is, that the power

[1] The Federalist, No. 65. [2] 1 Tucker's Black. Comm. App. 337, 338.
[3] Journ. of Convention, Supp. 425, 448. [4] Id. 437.

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 connection 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]

§ 776. The remaining parts of the clause of the Constitution now under consideration will not require an 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

[1] The Federalist, No. 65.

[2] Rawle on the Const. ch. 22, p. 212, 213.

under oath, but only make a declaration upon their honor.[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 honor of a peer which necessarily raises it above the honor 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 honor 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 times, and founded on feudal sovereignty more than on justice or principle.

§ 777. 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.[3] 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.

§ 778. 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

[1] 1 Black. Comm. 402; 4 Inst. 49; 3 Elliot's Debates, 53.
[2] 1 Black. Comm. 402.
[3] Rawle on Const. ch. 22, p. 216.

to a mere nullity. Besides, upon the trial of impeachments in the house of lords, the conviction or acquittal is by a mere majority ;[1] so that there is a failure of any analogy to support the precedent.

§ 779. 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."[2] 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 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

[1] Com. Dig. Parliament, L. 16, 17; 2 Woodeson, Lect. 40, p. 612. [A judgment of impeachment in the house of lords requires, however, that at least twelve of the members should concur in it. And "a verdict by less than twelve would not be good." Comyn's Digest, L. 17. — E. H. B.]

[2] 4 Black. Comm. 261.

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.

§ 780. 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 the Senate for its unfaithful discharge of these high functions; and the voice of a 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?

§ 781. 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 honor, trust, or profit under the United States. But the party convicted shall neverthe-

[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; Sergeant on Constitutional Law, ch. 29, p. 363, 364. [The danger that senators, chosen as representatives of political parties, will be swayed, consciously or unconsciously, by considerations that should not influence them, is much greater on the trial of a political officer from whose removal or retention party advantage might be expected, than on that of a judge. This was forcibly illustrated by the case of President Johnson, in which, with a few exceptions, senators divided on the question of guilt strictly according to their political affinities. The State of New York seeks to prevent such results by providing that the judges of the court of appeals — a body of men removed by their position from the sphere of party politics, and likely to be little influenced by the passions of the hour — shall constitute a part of the court of impeachment. In some cases such an element might be of incalculable value. It would be a calamity of the highest moment if the precedent should be set of the conviction and removal of the President on a partisan vote, and on grounds not sanctioned by the sober sense and mature reflection of the people.]

less be liable and subject to indictment, trial, judgment, and punishment, according to law."

§ 782. 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 justice 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.

§ 783. 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 bri-

[1] 4 Black. Comm. 335, 361; Hawk. P. C., B. 2, ch. 35.

bery 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.

§ 784. 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]

§ 785. 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 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,

[1] Com. Dig. Parliament, L. 44; 2 Woodeson, Lect. 40, p. 611 to 614.

[2] 2 Woodeson, Lect. 40, p. 601, 604.

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]

§ 786. 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 intrusted 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 intrusted 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 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 misdemeanors? 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 juridi-

[1] Rawle on the Constitution, ch. 22, p. 217; 2 Woodeson, Lect. 40, p. 608, 609.
[2] Com. Dig. Parliament, L. 28 to 39; 2 Woodeson, Lect. 40, p. 619, 620.

cal 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.

§ 787. It does not appear from the Journal of the Convention that the provision thus limiting the sentence upon impeachments to removal and disqualification 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.

§ 788. In order to complete our review of the constitutional provisions on the subject of impeachments, it is necesary 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 connection, 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.

§ 789. 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 misdemeanors."[3]

§ 790. From this clause it appears that the remedy by impeachment is strictly confined to civil officers of the United States, in-

[1] Journal of the Convention, p. 227, 302, 353.

[2] Journal of the Convention, p. 227, 302. 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.

cluding the President and Vice-President. 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 misdemeanors 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 a 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 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.[3]

[1] 4 Black. Comm. 260, 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. [3] Journal of Convention, 69, 121, 137, 226.

§ 791. 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*.[1] 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 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.[2] 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.[3]

§ 792. 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.[4] The reason for excepting military and naval officers is, that they are subject to trial and punishment according to a peculiar military code, the

[1] 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; Heinec. Elem. Juris. Nat. B. 2, ch. 6.

[2] 1 Black. Comm. 396, 408, 417; De Lolme, B. 2, ch. 17, p. 446.

[3] 1 Black. Comm. 332.

[4] Rawle on the Constitution, ch. 22, p. 213.

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 is not only better suited to the notions of military men, but they deem their honor 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.

§ 793. 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 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.

[1] The decision was made by a vote of 14 against 11. See Senate Journal, 10th January, 1799; 4 Tucker's Black. Comm. App. 57, 58; Rawle on Const. ch. 22, p. 213, 214.

[2] 4 Tuck. Black. Comm. App. 57, 58; Rawle on Const. ch. 22, p. 213, 214, 218, 219.

Other clauses of the Constitution would seem to favor 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 sixth 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.

§ 794. 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 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*," etc. "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

[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.

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 the Constitution not to be objects of the impeaching power.[2]

§ 795. 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.[3]

§ 796. The next inquiry is, what are impeachable offences? They are "treason, bribery, or other high crimes and misdemeanors." For the definition of treason, 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 ques-

[1] The Federalist, No. 66.

[2] 3 Elliot's Debates, 43, 44, 45, 46, 56, 57.

[3] 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).

tion is, what are to be deemed high crimes and misdemeanors? 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 misdemeanors, 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 favor of the party until Congress have made a legislative declaration and enumeration of the offences which shall be deemed high crimes and misdemeanors? 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 offence that by the Constitution is so impeachable. It must not only be an offence, but a *high* crime and misdemeanor. 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?

§ 797. 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

[1] Rawle on the Constitution, ch. 29, 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 misdemeanor *consisting in some act done or omitted in violation of law* forbidding or commanding it." "Hence it clearly results, that no 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." (1 Chase's Trial, p. 47, 48.) The same doctrine was insisted on by his counsel. (2 Chase's Trial, p. 9 to 18; 4 Elliot's Debates, 262.)

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 misdemeanors, 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 misdemeanors.

§ 798. 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 application of 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 birthright, 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 believe that the common law, so far as it is

[1] 2 Woodeson, Lect. 40, p. 611, 612; 4 Black. Comm. 261, Christian's Note (2).

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 existence, 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.

§ 799. 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

[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, in 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, namely, 1 Tuck. Black. Comm. App. Note E, p. 378, etc.; in the report of the Virginia legislature of 1799, 1800; in Rawle on the Constit. ch. 30, p. 258, etc.; and in Duponceau on Jurisdiction, and the authorities there cited. 1 Kent, Comm. Lect. 16, p. 311, *et seq.*; North American Review, July, 1825; Mr. Bayard's speech, Debate on the Judiciary in 1802, p. 372. [*Wheaton* v. *Peters*, 8 Pet. 591; *Kendall* v. *U. S.*, 12 Pet. 524.]

[2] 1 Journal of Congress, Oct. 1774, p. 29.

any statutable misdemeanors.[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 misdemeanors is to be ascertained by a recurrence to that great basis of American jurisprudence.[2] The reasoning by which the 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.[3]

§ 800. 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 misdemeanors 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.[4] So, where a lord chancellor has been thought to have put the great seal to an ignominous treaty, a lord admiral to have neglected the safeguard of the sea, an ambassador to have betrayed his trust, a privy councillor to have propounded or supported pernicious and dishonorable measures, or a confidential adviser of his sovereign to

[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 States. If the Senate may then declare what are offences against the United 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?

[3] *Dunn* v. *Anderson*, 6 Wheat. R. 204; Rawle on Constit. ch. 29, p. 271, 272.

[4] 2 Woodeson, Lect. 40, p. 602; Com. Dig. title *Parliament*, L. 28 to 40.

have obtained exorbitant grants or incompatible employments,— these have been all deemed impeachable 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 favoritism 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.

§ 801. Another inquiry growing out of this subject is, whether, under the Constitution, any acts are impeachable except such as are committed under color of office, and whether the party can be impeached 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.[5] 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 misdemeanors.' The treason contemplated must be against the United States. In general, those offences which may be committed equally by a

[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.
[5] Rawle on Const. ch. 22, p. 213; Blount's Trial, p. 49, 50 (Philad. 1799).

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."[1]

§ 802. 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 misdemeanor 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 execution thereof.[2] The decision, however, turned upon another point, viz., that a senator was not an impeachable officer.[3]

§ 803. 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 honor, 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 misdemeanors," 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.[4] 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 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

[1] Rawle on Constitution, ch. 22, p. 215.

[2] See Senate Journal, 14th Jan. 1799; 4 Tucker's Black. Comm. App. 57, 58.

[3] Sergeant on Const. Law, ch. 29, p. 363.

[4] 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.

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 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]

§ 804. 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]

§ 805. 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

[1] See Blount's Trial, 47, 48; Id. 64 to 68 (Philad. 1799); Id. 82.

[2] Mr. Bayard. Blount's Trial, 28 (Philad. 1799); Id. 80, 81.

[3] Blount's Trial, 39, 40 (Philad. 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 days before this impeachment, (being then a member,) and on that occasion he was, by a resolution of the Senate, [Yeas, 25; Nay, 1,] declared to be "guilty of a *high misdemeanor* 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 an 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.

reader as matters still *sub judice*, the final decision of which may be reasonably left to the high tribunal constituting the court of impeachment when the occasion shall arise.

§ 806. 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.

§ 807. 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.[1] 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 impeachment.[2] 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.[3] 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.[4] The process is served by the sergeant-at-arms of the Senate, and due return is made thereof under oath.

§ 808. The articles thus exhibited need not, and indeed do not, pursue the strict form and accuracy of an indictment.[5] They are sometimes quite general in the form of the allegations, but al-

[1] Com. Dig. *Parliament*, L. 20; 2 Woodeson, Lect. 40, p. 603, 604; Jefferson's Manual, sect. 53.

[2] Com. Dig. *Parliament*, L. 20; 2 Woodeson, Lect. 40, p. 603, 604; Jefferson's Manual, sect. 53.

[3] Com. Dig. *Parliament*, L. 21; Jefferson's Manual, sect. 53.

[4] Com. Dig. *Parliament*, L. 14, 18, 19, 20; Jefferson's Manual, sect. 53.

[5] 2 Woodeson's Lect. 40, p. 605, 606; Com. Dig. *Parliament*, L. 21; Foster on Crown Law, 389, 390.

ways 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.[1]

§ 809. 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 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.[2]

§ 810. 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;[3] or he may plead specially, in justification or excuse of the supposed offences, all the circumstances 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.[4]

§ 811. 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 as shall be appointed for that purpose by the Senate.[5] A time is then assigned for the

[1] Rawle on Const. ch. 22, p. 216.

[2] Jefferson's Manual, sect. 53.

[3] 2 Woodeson, Lect. 40, p. 606, 607; Com. Dig. *Parliament*, L. 23.

[4] 2 Woodeson, Lect. 40, p. 607; Jefferson's Manual, sect. 53.

[5] See 2 Woodeson, Lect. 40, p. 607; Com. Dig. *Parliament*, L. 24.

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.[1] 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.[2] 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 misdemeanors.[3] When the whole evidence has been gone through, and 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 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 misdemeanor, 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 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.[4] The pardoning power of the President does not, as

[1] See 2 Woodeson, Lect. 40, p. 610. [2] Jefferson's Manual, sect. 53.

[3] 2 Woodeson, Lect. 611; Jefferson's Manual, sect. 53.

[4] 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,

will be presently seen, extend to judgments upon impeachment; and hence, when once pronounced, they become absolute and irreversible.[1]

§ 812. 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 vigor 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.

§ 813. 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.[2] 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

namely, of William Blount, in 1798; of John Pickering, in 1804; of Samuel Chase, in 1804; and of James H. Peck, in 1831. See the Senate Journals of those Trials. See also Jefferson's Manual, sect. 202.

[1] Art. 2, sect. 2, clause 1.

[2] 1 Black. Comm. 246, 247.

not (under their old constitutions) impeachable until he was out of office.[1] So that no immediate remedy in 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.

[1] The Federalist, No. 39. [The whole subject of impeachment and impeachable offences has recently received so exhaustive an examination in this country (on the trial of President Johnson) that we might content ourselves in this place with making a simple reference to that case. The times, however, were prolific in impeachments. Three governors were impeached, two of whom were convicted and removed; a fourth vacated his office on serious charges being preferred; and a judge of the Supreme Court of New York was found guilty of the most scandalous misconduct. These were only the most notable cases. Truly, the time was "out of joint."]

CHAPTER XI.

ELECTIONS AND MEETINGS OF CONGRESS.

§ 814. 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."[1]

[1] [An act regulating the election of senators has recently been passed, and is as follows: —

"An act to regulate the times and manner of holding elections for senators in Congress.

"Be it enacted, &c., that the legislature of each State which shall be chosen next preceding the expiration of the time for which any senator was elected to represent said State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a senator in Congress, in the place of such senator so going out of office, in the following manner: Each house shall openly, by a *viva voce* vote of each member present, name one person for senator in Congress from said State; and the name of the person so voted for, who shall have a majority of the whole number of votes cast in each house, shall be entered on the journal of each house by the clerk or secretary thereof; but if either house shall fail to give such majority to any person on said day, that fact shall be entered on the journal. At twelve o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read; and if the same person shall have received a majority of all the votes in each house, such person shall be declared duly elected senator to represent said State in the Congress of the United States; but if the same person shall not have received a majority of the votes in each house, or if either house shall have failed to take proceedings as required by this act, the joint assembly shall then proceed to choose, by a *viva voce* vote of each member present, a person for the purpose aforesaid; and the person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected; and in case no person shall receive such majority on the first day, the joint assembly shall meet at twelve o'clock meridian of each succeeding day during the session of the legislature, and take at least one vote, until a senator shall be elected.

"Sec. 2. That, whenever on the meeting of the legislature of any State, a vacancy shall exist in the representation of such State in the Senate of the United States, said legislature shall proceed, on the second Tuesday after the commencement and organization of its session, to elect a person to fill such vacancy, in the manner hereinbefore provided for the election of a senator for the full term; and if a vacancy shall happen during the session of the legislature, then on the second Tuesday after the legislature shall have been organized and shall have notice of such vacancy.

§ 815. This clause does not appear to have attracted 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 elections 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 favorites from office. They might modify the right of election as they should please; they might regulate the number of votes by the quantity of property, without involving any repugnancy to the Constitution.[2] These and other suggestions of a similar nature, calculated to spread terror and alarm among the people, were dwelt on with peculiar emphasis.

§ 816. 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.[3] If, in the Constitution, there were some

"Sec. 3. That it shall be the duty of the governor of the State from which any senator shall have been chosen as aforesaid, to certify his election, under the seal of the State, to the president of the Senate of the United States, which certificate shall be countersigned by the secretary of state of the State." Approved July 25, 1866.

The election of representatives after 1874 is provided for by the Act of Congress of February 2, 1872, which requires the elections to be in districts of contiguous territory, and to be held on the Tuesday next after the first Monday in November in the year 1876, and every two years thereafter.]

[1] Journal of Convention, p. 218, 240; Id. 354, 374.

[2] 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, 423; 2 Elliot's Debates, 277.

[3] The Federalist, No. 59; 2 Elliot's Debates, 276, 277.

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 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]

§ 817. 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

[1] The Federalist, No. 59; 2 Elliot's Debates, 38, 39; Id. 276, 277.

[2] 1 Elliot's Debates, 44, 45; the Federalist, No. 22.

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 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]

§ 818. 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 aggrandizement, may be in a very opposite temper, and artfully using all their influence to cripple or destroy the national government.[3] 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

[1] The Federalist, No. 59. [2] Id.

[3] The Federalist, No. 59; 1 Elliot's Debates, 43 to 55; Id. 67, 68; 3 Elliot's Debates, 65.

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.[1]

§ 819. 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.[2] 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 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?

§ 820. 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 favorite candidate or favorite 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

[1] The Federalist, No. 59.

[2] Id.

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 people, 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 forbids 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 favor 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.

§ 821. 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? The wealthy and the well-born are not confined to any particular spots in any State; nor are their interests permanently fixed any-

[1] The Federalist, No. 60. [2] Id.

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 or permanent 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.

§ 822. 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 representatives 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

[1] The Federalist, No. 60.

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.

§ 823. 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] 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.[2]

§ 824. 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.[3] 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

[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 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 Elliot's Debates, 68.

[2] 2 Elliot's Debates, 38, 39.

[3] The Federalist, No. 61.

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, unless the people themselves choose to aid in their own degradation.

§ 825. The objections, then, to the provision are not sound or tenable. The reasons in its favor 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 favor 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]

§ 826. 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 to make any regulations, or interfere in the sightest degree with the elections of members of Congress.[3] If, therefore, experience can demonstrate anything, 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 ex-

[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.

[3] [But since these commentaries were written, it has been done by several acts, the last of which is referred to in note 1 to § 814, *ante*.]

erted, 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 sessions 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 favor of the existing system.[2]

§ 827. 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.[3]

§ 828. 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 excep-

[1] 1 Tucker's Black. Comm. App. 192.

[2] 1 Tucker's Black. Comm. App. 191, 192.

[3] See Journal of Convention, Supplement, p. 402, 411, 418, 425, 433, 447, 454.

tion 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 favor, one against it, and one was divided.[1]

§ 829. 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 favorite 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.[2]

§ 830. 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 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.[3]

[1] Journal of Convention, 354, 374. [2] The Federalist, No. 52.
[3] 1 Black. Comm. 187, 188, and Christian's Note; 2 Wilson's Law Lect. 154, 155.

§ 831. 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 recognized in the present State constitutions.

§ 832. 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." [1]

§ 833. 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 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.[2]

[1] See the New Jersey Elections for 1841 – 1843, where the house refused the governor's certificate of election under the State seal as *prima facie* evidence of election, and the subsequent proceedings. [Quincy's Memoir of John Quincy Adams, 295.]

[2] 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.

§ 834. The propriety of establishing a rule for a quorum for the despatch 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.[1] 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.

§ 835. 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 majority 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.[2] 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 interest 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

[1] 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. [Three lords constitute a quorum; see 2 English Jurist, 1829, p. 261, 262; Cooper's Lettres sur le Chancellerie, Letter 18, p. 134; Macqueen's Practice of House of Lords, p. 19. — E. H. B.] [See also Cooley's Blackstone, Vol. 3, p. 56 note.]

[2] The Federalist, No. 58; Journal of Convention, 218, 242.

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.[1]

§ 836. 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.[2] 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;[3] and no power of compelling the attendance of the requisite number existed.

[1] The Federalist, Nos. 22, 58.

[2] Journal of Convention, 218, 242; 4 Instit. 43, 49.

[3] Confederation, art. 9; 1 Elliot's Debates, 44, 45; the Federalist, No. 22.

CHAPTER XII.

PRIVILEGES AND POWERS OF BOTH HOUSES OF CONGRESS.

§ 837. THE next clause is, "each house may determine the rules of its proceedings, punish its members for disorderly behavior, 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 behavior 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 clamor, 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 general authority to expel exists in the British house of commons, and in the legislative bodies of many of the States composing the Union.

§ 838. What must be the disorderly behavior which the house may punish, and what punishment, other than expulsion, may be

[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.

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 misbehavior 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.[1] 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 misdemeanor, 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 statutable offence, nor was it committed in his official character; nor was it committed during the session of Congress, nor at the seat of government. Yet, by an almost unanimous vote[2] he was expelled from that body; and he was afterwards impeached (as has been already stated) for this, among other charges.[3] It seems, therefore, to be settled by the Senate, upon full deliberation, that expulsion may be for any misdemeanor 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 constitutional majority of two thirds of the members of the Senate.[4] 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 misdemeanor not done in the presence or view of the body; but most probably it was decided upon some doubt as to the facts.[5] It may be thought difficult to

[1] Rawle on the Constitution, ch. 4. p. 47.

[2] Yeas 25, nay 1.

[3] See Journal of Senate, 8 July, 1797; Sergeant's Const. Law, ch. 28, p. 286; 1 Hall's Law Journ. 459, 471. [March 1, 1861, the Senate expelled a member for alleged treasonable correspondence with the enemy.]

[4] Yeas 19, nays 10.

[5] 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. [Also the proceedings in Houston's case, Benton's Abridgment of Debates, Vol. 2, p. 658.]

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 where the offence is such as, in the judgment of the house, unfits him for parliamentary duties.[1]

§ 839. 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."[2]

§ 840. 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 a 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 fifth, and insert in its stead "if every member present," was finally adopted by a unanimous vote.[3]

[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. [See Cushing, Law and Practice of Legislative Assemblies, § 84, 192. Recently a member was expelled for having received money from those he had recommended to the President for appointments to office.]

[2] [This clause was much relied upon when, in 1837, a resolution to expunge from the journal of the Senate a previous resolution of censure upon President Jackson was under discussion. Mr. Webster, among others, strongly insisted that the action proposed would be a manifest violation of this instrument. Webster's Works, IV. 292. And see Clay's Works, VI. 45. The opposite view was forcibly presented by Mr. Benton. Thirty Years in the Senate, I. 717. For some notice of the final debate, see Ibid. 727. And for a more complete abridgment of it, see Benton's Abridgment of Debates, Vol. 13. A similar instance of an expunging resolution occurs in the history of Massachusetts. In 1813 a vote of thanks to Captain Lawrence for the capture of the Peacock coming up in the State senate, Mr. Josiah Quincy offered his celebrated resolution, which was adopted: "*Resolved*, That in a war like the present, waged without justifiable cause, and prosecuted in a manner indicating that conquest and ambition are its real motives, it is not becoming a moral and religious people to express any approbation of military and naval exploits not immediately connected with the defence of our seacoast and soil." In 1824, when the opposing party had obtained control of the State, this resolution, by a party vote, was ordered to be erased from the journal of the senate. Life of Josiah Quincy, 324. Other precedents will be found referred to in the Congressional Debates in 1837. See that in *Wilkes's Case*, 7 Mahon's England, 163.]

[3] Journal of the Convention, p. 219, 243, 244, 245, 354, 373.

The object of the whole clause is to insure 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.[1] 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 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."[2]

§ 841. 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 *viva voce* voting, even at elections. The practice in New England is one way, and in some of the States in the South and West[3] 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

[1] 1 Tucker's Black. Comm. App. 204, 205; 2 Wilson's Lect. 157, 158.

[2] 1 Black. Comm. 181, 182.

[3] [Voting by ballot is now nearly universal in the United States, except in legislative bodies, and its introduction into England was effected in 1872. See New American Cyclopædia, ed. 1872, art. "Ballot." The frauds practised under this system, however, have been very great and dangerous, and have led to stringent registration laws; but even these in some cases have seemed to facilitate fraud rather than prevent it. The whole subject is beset with difficulties, and no one as yet has succeeded in devising such checks as shall invariably secure a free expression of the will of the electors, and a truthful declaration of the result.]

a free people, so long as a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor 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. 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.

§ 842. 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.

§ 843. 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 against any encroachment on the part of the executive.[3] 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

[1] 1 Tuck. Black. Comm. App. 205, 206.

[2] See Journ. of Convention, 219, 246. See also 2 Elliot's Debates, 276, 277.

[3] 1 Tucker's Black. Comm. App. 206, 207.

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.[1]

§ 844. 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 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.

§ 845. 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

[1] 1 Black. Comm. 185 to 190; 2 Wilson's Law Lect. 154, 155; Com. Dig. *Parliament*, L. M. N. O. P.

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, 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 requires 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.

§ 846. 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

[1] Advancement of Learning; 1 Tuck. Black. App. 200, note.
[2] 1 Tucker's Black. 200.

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 unfavorable 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, etc., 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]

§ 847. This subject has of late undergone a great deal of discussion both in England and America, and 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, namely, 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.[5] The judgment of the

[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. 1; *Burdett* 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.

[5] The learned reader is referred to *Burdett* v. *Abbott*, 14 East, R. 1; *Burdett* v. *Colman*, 14 East, R. 163; s. c. 5 Dow. Parl. R. 165, 199; and *Anderson* v. *Dunn*, 6 Wheat. R.

supreme court of the United States, in the case alluded to, contains so elaborate and exact a consideration of the whole argument on

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, render 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 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 libitum* to aid him, is 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 two 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 occassion, conceal the law in its own breast, and after the fact committed make 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 will be perilous indeed."

each side, that it will 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]

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 favored by Mr. Jefferson. It deserves and will requite an attentive perusal. See also *Burdett* v. *Abbott*, 4 Taunt. R. 401 ; 4 Dow's Parl. Rep. 165.

[1] It is necessary to premise that the suit was brought for false imprisonment by a party who had been arrested under a warrant of the 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 the cause was decided upon a demurrer to the justification set up by the 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 the power to punish. If the House of Representatives possessed no authority to punish for contempt, the initiating process issued in the 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, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

" 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

§ 848. This is not the only case in which the House of Representatives has exerted the power to arrest and punish for a con-

exercise the powers which the people have intrusted to them. The interest 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 it is 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 neighbor'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 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 deliberative 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 dis-

tempt committed within the walls of the House. The power was exerted[1] in the case of Robert Randall, in December, 1795, for an

trict 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 favor; for, *non constat*, from the pleadings, but that this warrant issued for an offence committed in the immediate presence of the House.

"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 further 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 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 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 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

[1] By a vote of 78 yeas against 17 nays.

attempt to corrupt a member;[1] in 1796, in the case of ——, a challenge given to a member, which was held a breach of privi-

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 the 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 the 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 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 honor 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 anywhere else would not

[1] 1 Tucker's Black. Comm. App. 200 to 205, note; Jefferson's Manual, § 3.

lege;[1] and in May, 1832, in the case of Samuel Houston, for an assault upon a member for words spoken in his place, and afterwards printed, reflecting on the character of Houston.[2] In the former case, the House punished the offence by imprisonment; in the 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 punished by imprisonment.[3] Nor is there anything peculiar in the claim under the Constitution of the United States. The same power has been claimed and 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.[4]

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 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 Unied States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or 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, 20th Aug. 263, 264.

[1] Jefferson's Manual, § 3. [The case was that of James Gunn. See Annals of Congress, 1st Sess. 4th Cong. p. 786.]

[2] See the Speeches of Mr. Doddridge and Mr. Burges on this occasion.

[3] Journ. of Senate, 27th March, 1800; Jefferson's Manual, § 3. See also *Burdett* v. *Abbott*, 14 East, 1. [In a case decided in November, 1872, the Supreme Court of Illinois punished as for contempt the publisher of a daily paper in whose columns had appeared an article reflecting severely upon the court.]

[4] *Bolton* v. *Martin*, 1 Dall. R. 286. 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. [See also

§ 849. 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.[1] 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.[2] Whether a fine may not be imposed has been recently[3] made a question in a case of contempt 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.[4] 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.[5]

§ 850. 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.[6] 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.

the recent cases of *Hiss* v. *Bartlett*, 3 Gray, 468; *Burnham* v. *Morrissey*, 14 Gray, 226; *State* v. *Mathews*, 37 N. H. 450. The courts cannot inquire into the justice or propriety of a legislative punishment in the expulsion of a member for misconduct. *Hiss* v. *Bartlett*, supra.]

[1] *Dunn* v. *Anderson*, 6 Wheat. R. 204, 230, 231.

[2] *Dunn* v. *Anderson*, 6 Wheat. R. 204, 230, 231; 1 Kent's Comm. Lect. 11, p. 221.

[3] In 1831.

[4] See a learned article on this subject in the English Law Magazine for July, 1831, p. 1, etc. Parliamentary Debates, 1831.

[5] 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." [See also *Hiss* v. *Bartlett*, 3 Gray, 468.]

[6] Com. Dig. *Parliament*, D. 17. [*Coffin* v. *Coffin*, 4 Mass. 27.]

§ 851. 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."

§ 852. 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 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.

§ 853. 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

[1] 1 Black. Comm. 174, and Christian's Note, 34; Id. Prynne on 4 Inst. 32; Com. Dig. *Parliament*, D. 16. [The compensation to members of Congress is now $ 5,000 per annum, and to the speaker, $ 8,000, with an allowance for mileage of twenty cents a mile by the nearest usually travelled route. 14 Stat. at Large, 323.]

admitting of much argument on each side; 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 favor 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 the affirmative and five in the negative, two being divided;[3] 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.[4] 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.[5] 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,[6] and ultimately the present plan was agreed to by a vote of nine States against two.[7] Such a fluctuation of opinion exhibits in a strong light the embarrassing considerations which surrounded the subject.[8]

§ 854. The principal reasons in favor of a compensation may be presumed to have been the following. In the first place, the advantage is secured of 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 favored by nature, might not be favored 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

[1] Journal of Convention, 67, 116, 117.
[2] Id. 119.
[3] Journ. of Convention, 142.
[4] Id. 144.
[5] Id. 150, 151.
[6] Id. 219, § 10.
[7] Id. 251.
[8] See Yates's Minutes, 4 Elliot's Deb. 92 to 99.

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.[1] In the 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.[2]

§ 855. 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 laborer was worthy of his hire. There is no 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

[1] See 2 Elliot's Debates, 279, 280; Yates's Minutes, 4 Elliot's Deb. 92 to 99.

[2] See Rawle on the Constitution, ch. 18, p. 179.

profusion and poverty were, with a few splendid exceptions, equally unsafe to be intrusted 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 angusta domi*.[1]

§ 856. 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 station. It has been justly observed, that the principle of compensation to those who render services to the public runs through the whole Constitution.[2]

§ 857. 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 labor 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 any part of the Union. It is fixed with a liberal view to the national du-

[1] See Yates's Minutes, 4 Elliot's Debates, 92 to 99.

[2] Rawle on the Constitution, ch. 18, p. 179.

ties, 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.[1] Serious evils were felt from this source under the confederation, by which each State was to maintain its own delegates in Congress;[2] for it was found that the States too often were operated upon by local considerations, as contradistinguished from general and national interests.[3]

§ 858. The only practical question which seems to have been further 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.[4] If fixed by the Constitution, it might, from the change of the value of money and the modes of life, become too low and utterly inadequate. Or it might become too high, in consequence of serious changes in the prosperity of the nation.[5] 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.[6] 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.[7]

§ 859. The next part of the clause regards the privilege of the

[1] 2 Elliot's Debates, 279.
[2] Articles of Confederation, art. 5.
[3] 2 Elliot's Debates, 279; 1 Elliot's Debates, 70, 71.
[4] See note, p. 603, supra.
[5] 2 Elliot's Debates, 279, 280, 281, 282.
[6] 1 Elliot's Debates, 70, 71.
[7] See Gov. Randolph's Letter; 3 Amer. Mus. 62, 70.

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]

§ 860. 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 *subpœna ad respondendum, aut testificandum*, or a summons to serve on a jury, and (as has been justly observed) with reason, because a member has superior duties to perform in another place.[3] 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 comparison.[4] 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.[5]

§ 861. The privilege of the peers of the British Parliament to be free from arrest in civil cases is forever 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 Parlia-

[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. [See also Cushing, Law and Practice of Legislative Assemblies, § 546–597. Cooley, Const. Lim. 134.]

[3] [Exemption from arrest is not violated by the service of citations or declarations in civil cases. *Gentry* v. *Griffith*, 27 Texas, 461; *Case* v. *Rorabacker*, 15 Mich. 537.]

[4] Jefferson's Manual, § 3. [5] Id. § 3.

ment, 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.[1] 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 fourscore days at a time.[2] 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*.[3]

§ 862. 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.[4] In the members 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 ad propria 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.[5]

§ 863. 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*;[6] and the arrest may also be punished as a contempt of the House.[7]

§ 864. 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

[1] Com. Dig. *Parliament*, D. 17; 1 Black. Comm. 165, 166.

[2] 1 Black. Comm. 165; Com. Dig. *Parliament*, D. 17.

[3] *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.

[4] Com. Dig. *Parliament*, D. 17; 1 Black. Comm. 165; Jefferson's Manual, § 3.

[5] Jefferson's Manual, § 3.

[6] Jefferson's Manual, § 3; 2 Str. 990; 2 Wilson's R. 151; Cas. Temp. Hard. 28.

[7] 1 Black. Comm. 164, 165, 166; Com. Dig. *Parliament*, D. 17; Jefferson's Manual, § 3.

convenience or necessity directed it.[1] The privilege from arrest takes place by force of the election, and before the member has taken his seat or is sworn.[2]

§ 865. The exception to the privilege is, that it shall not extend to "treason, felony, or breach of the peace." These words are the same as those in which the exception to the privilege of Parliament is usually expressed at the common law, and were doubtless borrowed from that source.[3] Now, as all crimes are offences against the peace, the phrase "breach of the peace" would seem to extend to all indictable offences, 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.[4] 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,[5] 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.[6] 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.

§ 866. The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual.[7] 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 further fortified by an act 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.[8] But this privilege is strictly confined to things done

[1] Jefferson's Manual, § 3; 2 Str. R. 986, 987.
[2] Jefferson's Manual, § 3; but see Com. Dig. *Parliament*, D. 17.
[3] 4 Inst. 25; 1 Black Comm. 165; Com. Dig. *Parliament*, D. 17.
[4] 1 Black. Comm. 166.
[5] *Rex* v. *Wilkes*, 2 Wilson's R. 151.
[6] See 1 Black. Comm. 166, 167.
[7] See 2 Wilson's Law Lect. 156.
[8] 1 Black. Comm. 164, 165.

in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty.[1] 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.[2] 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 color 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 overweening self-conceit of a member of Congress.[3] It is proper, however, to apprise the learned reader that it has been recently insisted in Congress by very distinguished lawyers, that the privilege of speech and debate in Congress does extend to publication of the speech of the member. 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

[1] Jefferson's Manual, § 3.

[2] *The King* v. *Creevy*, 1 Maule and Selw. 273. [To the same effect is *The King* v. *Lord Abingdon*, 1 Esp. 226. But the *bona fide* publication by a member of his speech for the information of his constituents is protected. Lives of the Chief Justices by Lord Campbell, Vol. 3, p. 167; *Davison* v. *Duncan*, 7 El. and Bl. 223, 229; Cooley, Const. Lim. 459, 460; Townsend on Slander and Libel, § 282. In *Stockdale* v. *Hansard*, 9 Ad. and El. 1, it was decided that the order of the house of commons, that a report made to that body should be published, would not protect the printer from a recovery at the suit of a party who was libelled in the report. But this led to a statute making such publications privileged; and in the later case of *Wason* v. *Walter*, L. R. 4 Q. B. 73, while not questioning the case last referred to, it was unanimously held that a faithful report in a public newspaper of a debate in either house of Parliament, containing matter disparaging to an individual, is privileged on the same grounds which protect publication of proceedings in courts of justice.]

[3] See the reasons in *Coffin* v. *Coffin*, 4 Mass. R. 1.

direct encouragement of the body. This reasoning deserves a very attentive examination.[1]

§ 867. The next clause regards 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, 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 coextensive with the supposed mischief, and thus have forever excluded members from the possession of offices created, or rendered more lucrative, by themselves.[5] Perhaps there is quite as much wisdom in leaving the provision where it now is.

§ 868. 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 forever rest in a free government

[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, 323.

[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 449.

[5] Rawle on the Const. ch. 19. See 1 Tuck. Black. Comm. App. 375.

— 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 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 favorite child or relative. A dishonorable 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 favorites. The history of our State governments (to go no further) will scarcely be thought by any ingenuous mind to afford any proofs that the absence of such a disqualification has rendered State legislation less pure or less intelligent, or that the existence of such a disqualification would have retarded

[1] The Federalist, No. 55.

[2] 2 Elliot's Debates, 279

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 honor, 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.

§ 869. The other part of the clause, which disqualifies persons holding any office under the United States from being members of either house during the 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 indifferent 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 blan-

[1] See Rawle on the Constitution, ch. 19; the Federalist, No. 56.

dishments of office and all the deadening weight of silent patronage. The executive will never be compelled to avow or to support any opinions. Its ministers may conceal or evade any expression of their opinions. It will seem to follow, when in fact it directs, the opinions of Congress. It will assume the air of a dependent instrument, ready to adopt the acts of the legislature, when in fact its spirit and its 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 have been safe to trust the heads of departments, as representatives, to the choice of the people, 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 have involved little danger and more searching jealousy and opposition, whereas it is now secret and silent, and from that very cause may become overwhelming.

§ 870. One other reason in favor 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 favorites, but from statesmen of high public character, talents, experience, and elevated services; from statesmen who had earned public favor and could command public confidence. At present, gross incapacity may be concealed under official forms, and ignorance silently escape by shifting the labors 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.

§ 871. 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

[1] See 1 Black. Comm. 165, 176.

re-eligible, and are entitled, if the people so choose, again to hold a seat in the house of commons, 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 everything.

§ 872. 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 interposed by the Constitution has been received with general approbation, and has been thought to have worked well during our experience under the national government.[3] 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

[1] 1 Black. Comm. 175, 176, Christian's Note, 39.

[2] Rawle on the Const. ch. 19, p. 187.

[3] 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.

some writers traced back to the same original blemish.[1] 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] 1 Wilson's Law Lect. 446 to 449.

CHAPTER XIII.

MODE OF PASSING LAWS. PRESIDENT'S NEGATIVE.

§ 873. 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.

§ 874. 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 commons; 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 the lords any power of framing new taxes for the subject. It is sufficient that they have a power of

[1] 1 Black. Comm. 169.

rejecting, if they think the commons too lavish or improvident in their grants.[1]

§ 875. 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 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.[3] 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 favorite measures of the commons, with a view to insure 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, have made it a standing order to reject upon sight all bills that are tacked to money bills.[4] Thus, the

[1] 1 Black. Comm. 169; De Lolme on Constitution, ch. 4, 8, p. 66, 84, 85, and note. [At the present time it is not conceded that the house of lords may even reject a money bill. See May, Constitutional History, ch. 7.]

[2] 2 Wilson's Law Lect. 161, 162, 163, citing Millar on Constitution, 398. But see 1 Wilson's Law Lect. 444, 445.

[3] 1 Black. Comm. 170, and Christian's Note (26).

[4] De Lolme on the Constitution, ch. 17, p. 381, 382.

privilege is maintained on one side and guarded against undue abuse on the other.

§ 876. 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 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 have 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.

§ 877. 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 might make it entirely acceptable to both houses.[3] Such a practical obstruction to the legislation of a free government would far

[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.

[3] 2 Elliot's Debates, 283, 284.

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.

§ 878. 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.[1] 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.

§ 879. 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.[2]

§ 880. What bills are properly "bills for raising revenue," in the sense of the Constitution, has been matter 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.[3] 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.[4] No one supposes that a bill to sell any of the

[1] 2 Elliot's Debates, 283, 284. [2] Id.

[3] 1 Tucker's Black. Comm. App. 261, and note.

[4] See Elliot's Debates, 283, 284. [Bills repealing duties, it has been claimed by 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.

§ 881. 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 subsequently be passed, in order to become a law; and 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 favor 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,

commons in Parliament, are money bills which the house of lords must not originate, amend, or reject. See May, Constitutional History, ch. 7.

This general subject was somewhat discussed in Congress in the year 1872.

The 42d Congress House passed a bill "to repeal existing duties on tea and coffee." The Senate substituted for it a bill containing a general revision, reduction, and repeal of laws imposing import duties and internal taxes, and sent the substituted bill to the House for concurrence. The House resolved that this substitution was "in conflict with the true intent and purpose of that clause of the Constitution which requires that all bills for raising revenue shall originate in the House of Representatives," and therefore ordered it to lie on the table. The Senate thereupon referred the subject to its Committee on Privileges and Elections, who reported that the House bill "was not a bill for raising revenue within the meaning of the Constitution, and therefore, while the Senate might have amended it so as to abolish duties altogether upon other articles, the Senate had no right to ingraft upon it, as it did in substance, an amendment providing that revenue should be collected upon other articles, though at a less rate than previously fixed by law. That amendment would have become a provision in the Act for raising revenue, because revenue at a certain rate would have been collected by the operation of the Act." This report was adopted by the Senate, but the subject did not again go before the House so as to afford opportunity for ascertaining whether its views and those of the Senate were or were not in all particulars entirely in accord.]

[1] Journal of the Convention, 97.

without any apparent struggle.[1] 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.[2]

§ 882. 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, namely, 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 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 connection 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.[3] And the patronage of the executive has also some tendency to create a counteracting influence in aid of its 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.[4] Yet in point of fact this negative of the king has not been once exercised since the year 1692,[5] 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

[1] Journal of the Convention, 195, 253, 254, 355.

[2] Journal of the Convention, 69, 96, 195, 253.

[3] The Federalist, No. 51.

[4] 1 Black. Comm. 154.

[5] De Lolme on Constitution, ch. 17, p. 390, 391; 1 Kent's Comm. Lect. 11, p. 226. [It was once exercised by Queen Anne in 1707.]

prerogative has become so odious that it has not been deemed safe to exercise it except upon the most pressing emergencies.[1] Probably both motives have alternately prevailed in regard to bills which were disagreeable to the crown;[2] 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 favorite 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.[3] 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.

§ 883. 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 recon-

[1] 1 Wilson's Law Lect. 448, 449; The Federalist, No. 73; Id. No. 69; 1 Kent's Comm. Lect. 11, p. 226. Mr. Burke, in his letter to the sheriffs of Bristol, (in 1777,) 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 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." [It may be accounted for perhaps in another way. By the theory of the British constitution, as now settled, the ministry under whose advice the king acts must be in accord with the majority in the house of commons, and possess its confidence; and whenever its votes demonstrate that they have lost that confidence, they must either resign or be dismissed, or they must advise a dissolution of the Parliament with a view to an appeal to the people. To attempt to retain power against adverse votes in the commons would of itself be regarded as unconstitutional; still more must it be so to attempt to control that majority through the royal veto. See Todd. Parl. Gov. I. 40; Cooley's Blackstone, I. 246, note.]

[2] 1 Tuck. Black. Comm. App. 255, 256; 1 Kent's Comm. Lect. 11, p. 226.

[3] See the reasoning in the Federalist, No. 73; Id. No. 51; 1 Wilson's Law Lect. 448, 449.

cilable with the spirit of deliberation and independence which distinguishes the councils of modern times. The French constitution of 1791, a labored 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]

§ 884. 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, it might gradually be stripped of all its authority, and become, what it is well known the governors of some States are, a mere pageant and shadow of magistracy.[3]

§ 885. 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.[4] 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 experi-

[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, Nos. 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.

[4] The Federalist, No. 73; 1 Wilson's Law Lect. 448, 449, 450.

ence 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 favor 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.[1] His view of them, if not more wise or more elevated, will at least be 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.

§ 886. Nor is there any solid objection to this qualified power.[2] 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 favor 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.[3] 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.[4] In the next place, there is no practical danger that this power would be much if any abused by the President. The supe-

[1] The Federalist, No. 73.
[2] 1 Tuck. Black. Comm. 225, 324; 1 Kent's Comm. Lect. 11, p. 225, 226.
[3] The Federalist, No. 73. [4] Id.

rior 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 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]

§ 887. 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.

§ 888. 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 of its own judgment.[4] 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

[1] The Federalist, No. 73. [2] Id. [3] Id. [4] Id.

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,[1] and to create a continued watchfulness as to the practical effect 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.[2] 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 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.

§ 889. 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.[3] 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,

[1] Rawle on the Constitution, ch. 6, p. 61, 62.

[2] Wilson's Law Lect. 449, 450; The Federalist, No. 73. [The veto power was used very freely in the administrations of Presidents Tyler and Johnson, and during the whole of the former important legislation was controlled by means thereof. Some attempt was made to abolish the power under the feeling excited thereby, but it did not meet with any very decided favor. Mr. Davis, during the existence of the Confederate States government, is said to have employed the veto power with great freedom, and to have exercised by that means a controlling authority in the Congress on all important measures. Foote's War of the Rebellion, 344.]

[3] Journal of Convention, 195, 253.

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 degrees, 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.[1] 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. 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.[2]

§ 890. 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.[3] 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

[1] The Federalist, No. 73.

[2] It is a remarkable circumstance in the history of Mr. Jefferson's opinions, that he was decidedly in favor of associating the judiciary with the executive in the exercise of the negative on laws, or of investing it separately with a similar power. 2 Jefferson's Corresp. 274; 2 Pitk. 283. At a subsequent period his opinion respecting the value and importance seems to have undergone extraordinary changes. [In the New York council of revision under the first constitution, the chancellor and justices of the supreme court were associated with the governor; but it did not prove a satisfactory arrangement.]

[3] Journal of the Convention, p. 220, 253, 254, 256.

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 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 favor 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 might, 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 be 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 further, it would endanger the very objects for which it is introduced into the Constitution.

§ 891. 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."

§ 892. 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 have effectually defeated the President's qualified negative in all the most important portions of legislation.[2]

§ 893. 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 intrusted with the executive power, were to prepare and frame 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,

[1] The original proposition in the convention was, that the bill should be returned by the President in *seven* days. It was subsequently altered to *ten* days by a vote of nine States against two. Journal of Convention, 220, 224, 225. [It has been held that the time specified will include days on which the legislature is not in session, if it has not finally adjourned. Opinions of Justices, 45 N. H. 607. But the day of presenting the bill for approval should be excluded. Ibid. Where on the tenth day the governor sent a bill with his objections to the house with which it originated, but the messenger, finding the house had adjourned for the day, returned it to the governor, who retained it, it was held that, to prevent the bill becoming a law, it should have been left with the proper officer of the house instead of being retained by the governor. *Harpending* v. *Haight*, 39 Cal. 189. As to when an approval is to be deemed complete, see *People* v. *Hatch*, 19 Ill. 283.]

[2] Journal of Convention, p. 220, 255.

in fact, exercised by a select assembly before it can be acted upon by the larger assembly of the citizens, or their representatives.[1] De Lolme 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.

§ 894. 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 the 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.[3]

§ 895. On the day appointed for the assembling of a new Congress, the members of each house meet in their separate

[1] De Lolme, Eng. Const. B. 2, ch. 4, p. 224, and note.

[2] De Lolme, Eng. Const. B. 2, ch. 4, p. 224, and note.

[3] 1 Tuck. Black. Comm. App. 229, note; 1 Black. Comm. 181; Jefferson's Manual, *passim*; 2 Wilson's Law Lect. 171 to 176.

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 admininistered 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.[1] 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 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

[1] Act of 1789, ch. 1.

is driven to defend itself in detail, on every leading motion or measure of the session.[1]

§ 896. 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 anything 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 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.

§ 897. On going into a committee of the whole house the

[1] Under President Washington and President John Adams the practice was to deliver speeches. President Jefferson discontinued this course, and substituted messages; and this practice has been since invariably followed.

speaker leaves the chair, and a chairman is appointed by him 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 time 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.

§ 898. 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 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 favor of the bill untimately, 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 favor.

§ 899. The two last stages of the bill, namely, 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 ardor 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.

§ 900. The bill, when thus transmitted to the other house, goes through similar forms. It is either rejected, committed, or concurred in, with or without amendments. If a bill is amended by the house to which it is 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 further 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]

§ 901. This review of the forms and modes of proceeding in the

[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; 2 Wilson's Law Lect. 171, 172, 173; Rawle on the Constitution, ch. 6, p. 60, etc.; and especially from the rules of both houses, and Jefferson's Manual (edition at Washington, 1828).

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 opportunites 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.

§ 902. 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.

§ 903. Yet, after all, the fabric may fall; for the work of man is perishable, and must forever 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 surren-

dered 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 Edmund Burke, "is the same; both exercise despotism over the better class of citizens; and the decrees are in the one what ordinances and arrêts are in the other. *The demagogue, too, and the court favorite are not unfrequently the same identical men, and always bear a close analogy.* And these have the principal power, each in their respective governments, favorites with the absolute monarch, and demagogues with the people, such as I have described."[1]

§ 904. 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.

[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.

§ 905. 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 debatable 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 ardor of opposition and the jealousy of rivals might well foster in those who may desire to defeat what they have no interest to approve.

§ 906. 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."

§ 907. 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 the 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 color 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, "to pay the debts and provide for the common defence and the general welfare."

§ 908. 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

[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. 4 Jefferson's Corresp. 306. 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. 2 Elliot's Debates, 170, 183, 195; 3 Elliot's Debates, 262; 2 Amer. Museum, 434; 3 Amer. Museum, 338. 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." 2 Elliot's Debates, 327, 328.

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 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.

§ 909. 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 powers 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.

§ 910. One of the most common maxims of interpretation is (as has been already stated), that, as an exception strengthens

[1] President Monroe's Message, 4th May, 1822, p. 32, 33.

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 authors of the Constitution.[1] It would be to charge them either with premeditated folly or premeditated fraud.

§ 911. On the other hand, construing this clause in connection 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]

§ 912. 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

[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 Tuck. Black. App. 231.

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, namely, 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.[1] But this circumstance will be found of very little weight, when the origin of the clause and its progress to its present state are traced in the proceedings in the convention. It will then appear that it was first introduced as an appendage to the power to lay taxes.[2] 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 connection in which it stands.[3] 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?

§ 913. 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,"[4] 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 foregoing

[1] Journ. of Convention, p. 356; Id. 494; 2 United States Law Journal, p. 264, April, 1826, New York. In the Federalist, No. 41, the circumstance 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.

[2] Journ. of Convention, p. 323, 324, 326.

[3] President Monroe's Message, 4th May, 1822, p. 32, 33.

[4] President Madison's Letter to Mr. Stevenson, 27 Nov. 1830.

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.

§ 914. 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 the 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 establishes 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

[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.

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 supersede and vacate.

§ 915. 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 unfavorable 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 were 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.

§ 916. But it does so happen, that, in point of fact, no such unfavorable 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 moneys 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 questions 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 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

[1] Mr. Madison himself, in his letter to Mr. Stevenson, Nov. 27, 1830, 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 its 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.

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.

§ 917. 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 there is no avowed connection 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."[2]

§ 918. It has been further 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

[1] 2 Elliot's Deb. 195.

[2] 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 Congres (printed in 1821), p. 285, 294, 307, 323 to 325, 354.

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 are destroyed by the exposition given to these general phrases." The conclusion deduced 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 vested 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]

§ 919. 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 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,

[1] Virginia Resolutions 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.

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.

§ 920. 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 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 moneys so raised, which indirectly produces the same result.[2] 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*.

§ 921. 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 re-

[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. 280, 281.

[2] 4 Elliot's Deb. 280, 281.

specting 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 powers are in distinct clauses, and do not touch taxation. No advocate for 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.

§ 922. 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.

§ 923. 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 appropriated 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

[1] See the Federalist, Nos. 21, 22, 30; 1 Elliot's Debates, 318.

[2] See the Federalist, No. 30 to 37.

to any government which has not some reference 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.

§ 924. 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 coextensive 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.

§ 925. 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 nowhere 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 warfare* 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 connection 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 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 moneys in the treasury.

§ 926. The argument in favor 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.[2] "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 anything they please to provide for the general welfare, but only to lay taxes for that purpose.

[1] See also 4 Elliot's Debates, 280, 281.

[2] Mr. Jefferson.

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 power 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]

§ 927. 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 stated conventions called to ratify the Constitution;[3] and it has been, on various occasions, adopted by Congress,[4] and may fairly be deemed that

[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 very 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 moneys is coextensive, 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, 344; 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.

[4] 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, 389 to 401, 411, 412, 426.

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*,[1] Mr. Chief Justice Marshall, in delivering the opinion of the court, said, "Congress is authorized to lay and collect taxes, etc., 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.[2]

§ 928. 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. 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."[3] 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."[4] When the first draft of the Constitution was prepared, in pursuance of the resolutions of the con-

[1] 9 Wheat. R. 1, 199.

[2] 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.

[3] Journ. of Convention, 68, 86, 87, 135, 136.

[4] Journ. of Convention, 181, 182, 208.

vention, 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.

§ 929. 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.[1] 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 by the United States.[2] 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 the 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."[3] 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.[4] 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

[1] Journ. of Convention, 261.
[2] Journ. of Convention, 277.
[3] Id.
[4] Id. 279, 280.

States, and shall have power to lay and collect taxes, duties, imposts, 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, etc.) 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, etc., 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 it is apparent that it was first brought forward in connection 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.[5]

§ 930. Besides, it is impracticable in grammatical propriety to separate the different parts of the latter clause. The words

[1] Journ. of Convention, 284. [2] Id. 291. [3] Journ. of Convention, 323, 324, 326.
[4] Id. 351, 356. [5] Journ. of Convention, 277.

are, "to pay the debts, *and* provide for the common defence," etc. "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;[1] 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 connection with it, (as this historical review establishes beyond any reasonable controversy,) they draw the other words, "and provide for the common defence," etc., with them into the same connection. On the other hand, if this connection be once admitted, it would be almost absurd to contend, that "to pay the debts" of the United States was a general phrase, 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 coextensive 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."[2]

[1] Journ. of Convention, 291. See also the Constitution, art. 6.

[2] Journal of Convention, 181, 182, 208. The letter of Mr. Madison to Mr. Steven-

§ 931. Having thus disposed of the question, what is the true interpretation of the clause, as it stands in the text of the

son 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 labor under a mistake, namely, 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 debts 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 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. Journal of Convention, p. 220, 257, 284, 291. 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 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 labor 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 apprehend-

Constitution, and ascertained that the power of taxation, though general as to the subjects to which it may be applied, is yet

ing 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 States, and as its general impotency became manifest. Examples of departure from the prescribed rule are too well known to require proof. The 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 a small pamphlet, entitled 'Considerations on the Bank of North America,' in which he endeavored to derive the power from the nature of the Union, in which the colonies were declared and became independent States; and also from the tenor 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.'

restrictive, as to the purposes for which it may be exercised; it next becomes matter of inquiry, what were the reasons for

"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 acceptance 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 immeasurable difference between the Constitution limited in its powers to the enumerated objects, and expanded 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, still 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, it is 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 parts 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 amendments, nine were proposed by the convention of Massachusetts, five by that of South Carolina, twelve by that of New Hampshire, 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 Rhode Island.

"Here are a majority of the States proposing amendments, in one instance thirty-

which this power was given, and what were the objections to which it was deemed liable.

§ 932. 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 from the imbecilities as well as the inequalities of the confederation.[1] Without such a power,

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 than 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 freeing 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 the progress of the discussions, not a single proposition was made in either branch of the legislature which referred to the phrase, as 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 welfare,' were not, at that time, deemed susceptible of any such construction as has since been applied to them.

"It may be thought, perhaps, due to the subject to advert to a letter of October 5, 1787, to Samuel Adams, and another of October 16th, of the 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 the 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 may 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.

[1] See the Federalist, Nos. 21, 30.

it would not be possible to provide for the support of the national 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 the 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]

§ 933. If, then, there is to be a real, effective, national government, there must be a power of taxation coextensive 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 the power should be restricted; its friends as strenuously contended that it was indispensable for the public safety, that it should be general.

§ 934. 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

[1] 1 Tuck. Black. Comm. App. 235 *et seq.*; Id. 244, 245.
[2] The Federalist, No. 30. [3] Id.

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 been found, that in the usual progress of things the necessities of a nation in every state of its existence are, at least, equal to its resources.[2] But, if a more favorable 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."[3] 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 already suggested) illimitable in their nature, so it is impossible safely to limit that capacity.[4]

[1] The Federalist, No. 31; Id. No. 30; Id. No. 21.

[2] The Federalist, No. 30.

[3] The Federalist, No. 21.

[4] 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.

§ 935. 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 the 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."[1] The 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 intrusted 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;[2] 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.[3]

[1] The Federalist, No. 31; 1 Elliot's Debates, 77, 78 to 89; Id. 91, 105, 112; Id. 293, 294 to 296; Id. 301, 302, 303; Id. 329 to 333; 2 Elliot's Debates, 52, 53, 208; 3 Elliot's Debates, 77 to 91; 1 Tuck. Black. Comm. App. 240; 2 Amer. Museum, 543, 544.

[2] 3 Amer. Museum, 423; 2 Elliot's Debates, 52, 53, 200, 206.

[3] See the Federalist, No. 30; 1 Elliot's Debates, 294; 1 Tucker's Black. Comm.

§ 936. 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.[1] Direct taxes were exceedingly unequal and difficult to adjust,[2] and could 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 and 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.[3] 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.[4] How is it possible that a government half supplied and half necessitous can 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 anything 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

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. Journal of the Convention, p. 274.

[1] The Federalist, No. 30; 1 Elliot's Debates, 303, 304; Id. 325, 326, 327; 2 Elliot's Debates, 198, 199, 204.

[2] The Federalist, No. 21; 1 Elliot's Debates, 81, 82; 2 Elliot's Debates, 105; Id. 199, 204, 236; 1 Tucker's Black. Comm. App. 234, 235, 236; 3 Dall. R. 171, 178.

[3] The Federalist, No. 41. See 1 Elliot's Debates, 303 to 306.

[4] The Federalist, Nos. 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.

good?[1] Who would lend to a 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.[2] 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 intrusted 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 founded 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.[3] 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.

§ 937. 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 possessed a large naval force, greatly endanger, if they did not wholly cut off, our supplies from this source.[4] 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

[1] The Federalist, No. 30.
[2] Id.
[3] The Federalist, No. 34.
[4] 3 Elliot's Debates, 290.

principal ports?[1] 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?

§ 938. There is another very important view of this 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 sea-coast, would be most mischievously encouraged.[2] 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 can never 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.

§ 939. In regard to the other part of the objection, founded on the dangers to the State governments from this general power of

[1] 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 advantages, 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.

[2] The Federalist, No. 35.

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.[1] In truth, no reasoning, 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.[2]

§ 940. But, waving 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 coextensive 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.[3]

§ 941. The remarks of the Federalist on this point are very full and cogent. "There is plainly," 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

[1] The Federalist, No. 31.

[2] The Federalist, Nos. 31, 32.

[3] The Federalist, No. 32. See *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 199 to 202. 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. 448. [*Dobbins* v. *The Commissioners of Erie County*, 16 Peters, S. C. R. 447.]

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 pre-existing right of sovereignty.[1]

[1] The Federalist, Nos. 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; *McCulloch* v. *State of Maryland*, 4 Wheaton's R. 316, 433 to 436; 9 Wheat. 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. [As to con-

§ 942. 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.[1]

§ 943. 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 fall 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 to 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 internal 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

current power of taxation in the States and the Federal government, see *United States* v. *Benzon*, 2 Cliff. 512.]

[1] The Federalist, Nos. 33, 36; 1 Elliot's Deb. 307, 308; Id. 321, 322.

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 forever changing and incapable of any precise ascertainment. Too much or too little would forever 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]

§ 944. 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 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 endeavored 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,

[1] The Federalist, No. 34; 1 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, Nos. 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.

as to discharge any other functions delegated to Congress. To suppose otherwise is to suppose the Union impracticable or mischievous.[1]

§ 945. 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 or the suggestions of fear, stimulated by discontent, or carried away by phantoms of the imagination.[3]

§ 946. But another extraordinary objection which shows how easily men may persuade themselves of 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 would pay but little in comparison with the Northern. It was refuted by unanswerable reasoning,[4] 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 fall with the most calamitous inequality on the Southern States. Nay, it has been seriously urged, that a single Southern State is burdened with the payment of more than half of the whole duties levied on foreign goods throughout the Union.

§ 947. 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 com-

[1] The Federalist, Nos. 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.

[3] 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.

[4] See Mr. Ellsworth's Speech, 3 American Museum, 338, 340.

mon resort to supply revenue.[1] 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.[2] An objection of a directly opposite character was also taken, namely, 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.[3] 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 be utterly prostrated.[4]

§ 948. 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 jealousy 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

[1] 1 Elliot's Debates, 90, 91.

[2] 1 Tuck. Black. Comm. App. 234 to 238; The Federalist, Nos. 12, 21, 36; 1 Elliot's Debates, 61, 62; 2 Elliot's Debates, 105; 3 Elliot's Debates, 77 to 91; 8 Journ. of Continent. Congress, 16th Dec. 1782, p. 203.

[3] 2 Elliot's Debates, 197 to 204; Id. 208, 232, 235; 3 Elliot's Debates, 77, 91.

[4] Ibid.

with a pale and ineffectual light, and then have departed forever to the land of shadows. There is so much candor 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 lesser evil, as a means of avoiding one more permanent and of greater magnitude."

§ 949. The language of the Constitution is, "Congress shall have power to lay and collect taxes, duties, imposts, and excises," etc. "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.

§ 950. 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.[2] In this sense they are

[1] 1 Tucker's Black. Comm. App. 246.

[2] 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.

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.[1] 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.[2] But it may be asked, if such was the intention, why were the subsequent 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.[3] 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.[4]

§ 951. 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 hereinbefore 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 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

[1] The Federalist, Nos. 21, 36; 1 Tuck. Black. Comm. 233, 238, 239; Smith's Wealth of Nations, B. 5, ch. 2, Pt. 2, art. 1 and 2, and App.

[2] *Loughborough* v. *Blake*, 5 Wheat. R. 317, 318, 319.

[3] Journal of Convention, 220.

[4] *Hylton* v. *United States*, 3 Dall. 171, 174.

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 ascertain 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.

§ 952. 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 sense. In its large sense, it is very nearly an equivalent to taxes, embracing all impositions or charges levied on persons or things.[4] 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.[5] 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 merchan-

[1] *Hylton* v. *United States*, 3 Dall. R. 171.

[2] 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.

[4] See the Federalist, No. 36.

[5] Smith's Wealth of Nations, B. 4, ch. 1, P. 3, B. 5, ch. 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.

dise.[1] 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."[2] There is another provision, that "No State shall, without the consent of Congress, lay any *duty of tonnage*," etc., 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,[3] but a duty on the tonnage 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 connection 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."[4] Another learned judge has said,[5] "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 will 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, etc.) embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importations only."[6]

[1] The Federalist, No. 30; 3 Elliot's Debates, 289.

[2] Mr. Madison is of opinion 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.

[3] 1 Black. Comm. 315; Hale on Customs, Harg. Law Tracts, p. 3, ch. 7, ch. 14, ch. 15.

[4] 1 Tucker's Black. Comm. App. 243.

[5] Mr. Justice Patterson in *Hylton* v. *United States*, 3 Dall. R. 171, 177.

[6] Mr. Justice Chase, Ibid. 174. See the Federalist, No. 36.

§ 953. "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 inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption.[1]

§ 954. 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," etc., is the language of that instrument.

§ 955. 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*,[4] said, "I am inclined to think that the direct taxes contemplated by the Constitution are *only* two, namely, 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 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, etc. 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, etc. I never entertained

[1] 1 Black. Comm. 318; 1 Tuck. Black. Comm. App. 341; Smith's Wealth of Nations, B. 5, ch. 2, 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 325.

[4] 3 Dall. R. 171. [See *Pacific Insurance Co.* v. *Soule*, 7 Wal. 444.]

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]

§ 956. In the year 1794, Congress passed an act[2] laying duties upon carriages for the conveyance of persons 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, etc., etc., and made the levy uniform throughout the United States. The constitutionality of the act was contested, in the case before stated,[3] 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 cases of doubt the rule of apportionment ought not to be favored, because it was matter of compromise, and in itself radically inde-

[1] The Federalist, Nos. 31, 36. [Since the case of *Hylton* v. *United States*, there has been little occasion to discuss the question what constitutes a *direct tax* in the constitutional sense. In *Pacific Insurance Company* v. *Soule*, 7 Wal. 444, it was decided that a tax imposed on the income of insurance companies was not a direct tax, but a duty or excise. And in *Veazie Bank* v. *Fenno*, 8 Wal. 533, a tax of ten per centum upon the circulation of State banks was held not a direct tax.]

[2] Act of 1794, ch. 45.

[3] 3 Dallas's Reports, 171.

fensible 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 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 $\frac{19}{100}$ parts, or $190; the share of Connecticut would be $\frac{7}{100}$ 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 $ 3.80. 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, namely, $ 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 on 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]

[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.

§ 957. Having endeavored 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 further 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 favored neighbors. 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 of manufactures. So that the general propriety of this clause is established by its intrinsic political wis-

dom, as well as by its tendency to quiet alarms and suppress discontents.[1]

§ 958. Two practical questions of great importance have arisen upon the construction of this clause, either standing alone, or in connection 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; 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 ardor. 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.

§ 959. 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.

§ 960. 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

[1] See 4 Elliot's Deb. 235, 236.

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.

§ 961. 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 these duties, *as incidentally*, and to that extent to give protection to the manufacturer. But the right is denied to convert what is here denominated 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. Con-

[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.

gress 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]

§ 962. 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-laws, or the road laws of the States. Congress is empowered to lay taxes for revenue, it is true; but there is no power to encourage, protect, or meddle with manufactures.[2]

§ 963. 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, namely, 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 au-

[1] This is extracted from the address of the Free-Trade Convention, at Philadelphia, in October, 1831, p. 33, 34, attributed to the pen of Mr. Attorney-General Berrien. Mr. Senator Hayne, in his Speech 9th 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.

[2] Col. Drayton's Oration, at Charleston, 4th of July, 1831, p. 13, 14.

thority. 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.

§ 964. The argument in favor 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 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.

§ 965. 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 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; for 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;

[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.

sometimes as a bounty upon an infant manufacture or agricultural 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]

§ 966. 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?

§ 967. 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 objects is it limited by the terms of the Constitution?

§ 968. 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 substantive, 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.

§ 969. 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 wel-

[1] See Smith's Wealth of Nations, B. 5, ch. 2, art. 4.

fare, 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?

§ 970. 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 welfare 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

[1] See Hamiliton's Report on Manufactures in 1791; 1 Hamilton's Works, (edit. 1810,) 230; 2 Elliot's Debates, 344.

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?

§ 971. 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 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 coextensive 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?

§ 972. 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]

§ 973. So that, whichever construction of the power to lay taxes is adopted, the same conclusion is sustained, 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.[2]

§ 974. 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

[1] See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828.

[2] 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. [See *post*, § 1073.]

hereafter resumed in examining the nature and extent of the power to regulate commerce.

§ 975. The other question is, 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.

§ 976. The reasoning, upon which the opinion adverse to the authority of Congress to make appropriations not within the scope of the enumerated powers, is maintained, has been already, in a great measure, stated 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

[1] See Virginia Resolutions, 7th Jan. 1800; Mr. Madison's Letter to Mr. Speaker Stevenson, 27th Nov. 1830. See also 4 Elliot's Deb. 280, 281; 2 Elliot's Deb. 344.

jealousy, and, as such, resisted in and out of the State conventions.[1]

§ 977. The argument in favor 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);[2] 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 of the text, and the practice of the government, to sustain it against an artificial doctrine set up on the other side.

§ 978. 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

[1] The following summary, taken from President Madison's Veto Message on the Bank Bonus Bill for Internal Improvements, 3d March, 1817, (4 Elliot's Debates, 280, 281,) contains a very clear statement of the reasoning. "To refer the power in question" (that is, of constructing roads, canals, and other internal improvements) "to the clause, to provide for the common defence 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 superseded 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, anything 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 be 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 Codfishery Bill in 1792. 4 Elliot's Debates, 236.

[2] Mr. Madison's Letter to Mr. Speaker Stevenson, 27th Nov. 1830.

of the Treasury[1] 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 welfare, 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 welfare, 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 welfare. A power to *appropriate money* with this latitude, which is granted in express terms,

[1] Mr. Hamilton.

would not carry a power to do any other thing not authorized in the Constitution, either expressly or by fair implication.[1]

§ 979. 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 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,—

§ 980. "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 none 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 the other in the same sentence,) it seems to be impossible to give to the latter any other construction than that contended for. Congress shall have power to lay and collect taxes, duties, imposts, and excises. For what purpose? To pay the debts,

[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, of learning, of a university, of new inventions, of agriculture, of 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.

and provide for the common defence and general welfare of the United States; an arrangement and phrascology 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 instances; 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.

§ 981. "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 remaining 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 burden 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.

§ 982. "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 excises, — 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.

§ 983. "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 a 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 institution, 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 everything into confusion.

§ 984. "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.

§ 985. "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.

§ 986. "The grant consists, as heretofore observed, of a twofold 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 heartfelt 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.

§ 987. "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 welfare' 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.

§ 988. "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 might 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 favored a measure might give to the power 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 appro-

priation 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.

§ 989. "Many considerations of great weight operate in favor 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 expenditures 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 favor 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 coextensive 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.

§ 990. "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."

§ 991. 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,

[1] It would be impracticable to enumerate all these various objects of appropriation in detail. Many of them will be found enumerated in President Monroe's Exposition,

but upon discussion, Congress has gone the length of making appropriations to aid destitute foreigners and cities laboring 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.[1] An illustration equally forcible of a 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.[2]

§ 992. 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.

§ 993. In order to prevent the necessity of recurring again to the subject of taxation, it seems desirable to bring together, in this connection, 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,

of 4th 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. 524,) he manifestly maintained it. In his Message to Congress, (2 Dec. 1806, Wait's State Papers, 457, 458,) he seems to have denied it. In signing the bill for the Cumberland Road, on 29th March, 1806, Act of 1806, ch. 19, 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, 27th May, 1830, 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, 10th Feb. 1831. See 1 Kent, Comm. Lect. 12, p. 250, 251; Sergeant's Const. Law, ch. 28, p. 311 to 314; Rawle on the Const. ch. 9, p. 104; 2 United States Law Jour. April, 1826, p. 251, 264 to 282.

[1] See Act of 12th Feb. 1794, ch. 2; Act of 8th May, 1812, ch. 79; 4 Elliot's Debates, 240.

[2] See Act of Congress, of 16th 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 Hon. Mr. Grimké, 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.

hereinbefore directed to be taken." This includes poll-taxes and land-taxes, as has been already remarked.

§ 994. 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 relative value and productiveness to white labor. 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 burden with the white population.[1]

§ 995. In respect to direct taxes on land, the difficulties of making a due apportionment, so as to equallze the burdens 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, etc., in each State; which is precisely the rule adopted in the Constitution.

§ 996. 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 State contributions, has any pretension to being deemed a just representative of that wealth. If we compare the

[1] The Federalist, Nos. 21, 36, 54; 3 Dall. R. 171, 178; 1 Tucker's Black. Comm. App. 236, 287; 2 Elliot's Debates, 208 to 210; 3 Elliot's Debates, 290; 3 Amer. Museum, 424; 2 Elliot's Debates, 338.

[2] 8 Journal of Continental Congress, 184, 188, 198.

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.

§ 997. 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 deliberately made, is open to many errors and inequalities, which become the fruitful source of discontents, controversies, and heartburnings. 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 everything 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.[3]

[1] The Federalist, No. 21.
[2] Id.
[3] 1 Black. Comm. 312, 313.

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.[1] In short, it may be 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.[2] 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.[3]

§ 998. 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,[4] 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

[1] See the remarks of Mr. Justice Patterson, in *Hylton* v. *United States*, 3 Dall. 171, 178, 179.

[2] 1 Tuck. Black. Comm. App. 234, 235, and note; Id. 236, 237; 3 Dall. R. 178, 179; Federalist, Nos. 21, 36; 2 Elliot's Deb. 208 to 210.

[3] [Another was laid on the breaking out of the civil war in 1861.]

[4] Act of 27th Feb. 1815, ch. 213.

had such a right.[1] 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 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.

§ 999. "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 coextensive 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.

§ 1000. "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.'

[1] *Loughborough* v. *Blake*, 5 Wheaton's R. 317; Sergeant on Const. Law, ch. 28, p. 290; 1 Kent, Comm. Lect. 12, p. 241.

§ 1001. "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 has 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.

§ 1002. "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 hereinbefore directed to be taken.'

§ 1003. "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.'

§ 1004. "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 hereinbefore directed to be taken,' but 'unless in proportion to' that census. Now, this proportion may be applied to the District or the Territories. If the 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 the information is acquired by which a direct tax may be imposed on the District and Territories, 'in proportion to the census or enumeration' which the Constitution directs to be taken.

§ 1005. "The standard, then, by which direct taxes must be laid is applicable to this District, and will enable Congress to apportion on its just and equal share of the burden with the same accuracy as on the respective States. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to.

§ 1006. "But the argument is presented in another form, in which its refutation is more difficult. It is urged against this construction, that it would produce the necessity of extending direct taxation to the District and Territories, which would not only be inconvenient, but contrary to the understanding and practice of the whole government. If the power of imposing direct taxes be coextensive with the United States, then it is contended that the restrictive clause, if applicable to the District and Territories, requires that the tax should be extended to them, since to omit them would be to violate the rule of proportion.

§ 1007. "We think a satisfactory answer to this argument may be drawn from a fair comparative view of the different clauses of the Constitution which have been recited.

§ 1008. "That the general grant of power to lay and collect taxes is made in terms which comprehend the District and the Territories, as well as the States, is, we think, incontrovertible. The subsequent clauses are intended to regulate the exercise of this power, not to withdraw from it any portion of the community. The words in which those clauses are expressed import this intention. In thus regulating its exercise, a rule is given in the second section of the first article for its application to the respective States. That rule declares how direct taxes upon the States shall

be imposed. They shall be apportioned upon the several States according to their numbers. If, then, a direct tax be laid at all, it must be laid on every State, conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any State from its due share of the burden. But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District or the Territories. The words of the ninth section do not in terms require that the system of direct taxation, when resorted to, shall be extended to the Territories, as the words of the second section require that it shall be extended to all the States. They therefore may, without violence, be understood to give a rule when the Territories shall be taxed, without imposing the necessity of taxing them. It could scarcely escape the members of the convention that the expense of executing the law in a Territory might exceed the amount of the tax. But, be this as it may, the doubt created by the words of the ninth section relates to the obligation to apportion a direct tax on the Territories, as well as the States, rather than to the power to do so.

§ 1009. "If, then, the language of the Constitution be construed to comprehend the Territories and District of Columbia as well as the States, that language confers on Congress the power of taxing the District and Territories as well as the States. If the general language of the Constitution should be confined to the States, still, the sixteenth paragraph of the eighth section gives to Congress the power of exercising 'exclusive legislation in all cases whatsoever within this District.'

§ 1010. "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.

§ 1011. "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.

§ 1012. "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."

§ 1013. The next clause in the Constitution is: "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."

§ 1014. 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 favor 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 means result from agricultural exports. In others, a great portion is derived from other sources; from external fisheries, from freights, and from the profits of commerce in its largest extent. The burden 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 indirectly 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.[2] 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.[3]

§ 1015. The first part of the clause was reported in the first draft of the Constitution. But it did not pass 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.[4] It then passed by a vote of seven States against four.[5] Subsequently the remaining parts of the clause were proposed by re-

[1] Rawle on the Constitution, ch. 10, p. 115, 116. [See *Aguirre* v. *Maxwell*, 3 Blatch. 140.]

[2] Journ. of Convention, 293, 294; Sergeant on Const. Law, ch. 28, p. 346; *United States* v. *Brig William*, 2 Hall's Law Journ. 255, 259, 260; Rawle on the Const. ch. 10, p. 116; 1 Jefferson's Corresp. 104 to 106, 112.

[3] Reeves on Shipping, p. 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.

[4] Journ. of Convention, 222, 275. [5] Id. 275, 276.

port of a committee, and they appear to have been adopted without objection.[1] 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.[2] The prohibition extends not only to exports, but to the exporter. Congress can no more rightfully tax the one than the other.[3]

§ 1016. 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," etc., "shall lay imposts or duties on imports." The clause was then amended by adding "or exports," not, however, without opposition, — six States voting in the affirmative, and five in the negative;[4] 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.[5] 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.[6] 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

[1] Journ. of Convention, 301, 318; Id. 377, 378.
[2] 1 Tuck. Black. Comm. App. 252, 253; Id. 294.
[3] *Brown* v. *Maryland*, 12 Wheat. R. 449.
[4] Journ. of Convention, 227, 303.
[5] Id. 303, 304.
[6] Journ. of Convention, 359, 380, 381. See 2 American Museum, 534; Id. 540.

petty warfare of regulation is thus prevented, which would rouse resentments and create dissensions, to the ruin of the harmony and amity of the States. The power to enforce their inspection 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.[1]

§ 1017. Inspection laws are not, strictly speaking, regulations of commerce, though they may have a remote and considerable influence on commerce. The object of inspection laws is to improve the quality of articles produced by the labor 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 everything 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, etc., 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 may be controlled by Congress when they interfere with their acknowledged powers.[2] 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," etc., etc. 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.[3] The power to lay duties and imposts on imports and exports, and to lay a tonnage duty, is doubtless properly con-

[1] 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.

[2] *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 203 to 206, 210, 235, 236, 311; *Brown* v. *Maryland*, 12 Wheat. R. 419, 438, 439, 440.

[3] The Federalist, Nos. 7, 22.

sidered a part of the taxing power, but it may also be applied as a regulation of commerce.[1]

§ 1018. 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, etc., by bale or package, or of wine, rum, etc., etc., 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.[3] 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.

§ 1019. "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 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 favor of every legislative act, and that the whole burden of proof lies on those who deny its constitutionality. The plaintiffs in error take the burden on 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.'

[1] *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 199, 200, 201; *Brown* v. *Maryland*, 12 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.

§ 1020. "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 connection 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 on 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 after 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 that 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 on 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 favor 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.

§ 1021. "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 exports' 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 connections 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.

§ 1022. "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 neces-

sarily produce countervailing measures on the part of those States whose situation was less favorable 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.

§ 1023. "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.

§ 1024. "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.

§ 1025. "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 requires 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 overland 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.

§ 1026. "The counsel for the defendant in error have endeavored 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 sell by 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 pedler. He may introduce articles, as gunpowder, 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.

§ 1027. "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 consequently 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 pedler. 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 gunpowder 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 be 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.

§ 1028. "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 further than to prevent the States from doing that which it was the great object of the Constitution to prevent.

§ 1029. "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.

§ 1030. "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 the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

§ 1031. "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]

§ 1032. 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.

§ 1033. In the year 1818, the State of Maryland passed an act, lay-

[1] [That the term *import*, as employed in the clause of the Constitution under examination, does not refer to articles imported from one State into another, but only to articles imported from foreign countries into the United States, see *Woodruff* v. *Parham*, 8 Wall. 123; *Hinson* v. *Lott*, Id. 148.

That goods imported from foreign countries, after having been sold by the importer, are subject to State taxation, even though still in the original packages, see *Pervear* v. *Commonwealth*, 5 Wall. 479; *Waring* v. *The Mayor*, 8 Wall. 110.]

ing 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.[1] The reasoning of the Supreme Court on this subject was as follows: —

§ 1034. "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 even 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.

§ 1035. "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

[1] *M'Culloch* v. *State of Maryland*, 4 Wheat. R. 316; 1 Kent's Comm. Lect. 19, p. 398; Id. 401.

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. 2d. 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.

§ 1036. "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.

§ 1037. "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.

§ 1038. "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 coextensive 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 everything 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.

§ 1039. "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.

§ 1040. "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.

§ 1041. "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;[1] that there is a plain repugnance in conferring on one gov-

[1] [A very striking illustration of this truth is afforded by the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, in which taxation imposed upon State banks and their circulation

ernment 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.

§ 1042. "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 mail, 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 claim the right to extend State taxa-

for the very purpose of destruction was held not unconstitutional. The case of imposts levied not primarily for the purposes of revenue, but in order to aid home industry by checking importations, may also be referred to.]

tion 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 tenth section of the first article of the Constitution; that, with respect to everything 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."

§ 1043. "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.

§ 1044. "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]

§ 1045. 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

[1] The doctrine was again re-examined by the Supreme Court in a later case, and deliberately reaffirmed. *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, per Mr. Chief Justice Marshall. [See also *Bank of Commerce* v. *New York*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *The Bank* v. *The Mayor*, 7 Wall. 16; *Bank* v. *The Supervisors*, 7 Wall. 26.

The general principles declared in *M'Culloch* v. *Maryland* were again applied in *Dobbins* v. *Commissioners of Erie Co.*, 16 Pet. 448. It was there held that a State could not levy a tax upon the compensation allowed by the United States to one of its officers, which compensation, it is to be assumed, was no more than the services were worth, and no more than would be sufficient to secure a diligent performance of the official duties. And it has also been held competent for Congress to provide that banks organized under its enactments may be taxed by the States to a certain extent and in a particular way, and not otherwise. *Van Allen* v. *Assessors*, 3 Wall. 573; *People* v. *Commissioners*, 4 Wall. 244; *Bradley* v. *People*, 4 Wall. 459.

But State taxation of a Federal instrumentality, as, for instance, of a railroad which is employed by the government for its purposes, is not impliedly prohibited where it does not impair the usefulness or capability of such instruments to serve the government. *Thomson* v. *Pacific Railroad*, 9 Wall. 579. See *National Bank* v. *Commonwealth*, 9 Wall. 353.

On the other hand, and for the same reasons, the Supreme Court has declared it incompetent for the United States to impose a tax upon the salary of a State officer. "If the means and instrumentalities employed by [the Federal] government to carry into operation the powers granted to it are necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers for like reasons equally exempt from Federal taxation? Their un-

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 evidence of 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 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?

§ 1046. "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 unburdened exercise of which more deeply affects every member of our republic. In war, when the honor, 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 antici-

impaired existence is as essential in the one case as in the other." *The Collector* v. *Day*, 11 Wall. 127.

And the State courts, upon the reasoning in *M'Culloch* v. *Maryland*, have held that stamp duties could not be imposed upon State process. *Warren* v. *Paul*, 22 Ind. 279; *Jones* v. *Estate of Keep*, 19 Wis. 369; *Fifield* v. *Close*, 15 Mich. 505; *Union Bank* v. *Hill*, 3 Cold. 325; *Smith* v. *Short*, 40 Ala. 796.

Nor upon the tax deeds of a State. *Sayles* v. *Davis*, 22 Wis. 225.

Nor upon the official bonds of a State officer. *State* v. *Gaston*, 32 Ind. 1.

Some of these cases are referred to with approbation by Mr. Justice Clifford, in deciding the case of *Day* v *Buffington*. See American Law Review for Oct. 1871, p. 176.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, it was held that Congressional taxation of State banks of issue to an extent that would put an end to their existence was constitutional, notwithstanding it was imposed for that express purpose and not for revenue. And in *Crandall* v. *Nevada*, 6 Wall. 35, a State tax upon carriers of passengers, of so much for each passenger carried out of the State, was held void, because if the power existed to impose it, it might be exercised to an extent that would preclude the government from transporting its troops through the State by the usual modes, or its citizens from visiting the Capitol or the Federal offices, where the State line must be crossed for the purpose. And See *Minot* v. *Philadelphia*, &c., R. R. Co., 2 Abb. U. S. 323.]

pated 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 anything 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 burden the exercise of this power at their discretion?

§ 1047. "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 burdened, impeded, if not arrested, by any of the organized parts of the confederacy.

§ 1048. "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 undoubtedy 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.

§ 1049. "This subject was brought before the court in the case of *M'Culloch* v. *The State of Maryland*,[1] when it was thoroughly

[1] 4 Wheaton, 316.

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 everything 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, burden, 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 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.

§ 1050. "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 connection 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 govern-

ment, 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 burden on the operations of government. It may be carried to an extent which will arrest them entirely.

§ 1051. "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 connection 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 burdens. 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 connection between the borrower and the lender is dissolved. It is no burden 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 exhibit-

ing our view of the sentiments expressed on this subject by the authors of that work.

§ 1052. "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."

§ 1053. 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 own constituents; and such taxes must be uniform.[2] 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.[3]

[1] *Providence Bank* v. *Billings*, 4 Peters's R. 514.

[2] *M'Culloch* v. *Maryland*, 1 Wheat. R. 316, 435.

[3] [See, however, *Thompson* v. *Pacific Railroad*, 9 Wall. 579; *National Bank* v. *Commonwealth*, 9 Wall. 353.]

APPENDIX.

APPENDIX.

WHILE this work was passing through the press, President Jackson's Proclamation of the 10th of December, 1832, concerning the [then] 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 the 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 most important passages, as among the 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 the 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' two acts 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 case 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 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 South Carolina 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 free 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 ab-

solved from all further obligation to maintain or preserve their political connection with the people of the other States, and will forthwith proceed to organize a separate government, and do all other acts and things which sovereign and independent states may of right do:

"And whereas, the said ordinance prescribes to the people of South Carolina 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 favor of Heaven, to a state of prosperity at home and high consideration abroad rarely, if ever, equalled in the history of nations. To preserve this bond of our political existence from destruction, to maintain inviolate this state of national honor 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 and 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 anything will be yielded to reasoning and remonstrance, perhaps demand, and will certainly justify, a full exposition to South Carolina and the nation of the views I entertain 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 are closed against an application to review it, both judges and jurors being sworn to decide in its favor. 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, anything 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 port of Charleston, there would be a clear constitutional objection to their coellction in every other port, and no revenue could be collected anywhere; 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 more unequal in their operation than any of the laws now complained of; but fortunately none of those States discovered that they had the right now claimed by South Carolina. The war into which we were forced to support the dignity of the nation and the rights of our citizens might have ended in defeat and disgrace, instead of victory and honor, 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 of South Carolina belongs the invention; and upon the citizens of that State will unfortunately fall 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 of 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 a 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 of 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, is, '*to 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 of 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 the 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 this doctrine, and you give to the States an uncontrolled right 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 can be 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 intrusted?

"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 and 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 of 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 you 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 fellow-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 laws for raising a 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, anything in the constitution and laws 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, and 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 of 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 the United States extend to cases arising under the laws of the United States; 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 case 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 a 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 of the United States, not representatives of the particular 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 of 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*, and 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 are not a nation; because it would be a solecism to contend

that any part of a nation might dissolve its connection 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 penalities 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 that 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 carry its powers into effect, and under this grant provision has been made for punishing acts which obstruct the due administration of the laws.

"It would seem superfluous to add anything 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 part, 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 States and to laws made in conformity with the powers 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 of our political character (as has here been shown for another 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 be 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 labored 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 be 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 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 might 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."

[This document is understood to have been prepared by that eminent jurist, Edward Livingston. Hunt's Life of Livingston, 371; Parton's Life of Jackson, III. 406. It will not be inappropriate to place beside it extracts from the Inaugural Address of President Lincoln, covering the same ground: —

"It is seventy-two years since the first inauguration of a President under our national Constitution. During that time fifteen different and greatly distinguished citizens have, in succession, administered the executive branch of the government. They have conducted it through many perils, and generally with great success. Yet, with all this scope for precedent, I now enter upon the same task, for the brief constitutional term of four years, under great and peculiar difficulty. A disruption of the Federal Union, heretofore only menaced, is now formidably attempted.

"I hold that, in contemplation of universal law and of the Constitution, the union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure forever, it being impossible to destroy it, except by some action not provided for in the instrument itself.

"Again, if the United States be not a government proper, but an association of States in the nature of the contract merely, can it, as a contract, be peaceably unmade by less than all the parties who made it? One party to a contract may violate it, break it, so to speak, but does it not require all to lawfully rescind it?

"Descending from these general principles, we find the proposition that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association, in 1774. It was matured and continued by the Declaration of Independence, in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation, in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution was '*to form a more perfect union.*'

"But if destruction of the Union by one, or by a part only, of the States, be lawfully possible, the Union is less perfect than before, the Constitution having lost the vital element of perpetuity.

"It follows, from these views, that no State, upon its own mere motion, can lawfully get out of the Union; that *resolves* and *ordinances* to that effect are legally void; and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to circumstances.

"I therefore consider that, in view of the Constitution and the laws, the Union is unbroken, and, to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the

States. Doing this I deem to be only a simple duty on my part, and I shall perform it, as far as practicable, unless my rightful masters, the American people, shall withhold the requisite means, or, in some authoritative manner, direct the contrary. I trust this will not be regarded as a menace, but only as a declared purpose of the Union that it *will* constitutionally defend and maintain itself.

"In doing this there need be no bloodshed or violence; and there shall be none, unless it be forced upon the national authority. The power confided to me will be used to hold, occupy, and possess the property and places belonging to the government, and to collect the duties and imposts; but, beyond what may be necessary for these objects, there will be no invasion, no using of force against or among the people anywhere. Where hostility against the United States, in any interior locality, shall be so great and universal as to prevent competent resident citizens from holding the Federal offices, there will be no attempt to force obnoxious strangers among the people for that object. While the strict legal right may exist in the government to enforce the exercise of these offices, the attempt to do so would be so irritating, and so nearly impracticable with all, I deem it better, for the time, to forego the uses of such offices.

"The mails, unless repelled, will continue to be furnished in all parts of the Union. So far as possible the people everywhere shall have that sense of perfect security which is most favorable to calm thought and reflection. The course here indicated will be followed, unless current events and experience shall show a modification or change to be proper, and in every case and exigency my best discretion will be exercised, according to circumstances actually existing, and with a view and a hope of a peaceful solution of the national troubles and the restoration of fraternal sympathies and affections.

"That there are persons in one section or another who seek to destroy the Union at all events, and are glad of any pretext to do it, I will neither affirm or deny; but if there be such, I need address no word to them. To those, however, who love the Union may I not speak?

"Before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories, and its hopes, would it not be wise to ascertain precisely why we do it? Will you hazard so desperate a step while there is any possibility that any of the ills you fly from have no real existence? Will you, while the certain ills you fly to are greater than all the real ones you fly from, — will you risk the commission of so fearful a mistake?

"All profess to be content in the Union if all constitutional rights can be maintained. Is it true, then, that any right, plainly written in the Constitution, has been denied? I think not. Happily, the human mind is so constituted that no party can reach to the audacity of doing this? Think, if you can, of a single instance in which a plainly written provision of the Constitution has ever been denied. If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution, — certainly would if such right were a vital one. But such is not our case. All the vital rights of minorities and of individuals are so plainly assured to them by affirmations and negations, guaranties and prohibitions, in the Constitution, that controversies never arise concerning them. But no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate, nor any document of reasonable length contain, express provisions for all possible questions. Shall fugitives from labor be surrendered by national or by State authority? The Constitution does not expressly say. *May* Congress prohibit slavery in the Territories? The Constitution does not expressly say. *Must* Congress protect slavery in the Territories? The Constitution does not expressly say.

"From questions of this class spring all our constitutional controversies, and we divide upon them into majorities and minorities. If the minority will not acquiesce, the

majority must, or the government must cease. There is no alternative; for continuing the government is acquiescence on one side or the other. If a minority in such case will secede rather than acquiesce they make a precedent which, in turn, will divide and ruin them; for a minority of their own will secede from them whenever a majority refuses to be controlled by such minority. For instance, why may not any portion of a new confederacy, a year or two hence, arbitrarily secede again, precisely as portions of the present Union now claim to secede from it? All who cherish disunion sentiments are now being educated to the exact temper of doing this.

"Is there such perfect identity of interests among the States to compose a new union, as to produce harmony only, and prevent renewed secession?

"Plainly the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

"I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decision must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.

"Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes. One section of our country believes slavery is *right*, and ought to be extended, while the other believes it is *wrong*, and ought not to be extended. This is the only substantial dispute. The fugitive slave clause of the Constitution and the law for the suppression of the foreign slave-trade are each as well enforced, perhaps, as any law ever can be in a community where the moral sense of the people imperfectly supports the law itself. The great body of the people abide by the dry legal obligation in both cases, and a few break over in each. This, I think, cannot be perfectly cured; and it would be worse in both cases *after* the separation of the sections than before. The foreign slave-trade, now imperfectly suppressed, would be ultimately revived without restriction in one section; while fugitive slaves, now only partially surrendered, would not be surrendered at all by the other.

"Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them. A husband and wife may be divorced, and go out of the presence and beyond the reach of each other, but the different parts of our country cannot do this. They cannot but remain face to face, and intercourse, either amicable or hostile, must continue between them. Is it possible, then, to make that intercourse more advantageous *after* separation than *before*? Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens than laws can among friends? Suppose you go to

war, you cannot fight always; and when, after much loss on both sides, and no gain on either, you cease fighting, the identical old questions, as to terms of intercourse, are again upon you.

"This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government they can exercise their *constitutional* right of amending it, or their revolutionary right to dismember or overthrow it. I cannot be ignorant of the fact that many worthy and patriotic citizens are desirous of having the national Constitution amended. While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject, to be exercised in either of the modes prescribed in the instrument itself; and I should, under existing circumstances, favor rather than oppose a fair opportunity being afforded the people to act upon it. I will venture to add, that to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves, instead of only allowing them to take or reject propositions originated by others, not especially chosen for the purpose, and which might not be precisely such as they would wish to either accept or refuse. I understand a proposed amendment to the Constitution — which amendment, however, I have not seen — has passed Congress, to the effect that the Federal government shall never interfere with the domestic institutions of the States, including that of persons held to service. To avoid misconstruction of what I have said, I depart from my purpose not to speak of particular amendments so far as to say that, holding such a provision now to be implied constitutional law, I have no objection to its being made express and irrevocable.

"The Chief Magistrate derives all his authority from the people, and they have conferred none upon him to fix terms for the separation of the States. The people themselves can do this also, if they choose; but the executive, as such, has nothing to do with it. His duty is to administer the present government, as it came to his hands, and to transmit it, unimpaired by him, to his successor.

"Why should there not be a patient confidence in the ultimate justice of the people. Is there any better or equal hope in the world? In our present differences is either party without faith of being in the right? If the Almighty Ruler of Nations, with his eternal truth and justice, be on your side of the North, or on yours of the South, that truth and that justice will truly prevail, by the judgment of this great tribunal of the American people.

"By the frame of the government under which we live, this same people have wisely given their public servants but little power for mischief; and have, with equal wisdom, provided for the return of that little to their own hands at very short intervals. While the people retain their virtue and vigilance, no administration, by any extreme of weakness or folly, can very seriously injure the government in the short space of four years.

"My countrymen, one and all, think calmly and *well* upon this whole subject. Nothing valuable can be lost by taking time. If there be an object to hurry any of you, in hot haste, to a step which you will never take *deliberately*, that object will be frustrated by taking time. Such of you as are now dissatisfied still have the old Constitution unimpaired, and, on the sensitive point, the laws of your own framing under it; while the new administration will have no immediate power, if it would, to change either. If it were admitted that you who are dissatisfied hold the right side in the dispute, there still is no single good reason for precipitate action. Intelligence, patriotism, Christianity, and a firm reliance on Him who has never yet forsaken this favored land, are still competent to adjust, in the best way, all our present difficulty.

"In *your* hands, my dissatisfied fellow-countrymen, and not in *mine*, is the momentous issue of civil war. The government will not assail *you*. You can have no conflict without being yourselves the aggressors. *You* have no oath registered in heaven

to destroy the government, while I shall have the most solemn one to 'preserve, protect, and defend it.'

"I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break, our bonds of affection. The mystic chords of memory, stretching from every battle-field and patriot grave to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."]

END OF VOL. I.

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