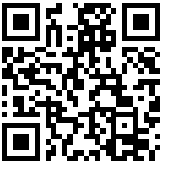

COMMENTARIES

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.,

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

IN THREE VOLUMES.

"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.

VOLUME I.

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TO THE

HONORABLE JOHN MARSHALL, LL. D.,

CHIEF JUSTICE OF THE UNITED STATES OF AMERICA.

SIR,

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

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

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

I am but too sensible, that to some minds the time may not seem yet to have arrived, when language, like this, however true, should meet the eyes 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 labours, 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 labours must soon belong exclusively to history?

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

I am with the highest respect,

affectionately your servant,

JOSEPH STORY.

Cambridge, January, 1833.

PREFACE.

I now offer to the public another portion of the labours devolved on me in the execution of the duties of the Dane Professorship of Law in Harvard University. The importance of the subject will hardly be 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 labour, and dry research, of which it is scarcely possible for the general reader to form any adequate estimate. Many of the materials lay loose and scattered; and were to be gathered up among pamphlets and discussions of a temporary character; among obscure private and public documents; and from collections, which required an exhausting diligence to master their contents, or to select from unimportant masses, a few facts, or a solitary argument. Indeed, it required no small labour, even after these sources were explored, to bring together the irregular fragments, and to form them into groups, in which they might illustrate and support each other.

From two great sources, however, I have drawn by far the greatest part of my most valuable materials. These are, The Federalist, an incomparable commentary of three of the greatest statesmen of their age; and the extraordinary 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 favour. Topics, therefore, having a natural connexion, are sometimes separated; and illustrations appropriate to several important points, are sometimes presented in an incidental discussion. I have transferred into my own pages all, which seemed to be of permanent importance in that great work; and have thereby endeavoured to make its merits more generally known.

The reader must not expect to find in these pages any novel views, and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts. My object will be sufficiently attained, if I shall have succeeded in bringing before the reader the true view of its powers maintained by its founders and friends, and confirmed and illustrated by the actual practice of the government. The expositions to be found in the work are less to be regarded, as my own opinions, than as those of the great minds, which framed the Constitution, or which have been from time to time called upon to administer it. 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, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Section 1.

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

Section 2.

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

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

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

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

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

Section 3.

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

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

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

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen 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 honour, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

Section 4.

1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof: but the congress may at any time by law, make or alter such regulations, except as to the places of choosing senators.

2. The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5.

1. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Section 6.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to, and returning from, the same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

Section 7.

1. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

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

3. Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary, (except on a question of adjournment,) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be re-passed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8.

The congress shall have power

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

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

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

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

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies 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 herein before directed to be taken.

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

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

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

Section 10.

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

Section 1.

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 pres-

ident, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

7. The president shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation:

9. "I do solemnly swear, (or affirm,) that I will faithfully "execute the office of president of the United States, and will, "to the best of my ability, preserve, protect, and defend the "Constitution of the United States."

Section 2.

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 behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2.

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

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

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

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

Section 3.

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

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

ARTICLE IV.

Section 1.

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

Section 2.

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

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

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

Section 3.

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

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

Section 4.

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

ARTICLE V.

1. The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds 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, any thing 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 favour; and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise 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 their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president.

2. The person having the greatest number of votes as 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.

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 dependance of all the Colonies upon the British Empire, and on the other with the particular charters of government and internal legislation, which belonged to each Colony, as a distinct sovereignty, and which have impressed upon each peculiar habits, opinions, attachments, and even prejudices. Traces of these peculiarities are every where discernible in the actual jurisprudence of each State; and are silently or openly referred to in several of the pro-

visions of the Constitution of the United States. In short, without a careful review of the origin and constitutional and juridical history of all the colonies, of the principles common to all, and of the diversities, which were no less remarkable in all, it would be impossible fully to understand the nature and objects of the Constitution; the reasons on which several of its most important provisions are founded; and the necessity of those concessions and compromises, which a desire to form a solid and perpetual Union has incorporated into its leading features.

The plan of the work will, therefore, naturally comprehend three great divisions. The first will embrace a sketch of the charters, constitutional history, and ante-revolutionary jurisprudence of the Colonies. The second will embrace a sketch of the constitutional history of the States during the Revolution, and the rise, progress, decline, and fall of the Confederation. The third will embrace the history of the rise and adoption of the Constitution; and a full exposition of all its provisions, with the reasons, on which they were respectively founded, the objections, by which they were respectively assailed, and such illustrations drawn from contemporaneous documents, and the subsequent operations of the government, as may best enable the reader to estimate for himself the true value of each. In this way (as it is hoped) his judgment as well as his affections will be enlisted on the side of the Constitution, as the truest security of the Union, and the only solid basis, on which to rest the private rights, the public liberties, and the substantial prosperity of the people composing the American Republic.

BOOK I.

HISTORY OF THE COLONIES.

CHAPTER I.

ORIGIN OF THE TITLE TO TERRITORY OF THE COLONIES.

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

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

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

by any Christian Power, in the name and for the benefit of the British Crown.[1] In the succeeding year 1497 Cabot sailed on his voyage, and having first discovered the Islands of Newfoundland and St. Johns, he afterwards sailed along the coast of the continent from the 56th to the 38th degree of north latitude, and claimed for his sovereign the vast region, which stretches from the Gulf of Mexico to the most northern regions.[2]

§ 2. Such is the origin of the British title to the territory composing these United States. That title was founded on the right of discovery, a right, which was held among the European nations a just and sufficient foundation, on which to rest their respective claims to the American continent. Whatever controversies existed among them (and they were numerous) respecting the extent of their own acquisitions abroad, they appealed to this as the ultimate fact, by which their various and conflicting claims were to be adjusted. It may not be easy upon general reasoning to establish the doctrine, that priority of discovery confers any exclusive right to territory. It was probably adopted by the European nations as a convenient and flexible rule, by which to regulate their respective claims. For it was obvious, that in the mutual contests for dominion in newly discovered lands, there would soon arise violent and sanguinary struggles for exclusive possession, unless some common principle should be recognised 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

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

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

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

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

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

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

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

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

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

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

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1 "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.

2 1 Haz. Collect.; 3 Marshall, Hist. Col. 13, 14.

3 Chalmers, Annals, 676, 677; 1 Doug. Summ. 213; Chalmers, Annals, 677.

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

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

§ 9. "The history of America, (says Mr. Chief Justice Marshall, in delivering the opinion of the Court,)[1] from its discovery to the present day, proves, we think, the universal recognition of these principles.

"Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States,

1 See also *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.

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

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

§ 13. "The same principle continued to be recognised. 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 province in the king's dominions in North America, which lies from 36 degrees 30 minutes north latitude to the 29th degree, and from the Atlantic ocean to the South sea.

§ 19. "Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil, as well as the right of dominion to the grantees. In those governments, which were denominated royal, 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 recognised, 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. Between France and Great Britain, whose discoveries, as well as settlements, were nearly contemporaneous, contests for the country, actually covered by the Indians, began as soon as their settlements approached each other, and were continued until finally settled in the year 1763, by the treaty of Paris.

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

§ 24. "After the termination of this fruitless discussion, the subject was transferred to Europe, and taken up by the cabinets of Versailles and London. This controversy embraced not only the boundaries of New-England, Nova Scotia, and that part of Canada, which adjoined those colonies, but embraced our whole western country also. France contended not only, that the St. Lawrence was to be considered as the 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 seacoast, and of the settlements she made on it, was not to be questioned; her claim of all the lands to the Pacific ocean, because she had discovered the

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

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

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

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

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

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

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

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

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

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

§ 32. "In pursuance of the same idea, Virginia proceeded, at the same session, to open her land-office for the sale of that country, which now constitutes Kentucky, a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage, as was ever manifested by any people.

§ 33. "The States having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on

conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that 'all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation,' &c. 'according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever.' The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

§ 34. "After these States became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

§ 35. "The magnificent purchase of Louisiana was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country would be considered as an aggression, which would justify war.

§ 36. "Our late acquisitions from Spain are of the same character; and the negotiations, which preceded those acquisitions, recognise 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 recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians."

CHAPTER II.

ORIGIN AND SETTLEMENT OF VIRGINIA.

§ 39. HAVING thus traced out the origin of the title to the soil of America asserted by the European nations, we may now enter upon a consideration of the manner, in which the settlements were made, and the political constitutions, by which the various Colonies were organized and governed.

§ 40. For a long time after the discoveries of Cabot were made, England from various causes remained in a state of indifference or inactivity in respect to the territory thus subjected to her sway.[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 labour.[3] The brilliant genius of Sir Walter Raleigh was captivated by the allurements of any scheme, which gave play to his romantic temper; and unmindful of the disastrous fate of his half brother, or gathering fresh courage from the consciousnes of difficulties, eagerly

[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.

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

§ 41. The first permanent settlement made in America under the auspices of England was under a charter granted to Sir Thomas Gates and his associates by James the First, in the fourth year after his accession to the throne of England[5] (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.[6] The second assumed the name of the Plymouth

1 1 Haz. Coll. 33; Robertson's America, B. 9.
2 1 Haz. Coll. 38—40; 2 Doug. Summ. 385.
3 Marsh. Colon. 17; Robertson's America, B. 9.
4 Robertson's America, B. 9.
5 Marsh. Colon. 25; 1 Haz. Coll. 50; Robertson's America, B. 9.
6 1 Haz. Coll. 99; Robertson's America, B. 9.

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

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

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

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

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

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

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

1 1 Haz. Coll. 50; Marsh. Colon. 26.

2 Marsh. Colon. 27, 28.

3 1 Haz. Coll. 58, 72; Marsh. Colon. 44, 45, 47; Robertson's America, B. 9.

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

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

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

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

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

[2] 1 Henning, Stat. 111; Stith's Virg. App. No. 4, p. 32; 1 Chalm. Annals, 54.

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

by the successful inroads of the Indians, created much discontent and disappointment among the proprietors at home. The king found it no difficult matter to satisfy the nation, that an inquiry into their conduct was necessary. It was accordingly ordered; and the result of that inquiry, by commissioners appointed by himself, was a demand on the part of the crown of a surrender of the charters.[1] The demand was resisted by the company; a *quo 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.[2]

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

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

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

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

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

appointing a governor and twelve 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, 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]

§ 66. 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

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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.

to their discontents; but pressed, as he was, by severe embarrassments at home, he was content to adopt a policy, which would conciliate the colony and remove some of its just complaints. He accordingly soon afterwards appointed Sir William Berkeley governor, with powers and instructions, which breathed a far more benign spirit. He was authorized to proclaim, that in all its concerns, civil as well as ecclesiastical, the colony should be governed according to the laws of England. He was directed to issue writs for electing representatives of the people, who with the governor and council should form a general assembly clothed with supreme legislative authority; and to establish courts of justice, whose proceedings should be guided by the forms of the parent country. The rights of Englishmen were thus in a great measure secured to the colonists; and under the government of this excellent magistrate, with some short intervals of interruption, the colony 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 recognised as the general basis of its jurisprudence; and the legislature, with some appearance of boast, stated, soon after the restoration of Charles the Second, that they had "endeav-

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

oured, in all things, as near as the capacity and constitution of this 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."[1] The prevalence of the common law was also expressly provided for in all the charters successively granted, as well as by the royal declaration, when the colony was annexed as a dependency to the crown. Indeed, there is no reason to suppose, that the common law was not in its leading features 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; and its doctrines and discipline were strictly enforced. All nonconformists were at first compelled to leave the colony; and a spirit of persecution was exemplified not far behind the rigour of the most zealous of the Puritans. The clergy of the established church were amply provided for by glebes and tithes, and other aids. Non-residence was prohibited, and 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 of William and Mary. Subject to this, the church of England seems to have maintained an exclusive su-

[1] 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."

premacy down to the period of the American Revolution. Marriages, except in special cases, were required to be celebrated in the parish church, and according to the rubric in the common prayer book. The law of inheritance of the parent country was silently maintained down to the period of the American Revolution; and the distribution of intestate estates was closely fashioned upon the same general model. Devises also were regulated by the law of England;[1] and no colonial statute appears to have been made on that subject until 1748, when one was enacted, which contains a few deviations from it, probably arising from local circumstances.[2] One of the most remarkable facts in the juridical history of the colony, is the steady attachment of the colony to entails. By an act passed in 1705, 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 entials and perpetuate inheritances in the same family outstripped that of the parent country.

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

[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 Henning, Stat. 400; 5 Henning, Stat. 414; 1 Tuck. Black. Comm. App.

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

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

[1] 1 Henning, Stat. 290.

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

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

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

[2] Marsh. Colon. ch. 5, p. 163; 1 Chalm. Annals, 325.

CHAPTER III.

ORIGIN AND SETTLEMENT OF NEW-ENGLAND.

§ 52. We may now advert in a brief manner to the history of the Northern, or Plymouth Company. That company possessed fewer resources and less enterprise than the Southern; and 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. Capt. 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, after King Charles the First, the flattering name of *New-England*, a name, which effaced from it that of Virginia, and which has since become dear beyond expression to the inhabitants of its harsh but salubrious climate.[1]

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

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

own infallibility in doctrine and worship, and was eager to obtain proselytes, and denounce the errors of its opponents. If it had stopped here, we might have forgotten, in admiration of the sincere zeal for Christian truth, the desire of power, and the pride of mind, which lurked within the inner folds of their devotion. But unfortunately the spirit of intolerance was abroad in all its stern and unrelenting severity. To tolerate errors was to sacrifice Christianity to mere temporal interests. Truth, and truth alone, was to be followed at the hazard of all consequences; and religion allowed no compromises between conscience and worldly comforts. Heresy was itself a sin of a deadly nature, and to extirpate it was a primary duty of all, who were believers in sincerity and truth. Persecution, therefore, even when it seemed most to violate the feelings of humanity and the rights of private judgment, never wanted apologists among those of the purest and most devout lives. It was too often 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

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

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

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

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 of persecution itself, but of the infamous errors of the persecutors. There are not wanting on the records of the history of these times abundant proofs, how easily sects, which had borne every human calamity with unshrinking fortitude for conscience' sake, could turn upon their inoffensive, but, in their judgment, erring neighbours, with a like infliction of suffering.[1] Even adversity sometimes fails of producing its usual salutary effects of moderation and compassion, when a blind but honest zeal has usurped dominion over the mind. If such a picture of human infirmity may justly add to our humility, it may also serve to admonish us of the Christian duty of forbearance. And he, who can look with an eye of exclusive censure on such scenes, must have forgotten, how many bright examples they have afforded of the liveliest virtue, the most persuasive fidelity, and the most exalted piety.

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

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

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

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

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

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

[3] 1 Haz. Coll. 87, 88 ; Morton's Mem. App. 373.

example of it in primitive and almost patriarchal simplicity.

§ 55. On the 11th of November, 1620, these humble but fearless adventurers, before their landing, drew up and signed an original compact, in which, after acknowledging themselves subjects of the crown of England, they proceed to declare: "Having undertaken for the glory of God and the advancement of the Christian faith and the honor of our king and country, a voyage to plant the first colony in the northern parts of Virginia, we do by these presents solemnly and mutually, in the presence of God and of one another, covenant and combine ourselves together into a civil body politic, 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 in-

[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.

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

§ 56. The Plymouth Colonists acted, at first, altogether under the voluntary compact and association already mentioned. But they daily felt embarrassments from the want of some general authority, derived directly or indirectly from the crown, which should recognise their settlement and confirm their legislation. After several ineffectual attempts made for this purpose, they at length succeeded in obtaining, in January, 1629, a patent from the council established at Plymouth, in England, under the charter of King James of 1620.[5] This patent, besides a grant of the territory upon the terms and tenure of the original patent of 1620,

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

2 Robertson's America, B. 10; 2 Hutch. Hist. 467; 1 Haz. Coll. 408, 411, 412, 114.

3 2 Hutch. Hist. 463.

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

5 2 Hutch. Hist. 464, 479; 1 Haz. Collec. 298, 404, 468; 1 Chalm. Annals, 97, 98; 1 Holmes's Annals, 201.

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

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

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

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

[2] Chalmers says, (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. of the Colonies, ch. 3. 82, 83.

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

scruple as to their right to inflict capital punishments.[1] They were not disturbed in the free exercise of these powers, either through the ignorance or the connivance of the crown, until after the restoration of Charles the Second. Their authority under their charter was then questioned; and several unsuccessful attempts were made to procure a confirmation from the crown. They continued to cling to it, until, in the general shipwreck of charters in 1684, theirs was overturned. An arbitrary government was then established over them in common with the other New-England colonies; and they were finally incorporated into a province with Massachusetts under the charter granted to the latter by William and Mary in 1691.[2]

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

[1] 2 Hutch Hist. 464, 465, 467; Chalm. Annals, 88.

[2] Hutch. Hist. 479, 480; Chalm. Annals, 97, 98.

[3] In 1636. See 1 Haz. Coll. 404, 408; Id. 178, Plymouth Colony Laws, (edit. 1685;) 1 Haz. Coll. 411, 414, 419.

without being brought to answer by due course and process of law; that in criminal and civil cases there should be a trial by jury at all events upon a final trial on appeal; with the right to challenge for just cause; and in capital cases a peremptory right to challenge twenty jurors as in England; that no party should be cast or condemned, unless upon the testimony of two sufficient witnesses, or other sufficient evidence or circumstances, unless otherwise specially provided by law; that all persons of the age of twenty-one years, and of sound memory, should have power to make wills and other lawful alienations of their estate, whether they were condemned, or excommunicated or other; except that in treason their personal estate should be forfeited; but their real estate was still to be at their disposal. All processes were directed to be in the king's name.[1] All trials in respect to land were to be in the county, where it lay; and all personal actions, where one of the parties lived; and lands and goods were liable to attachment to answer the judgment rendered in any action. All lands were to descend according to the free tenure of lands of East Greenwich, in the county of Kent; and all entailed lands according to the law of England. All the sons were to inherit equally, except the eldest, who was to have a double share. If there were no sons, all the daughters were to inherit alike. Brothers of the whole blood were to inherit; and if none, then sisters of the whole blood. All conveyances of land were to be by deed only, acknowledged before some magistrate, and recorded in the public records. Among capital offences were enumerated, without any discrimination, idolatry, blasphemy, treason, murder,

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

witchcraft, bestiality, sodomy, false witness, man-stealing, cursing or smiting father or mother, rape, 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 were carefully provided for.[1]

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

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

CHAPTER IV.

MASSACHUSETTS.

§ 61. About the period when the Plymouth colonists completed their voyage, James the First, with a view to promote more effectually the interests of the second or northern company, 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 main land from sea to sea, excluding however all possession of any other Christian prince, and all lands within the bounds of the southern colony.[2] To the territory thus bounded he affixed the name of New-England, and to the corporation itself so created, the name of "The Council established at Plymouth in the county of Devon, for the planting, ruling, ordering, and governing of New-England in America."[3] The charter contains the names of the persons, who were to constitute the first council, with power to fill vacancies, and keep up a perpetual succession of 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

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.

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

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

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

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

§ 63. Other persons were soon induced to unite with them, if a charter could be procured from the crown, which should secure to the adventurers 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,

1 Marsh. Colon. ch. 3, p. 83; Chalm. Annals, p. 81, 83.

2 Robertson's America, B. 10; Chalm. Annals, 90.

3 These are not the descriptive words of the grant, but a statement of the substance of it. The grant is recited in the charter in Hutchinson's Collection, p. 1, &c. and in the Colonial and Province laws of Massachusetts, printed in 1814.

as of the royal manor of East Greenwich, "in free and common soccage, and not in capite, nor by knight's service," yielding to the crown one fifth part of all ore of gold and silver, &c. with the exception, however, of any part of the territory actually possessed or inhabited by any other Christian prince or state, or of any part of it within the bounds of the southern colony [of Virginia] granted by King James. It also created the associates a body politic by the name of "The Governor and Company of the Massachusetts Bay in New-England," with the usual powers of corporations. It provided, that the government should 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, 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

[1] Hutch. Collection, page 1 to 23; 1 Haz. Coll. 239; 1 Chalmers's Annals, p. 137.

[2] Chalmers's Annals, 81; Robertson's Hist. Amer. B. 10.

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

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

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

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

[1] 1 Hutch. Hist. 12, 13; 1 Chalm. Ann. 150, 151.

[2] 1 Hutch. Hist. 13; 3 Hutch. Coll. 25, 26; Robertson's America, B. 10; Marsh. Colonies, ch. 3, p. 89; 1 Holmes's Annals, 197; 1 Chalm. Annals, 150.

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

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

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.[1] It is true, as Dr. Robertson has observed,[2] that as soon as the Massachusetts emigrants had landed on these shores, they considered themselves for many purposes as a voluntary association, possessing the natural rights of men to adopt that mode of government, which was most agreeable to themselves, and to enact such laws, as were conducive to their own welfare. They did not, indeed, surrender up their charter, or cease to recognise its obligatory force.[3] But they extended their acts far beyond its expression of powers; and while they boldly claimed protection from it against the royal demands and prerogatives, they nevertheless did not feel, that it furnished any limit upon the freest exercise of legislative, executive, or judicial functions. They did not view it, as creating an English corporation under the narrow construction of the common law; but as affording the means of founding a broad political government, subject to the crown of England, but yet enjoying many exclusive privileges.[4]

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

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

[3] 3 Hutch. Coll. 199, 203.

[4] 1 Hutch. Hist. 35, 36, 37, 410, 507, 529; 3 Hutch. Coll. 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 mal-contents, used the following language:[1] "For our government itself, it is framed according to our charter, and the fundamental and common laws of England, and carried on according to the same (taking the words of eternal truth and righteousness along with them, as that rule, by which all kingdoms and jurisdictions must render account of every act and administration in the last day) with as bare allowance for the disproportion between such an ancient, populous, wealthy kingdom, and so poor an infant, thin colony, as common reason can afford." And they then proceeded to show the truth of their statement, by drawing a parallel, setting down in one column the fundamental and common laws and customs of England, beginning with *Magna Charta*, and in a corresponding column their own fundamental laws and customs. Among other parallels, after stating, that the supreme authority in England is in the high court of Parliament, they stated: "The highest authority here is in the general court both by our charter and by our own positive laws."

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

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

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

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

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

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

[3] 1 Hutch. Hist. 35, 36, 37, 94, note, 449 ; 1 Holmes's Annals, 222 ; 1 Haz. Coll. 320, 321 ; 1 Chalmers's Annals, 157.

[4] 1 Hutch. Hist. 449 ; 1 Chalmers's Annals, 166 ; Col. and Province Laws, (1814,) ch. 31, p. 88 ; 3 Hutch. Coll. 205 ; 1 Doug. Summ. 431.

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

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

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

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

[3] 1 Holmes's Annals, 412.

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

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

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

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

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

§ 72. In reviewing the laws passed by the Legislature of Massachusetts during its colonial state, the first and most important consideration is the early care, with which the public rights of the inhabitants were declared and established. No man's life, person, honor, or good name was to be affected; no man was to be deprived of his wife or children, or estate, unless by virtue or equity of some express law of the General Court, "or in case of a defect of a law in any particular case, by the word of God; and in capital cases, or in cases of dismembering or banishment according to that word, to be judged of by the General Court."[2] No persons but church members were allowed to become freemen; and all persons of twenty-one years of age were allowed to dispose of their estate by will or any proper conveyance.[3] All conveyances were to be by deed acknowledged and recorded in the public records.[4] All lands and hereditaments were declared free from all fines and forfeitures. Courts of law were established, and local processes provided for.[5] The trial by jury in civil and criminal cases was secured.[6] Wager at law was not allowed but ac-

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

[2] 3 Hutch. Coll. 201.

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

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

[5] 3 Hutch. Coll. 203, 205.

[6] 1 Hutch. 450; 3 Hutch. Coll. 203, 205.

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

[1] 3 Hutch. Coll. 205.

[2] Ant. Col. and Prov. Laws, ch. 18, p. 58, 59, 60; 1 Hutch. Hist. 440, 441, 442; 1 Belk. New-Hampshire, ch. 4, p. 66.

[3] 3 Hutch. Coll. 205.

[4] 1 Hutch. Hist. 442, 443, 444; Ant. Col. and Prov. Laws, ch. 17, p. 56.

[5] 1 Hutch. Hist. 435, 439. [6] 1 Hutch. Hist. 444.

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

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

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

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

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

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

[1] 1 Hutch. Hist. 447.

[2] 1 Hutch. Hist. 447.

[3] 3 Hutch. Collect. 201; Ant. Colon. and Prov. Laws, ch. 39, p. 100; 1 Haz. Coll. 488.

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

[5] 1 Hutch. Hist. 420, 421, 422, 423, 424, 434; 1 Belk. New-Hamp. ch. 4, p. 70, 71.

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

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

[1] Robertson's America, B. 10; 1 Belk. New-Hamp. ch. 4, p. 70 to 77; Ant. Col. and Prov. Laws, ch. 57, p. 120, &c.; 3 Hutch. Coll. 215, 216; 1 Hutch. Hist. 431; 3 Hutch. Hist. 42; 1 Haz. Coll. 538; 1 Chalmers's Annals, 163, 164, 165, 167, 169, 189, 190, 191, 194.

[2] 1 Hutch. Hist. 427; Ant. Col. and Prov. Laws, ch. 39, p. 103, 104.

[3] 1 Hutch. Hist. 431.

[4] Ant. Col. and Prov. Laws, ch. 88, p. 186.

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

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

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

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

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

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

CHAPTER V.

NEW-HAMPSHIRE.

§ 78. HAVING gone into a full consideration of the origin and political organization of the primitive colonies in the South and North, it remains only to take a rapid 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, Capt. John Mason obtained a grant from the council of Plymouth of all that part of the main land in New-England "lying upon the 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 three score miles be finished from the first entrance of Piscataqua river; and also from Merrimack through the said river and to the furthest head thereof, and so forwards up into the lands westwards, until three score miles be finished; and from thence to cross over land to the three score miles and accounted from Piscataqua river, together with all islands and islets within five leagues distance of the premises."[1] This territory was afterwards called New-Hampshire. The land so granted was expressly subjected to the conditions and limitations in the original

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

patent; and there was a covenant on the part of Mason, that he would establish such government therein, and continue the same, "as shall be agreeable, as near as may be, to the laws and customs of the realm of England;" and that if charged with neglect, he would reform the same according to the discretion of the president and council; or in default thereof, that the aggrieved inhabitants, or planters, tenants of the lands, might appeal to the chief court of justice of the president and council. A further grant was made to Mason by the council of Plymouth about the time of the surrender of their charter, (22 April, 1635,) "beginning from the middle part of Naumkeag river [Salem], and from thence to proceed eastwards along the sea-coast to Cape Ann and round about the same to Piscataqua harbour; and then covering much of the land in the prior grant, and giving to the whole the name of 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 Massa-

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[1] 1 Haz. Coll. 383, 384, 385; 1 Chalm. Annals, 472, 473, 477; 1 Belk. N. Hamp. ch. 1, p. 27.

[2] 1 Hutch. Hist. 313, 314; Marsh. Colon. ch. 3, p. 97.

[3] 1 Hutch. Hist. 101, 108, 109, 311, 312, to 318.

chusetts contended, that its limits included the whole territory of New-Hampshire; and being at that time comparatively strong and active, she succeeded in establishing her jurisdiction over it, and maintained it with unabated vigilance for forty years.[1] The controversy was finally brought before the king in council; and in 1679 it was solemnly adjudged against the claim of Massachusetts. And it being admitted, that Mason, under his grant, had no right to exercise any powers of government, a commission was, in the same year, issued by the crown for the government of New-Hampshire.[2] By the form of government, described in this commission, the whole executive power was vested in a president and council appointed by the crown, to whom also was confided the judiciary power with an appeal to England. In the administration of justice it was directed, that "the form of proceedings in such cases, and the judgment thereon to be given, be as consonant and agreeable to the laws and statutes of this our realm of England, as the present state and condition of our subjects inhabiting within the limits aforesaid, and the circumstances of the place will admit."[3] The legislative power was entrusted to the president, council, and burgesses, or representatives chosen by the towns; and they were authorized to levy taxes and to make laws for the interest of the province; which laws being approved by the president and council were to stand and be in force, until the pleasure of the king should

[1] 1 Chalm. Annals, 477, 484, 485, 504, 505; Marsh. Colon. ch. 4, p. 109, ch. 6, p. 167, 168; 3 Hutch. Coll. 422; 1 Belk. N. Hamp. ch. 2, p. 49, 50.

[2] 1 Chalm. Annals, 489, 490; 1 Hutch. Hist. 319; 1 Holmes's Annals, 395; Marsh. Colon. ch. 6, p. 168; Robert. 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.

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

be known, whether the same laws and ordinances should receive any change or confirmation, or be totally disallowed and discharged. And the president and council were required to transmit and send over the same by the first ship, that should depart thence for England after their making. Liberty of conscience was allowed to all protestants, those of the Church of England to be particularly encouraged. And a pledge was given in the commission to continue the privilege of an assembly in the same manner and form, unless by inconvenience arising therefrom the crown should see cause to alter the same.[1] A body of laws was enacted in the first year of their legislation, which, upon being sent to England, was disallowed by the crown.[2] 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 to, but as near as may be agreeable, to the laws and statutes of the realm of England."[4]

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

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[1] 1 Chalm. Annals, 489, 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.

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

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

[2] 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 Capt. John Mason all the land lying between the rivers Merrimack and Sagadahock, extending back to the great lakes and rivers of Canada; which was called Laconia.[2] In April, 1639, Sir Ferdinando obtained from the crown a confirmatory grant of all the land from Piscataqua to Sagadahock and the Kennebeck river, and from the coast into the northern interior one hundred and twenty miles; and it was styled "The Province of Maine."[3] Of this province he was made Lord Palatine, with all the powers, jurisdiction, and royalties belonging to the bishop of the county Palatine of Durham; and the lands were to be holden, as of the manor of East Greenwich. The charter contains a reservation of faith and allegiance to the crown, as having the supreme dominion; and the will and pleasure of the crown is signified, that the religion of the Church of England be professed, and its ecclesiastical government established in the province. It also authorizes the Palatine, with the assent of the greater part of the freeholders of the province, to make laws not repugnant or

[1] 1 Hutch. Hist. 6, 104; Robert. 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] 1 Holmes's Annals, 254; 1 Chalm. Annals, 472, 473, 474; 1 Doug. Summ. 386, &c.

contrary, but as near as conveniently may be to the laws of England, for the public good of the province; and to erect courts of judicature for the determination of all civil 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 that of the Lord High Admiral of England. And the inhabitants, being subjects of the crown, were to enjoy all the rights and privileges of natural born subjects in England.[1]

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

1 Haz. Coll. 442 to 445.

2 1 Chalm. Annals, 474, 479; 1 Holmes's Annals, 254, 258, 296.

3 1 Chalm. Annals, 480, 481, 483; 1 Hutch. History, 176, 177, 256; 1 Holmes's Annals, 296; 2 Winthrop's Journ. 38, 42.

4 1 Chalm. Annals, 483, 484; 1 Holmes's Annals, 343, 348; 3 Hutch. Coll. 422.

setts and the Palatine, as to jurisdiction over the province, was brought before the privy council at the same time with that of Mason respecting New-Hampshire, and the claim of Massachusetts was adjudged void.[1] Before a final adjudication was had, Massachusetts had the prudence and sagacity, in 1677, to purchase the title of Gorges for a trifling sum; and thus to the great disappointment of the crown, (then in treaty for the same object,) succeeded to it, and held it, and governed it as a provincial dependency, until the fall of its own charter; and it afterwards, as we have seen, was incorporated with Massachusetts in the provincial charter of 1691.[2]

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

CHAPTER VII.

CONNECTICUT.

§ 84. CONNECTICUT was originally settled under the protection of Massachusetts; but the inhabitants in a few years afterwards (1638) felt at liberty (after the example of Massachusetts) to frame a constitution of government and laws for themselves.[1] In 1630 the Earl of Warwick obtained from the council of Plymouth a patent of the land upon a straight line near the 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 of the mouth of the Connecticut in 1635.[3] The settlers there were not, however, disturbed; and finally, in 1644, they extinguished the title of the proprietaries, or Lords, and continued to act under the constitution of

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[1] 1 Hutch. Hist. 98, 99; 2 Hutch. Hist. 202; 1 Haz. Coll. 321; 1 Holmes's Annals, 269, 220, 228, 231, 232, 251; 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 Ann. 251; and a full copy in 1 Haz. Collec. 437, 441.

[2] 2 Hutch. History, 203; 1 Haz. Coll. 318; 1 Holmes's Annals, 208; 1 Chalm. Annals, 299.

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

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

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

[1] 1 Haz. Coll. 437; 1 Holmes's Ann. 251.

[2] Ibid.

[3] 1 Hutch. Hist. 82, 83; 1 Holmes's Ann. 244, 245; 1 Chalm. Ann. 290; Robertson's America, B. 10; 3 American Museum, 523.

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

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

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[1] 3 American Museum, 523.

[2] 1 Hutch. Hist. 83, note.

[3] 1 Hutch. Hist. 84, note; 1 Chalm. Annals, 290.

[4] 2 Haz. Coll. 586; 1 Chalm. Ann. 292, 293; 1 Holmes's Ann. 320; 2 Doug. Summ. 164.

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

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

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

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

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

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

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

[2] 1 Holmes's Ann. 415, 421, 429, 442; 1 Chalm. Ann. 297, 298, 301, 304, 306; 1 Hutch. Hist. 339, 406, note.

[3] Idem.

[4] 2 Doug. Summ. 171 to 176, 193 to 202.

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

§ 90. In respect to 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-

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

[2] Idem. p. 2.—This practice continued down to the establishment of the new constitution in 1818.

[3] Idem. p. 27, 30.

[4] Idem. 41.

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

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

§ 92. The spirit of toleration was not more liberal here, than in most of the other colonies. No persons were allowed to embody themselves into church estate without the consent of the general assembly, and the approbation of the neighbouring churches, and no ministry or church administration was entertained or authorized separate from, and in opposition to that openly and publicly observed and dispensed by the approved minister of the place, except with the approbation and consent aforesaid.[3] Quakers, Ranters, Adamites, and other notorious heretics (as they were called) were to be committed to prison or sent out of the colony by order of the governor and assistants.[4] Nor does the zeal of per-

[1] Colony Laws of Connecticut, edition by Greene, 1715 – 1718, folio. (New London,) p. 12.

[2] Id. p. 29, 84, 85, 110, 141. — The Constitution of 1818 has made a great change in the rights and powers of the ministers and parishes in ecclesiastical affairs.

[3] Id. p. 29.

[4] Id. p. 49.

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

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

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

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

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[1] Colony Laws of Conn. edition by Greene, 1715 – 1718, folio. (New London,) p. 134.

[2] Id. p. 33, 61, 164.

[3] Id. p. 41.

[4] Id. p. 6.

[5] Id. p. 116.

[6] Id. p. 26.

[7] Id. p. 7.

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

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

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[1] Colony Laws of Conn. edition by Greene, 1715 – 1718 folio. (New London,) p. 84.

[2] Id. p. 70.—A similar code existed in Massachusetts, enacted in 1668.

CHAPTER VIII.

RHODE ISLAND.

§ 94. RHODE ISLAND was originally settled by emigrants from Massachusetts, fleeing thither to escape from religious persecution; and it still boasts of Roger Williams as its founder, and as the early defender of religious freedom and the rights of conscience. One body of them purchased the island, which has given the name to the State, and another the territory of the Providence Plantations from the Indians, and began their settlements in both places nearly at the same period, viz. in 1636 and 1638.[1] They entered into separate voluntary associations of government. But finding their associations not sufficient to protect them against the encroachments of Massachusetts, and having no title under any of the royal patents, they sent Roger Williams to England in 1643 to procure a surer foundation both of title and government. He succeeded in obtaining from the Earl of Warwick (in 1643) a charter of incorporation of Providence Plantations;[2] and also, in 1644, a charter from the two houses of parliament (Charles the First being then driven from his capital) for the incorporation of the towns of Providence, New-

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[1] 1 Hutch. Hist. 72; 1 Holmes's Annals, 225, 233, 246; 1 Chalm. Annals, 269, 270; 3 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; 2 Doug. Summ. 76, 77.— 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.

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

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

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

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[1] 1 Chalm. 271, 272; 3 Hutch. Coll. 415, 416.

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

[3] 1 Chalm. Annals, 273; 1 Holmes's Annals, 283.

[4] 1 Chalm. Annals, 274; 1 Holmes's Annals, 297; Marsh. Colon. ch. 5, p. 133.

[5] 1 Chalm. Annals, 274; 1 Holmes's Annals, 329.

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

[1] 2 Haz. Coll. 612 to 623; 2 Doug. Summ. 81

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

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

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

2 2 Haz. Coll. 613.

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

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

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

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

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

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

[2] On this subject, see 1 Chalmers's Annals, 276, 284; and Doctor Holmes's valuable note to his Annals, vol. 1. p. 336, and Id. p. 341; 3 Hutch. Coll. 413, 415; Walsh's Appeal, 429 to 435.

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

[4] 1 Chalm. Annals, 278.

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

§ 100. In reviewing the colonial legislation of Rhode Island some peculiarties are discernible, though the general system is like that of the other parts of New-England.[4] No persons but those, who were admitted freemen of the colony, were allowed to vote at elections, and they might do it in person or by proxy; and none but freemen were eligible to office. Wills of real estate were required to have three witnesses. The probate of wills and the granting of administrations of personal estate were committed to the jurisdiction of the town councils of each town in the colony, with an appeal to the governor and council as supreme ordinary.[5]

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

[2] 1 Chalm. Annals, 278, 279; 1 Holmes's Annals, 415, 420, 428, 442; 2 Doug. Summ. 85, 377; Dunmer's Defence, 1 American Tracts, 7.

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

[4] Id. p. 1, 147.

[5] Id. p. 1, 4.

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

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

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

§ 101. We have now finished our review of all the successive colonies established in New-England. The remark of Chalmers is in general well founded: "Originally settled (says he[4]) 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

[1] R. Island Colony Laws, (Edit. 1744,) p. 192.

[2] Colony Laws of Rhode Island, (Edit. 1719, printed at Boston,) p. 95 96.

[3] Rhode Island Colony Laws, (1719,) p. 5, 8.

[4] 1 Chalm. Annals, 296.

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

§ 102. One of the most memorable circumstances in the history of New-England is the early formation and establishment of a confederation of the colonies for amity, offence, and defence, and mutual advice and assistance. The project was agitated as early as 1637; but difficulties having occurred, the articles of union were not finally adopted until 1643.[2] In the month of May of that year the colonies of Massachusetts, Connecticut, New-Haven, and Plymouth formed a confederacy by the name of the United Colonies of New-England, and entered into a perpetual league of friendship and amity for offence and defence and mutual advice and succour. The charges of all wars, offensive and defensive, were to be borne in common and according to an apportionment provided for in the articles; and in case of invasion of any colony the others were to furnish a certain proportion of armed men for its assistance.[3] Commissioners appointed by each colony were to meet and 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;

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1 *Gardner* v. *Collins*, 2 Peters's Sup. Rep. 58.

2 1 Holmes's Annals, 269, 270; 1 Winthrop's Jour. 237, 284.

3 2 Haz. Coll. 1 to 6; 2 Winthrop's Jour. 101 to 106; 1 Hutch. Hist. 124, 126.

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

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

[2] 1 Holmes's Annals, 287 and note; 1 Hutch. Hist. 124; 2 Haz. Coll. 99, 100.

CHAPTER IX.

MARYLAND.

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

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

[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.

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 soccage, and not in *capite* or by knights' service. The charter further provided, that the proprietary should have authority by and with the consent of the freemen, or their delegates assembled for the purpose, to make all laws for the province, "so that such laws be consonant to reason, and not repugnant or contrary, but, as far as conveniently might be, agreeable to the laws, statutes, customs, and rights of this our realm of England."[1] The proprietary was also vested with full executive power; and the establishment of courts of justice was provided for. The proprietary was also authorized to levy subsidies with the assent of the people in assembly. The inhabitants and their children were to enjoy all the rights, immunities, and privileges of subjects born in England. The right of the advowsons of the churches, according to the establishment of England, and the right to create manors and courts baron, to confer titles of dignity, to erect ports and other 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

[1] 1 Haz. Coll. 327, &c.; 1 Chalm. Annals, 202; Marsh. Colon. ch. 2, p. 69.

[2] 1 Chalmers's Annals, 203, 204, 205.

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

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

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

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

§ 107. The first legislative assembly of Maryland, held by the freemen at large, was in 1634 – 1635; but little of their proceedings is known. No acts appear to have been adopted until 1638 – 1639, when provision was made in consequence of an increase of the colonists for a representative assembly, called the House of Assembly, chosen by the freemen ; and the laws passed by the assembly, and approved by the proprietary or his lieutanent, 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

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

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

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

[1] Bacon's Laws of Maryland, ch. 2, of 1638; 1650, ch. 1; 1 Marsh. Colon. &c. ch. 2, p. 73; 1 Chalm. Ann. 213, 219, 220, 225.

[2] 1 Chalm. Annals, 223, 365; Bacon's Laws of Maryland, 1649.

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

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

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

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

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

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1 Bacon's Laws of Maryland, 1702, ch. 1.

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

3 Bacon's Laws of Maryland, 1674.

4 Bacon's Laws of Maryland, 1715, ch. 39.

5 Bacon's Laws of Maryland, 1650, ch. 25; 1 Chalm. Ann. 220.

6 Bacon's Laws of Maryland, 1692, 1716.

CHAPTER X.

NEW-YORK.

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

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

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

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

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

[1] I copy from the recital of it in Smith's History of New-Jersey in the surrender of 1702, of the provinces of East and West Jersey.

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

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

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

§ 113. As the validity of the original grant to the Duke of York, while the 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.[4] It confirmed the former grant, and empowered him to govern the inhabitants by such ordinances, as he or his assigns should establish. It authorized him to administer justice according to the laws of England, allowing an appeal to the king in council.[5] It prohibited trade thither without his permission; and allowed the colonists to import merchandize upon paying customs according to the laws of the realm. Under this charter he ruled the province until his accession to the throne.[6] No general assembly was called for several years; and the people having become clamorous for the privileges enjoyed by other colonists, the governor was, in 1682, authorized to call an assembly, which was empowered to make laws for the general regulation of the state, which, however, were of no force without the ratification of the proprie-

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

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

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

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

5 1 Chalmers's Annals, 579, 580.

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

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

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

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

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

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

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

examination; that wills in writing, attested by three or more credible witnesses, should be sufficient to pass lands; that there should be no fines upon alienations, or escheats and forfeitures of lands, except in cases of treason; that no person should hold any office, unless upon his appointment he would take the oaths of supremacy, and the test prescribed by the act of Parliament;[1] that no tax or talliage should be levied but by the consent of the general assembly; and that no person professing faith in Jesus Christ should be disturbed or questioned for different opinions in religion, with an exception of Roman Catholics. The act, however, was repealed by king William, in 1697.[2] Another act enabled persons, who were scrupulous of taking oaths, to make in lieu thereof a solemn promise to qualify them as witnesses, jurors, and officers. In the year 1693, an act was passed for the maintenance of ministers and churches of the Protestant religion. New-York (like Massachusetts) seemed at all times determined to suppress the Romish church. In an act passed in the beginning of the last century it was declared, that every Jesuit and Popish Priest, who should continue in the colony after a given day, should be condemned to perpetual imprisonment; and if he broke prison or escaped and was retaken, he was to be put to death. And so little were the spirit of toleration and the rights of conscience understood at a much later period, that one of her 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]

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

[2] 1 Holmes's Annals, 434; Province Laws of 1691; Smith's N. York, 127, [76]; 2 Kent's Comm. Lect. 25, p. 62, 63.

[3] Mr. Smith. [4] Art. 42.

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

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[1] 2 Kent's Comm. Lect. 25, p. 62, 63.

[2] I do not find any act respecting the distribution of intestate estates in the statute book, except that of 1697, which seems to have in view only the distribution of personal estate substantially on the basis of the statute of distribution of Charles the Second.

CHAPTER XI.

NEW-JERSEY.

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

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

[2] Smith's New-Jersey, 6, Appx. 512; 1 Chalm. Annals, 614.

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

§ 116. This constitution continued until the province was divided, in 1676, between the proprietors. By that division East New-Jersey was assigned to Carteret; and West New-Jersey to William Penn and others, who had purchased of Lord Berkeley.[2] Carteret then explained and confirmed the former concessions for the territory thus exclusively belonging to himself. The proprietors also of West Jersey drew up another set of concessions for the settlers within that territory. They contain very ample privileges to the people. It was 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;"[3] that no person shall be any ways called in question, or in the least punished, or either, for the sake of his opinion, judgment, faith, or worship towards God in matters of religion; that there shall be a trial by jury in civil and criminal cases; that there shall be a general assembly of representatives of the people, who shall have power to provide for the proper administration of the government;

[1] Smith's New-Jersey, 512, 514.
[2] Smith's New-Jersey, 61, 79, 80, 87; 1 Chalm. Ann. 617.
[3] Smith's New-Jersey, 80, App. 521, &c.

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

§ 117. Whether these concessions became the general law of the province seems involved in some obscurity. There were many difficulties and contests for jurisdiction between the governors of the Duke of York and the proprietors of the Jerseys; and these were not settled, until after the Duke, in 1680,[2] finally surrendered all right to both by letters patent granted to the respective proprietors.[3] 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.[4] There was to be a governor and council, and a general assembly of representatives of the people. The general assembly had the power to make laws, to levy taxes, and to appoint officers. Liberty of conscience was allowed, and no persons rendered incapable of office in respect of their faith and worship. West Jersey continued to be governed in this manner until the surrender of the proprietary government, in 1702.[5]

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

1 Smith's New-Jersey, 80, App. 521, &c.
2 Chalmers says, in 1680, p. 619. — Smith says in 1678, p. 111.
3 Smith's New-Jersey, 110, 111; 1 Chalm. Ann. 619, 626.
4 Smith's New-Jersey, 126.
5 Smith's New-Jersey, 154.

third and last grant of East Jersey.[1] Very serious dissensions soon arose between the two provinces themselves, as well as between them and New-York; which banished moderation from their councils, and threatened the most serious calamities. A *quo warranto* was ordered by the crown in 1686, to be issued against both provinces. East Jersey immediately offered to be annexed to West Jersey, and to submit to a governor appointed by the crown. Soon afterwards the crown ordered the Jerseys to be annexed to 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.[2]

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

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

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

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

§ 120 From this time to the American Revolution the province was governed without any charter under royal commissions, substantially in the manner pointed out in the first. The people always strenuously contended for the rights and privileges guaranteed to them by the former concessions; and many struggles occurred from time to time between their representatives, and the royal governors on this subject.[2]

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

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

CHAPTER XII.

PENNSYLVANIA.

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

[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.

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.[1]

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

1 1 Proud. Penn. 172.
2 1 Proud. Penn. 176; Laws of Pennsyl. Ed. of Franklin, 1742, App.
3 1 Proud. Penn. 175, 176, 177.
4 1 Proud. Penn. 177, 178.

reprieve criminals; to establish courts of justice, with a right of appeal to the crown from all judgments; to create cities and other corporations; to erect ports, and manors, and courts baron in such manors. Liberty was allowed to subjects to transport themselves and their goods to the province; and to import the products of the province into England; and to export them from thence within one year, the inhabitants observing the acts of navigation, and all other laws in this behalf made. It was further stipulated, that the crown should levy no tax, custom, or imposition upon the inhabitants or their goods, unless by the consent of the proprietary or assembly, "or by act of Parliament in England." Such are the most important clauses of this charter, which has been deemed one of the best drawn of the colonial charters, and which underwent the revision, not merely of the law officers of the crown, but of the then Lord Chief Justice (North) of England.[1] It has been remarked, as a singular omission in this charter, that there is no provision, that the inhabitants and their children shall be deemed British subjects, and entitled to all the liberties and immunities thereof, such a clause being found in every other charter.[2] Chalmers[3] has observed, that the clause was wholly unnecessary, as the allegiance to the crown was reserved; and the common law thence inferred, that all the inhabitants were subjects, and of course were entitled to all the privileges of Englishmen.

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

[1] 1 Chalm. Annals, 636, 637.
[2] 1 Graham's Hist. of Colon. 41, note; 1 Chalm. Annals, 639, 658.
[3] 1 Chalm. Annals, 639, 658.
[4] 1 Proud. Penn. 192; 2 Proud. Penn. App. 1; 2 Doug. Summ. 300, 301.

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

1 1 Chalm. Annals, 638, 642; Marsh. Colon. ch. 6, p. 182, 183.
2 1 Proud. Penn. 197, 198; 2 Proud. Penn. App. 7.
3 1 Proud. Penn. 200; 2 Proud. Penn. App. 19.
4 2 Proud. Penn. Appx. 15, 20; 1 Chalm. Annals, 641, 642.

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

§ 124. It was soon found, that the original frame of government, drawn up before any settlements were made, was ill adapted to the state of things in an infant colony. Accordingly it was laid aside, and a new frame of government was, with the consent of the General Assembly, established in 1683.[3] In 1692 Penn was deprived of the government of Pennsylvania by William and Mary; but it was again restored to him in the succeeding year.[4] A third frame of government was established in 1696.[5] This again was surrendered, and a new final charter of government was, in October, 1701, with the consent of the General Assembly, established, under which the province continued to be governed down to the period of the American Revolution. It provided for full liberty of conscience and worship; and for the right of all persons, professing to believe in Jesus Christ, to serve the government in any capacity.[6] An annual assembly was to be chosen of delegates from each county, and to have the usual legislative authority of other colonial assemblies, and also power to nominate certain persons for office to the governor. The laws were

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

[2] 1 Proud. Penn. 200.

[3] 1 Proud. Penn. 239; 2 Proud. Penn. App. 21; 2 Doug. Sumn. 302.

[4] 1 Proud. Penn. 377, 403.

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

[6] 1 Proud. Penn. 443 to 450; 2 Doug. Summ. 303.

to be subject to the approbation of the governor, who had a council of state to assist him in the government.[1] Provision was made in the same charter, that if the representatives of the province, and territories (meaning by territories the three counties of Delaware) should not agree to join together in legislation, they should be represented in distinct assemblies.[2]

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

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1 1 Proud. Penn. 450.

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

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

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

CHAPTER XIII.

DELAWARE.

§ 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]

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

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

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

[3] 1 Proud. Penn. 206; 1 Holmes's Annals, 404; 1 Chalm. Annals, 645, 646.

[4] 1 Chalm. Annals, 646; 1 Dall. Penn. Laws, App. 24, 26; 2 Colden's Five Nations, App.

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

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

CHAPTER XIV.

NORTH AND SOUTH CAROLINA.

§ 128. We next come to the consideration of the history of the political organization of the Carolinas. That level region, which stretches from the 36th degree of north latitude to Cape Florida, afforded an ample 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 soccage, and not in *capite*, or by knight service, subject immediately to the crown, as a dependency, for ever.[2]

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

[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.

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

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

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

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

[3] Carolina Charter, 4to. London.

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

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

[1] 1 Chalm. Annals, 515.

[2] 1 Chalm. Annals, 518, 553; Marsh. Colon. ch. 5, p. 152.

[3] 1 Chalm. Annals, 521; 1 Williams's N. Car. 230, 231; 1 Holmes's Annals, 340; Carolina Charters, 4to. London.

vided such laws were consonant with reason, and, as near as conveniently, may be agreeable to the laws and customs of the realm of England.[1] It also provided, that the inhabitants and their children should be denizens and lieges of the kingdom of England, and reputed and held as the liege people born within the kingdom; and might inherit and purchase lands, and sell and bequeath the same; and should possess all the privileges and immunities of natural born subjects within the realm. Many other provisions were added, in substance like those in the former charter.[2] Several detached settlements were made in Carolina, which were at first placed under distinct temporary governments; one was in Albemarle; another to the south of Cape Fear.[3] Thus various independent and separate colonies were established, each of which had its own assembly, its own customs, and its own laws; a policy, which the proprietaries had afterwards occasion to regret, from its tendency to enfeeble and distract the province.[4]

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

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

2 1 Holmes's Annals, 340; 1 Chalm. Annals, 521, 522; 1 Williams's N. Car. 230 to 254; Iredell's Laws of N. Car. Charter, p. 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. 33.

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

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

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

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

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

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

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

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

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

[2] 1 Chalmers's Annals, 552.

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

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

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

§ 137. There was at this period a space of three hundred miles between the Southern and Northern settlements of Carolina;[3] and though the whole province was owned by the same proprietaries, the legislation of the two great settlements had been hitherto conducted by separate and distinct assemblies, sometimes under the same governor, and sometimes under different governors. The legislatures continued to remain distinct down to the period, when a final surrender of the proprietary charter was made to the crown in 1729.[4] The respective territories were de-

1 1 Hewatt's South Carol. 45.

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

3 1 Williams's N. Car. 155.

4 Marsh. Colon. ch. 9, p. 216, 247; 1 Hewatt's South Carol. 212, 318.

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

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

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

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

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

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

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

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

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

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

2 Id. Act of 1703, p. 4.

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

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

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

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

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

CHAPTER XV.

GEORGIA.

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

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

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

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

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

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

§ 144. Such is the substance of the charter, which was obviously intended for a temporary duration only; and the first measures adopted by the trustees, granting lands in tail male, to be held by a sort of military service, and introducing other restrictions, were not adapted to aid the original design, or foster the growth of the colony.[1] It continued to languish, until at length the trustees, wearied with their own labours, and the complaints of the people, in June, 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]

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

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

2 2 Holmes's Annals, 45.

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

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

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

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

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.

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 the present state of things, or are at liberty to apply them in future by adoption, as the growth or interests of the colony may dictate.[1] The English rules of inheritance, and of protection from personal injuries, the rights secured by Magna Charta, and the remedial course in the administration of justice, are examples as clear perhaps as any, 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

[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.

far as they are contrary to our religion, or enact any thing, that is *malum in se*; for in all such cases the laws of the conquering or acquiring country shall prevail. This qualification of the rule arises from the presumption, that the crown could never intend to sanction laws contrary to religion or sound morals.[1] But although the king has thus the power to change the laws of ceded and conquered countries, the power is not unlimited. His legislation is subordinate to the 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.[2]

§ 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 later 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 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."[3]

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

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

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

§ 152. There is great reason to doubt the accuracy of this statement in a legal view. We have already seen, that the European nations, by whom America was colonized, treated the subject in a very different manner.[1] They claimed an absolute dominion over the whole territories afterwards occupied by them, not in virtue of any conquest of, or cession by the Indian natives; but as a right acquired by discovery.[2] 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;[3] 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.[4] We have also seen, that the title of the Indians was not treated as a right of propriety and dominion; but as a mere right of occupancy.[5] As infidels, heathen, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign and independent nations.[6] The territory, over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to

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

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

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

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

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

6 To do but justice to those times, it is proper to state, that this pretension 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, p. 49, 50.

Christians, deemed, as if it were inhabited only by brute animals. There is not a single grant from the British crown from the earliest grant of Elizabeth down to the latest of George the Second, that affects to look to any title, except that founded on discovery. Conquest or cession is not once alluded to. And it is impossible, that it should have been; for at the time when all the leading grants were respectively made, there had not been any conquest or cession from the natives of the territory comprehended in those grants. Even in respect to the territory of New-York and New-Jersey, which alone afford any pretence for a claim by conquest, they were conquered from the Dutch, and not from the natives; and were ceded to England by the treaty of Breda in 1667. But England claimed this very territory, not by right of this conquest, but by the prior right of discovery.[1] The original grant was made to the Duke of York in 1664, founded upon this right, and the subsequent confirmation of his title did not depart from the original foundation.

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

[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.

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

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

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

[1] 4 Wheat. R. 590, 591, 596; 1 Grahame's Hist. of America, 44; 3 Kent's Comm. 311; *Worcester* v. *State of Georgia*, 6 Peters's Sup. Ct. Rep. 515.

[2] 2 Salk. 411, 412; See also *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.

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

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.

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

§ 156. The doctrine of Mr. Justice Blackstone, therefore, may well admit of serious doubt upon general principles. But it is manifestly erroneous, so far as it is applied to the colonies and plantations composing our Union. In the charters, under which all these colonies were settled, with a single exception,[2] there is, as has been already seen, an express declaration, that all subjects and their children inhabiting therein shall be deemed natural-born subjects, and shall enjoy all the privileges and immunities thereof; and that the laws of England, so far as they are applicable, shall be in force there; and no laws shall be made, which are repugnant to, but as near as may be conveniently, shall conform to the laws of England. Now this declaration, even if the crown previously possessed a right to establish what laws it pleased over the territory, as a conquest from the natives, being a fundamental rule of the original settlement of the colonies, and before the emigrations thither, was conclusive, and could not afterwards be abrogated by the crown. It was an irrevocable annexation of the colonies to the mother country, as dependencies governed by the same laws, and entitled to the same rights.[3]

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[1] *Rex* v. *Brampton*, 10 East R. 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.

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

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[1] Notwithstanding the clearness of this doctrine, both from the language of the charters, and the whole course of judicial decisions, Mr. Jefferson has treated it with an extraordinary degree of derision, if not of contempt. "I deride (says he) with you the ordinary doctrine, that we brought with us from England the common law rights. This *narrow notion* was a *favourite* in the first moment of rallying to our rights against Great Britain. But it was that of men, who felt their 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. Opinion, 202, 220, 295; 1 Chalm. Annals, 677, 681, 682; 1 Tuck. Black. Comm. 385; 1 Kent's Comm. 322; Journal of Congress, 1774, p. 28, 29; 2 Wilson's Law Lect. 48, 49, 50; 1 Tuck. Black. Comm. App. 380 to 384; *Van Ness* v. *Packard*, 2 Peters's Sup. R. 137, 144.

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

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 engrafted upon the existing system should have no jurisprudence at all. If such be the result, there is no guide, and no rule for the courts of the United States, or indeed, for any other department of government, in the exercise of any of the powers confided to them, except so far as Congress has laid, or shall lay down a rule. In the immense mass of rights and duties, of contracts and claims, growing out of the Constitution and laws of the United States, (upon which positive legislation has 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 the subject. Those readers, who are desirous of more ample information, are referred to Duponceau on the Jurisdiction of the Courts of the United States; to 1 Tucker's Black. Comm. App. Note E, p. 372; to 1 Kent's Comm. Lect. 16, p. 311 to 322; to the report of the Virginia legislature of 1799 – 1800; to Rawle on the Constitution, ch. 30, p. 258; to the North American Review, July, 1825; and to Mr. Bayard's speech in the Debates on the Judiciary, in 1802, p. 372, &c. Some other remarks illustrative of it will necessarily arise in discussing the subject of Impeachments.

CHAPTER XVII.

GENERAL REVIEW OF THE COLONIES.

§ 159. In respect to their interior polity, the colonies have been very properly divided by Mr. Justice Blackstone into three sorts; viz. Provincial, Proprietary, and Charter Governments. *First*, Provincial Establishments. The constitutions of these depended on the respective commissions issued by the crown to the governors, and the instructions, which usually accompanied those commissions.[1] These commissions were usually in one form,[2] appointing a governor, as the king's representative or deputy, who was to be governed by the royal instructions, and styling him Captain General and Governor in Chief over the Province, and Chancellor, 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 assem-

[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.

[3] Stokes's Hist. Colon, 155, 237, 240, 241, 242, 251; 1 Pitk. Hist. 71; 1 Chalmers's Annals, 683.

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

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

1 Stokes's Hist. of Colonies, 157, 158, 184, 264.
2 1 Doug. Summ. 207.
3 1 Black. Comm. 108; Stokes's Hist. Colon. 19.

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

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

[1] Stokes's Hist. of Colon. 23.
[2] 1 Pitk. Hist. 55; Stokes's Hist. of Colon. 19; 2 Doug. Summ. 207.
[3] 1 Chalmers's Annals, 203, 637.

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

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

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

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

§ 163. (1.) They enjoyed the rights and privileges of British born subjects; and the benefit of the common laws of England; and all their laws were required to be not repugnant unto, but, as near as might be, agreeable to the laws and statutes of England.[3] This, as we have seen, was a limitation upon the legislative power contained in an express clause of all the charters; and could not be transcended without a clear breach of their fundamental conditions. A very liberal exposition of this clause seems, however, always to have prevailed, and to have been acquiesced in, if not adopted by the crown. Practically speaking, it seems to have been left to the judicial tribunals in the colonies to ascertain, what part of the common law was applicable to the situation of the colonies;[4] and of course, from a dif-

[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.

ference 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 an unity of execution.

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

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

[1] 1 Chalmers's Annals, 139, 140, 684, 687, 671, 675; 1 Tucker's Black. Comm. 384, App.; 2 Wilson's Law Lect. 49, 50; 1 Doug. Summ. 21[illegible]; 1 Pitk. Hist. 108; Mass. State Papers, 345, 346, 347, 351 to 364, [illegible] 390; Dummer's Defence, 1 American Tracts, 65, &c.

[2] Stokes's Colon. 27.

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

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

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

[2] 1 Doug. Summ. 213 to 215.

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

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

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

[1] 1 Hutch. Hist. Mass. 94, note; 1 Doug. Summ. 213. — Mr. Hutchinson's remarks are entitled to something more than this brief notice, and a quotation is therefore made of the leading passage. "It is observable, that all the colonies before the reign of King Charles the Second, Maryland excepted, settled 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 colour for it in the charter, yet a house of deputies appeared suddenly, in 1634, to the surprise of the magistrates, and the disappointment of their schemes for power. Connecticut soon after followed the plan of the Massachusetts. New-Haven, although the people had the highest reverence for their leaders, and for near thirty years in judicial proceeding submitted to the magistracy, (it must, however, be remembered, that it was annually elected,) without a jury; yet in 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 first assembly was called, and no reason given but this, viz. That, by the grant to the Earl of Carlisle, the inhabitants were to enjoy all the liberties, privileges, and franchises of English subjects; and therefore, as it is also expressly mentioned in the grant, could not legally be bound, or charged by any act without their own consent. This grant, in 1627, was made by Charles the First, a prince not the most tender of the subjects' liberties. After the restoration, there is no instance of a colony settled without a representative of the people, nor any attempt to deprive the colonies of this privilege, except in the arbitrary reign of King James the Second."

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

[1] 1 Pitk. Hist. 85, 86, 87; 1 Chalm. Opin. 189; 2 Doug. Summ. 251, &c.
[2] 1 Pitk. Hist. 88; 1 Chalm. Opin. 268, 272; 2 Doug. Summ. 37, 38, 39, 40, 41, 73; Chitty Prerog. ch. 3.
[3] 1 Pitk. Hist. 86, 87. [4] 1 Pitk. Hist. 87, 88.

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

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

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

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

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

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

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

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

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

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

[2] Mr. Burke has sketched with a most masterly hand the true origin of this resistance to the power of taxation. The passage is so full of his best eloquence, and portrays with such striking fidelity the character of the colonists, that, notwithstanding its length, I am tempted to lay it before the reader in this note.

"In this character of the Americans, 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 the English colonies probably than in any other people of the earth; and this from a great variety of powerful causes; which, to understand the true temper of their minds, and the direction which this spirit takes, it will not be amiss to lay open somewhat more largely.

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

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

your character was most predominant; and they took this bias and direction the moment they parted from your hands. They are therefore not only devoted to liberty, but to liberty according to English ideas, and on English principles. Abstract liberty, like other mere abstractions, is not to be found. Liberty inheres in some sensible object; and every nation has formed to itself some favourite point, which by way of eminence becomes the criterion of their happiness. It happened, you know, Sir, that the great contests for freedom in this country were from the earliest times chiefly upon the question of taxing. Most of the contests in the ancient commonwealths turned primarily on the right of election of magistrates; or on the balance among the several orders of the state. The question of money was not with them 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 an house of commons. They went much further; they attempted to prove, and they succeeded, that in theory it ought to be so, from the particular nature of a house of commons, as an immediate representative of the people; whether the old records had delivered this oracle or not. They took infinite pains to inculcate, as a fundamental principle, that in all monarchies, the people must in effect themselves mediately or immediately possess the power of granting their own money, or no shadow of liberty could subsist. — The colonies drew 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

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

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

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

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

"If any thing were wanting to this necessary operation of the form of government, religion would have given it a complete effect. Religion, always a principle of energy, in this new people, is no way worn out or impaired; and their mode of professing it is also one main cause of this free spirit. The people are Protestants; and of that kind, which is the most adverse to all implicit submission of mind and opinion. This is a persuasion not only favourable to liberty, but built upon it. I do not think, Sir, that the reason of this averseness in the dissenting churches from all that looks like absolute government is so much to be sought in their religious tenets, as in their history. Every one knows, that the Roman Catholic religion is at least coeval with most of the governments where it prevails; that it has generally gone hand in hand with them; and received great favour and every kind of support from authority. The church of England too was formed from her cradle under the nursing care of regular government. But the dissenting 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 dissidence 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

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

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 education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful; and in most provinces it takes the lead. The greater number of the deputies sent to the congress were lawyers. But all who read, and most do read, endeavour to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of 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

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

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

* The Attorney General.

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

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

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

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

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

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

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

[1] 1 Doug. Summ. 215.
[2] 1 Grahame's Hist. 43, 44.
[3] Stat. 12 Car. 2, ch. 24.

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

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

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

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

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

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

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

local legislature in 1719.[1] It was treated by the crown, as an inherent right of the subject, independent of any such reservation.[2] And so in divers cases it was held by the courts of England. The reasons given for the opinion, that writs of error [and appeals] lie to all the dominions belonging to England upon the ultimate judgments given there, are, (1.) That, otherwise, the law appointed, or permitted to such inferior dominion might be considerably changed without the assent of the superior dominion; (2.) Judgments might be given to the disadvantage or lessening of the superiority, or to make the superiority of the king only, and not of the crown of England; and (3.) That the practice has been accordingly.[3]

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

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

[2] 1 P. Will. 329; Chitty on Prerog. ch. 3.

[3] 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. 329; *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.

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

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

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

§ 177. (6.) Though the colonies had a common origin, and owed a common allegiance, and the inhabitants of each were British subjects, they had no direct political connexion with each other. Each was independent of all the others; each, in a limited sense, was sovereign within its own territory. There was neither alliance nor confederacy between them. The assembly of one province could not make laws for another; nor confer privileges, which were to be enjoyed or exercised in another, farther than they could be in any independent foreign state. As colonies, they were also excluded from all connexions with foreign states. They were known only as dependencies; and they followed the fate of the parent country both in peace and war, without having assigned to them, in the intercourse or diplomacy of nations, any distinct or independent existence.[4]

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

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

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

[4] 1 Chalm. Annals, 686, 689, 690.

They did not possess the power of forming any league or treaty among themselves, which should acquire an obligatory force without the assent of the parent state. And though their mutual wants and necessities often induced them to associate for common purposes of defence, these confederacies were of a casual and temporary nature, and were allowed as an indulgence, rather than as a right. They made several efforts to procure the establishment of some general superintending government over them all; but their own differences of opinion, as well as the jealousy of the crown, made these efforts abortive.[1] These efforts, however, prepared their minds for the gradual reconciliation of their local interests, and for the gradual developement 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 Great Britain, and owed allegiance to him; and all

[1] 1 Pitk. Hist. 50, 141, 142, 143, 144, 145, 146, 429; 2 Haz. Coll.; 1 Marsh. Colon. ch. 10, p. 284; 3 Hutch. Hist. 21, 22, 23.

the civil authority then existing, or exercised here, flowed from the head of the British empire. They were, in a strict sense, *fellow* subjects, and in a variety of respects *one people*. When the Revolution commenced, the patriots did not assert, that only the same affinity and social connexion subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain, and Spain, while Roman provinces, to wit, only that affinity and social connexion, which result from the mere circumstance of being governed by the same prince." Different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.[1]

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

(1.) As to the course of descents and distribution of intestate estates. And, here, the policy of different colonies was in a great measure determined by the nature of their original governments and local positions. All the southern colonies, including Virginia, adhered to the course of descents at the common law (as we have had occasion to see) down to the American Revolution. As a natural consequence, real property was in these colonies generally held in large masses by the families of ancient proprietors; the younger branches were in a great measure dependent upon the eldest; and the latter assumed, and supported somewhat of the pre-eminence, which belonged to baronial possessions in the parent country. Virginia was so tenacious of entails, that she would not even endure the barring of them by the common means of fines and recoveries. New-York

[1] *Chisholm* v. *State of Georgia*, 2 Dall. 470.

and New-Jersey silently adhered to the English rule of descents under the government of the crown, as royal provinces. On the other hand, all New-England, with the exception of Rhode Island, from a very early period of their settlements adopted the rule of dividing the inheritance equally among all the children, and other next of kin, giving a double share to the eldest son. Maryland, after 1715, and Pennsylvania almost from its settlement, in like manner distributed the inheritance among all the children and other next of kin. 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]

§ 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 connexion, which naturally subsists between the general equality of the apportionment of property among the mass of a nation, and the popular form of its government. The former can scarcely fail, first or last, to introduce the substance of a republic into the actual administration of the government, though its forms do not bear such an external impress. Our revolutionary statesmen were not insensible to this silent but potent influence; and the fact, that at the present time the law of divisible inher-

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

itances 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 statute 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]

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

[1] In 1727.

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

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

the payment of debts. In some of them, indeed, the English rule prevailed of making lands liable only to an extent upon an elegit. But in by far the greatest number, lands were liable to be set off upon appraisement, or sold for the payment of debts. And lands were also assets, in cases of a deficiency of personal property, to be applied in the course of administration to discharge the debts of the party deceased. This was a natural result of the condition of the people in a new country, who possessed little monied capital; whose wants were numerous; and whose desire of credit was correspondently great. The true policy in such a state of things was to make land, in some degree, a substitute for money, by giving it all the facilities of transfer, and all the prompt applicability of personal property. It will be found, that the growth of the respective colonies was in no small degree affected by this circumstance. Complaints were made, and perhaps justly, that undue priorities in payment of debts were given to the inhabitants of the colony over all other creditors; and that occasional obstructions were thrown in the way of collecting debts.[1] But the evil was not general in its operation; and the policy, wherever it was pursued, retarded the growth, and stinted the means of the settlements. For the purpose, however, of giving greater security to creditors, as well as for a more easy recovery of debts due in the plantations and colonies in America, the statute of 5 George 2, ch. 7, [1732,] among other things declared, that all houses, lands, negroes, and other hereditaments and real estates in the plantations should be liable to, and chargeable with the debts of the proprietor, and be assets for the satisfaction

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

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

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

§ 184. In the silence of express declarations we may resort to the doctrines maintained by the 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

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

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

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

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[1] The reader will find the subject of the royal prerogative in the colonies discussed at large in Chitty on the Prerogatives of the Crown, ch. 3, p. 25 to 40; in 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.

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

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

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

[2] 1 Pitk. Hist. 91; 1 Chalm. Annals, 445.

[3] 2 Winthrop's Jour. 25.

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

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

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

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

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

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

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

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

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

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

§ 190. Perhaps the best general summary of the rights and liberties asserted by all the colonies is contained in the celebrated declaration drawn up by the Congress of the Nine Colonies, assembled at 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 "colo-

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

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

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

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

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

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

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

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

1 Pitk. Hist. 448, 450.
2 1 Pitk. Hist. 453, 454.
3 4 Amer. Museum, 89.
4 4 Amer. Museum, 89, 90.
5 The celebrated Declaration of the Rights of the colonies by Congress in 1774 (hereafter cited) contains a summary not essentially different. 1 Journ. of Congress, 27 to 31.

trating the strength and prosperity of the colonies, drove them to a more close and narrow survey of the foundation of parliamentary supremacy. Doubts were soon infused into their minds; and from doubts they passed by an easy transition to a denial, first of the power of taxation, and next of all authority whatever to bind them by its laws.[1] One of the most distinguished of our 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 allegi-

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

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

3 3 Wilson's Works, 221, 222, 226, 227, 229, 237, 238; 2 Wilson's Works, 54, 55, 58 to 63; 1 Pitk. Hist. 242, 243, 246, 248, 249, 250; Mass. State Papers, 331, 333, 337, 339, 342 to 351, 352 to 364; 4 Debrett's Parl. Debates, 251, &c. note; Marsh. Hist. Colon. ch. 14, p. 412, 483 1 Jefferson's Corresp. 6, 7, 12, 100, 104 to 116.

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

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

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

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

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

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

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

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

Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet and sit in general congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties may not be subverted: Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and 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 exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner, as has been heretofore used and accustomed. But from the necessity of the case, and a regard to the mutual interests of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are *bona fide* restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or exter-

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

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nal, 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 for the same, are illegal.

"Resolved, N. C. D. 9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

"Resolved, N. C. D. 10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous, and destructive to the freedom of American legislation.

"All, and each of which, the aforesaid deputies in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered, or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures."

The plan of conciliation proposed by the provincial convention of 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.

the crown could not by its grants exempt them from the supreme legislative power of parliament, which extended wherever the sovereignty of the crown extended; that the colonists in their new settlements owed the same subjection and allegiance to the supreme power, as if they resided in England, and that the crown had no authority to enter into any compact to impair it; that the legislative power over the colonies is supreme and sovereign; that the supreme power must be entire and complete in taxation, as well as in legislation; that there is no difference between a grant of duties on merchandise, and a grant of taxes and subsidies; that there is no difference between external and internal taxes, and though different in name, they are in effect the same; that taxation is a part of the sovereign power, and that it may be rightfully exercised over those, who are not represented.[1]

§ 196. The grounds, on which the colonies resisted the right of taxation by parliament, were, (as we have seen,) that they were not represented in parliament; that they were entitled to all the privileges and immunites of British subjects; that the latter could not be taxed but by their own representatives; that representation and taxation were inseparably connected; that the principles of taxation were essentially distinct from those of legislation; that there is a wide difference between the power of internal and external taxation; that the colonies had always enjoyed the sole right of imposing taxes upon themselves; and that it was essential to their freedom.[2]

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

[2] 1 Pitk. Hist. 199, 200, 201, 208, 209, 211, 219, 285 to 288, 311, 443,

§ 197. The stamp act was repealed; but within a few years afterwards duties of another sort were laid, the object of which was to raise a revenue from importations into the colonies. These of course became as offensive to the colonies as the prior attempt at internal taxation; and were resisted upon the same grounds of unconstitutionality.[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.

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

[1] 1 Pitk. Hist. 217, 219, &c.

BOOK II.

HISTORY OF THE REVOLUTION AND OF THE CONFEDERATION.

CHAPTER I.

THE REVOLUTION.

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

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

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

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

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

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

§ 201. Thus was organized under the auspices, and with the consent of the people, acting directly in their primary, sovereign capacity, and without the intervention of the functionaries, to whom the ordinary powers of government were delegated in the colonies, the first general or national government, which has been very aptly called "the revolutionary government," since in its origin and progress it was wholly conducted upon revolutionary principles.[2] The congress, thus assembled, exercised *de facto* and *de jure* a sovereign authority; not as the delegated agents of the governments *de facto* of the colonies, but in virtue of original powers derived from the people. The revolutionary government, thus formed, terminated only, when it was regularly superseded by the confederated government under the articles finally ratified, as we shall hereafter see, in 1781.[3]

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

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

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

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

1 1 Jour. of Cong. 21. 2 See ante, note, p. 179.

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

4 See *Penhallow* v. *Doane*, 3 Dall. 54, and particularly the opinions of Iredell J. and Blair J. on this point. Journals of 1775, p. 73 to 79.

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

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

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

§ 204. At a subsequent adjournment, they authorized the equipment of armed vessels to intercept supplies to the British, and the organization of a marine corps. They prohibited all exportations, except from colony to colony under the inspection of committees. They recommended to New-Hampshire, Virginia, and South-Carolina, to call conventions of the people to establish a form of government.[2] They authorized the grant of commissions to capture armed vessels and transports in the British service; and recommended the creation of prize courts in each colony, reserving a right of appeal to congress.[3] They adopted rules for the regulation of the navy, and for the division of prizes and prize money.[4] They denounced, as enemies, all, who should obstruct or discourage the circulation of bills of credit. They authorized further emissions of bills of credit, and created two military departments for the middle and southern colonies. They authorized general reprisals, and the equipment of private armed vessels against British vessels and property.[5] They organized a general treasury department. They authorized the exportation and importation of all goods to and from foreign countries, not subject to Great Britain, with certain exceptions; and prohibited the importation of slaves; and declared a forfeiture of all

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

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

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

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

adopted the resolution for Independence; and on the 4th of July they adopted the Declaration of Independence; and thereby solemnly published and declared, "That these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown; and that all political connexion between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things, which independent states may of right do."

§ 206. These minute details have been given, not merely, because they present an historical view of the actual and slow progress towards independence; but because they give rise to several very important considerations respecting the political rights and sovereignty of the several colonies, and of the union, which was thus spontaneously formed by the people of the united colonies.

§ 207. In the first place, antecedent to the Declaration of Independence, none of the colonies were, or pretended to be sovereign states, in the sense, in which the term "sovereign" is sometimes applied to states.[1] The term "sovereign" or "sovereignty" is used in different senses, which often leads to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions. By "sovereignty" in its largest sense is meant, supreme, absolute, uncontrollable power, the *jus summi imperii*,[2] the absolute right to govern. A state or nation is a body politic, or society of men,

[1] 3 Dall. 110. Per Blair J.; 9 Dane's Abridg. Appx. § 2, p. 10, § 3, p. 12, § 5, p. 16.

[2] 1 Bl. Comm. 49; 2 Dall. 471. Per Jay C. J.

united together for the purpose of promoting their mutual safety and advantage by their combined strength.[1] By the very act of civil and political association, each citizen subjects himself to the authority of the whole; and the authority of all over each member essentially belongs to the body politic.[2] A state, which possesses this absolute power, without any dependence upon any foreign power or state, is in the largest sense a sovereign state.[3] And it is wholly immaterial, what is the form of the government, or by whose hands this absolute authority is exercised. It may be exercised by the people at large, as in a pure democracy; or by a select few, as in an absolute aristocracy; or by a single person, as in an absolute monarchy.[4] But "sovereignty" is often used in a far more limited sense, than that, of which we have spoken, to designate such political powers, as in the actual organization of the particular state or nation are to be exclusively exercised by certain public functionaries, without the control of any superior authority. It is in this sense, that Blackstone employs it, when he says, that it is of "the very essence of a law, that it is made by the supreme power. Sovereignty and legislature are, indeed, convertible terms; one cannot subsist without the other."[5] Now, in every limited government the power of legislation is, or at least may be, limited at the will of the nation; and therefore the legislature is not in an absolute sense sovereign. It is in the same sense, that Blackstone says, "the law ascribes to the

1 Vattel, B. 1, ch. 1, § 1; 2 Dall. 455. Per Wilson J.

2 Vattel, B. 1, ch. 1, § 2.

3 2 Dall. 456, 457. Per Wilson J.

4 Vattel, B. 1, ch. 1, § 2, 3.

5 1 Bl. Comm. 46. See also 1 Tucker's Black. Comm. App. note A., a commentary on this clause of the Author's text.

king of England the attribute of sovereignty or pre-eminence,"[1] because, in respect to the powers confided to him, he is dependant on no man, and accountable to no man, and subjected to no superior jurisdiction. Yet the king of England cannot make a law; and his acts, beyond the powers assigned to him by the constitution, are utterly void.

§ 208. In like manner the word "state" is used in various senses. In its most enlarged sense it means the people composing a particular nation or community. In this sense the state means the whole people, united into one body politic; and the state, and the people of the state, are equivalent expressions.[2] Mr. Justice Wilson, in his Law Lectures, uses the word "state" in its broadest sense. "In free states," says he, "the people form an artificial person, or body politic, the highest and noblest, that can be known. They form that moral person, which in one of my former lectures,[3] I described, as a complete body of free, natural persons, united together for their common benefit; as having an understanding and a will; as deliberating, and resolving, and acting; as possessed of interests, which it ought to manage; as enjoying rights, which it ought to maintain; and as lying under obligations, which it ought to perform. To this moral person, we assign, by way of eminence, the dignified appellation of STATE."[4] But there is a more limited sense, in which the word is often used, where it expresses merely the

[1] 1 Bl. Comm. 241.

[2] *Penhallow* v. *Doane*, 1 Peters's Cond. Rep. 37, 38, 39; 3 Dall. R. 93, 94. Per Iredell J. *Chisholm* v. *Georgia*, 2 Dall. 455. Per Wilson J. S. C. 2 Cond. Rep. 656, 670; 2 Wilson's Lect. 120; Dane's Appx. § 50, p. 63.

[3] 1 Wilson's Lect. 304, 305.

[4] 2 Wilson's Lect. 120, 121.

positive or actual organization of the legislative, executive, or judicial powers.[1] Thus, the actual government of a state is frequently designated by the name of *the state*. We say, the state has power to do this or that; the state has passed a law, or prohibited an act, meaning no more than, that the proper functionaries, organized for that purpose, have power to do the act, or have passed the law, or prohibited the particular action. The sovereignty of a nation or state, considered with reference to its association, as a body politic, may be absolute and uncontrollable in all respects, except the limitations, which it chooses to impose upon itself.[2] But the sovereignty of the government, organized within the state, may be of a very limited nature. It may extend to few, or to many objects. It may be unlimited, as to some; it may be restrained, as to others. To the extent of the power given, the government may be sovereign, and its acts may 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.[3] Strictly speaking, in our republican

[1] Mr. Madison, in his elaborate Report in the Virginia legislature in January, 1800, adverts to the different senses, in which the word "state" is used. He says, "It is indeed true, that the term "states" is sometimes used in a vague sense, and sometimes in different senses, according to the subject, to which it is applied. Thus it sometimes means the separate sections of territory, occupied by the political societies within each; sometimes the particular *governments* established by those societies; sometimes those societies, as organized into those particular governments; and lastly, it means *the people*, composing those political societies in their highest sovereign capacity."

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

[3] 3 Dall. 93. Per Iredell J. 2 Dall. 455, 457. Per Wilson J.

forms of government, the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each state, not granted to any of its public functionaries, is in the people of the state.[1]

§ 209. There is another mode, in which we speak of a state as sovereign, and that is in reference to foreign states. Whatever may be the internal organization of the government of any state, if it has the sole power of governing itself and is not dependent upon any foreign state, it is called a *sovereign state;* that is, it is a state having the same rights, privileges, and powers, as other independent states. It is in this sense, that the term is generally used in treatises and discussions on the law of nations. A full consideration of this subject will more properly find place in some future page.[2]

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[1] 2 Dall. 471, 472. Per Jay C. J.

Mr. J. Q. Adams, in his Oration on the 4th of July, 1831, published after the preparation of these Commentaries, uses the following language: "It is not true, that there must reside in all governments an absolute, uncontrollable, irresistible, and despotic power; nor is such power in any manner essential to sovereignty. Uncontrollable power exists in no government on earth. The sternest despotisms in any region and in every age of the world, are and have been under perpetual control. Unlimited power belongs not to man; and rotten will be the foundation of every government, leaning upon such a maxim for its support. Least of all can it be predicated of a government, professing to be founded upon an original compact. The pretence of an absolute, irresistible, despotic power, existing in every government somewhere, is incompatible with the first principles of natural right."

[2] Dr. Rush, in a political communication, in 1786, uses the term "sovereignty" in another, and somewhat more limited sense.* He says, "The people of America have mistaken the meaning of the word 'sovereignty.' Hence each state pretends to be *sovereign*. In Europe it is applied to those states, which possess the power of making war and peace, of forming treaties, and the like. As this power belongs only to congress, they are the only sovereign power in the United States. We commit a similar mistake in our ideas of the word 'independent.' No

* 1 Amer. Museum, 8, 9.

§ 210. Now it is apparent, that none of the colonies before the Revolution were, in the most large and general sense, independent, or sovereign communities. They were all originally settled under, and subjected to the British crown.[1] Their powers and authorities were derived from, and limited by, their respective charters. All, or nearly all, of these charters controlled their legislation by prohibiting them from making laws repugnant, or contrary to those of England. The crown, in many of them, possessed a negative upon their legislation, as well as the exclusive appointment of their superior officers; and a right of revision, by way of appeal, of the judgments of their courts.[2] In their most solemn declarations of rights, they admitted themselves bound, as British subjects, to allegiance to the British crown; and as such, they claimed to be entitled to all the rights, liberties, and immunities of free born British subjects. They denied all power of taxation, except by their own colonial legislatures; but at the same time they admitted themselves bound by acts of the British parliament for the regulation of external commerce, so as to secure the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members.[3] So far, as respects foreign states, the colonies were not, in the sense of the laws of nations,

individual state, as such, has any claim to independence. She is independent only in a union with her sister states in congress." Dr. Barton, on the other hand, in a similar essay, explains the operation of the system of the confederation in the manner, which has been given in the text.*

[1] 2 Dall. 471. Per Jay C. J.

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

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

* 1 Amer. Museum, 13, 14.

sovereign states; but mere dependencies of Great Britain. They could make no treaty, declare no war, send no ambassadors, regulate no intercourse or commerce, nor in any other shape act, as sovereigns, in the negociations usual between independent states. In respect to each other, they stood in the common relation of British subjects; the legislation of neither could be controlled by any other; but there was a common subjection to the British crown.[1] If in any sense they might claim the attributes of sovereignty, it was only in that subordinate sense, to which we have alluded, as exercising within a limited extent certain usual powers of sovereignty. They did not even affect to claim a local allegiance.[2]

§ 211. In the next place, the colonies did not severally act for themselves, and proclaim their own independence. It is true, that some of the states had previously formed incipient governments for themselves; but it was done in compliance with the recommendations of congress.[3] Virginia, on the 29th of June, 1776, by a convention of delegates, declared "the government of this country, as formerly exercised under the crown of Great Britain, totally dissolved;" and proceeded to form a new constitution of government. New-Hampshire also formed a government, in December, 1775, which was manifestly intended to be temporary, "during (as they said) the unhappy and unnatural contest with Great Britain."[4] New-Jersey, too, established a frame

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

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

[3] Journal of Congress, 1775, p. 115, 231, 235, 279; 1 Pitk. Hist. 351, 355; Marsh. Colon. ch. 14, p. 441, 447; 9 Hening. Stat. 112, 113; 9 Dane's Abridg. App. § 5, p. 16.

[4] 2 Belk. N. Hamp. ch. 25, p. 306, 308, 310; 1 Pitk. Hist. 351, 355.

of government, on the 2d of July, 1776; but it was expressly declared, that it should be void upon a reconciliation with Great Britain.[1] And South Carolina, in March, 1776, adopted a constitution of government; but this was, in like manner, "established until an accommodation between Great Britain and America could be obtained."[2] But the declaration of the independence of all the colonies was the united act of all. It was "a declaration by the representatives of the United States of America in congress assembled;" "by the delegates appointed by the good people of the colonies," as in a prior declaration of rights they were called.[3] It was not an act done by the state governments then organized; nor by persons chosen by them. It was emphatically the act of the whole *people* of the united colonies, by the instrumentality of their representatives, chosen for that, among other purposes.[4] It was an act not competent to the state governments, or any of them, as organized under their charters, to adopt. Those charters neither contemplated the case, nor provided for it. It was an act of original, inherent sovereignty by the people themselves, resulting from their right to change the form of government, and to institute a new government, whenever necessary for their safety and happiness. So the declaration of independence treats it. No state had presumed of itself to form a new government, or to provide for the exigencies of the times, without consulting congress on the subject; and when they acted, it was in pursuance of the recommendation

1 Stokes's Hist. Colon. 51, 75.

2 Stokes's Hist. Colon. 105; 1 Pitk. Hist. 355.

3 Journal, 1776, p. 241; Journal, 1774, p. 27, 45.

4 2. Dall. 470, 471. Per Jay C. J.; 9 Dane's Abridg. App. § 12, 13, p. 23, 24.

of congress. It was, therefore, the achievement of the whole for the benefit of the whole. The people of the united colonies made the united colonies free and independent states, and absolved them from all allegiance to the British crown. The declaration of independence has accordingly always been treated, as an act of paramount and sovereign authority, complete and perfect *per se*, and *ipso facto* working an entire dissolution of all political connexion with and allegiance to Great Britain. And this, not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice.[1]

§ 212. In the debates in the South Carolina legislature, in January, 1788, respecting the propriety of calling a convention of the people to ratify or reject the constitution, a distinguished statesman[2] used the following language: "This admirable manifesto (i. e. 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

[1] 2 Dallas R. 470.

[2] Mr. Charles Cotesworth Pinckney.

if it was intended to impress the maxim on America, that our freedom and independence arose from our union, and that without it we could never be free or independent. Let us then consider all attempts to weaken this union by maintaining, that each state is separately and individually independent, as a species of political heresy, which can never benefit us, but may bring on us the most serious distresses."[1]

§ 213. In the next place we have seen, that the power to do this act was not derived from the state governments; nor was it done generally with their 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

[1] Debates in South Carolina, 1788, printed by A. E. Miller, Charleston, 1831, p. 43, 44. — Mr. Adams, in his Oration on the 4th of July, 1831, which is valuable for its views of constitutional principles, insists upon the same doctrine at considerable length. Though it has been published since the original preparation of these lectures, I gladly avail myself of an opportunity to use his authority in corroboration of the same views. "The union of the colonies had preceded this declaration, [of independence,] and even the commencement of the war. The declaration was joint, that the united colonies were free and independent states, but not that any one of them was a free and independent state, separate from the rest." "The declaration of independence was a social compact, by which the whole people covenanted with each citizen, and each citizen with the whole people, that the united colonies were, and of right ought to be free and independent states. To this compact union was as vital, as freedom or independence." "The declaration of independence announced the severance of the thirteen united colonies from the rest of the British empire, and the existence of their people from that day forth as an independent nation. The people of all the colonies, speaking by their representatives, constituted themselves one moral person before the face of their fellow men." "The declaration of independence was not a declaration of liberty merely acquired, nor was it a form of government. The people of the colonies were already free, and their forms of government were various. They were all colonies of a monarchy. The king of Great Britain was their common sovereign."

congress assumed powers and passed measures, which were in their nature national, to that extent the people, from whose acquiescence and consent they took effect, must be considered as agreeing to form a nation.[1] The congress of 1774, looking at the general terms of the commissions, under which the delegates were appointed, seem to have possessed the power of concerting such measures, as they deemed best, to redress the grievances, and preserve the rights and liberties of all the colonies. Their duties seem to have been principally of an advisory nature; but the exigencies of the times led them rather to follow out the wishes and objects of their constituents, than scrupulously to examine the words, in which their authority was communicated.[2] The congress of 1775 and 1776 were clothed with more ample powers, and the language of their commissions generally was sufficiently broad to embrace the right to pass measures of a national character and obligation. The caution necessary at that period of the revolutionary struggle rendered that language more guarded, than the objects really in view would justify; but it was foreseen, that the spirit of the people would eagerly second every measure adopted to further a general union and resistance against the British claims. The congress of 1775 accordingly assumed at once (as we have seen) the exercise of some of the highest functions of sovereignty. They took measures for national defence and resistance; they followed up the prohibitions upon trade and intercourse with Great Britain; they raised a national army and navy, and authorized limited national hostilities against Great Britain; they raised money, emitted bills of credit, and contracted debts upon national account;

[1] 3 Dall. R. 80, 81, 90, 91, 109, 110, 111, 117.
[2] 3 Dall. R. 91.

they established a national post-office; and finally they authorized captures and condemnation of prizes in prize courts, with a reserve of appellate jurisdiction to themselves.

§ 214. The same body, in 1776, took bolder steps, and exerted powers, which could in no other manner be justified or accounted for, than upon the supposition, that a national union for national purposes already existed, and that the congress was invested with sovereign power 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]

[1] This whole subject is very amply discussed by Mr. Dane in his Appendix to the 9th volume of his Abridgment of the Laws; and many of

§ 215. From the moment of the declaration of independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation *de facto*, having a general government over it created, and acting by the general consent of the people of all the colonies. The powers of that government were not, and indeed could not be well defined. But still its exclusive sovereignty, in many cases, was firmly established; and its controlling power over the states was in most, if not in all national measures, universally admitted.[1] The articles of confederation, of which we shall have occasion to speak more hereafter, were not prepared or adopted by congress until November, 1777;[2] they were not signed or ratified by any of the states until July, 1778; and they were not ratified, so as to become obligatory upon all the states, until March, 1781. In the intermediate time, congress continued to exercise the powers of a general government, whose acts

his views coincide with those stated in the text. The whole of that Appendix is worthy of the perusal of every constitutional lawyer, even though he might differ from some of the conclusions of the learned author. He will there find much reasoning from documentary evidence of a public nature, which has not hitherto been presented in a condensed or accurate shape.

Some interesting views of this subject are also presented in President Monroe's Message on Internal Improvements, on the 4th of May, 1822, appended to his Message respecting the Cumberland Road. See, especially, pages 8 and 9.

When Mr. Chief Justice Marshall, in *Ogden* v. *Gibbons*, (9 Wheat. R. 187,) admits, that the states, before the formation of the constitution, were sovereign and independent, and were connected with each other only by a league, it is manifest, that he uses the word "sovereign" in a very restricted sense. Under the confederation there were many limitations upon the powers of the states.

[1] See *Penhallow* v. *Doane*, 3 Dall. R. 54; *Ware* v. *Hylton*, 3 Dall. 199, per Chase J. See the Circular Letter of Congress, 13th Sept. 1779; 5 Jour. Cong. 341, 348, 349.

[2] Jour. of Cong. 1777, p. 502.

were binding on all the states. And though they constantly admitted the states to be "sovereign and independent communities;"[1] yet it must be obvious, that the terms were used in the subordinate and limited sense already alluded to; for it was impossible to use them in any other sense, since a majority of the states could by their public acts in congress control and bind the minority. Among the exclusive powers exercised by congress, were the power to declare war and make peace; to authorize captures; to institute appellate prize courts; to direct and control all national, military, and naval operations; to form alliances, and make treaties; to contract debts, and issue bills of credit upon national account. In respect to foreign governments, we were politically known as the United States only; and it was in our national capacity, as such, that we sent and received ambassadors, entered into treaties and alliances, and were admitted into the general community of nations, who might exercise the right of belligerents, and claim an equality of sovereign powers and prerogatives.[2]

§ 216. In confirmation of these views, it may not be without use to refer to the opinions of some of our most eminent judges, delivered on occasions, which required an exact examination of the subject. In *Chisholm's Executors* v. *The State of Georgia*, (3 Dall. 419, 470,[3]) Mr. Chief Justice Jay, who was equally distinguished as a revolutionary statesman and a general jurist, expressed himself to the following effect: "The revolution, or rather the declaration of independence, found the *people* already united for general purposes, and at

[1] See Letter of 17th Nov. 1777, by Congress, recommending the articles of confederation; Journal of 1777, p. 513, 514.

[2] 1 Amer. Museum, 15; 1 Kent. Comm. 197, 198, 199.

[3] S. C. 1 Peters's Cond. R. 635.

the same time providing for their more domestic concerns by state conventions, and other temporary arrangements. From the crown of Great Britain the sovereignty of their country passed to the *people* of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states, within whose limits they were situated, but to the *whole people*. On whatever principle this opinion rested, it did not give way to the other; and *thirteen sovereignties* were considered as emerging from the principles of the revolution, combined by local convenience and considerations. The people, nevertheless, continued to consider themselves, in a national point of view, as *one people;* and they continued without interruption to manage their national concerns accordingly." In *Penhallow* v. *Doane*, (3 Dall. R. 54,[1]) Mr. Justice Patterson (who was also a revolutionary statesman) said, speaking of the period before the ratification of the confederation: "The powers of congress were revolutionary in their nature, arising out of events adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme, and controlling council of the nation, the centre of the union, the centre of force, and the sun of the political system. Congress raised armies, fitted out a navy, and prescribed rules for their government, &c. &c. These high acts of sovereignty were submitted to, acquiesced in, and approved of by the *people* of America, &c. &c. The danger being imminent and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert, or break the violence of the gathering

[1] S. C. 1 Peters's Cond. Rep. 21.

storm. They accordingly grew into union, and formed one great political body, of which congress was the directing principle and soul, &c. &c. The truth is, that the states, individually, were not known, nor recognized as sovereign by foreign nations, nor are they now. The states collectively under congress, as their connecting point or head, were acknowledged by foreign powers, as sovereign, particularly in that acceptation of the term, which is applicable to all great national concerns, and in the exercise of which other sovereigns would be more immediately interested." In *Ware* v. *Hylton*, (3 Dall. 199,[1]) Mr. Justice Chase (himself also a revolutionary statesman) said: "It has been inquired, what powers congress possessed from the first meeting in September, 1774, until the ratification of the confederation on the 1st of March, 1781. It appears to me, that the powers of congress during that whole period were derived from the *people* they represented, expressly given through the medium of their state conventions or state legislatures; or, that after they were exercised, they were impliedly ratified by the acquiescence and obedience of the *people*, &c. The powers of congress originated from necessity, and arose out of it, and were only limited by events; or, in other words, they were revolutionary in their nature. Their extent depended on the exigencies and necessities of public affairs. I entertain this general idea, that the several states retained all internal sovereignty; and that congress properly possessed the rights of external sovereignty. In deciding on the powers of congress, and of the several states before the confederation, I see but one safe rule, namely, that all the powers actually exer-

[1] S. C. 1 Peters's Cond. R. 99.

cised by congress before that period were rightfully exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant; and that all the powers exercised by the state conventions or state legislatures were also rightfully exercised, on the same presumption of authority from the people."[1]

§ 217. In respect to the powers of the continental congress exercised before the adoption of the articles of confederation, few questions were judicially discussed during the revolutionary contest; for men had not leisure in the heat of war nicely to scrutinize or weigh such subjects; *inter arma silent leges.* The people, relying on the wisdom and patriotism of congress, silently acquiesced in whatever authority they assumed. But soon after the organization of the present government, the question was most elaborately discussed before the Supreme Court of the United States, in a case calling for an exposition of the appellate jurisdiction of congress in prize causes before the ratification of the confederation.[2] The result of that examination was, as the opinions already cited indicate, that congress, before the confederation, possessed, by the consent of the people of the United States, sovereign and supreme powers for national purposes; and among others, the supreme powers of peace and war, and, as an incident, the right of entertaining appeals in the last resort in prize causes, even in opposition to state legislation. And that the actual powers exercised by congress, in

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[1] See also 1 Kent. Comm. Lect. 10, p. 196; President Monroe's Exposition and Message, 4th of May, 1822, p. 8, 9, 10, 11.

[2] *Penhallow* v. *Doane*, 3 Dall. 54, 80, 83, 90, 91, 94, 109, 110, 111, 112, 117; Journals of Congress, March, 1779, p. 86 to 88; 1 Kent. Comm. 198, 199.

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

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 re-conquest by Great Britain, after such separation in detached contests, but also to all the hazards of internal warfare and civil dissensions. So, that those, who had stood side by side in the common cause against Great Britain, might then, by the intrigues of their enemies, and the jealousies always incident to neighbouring nations, become instruments, in the hands of the ambitious abroad, or the corrupt at home, to aid in the mutual destruction of each other; and thus all successively fall, the victims of a domestic or foreign tyranny. Such considerations could not but have great weight with all honest and patriotic citizens, independent of the real blessings, which a permanent union could not fail to secure throughout all the states.

§ 219. It is not surprising, therefore, that a project, which, even in their colonial state, had been so often attempted by some of them to guard themselves against

the evils incident to their political weakness and their distance from the mother country, and which had been so often defeated by the jealousy of the crown, or of the colonies,[1] should have occurred to the great and wise men, who assembled in the Continental Congress at a very early period.

§ 220. It will be an instructive and useful lesson to us to trace historically the steps, which led to the formation and final adoption of the articles of confederation and perpetual union 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 ardour of inexperienced minds, which are apt to imagine, that the theory of government is too plain, and the principles, on which it should be formed, too obvious, to leave much doubt for the exercise of the wisdom of statesmen, or the ingenuity of speculatists. Nothing is indeed more difficult to forsee, than the practical operation of given powers, unless it be the practical operation of restrictions, intended to control those powers. It is a mortifying truth, that if the possession of power sometimes leads to mischievous abuses, the absence of it also sometimes produces a political debility, quite as ruinous in its consequences to the great objects of civil government.

§ 221. It is proposed, therefore, to go into an historical review of the manner of the formation and adoption of the articles of confederation. This will be followed by an exposition of the general provisions and distributions

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

of power under it. And this will naturally lead us to a consideration of the causes of its decline and fall; and thus prepare the way to a consideration of the measures, which led to the origin and final adoption of the present constitution of the United States.[1]

§ 222. On the 11th of June, 1776, the same day, on which the committee for preparing the declaration of independence was appointed, congress resolved, that "a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies;" and on the next day a committee was accordingly appointed, consisting of a member from each colony.[2] Nearly a year before this period, (viz. on the 21st of July, 1775,) Dr. Franklin had submitted to congress a sketch of articles of confederation, which does not, however, appear to have been acted on. These articles contemplated a union, until a reconciliation with Great Britain, and on failure thereof, the confederation to be perpetual.

§ 223. On the 12th of July, 1776, the committee, appointed to prepare articles of confederation, presented a draft,[3] which was in the hand-writing of Mr. Dickenson, one of the committee, and a delegate from Pennsylvania. The draft, so reported, was debated from the 22d to the 31st of July, and on several days between the 5th and 20th of August, 1776. On this last day, congress, in

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

[3] The draft of Dr. Franklin, and this draft, understood to be by Mr. Dickenson, were never printed, until the publication of the Secret Journals by order of Congress in 1821, where they will be found under pages 283 and 290.

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

§ 224. The subject seems not again to have been touched until the 8th of April, 1777, and the articles were debated at several times between that time and the 15th 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 many sovereign and independent communities, under

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

a conviction of the absolute necessity of uniting all our councils, and all our strength, to maintain and defend our common liberties. Let them be examined with a liberality becoming brethren and fellow citizens, surrounded by the same imminent dangers, contending for the same illustrious prize, and deeply interested in being for ever bound, and connected together, by ties the most intimate and indissoluble. And finally, let them be adjusted with the temper and magnanimity of wise and patriotic legislators, who, while they are concerned for the prosperity of their own more immediate circle, are capable of rising superior to local attachments, when they may be incompatible with the safety, happiness, and glory of the general confederacy."

§ 225. Such was the strong and eloquent appeal made to the states. It carried, however, very slowly conviction to the minds of the local legislatures. Many objections were stated; and many amendments were proposed. All of them, however, were rejected by congress, not probably because they were all deemed inexpedient or improper in themselves; but from the danger of sending the instrument back again to all the states, for reconsideration. Accordingly, on the 26th of June, 1778, a copy, engrossed for ratification, was prepared, and the ratification begun on the 9th day of July following. It was ratified by all the states, except Delaware and Maryland, in 1778; by Delaware in 1779, and by Maryland on the first of March, 1781, from which last date its final ratification took effect, and was joyfully announced by congress.[1]

§ 226. In reviewing the objections, taken by the various states to the adoption of the confederation in the

[1] Secret Journals, 401, 418, 423, 424, 426; 3 Kent's Comm. 196, 197.

form, in which it was presented to them, at least so far as those objections can 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.[1] Among the latter were the objections taken, and alterations proposed in respect to the apportionment of taxes, and of the quota of public forces to be raised among the states, by Massachusetts, Connecticut, New-Jersey, and Pennsylvania.[2] There was also an abundance of jealousy of the power to keep up a standing army in time of peace.[3]

§ 227. But that, which seemed to be of paramount importance, and which, indeed, protracted the ratification of the confederation to so late a period, was the alarming controversy in respect to the boundaries of some of the states, and the public lands, held by the crown, within these reputed boundaries. On the one hand, the great states contended, that each of them had an exclusive title to all the lands of the crown within its boundaries; and these boundaries, by the claims under some 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

[1] 2 Pitk. Hist. ch. 11, p. 19 to 36; 1 Kent's Comm. 197, 198.

[2] Secret Journals, 371, 373, 376, 378, 381; 2 Pitk. Hist. ch. 11, p. 19 to 32.

[3] Secret Journals, 373, 376, 383; 2 Pitk. Hist. ch. 11, p. 19 to 32.

Paris of 1763, if wrested from the common enemy by the blood and treasure of the thirteen states, ought to be deemed a common property, subject to the disposition of congress for the general good.[1] Rhode-Island, Delaware, New-Jersey, and Maryland insisted upon some provision for establishing the western boundaries of the states; and for the recognition of the unsettled western territory, as the property of the Union.

§ 228. The subject was one of a perpetually recurring interest and irritation; and threatened a dissolution of the confederacy. New-York, at length, in February, 1780, passed an act, authorizing a surrender of a part of the western territory claimed by her. Congress embraced the opportunity, thus afforded, to address the states on the subject of ceding the territory, reminding them, "how indispensably necessary it is to establish the federal union on a fixed and permanent basis, and on principles, acceptable to all its respective members; how essential to public credit and confidence, to the support of our army, to the vigor of our councils, and the success of our measures; to our 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 articles of confederation.[2] A cession was accordingly made by the delegates of New-York on the first of March, 1781, the very day, on which Maryland acceded to the confederation. Virginia had previously acted upon the recommendation of congress; and by subsequent cessions

[1] 2 Dall. R. 470, per Jay C. J.; 2 Pitk. Hist. ch. 11, p. 19 to 36.

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

from her, and from the states of Massachusetts, Connecticut, South-Carolina, and Georgia, at still later periods, this great source of national dissension was at last dried up.[1]

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

CHAPTER III.

ANALYSIS OF THE ARTICLES OF CONFEDERATION.

§ 229. In pursuance of the design already announced, it is now proposed to give an analysis of the articles of confederation, or, as they are denominated in the instrument itself, the "Articles of Confederation and Perpetual Union between the States," as they were finally adopted by the thirteen states in 1781.

§ 230. The style of the confederacy was, by the first article, declared to be, "The United Sates of America." The second article declared, that each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which was not by this confederation *expressly* delegated to the United States, in congress assembled. The third article declared, that the states severally entered into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. The fourth article declared, that the free inhabitants of each of the states (vagabonds and fugitives from justice excepted) should be entitled to all the privileges of free citizens in the several states; that the people of each state should have free ingress and regress to and from any other state, and should enjoy all the privileges of trade and commerce, subject to the same duties and restrictions, as the inhabitants; that fugitives from justice should, upon demand of the executive of the state, from which they

fled, be delivered up; and that full faith and credit should be given, in each of the states, to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

§ 231. Having thus provided for the security and intercourse of the states, the next article (5th) provided for the organization of a general congress, declaring, that delegates should be chosen in such manner, as the legislature of each state should direct; to meet in congress on the first Monday in every year, with a power, reserved to each state, to recall any or all of the delegates, and to send others in their stead. No state was to be represented in congress by less than two, nor more than seven members. No delegate was eligible for more than three, in any term of six years; and no delegate was capable of holding any office of emolument under the United States. Each state was to maintain its own delegates; and, in determining questions in congress, was to have one vote. Freedom of speech and debate in congress was not to be impeached or questioned in any other place; and the members were to be protected from arrest and imprisonment, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

§ 232. By subsequent articles, congress was invested with the sole and exclusive right and power of determining on peace and war, unless in case of an invasion of a state by enemies, or an imminent danger of an invasion by Indians; of sending and receiving ambassadors; entering into treaties and alliances, under certain limitations, as to treaties of commerce;[1] of es-

[1] "No treaty of commerce could be made, whereby the legislative power of the states was to be restrained from imposing such imposts and

tablishing rules for deciding all cases of capture on land and water, and for the division and appropriation of prizes taken by the land or naval forces, in the service of the United States; of granting letters of marque and reprisal in times of peace; of appointing courts for the trial of piracies and felonies commited on the high seas; and of establishing courts for receiving and finally determining appeals in all cases of captures.

§ 233. Congress was also invested with power to decide in the last resort, on appeal, all disputes and differences between two or more states concerning boundary, jurisdiction, or any other cause whatsoever; and the mode of exercising that authority was specially prescribed. And all controversies concerning the private right of soil, claimed under different grants of two or more states before the settlement of their jurisdiction, were to be finally determined in the same manner, upon the petition of either of the grantees. But no state was to be deprived of territory for the benefit of the United States.

§ 234. Congress was also invested with the sole and exclusive right and 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 be not infringed or violated; of establishing and regulating post-offices from one state to another, and exacting postage to defray the expenses; of appointing all

duties on foreigners, as their own people were subjected to, or prohibiting the exportation or importation of any species of goods or commodities whatever."

officers of the land forces in the service of the United States, except regimental officers; of appointing all officers of the naval forces, and commissioning all officers whatsoever in the service of the United States; and of making rules for the government and regulation of the land and naval forces, and directing their operations.

§ 235. Congress was also invested with authority to appoint a committee of the states to sit in the recess of congress, and to consist of one delegate from each state, and other committees and civil officers, to manage the general affairs under their direction; to appoint one of their number to preside, but no person was to serve in the office of president more than one year in the term of three years; to ascertain the necessary sums for the public service, and to appropriate the same for defraying the public expenses; to borrow money, and emit bills on credit of the United States; to build and equip a navy; to agree upon the number of land forces, and make requisitions upon each state for its quota, in proportion to the number of white inhabitants in such state. The legislature of each state were to appoint the regimental officers, raise the men, and clothe, arm, and equip them at the expense of the United States.

§ 236. Congress was also invested with power to adjourn for any time not exceeding six months, and to any place within the United States; and provision was made for the publication of its journal, and for entering the yeas and nays thereon, when desired by any delegate.

§ 237. Such were the powers confided in congress. But even these were greatly restricted in their exercise; for it was expressly provided, that congress should never engage in a war; nor grant letters of marque or

reprisal in time of peace; nor enter into any treaties or alliances; nor coin money, or regulate the value thereof; nor ascertain the sums or expenses necessary for the defence and welfare of the United States; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war to be built, or purchased; or the number of land or sea forces to be raised; nor appoint a commander in chief of the army or navy; *unless nine states should assent to the same.* And no question on any other point, except for adjourning from day to day, was to be determined, except by the vote of a majority of the states.

§ 238. The committee of the states, or any nine of them, were authorized in the recess of congress to exercise such powers, as congress, with the assent of nine states, should think it expedient to vest them with, except such powers, for the exercise of which, by the articles of confederation, the assent of nine states was required, which could not be thus delegated.

§ 239. It was further provided, that all bills of credit, monies borrowed, and debts contracted by or under the authority of congress before the confederation, should be a charge against the United States; that when land forces were raised by any state for the common defence, all officers of or under the rank of colonel should be appointed by the legislature of the state, or in such manner as the state should direct; and all vacancies should be filled up in the same manner; that all charges of war, and all other expenses for the common defence or general welfare, should be defrayed out of a common treasury, which should be supplied by the several states, in proportion to the value of the land within each state granted or surveyed, and the buildings and im-

provements thereon, to be estimated according to the mode prescribed by congress; and the taxes for that proportion were to be laid and levied by the legislatures of the states within the time agreed upon by congress.

§ 240. Certain prohibitions were laid upon the exercise of powers by the respective states. No state, without the consent of the United States, could send an embassy to, or receive an embassy from, or enter into, any treaty with any king, prince, or state; nor could any person holding any office under the United States, or any of them, accept any present, emolument, office, or title, from any foreign king, prince, or state; nor could congress itself grant any title of nobility. No two states could enter into any treaty, confederation, or alliance with each other, without the consent of congress. No state could lay any imports or duties, which might interfere with any then proposed treaties. No vessels of war were to be kept up by any state in time of peace, except deemed necessary by congress for its defence, or trade, nor any body of forces, except such, as should be deemed requisite by congress to garrison its forts, and necessary for its defence. But every state was required always to keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and to be provided with suitable field-pieces, and tents, and arms, and ammunition, and camp-equipage. No state could engage in war without the consent of congress, unless actually invaded by enemies, or in danger of invasion by the Indians. Nor could any state grant commissions to any ships of war, nor letters of marque and reprisal, except after a declaration of war by congress, unless such state were infested by pirates, and

then subject to the determination of congress. No state could prevent the removal of any property imported into any state to any other state, of which the owner was an inhabitant. And no imposition, duties, or restriction could be laid by any state on the property of the United States or of either of them.

§ 241. There was also provision made for the admission of Canada into the union, and of other colonies with the assent of nine states. And it was finally declared, that every state should abide by the determinations of congress on all questions submitted to it by the confederation; that the articles should be inviolably observed by every state; that *the union should be perpetual;* and that no alterations should be made in any of the articles, unless agreed to by congress, and confirmed by the legislatures of every state.

§ 242. Such is the substance of this celebrated instrument, under which the treaty of peace, acknowledging our independence, was negotiated, the war of the revolution concluded, and the union of the states maintained until the adoption of the present constitution.

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 of all external authority; and these inconveniences to extreme doubts, if not to dread of any legislation, not exclusively originating in their domestic assemblies. They had, as yet, not felt the importance or necessity of union among themselves, having been hitherto connected with the British sove-

[1] 2 Pitk. Hist. 16.

reignty in all their foreign relations. What would be their fate, as separate and independent communities; how far their interests would coincide or vary from each other, as such; what would be the effects of the union upon their domestic peace, their territorial interests, their external commerce, their political security, or their civil liberty, were points to them wholly of a speculative character, in regard to which various opinions might be entertained, and various, and even opposite conjectures formed upon grounds, apparently of equal plausibility. They were smarting, too, under the severe sufferings of war; and hardly had time to look forward to the future events of a peace; or if they did, it would be obviously a period for more tranquil discussions, and for a better understanding of their mutual interests. They were suddenly brought together, not so much by any deliberate choice of a permanent union, as by the necessity of mutual co-operation and support in resistance of the measures of Great Britain. They found themselves, after having assembled a general congress for mutual advice and encouragement, compelled by the course of events to clothe that body with sovereign powers in the most irregular and summary manner, and to permit them to assert the general prerogatives of peace and war, without any previous compact, and sanctioned only by the silent acquiescence of the people. Under such circumstances each state felt, that it was the true path of safety to retain all sovereign powers within its own control, the surrender of which was not clearly seen, under existing circumstances, to be demanded by an imperious public necessity.[1]

[1] Dr. Rush, in apologizing for the defects of the confederation, has observed, — "The confederation, together with most of our state con-

§ 245. Notwithstanding the declaration of the articles, that the union of the states was to be perpetual, an examination of the powers confided to the general government would easily satisfy us, that they looked principally to the existing revolutionary state of things. The principal powers respected the operations of war, and would be dormant in times of peace. In short, congress in peace was possessed of but a delusive and shadowy sovereignty, with little more, than the empty pageantry of office. They were indeed clothed with the authority of sending and receiving ambassadors; of entering into treaties and alliances, of appointing courts for the trial of piracies and felonies on the high seas; of regulating the public coin; of fixing the standard of weights and measures; of regulating trade with the Indians; of establishing post-offices; of borrowing money, and emitting bills on the credit of the United States; of ascertaining and appropriating the sums necessary for defraying the public expenses, and of disposing of the western territory. And most of these powers required for their exercise the assent of nine states. But they possessed not the power to raise any revenue, to levy any tax, to enforce any law, to secure any right, to regulate any trade, or even the poor prerogative of commanding means to pay its own ministers at a foreign court. They could contract debts; but they were without means to discharge them. They could

stitutions, was formed under very unfavourable circumstances. We had just emerged from a corrupted monarchy. Although we understood perfectly the principles of liberty, yet most of us were ignorant of the forms and combinations of power in republics. Add to this the British army in the heart of our country, spreading desolation wherever it went."* The North American Review, for Oct. 1827, contains a summary of some of the prominent defects of the confederation. Art. I. p. 249, &c.

* 1 Amer. Museum, 8. See also, 1 Amer. Museum, 270.

pledge the public faith; but they were incapable of redeeming it. They could enter into treaties; but every state in the union might disobey them with impunity. They could contract alliances; but could not command men or money to give them vigour. They could institute courts for piracies and felonies on the high seas; but they had no means to pay either the judges, or the jurors. In short, all powers, which did not execute themselves, were at the mercy of the states, and might be trampled upon at will with impunity.

246. One of our leading writers addressed the following strong language to the public:[1] "By this political compact the United States in congress have exclusive power for the following purposes, without being able to execute one of them. They may make and conclude treaties; but can only recommend the observance of them. They may appoint ambassadors; but cannot defray even the expenses of their tables. They may borrow money in their own name on the faith of the Union; but cannot pay a dollar. They may coin money; but they cannot purchase an ounce of bullion. They may make war, and determine what number of troops are necessary; but cannot raise a single soldier. *In short, they may declare every thing, but do nothing.*"[2]

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

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[1] 1 Amer. Mus. 1786, p. 270.

[2] Language equally strong, and almost identical in expression, will be found in Mr. Jay's Letter, addressed to the people of New-York, 1787; 3 Amer. Museum, 554, 556.

[3] Mr. Justice Patterson, in *Hylton* v. *The United States*,* after remarking, that congress, under the confederation, had no coercive author-

* 3 Dall. 176; 1 Cond. Rep. 83, 88.

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

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ity, said, "Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional."

[1] 5 Marshall's Life of Washington, 64. See also 2 Pitk. Hist. 217; North Amer. Rev. Oct. 1827, p. 249, 254, 256, 259.

[2] See 1 Amer. Museum, 275, 290, 364, 430, 447, 448, 449. The Federalist, No. 15 to 22; 2 Amer. Museum, 383; Id. 395, &c.; 3 Amer. Museum, 62 to 69; Id. 73; Id. 334 to 338; Id. 342; Id. 348, &c.; Id. 549, &c.; 1 Kent's Comm. 201.

[3] 1 Amer. Museum, 352.

[4] 5 Marshall's Life of Washington, 83.

[5] 1 Jefferson's Corresp. 63.

that may be called a government, which possessed no one solid attribute of power. It has been justly observed, that "a government authorized to declare war, but relying on independent states for the means of prosecuting it; capable of contracting debts, and of pledging the public faith for their payment; but depending on thirteen distinct sovereignties for the preservation of that faith; could only be rescued from ignominy and contempt by finding those sovereignties administered by men exempt from the passions incident to human nature."[1] That is, by supposing a case, in which all human governments would become unnecessary, and all differences of opinion would become impossible. In truth, congress possessed only the power of recommendation.[2] It depended altogether upon the good will of the states, whether a measure should be carried into effect or not. And it can furnish no matter of surprise under such circumstances, that great differences of opinion as to measures should have existed in the legislatures of the different states; and that a policy, strongly supported in some, should have been denounced as ruinous in others. Honest and enlightened men might well divide on such matters; and in this perpetual conflict of opinion the state might feel itself justified in a silent, or open disregard of the act of congress.

§ 249. The fact corresponded with the theory. Even during the revolution, while all hearts and hands were engaged in the common cause, many of the measures of congress were defeated by the inactivity of the

[1] 5 Marshall's Life of Washington, 31. See also 1 Kent's Comm. 199; 1 Elliot's Debates, 208, 209, 210, 211; North Amer. Rev. Oct. 1827, p. 249, 257, &c.; The Federalist, No. 15.

[2] The Federalist, No. 15.

states; and in some instances the exercise of its powers ~~were~~ resisted. But after the peace of 1783, such opposition became common, and gradually extended its sphere of activity, until, in the expressive language already quoted, "the confederation became a shadow without the substance." There were no national courts having original or appellate jurisdiction over cases regarding the powers of the union; and if there had been, the relief would have been but of a very partial nature, since, without some act of state legislation, many of those powers could not be brought into life.

§ 250. A striking illustration of these remarks may be found in our juridical history. The power of appeal in prize causes, as an incident to the sovereign powers of peace and war, was asserted by congress after the most elaborate consideration, and supported by the voice of ten states, antecedent to the ratification of the articles of confederation.[1] The exercise of that power was, however, resisted by the state courts, notwithstanding its immense importance to the preservation of the rights of independent neutral nations. The confederation gave, in express terms, this right of appeal. The decrees of the court of appeals were equally resisted; and in fact, they remained a dead letter, until they were enforced by the courts of the United States under the present constitution.[2]

§ 251. The Federalist speaks with unusual energy on this subject.[3] "The great and radical view in the construction of the confederation is in the principle of legislation for states or governments in their corporate

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

[2] *Penhallow* v. *Doane*, 3 Dall. 54; *Carson* v. *Jennings*, 4 Cranch, 2.

[3] The Federalist, No. 15. See also 1 Jefferson's Corresp. 63; President Monroe's Message of May, 1822; 1 Tucker's Black. Comm. App. note D. *passim*.

or collective capacities, and as contradistinguished from the individuals, of whom they consist. Though this principle does not run through all the powers delegated to the union; yet it pervades and governs those, on which the efficacy of the rest depends. Except as to the rule of apportionment, the United States have an indefinite discretion to make requisitions for men and money; but they have no authority to raise either by regulations extending to the individuals of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union; yet, in practice, they are mere recommendations, which the states observe or disregard at their option." Again; "The concurrence of thirteen distinct sovereignties is requisite under the confederation to the complete execution of every important measure, that proceeds from the Union. It has happened, as was to have been foreseen. The measures of the Union have not been executed. The delinquences of the state have, step by step, matured themselves to an extreme, which has at length arrested all the wheels of the national government, and brought them to an awful stand. Congress at this time scarcely possess the means of keeping up the forms of administration till the states can have time to agree upon a more substantial substitute for the present shadow of a federal government."

§ 252. A farther illustration of this topic may be gathered from the palpable defect in the confederation, of any power to give a *sanction* to its laws.[1] Congress had no power to exact obedience, or punish disobedience to its ordinances. They could neither impose fines,

[1] 1 Kent's Comm. 200.

nor direct imprisonment, nor divest privileges, nor declare forfeitures, nor suspend refractory officers. There was in the confederation no *express* authority to exercise force; and though it might ordinarily be implied, as an incident, the right to make such implication was prohibited, for each state was to "retain every power, right, and jurisdiction, not *expressly* delegated to congress."[1] The consequence naturally was, that the resolutions of congress were disregarded, not only by states, but by individuals. Men followed their interests more than their duties; they cared little for persuasions, which came without force; or for recommendations, which appealed only to their consciences or their patriotism.[2] Indeed, it seems utterly preposterous to call that a government, which has no power to pass laws; or those enactments laws, which are attended with no sanction, and have no penalty or punishment annexed to the disobedience of them.[3]

§ 253. But a still more striking defect was the total want of power to lay and levy taxes, or to raise revenue to defray the ordinary expenses of government,[4] The whole power, confided to congress upon this head, was the power "to ascertain the sums necessary to be raised for the service of the United States;" and to apportion the quota or proportion on each state. But the power was expressly reserved to the states to lay and levy the taxes, and of course the time, as well as the mode of payment, was extremely uncertain. The

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[1] The Federalist, No. 21.

[2] Yates's Minutes, 4 Elliot's Deb. 84.

[3] The Federalist, No. 15; 1 Kent Comm. 200, 201.

[4] See in 1 U. S. Laws, (Bioren & Duane's Edition, p. 37 to 54,) the proceedings of the old congress on this subject. See also The Federalist, No. 21; 1 Tucker's Black. Comm. 235 to 238; The Federalist, No. 22, 32.

evils resulting from this source, even during the revolutionary war, were of incalculable extent;[1] and, but for the good fortune of congress in obtaining foreign loans, it is far from being certain, that they would not have been fatal.[2] The principle, which formed the basis of the apportionment, was sufficiently objectionable, as it took a standard extremely unequal in its operation upon the different states. The value of its lands was by no means a just representative of the proportionate contributions, which each state ought to make towards the discharge of the common burthens.[3]

§ 254. But this consideration sinks into utter insignificance, in comparison with others. Requisitions were to be made upon thirteen independent states; and it depended upon the good will of the legislature of each state, whether it would comply at all; or if it did comply, at what time, and in what manner. The very tardiness of such an operation, in the ordinary course of things, was sufficient to involve the government in perpetual financial embarrassments, and to defeat many of its best measures, even when there was the utmost good faith and promptitude on the part of the states in complying with the requisitions. But many reasons concurred to produce a total want of promptitude on the part of the states, and, in numerous instances, a total disregard of the requisitions.[4] Indeed, from the moment, that the peace of 1783 secured the country from the distressing calamities of war, a general relaxa-

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

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

[3] The Federalist, No. 21, 30.

[4] 2 Pitk. Hist. 156, 157. See also Remarks of Patterson J. in *Hylton v. United States*, 3 Dall. 171; 1 Elliot's Debates, 208; The Federalist No. 21, 31; 3 Dall. 171, 178.

tion took place; and many of the states successively found apologies for their gross neglect in evils common to all, or complaints listened to by all. Many solemn and affecting appeals were, from time to time, made by congress to the states; but they were attended with no salutary effect.[1] Many measures were devised to obviate the difficulties, nay, the dangers, which threatened the Union; but they failed to produce any amendments in the confederation.[2] An attempt was made by congress, during the war, to procure from the 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.[3] The treasury was empty; the credit of the confederacy was sunk to a low ebb; the public burthens were increasing; and the public faith was prostrate.

§ 255. These general remarks may be easily verified by an appeal to the public acts and history of the times. The close of the revolution, independent of the enormous losses, occasioned by the excessive issue and circulation, and consequent depreciation of paper money, found the country burthened with a public debt of upwards of forty-two millions of dollars;[4] eight millions of which was due for loans obtained in France or Holland, and the remainder to our own citizens, and principally to those, whose bravery and patriotism had saved their country.[5] Congress, conscious of its inability to dis-

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

2 5 Marshall's Life of Washington, p. 35, 36, 37.

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

4 The whole expense of the war was estimated at 135 millions of dollars, including the specie value of all treasury bills of the United States, reduced according to the scale of depreciation established by congress. 2 Pitk. Hist. 180.

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

charge even the interest of this debt by its existing means, on the 12th of February, 1783, resolved, that the establishment of permanent and adequate funds, or taxes, or duties throughout the United States, was indispensable to do justice to the 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.[1]

§ 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

[1] 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.

patriotism of the nation.[1] It was also recommended by Washington in a circular letter, addressed to the governors of the several states; availing himself of the approaching resignation of his public command to impart his farewell advice to his country. After having stated, that there were, in his opinion, four things essential to the well being and existence of the United States, as an independent power, viz: 1. An indissoluble union of the states under one federal head; 2. A sacred regard to public justice; 3. The adoption of a proper peace establishment; 4. The prevalence of a pacific and friendly disposition of the people of the United States towards each other; he proceeded to discuss at large the first three topics. The following passage will at once disclose the depth of his feelings, and the extent of his fears. "Unless (said he) the states will suffer congress to exercise those prerogatives, they are undoubtedly invested with by the constitution, every thing must very rapidly tend to anarchy and confusion. It is indispensable to the happiness of the individual states, that there should be lodged somewhere a supreme power to regulate and govern the general concerns of the confederated republic, without which the union cannot be of long duration. There must be a faithful and pointed compliance on the part of every state with the late proposals and demands of congress, or the most fatal consequences will ensue. Whatever measures have a tendency to dissolve the Union, or contribute to violate, or lessen the sovereign authority, ought to be considered hostile to the liberty and independence of America, and the authors of them treated accordingly. And lastly; unless we can be enabled by the concurrence of the states to participate of the fruits of the rev-

[1] 2 Pitk. Hist. 181, 182; 5 Marsh. Life of Wash. 32, 38, 39.

olution, and enjoy the essential benefits of civil society under a form of government so free and uncorrupted, so happily guarded against the danger of oppression, as has been devised by the articles of confederation, it will be a subject of regret, that so much blood and treasure have been lavished for no purpose; that 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 obliged to rely, for the immediate supply of the treasury, upon requisitions annually made, and annually neglected. The requisitions for the payment of the interest upon the domestic debt, from 1782 to 1786, amounted to more than six millions of dollars; and of this sum up to March, 1787, about a million only was paid;[3] and from November, 1784, to January, 1786, 483,000 dollars only had been received at the national treasury.[4] But for a temporary loan negotiated in Holland, there would have been an utter prostration of the government. In this state of things the

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

[2] Journals of Congress, 1786, p. 34. See also 2 American Museum, 153. — The Report of a committee of congress of the 15th of February, 1786, contains a detailed statement of the acts of the states relative to the measure. Jour. of Congress, 1786, p. 34; 1 Amer. Museum, 282; 2 Amer. Museum, 153 to 160.

[3] 2 Pitk. Hist. 184. [4] 5 Marsh. Life of Washington, 60.

value of the domestic debt sunk down to about one tenth of its nominal amount.[1]

§ 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 monies are to be drawn to discharge the engagements of the confederation, definite as they are in time and amount, *would be no less dishonourable 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 the people of these United States, by whose will and for whose benefit the federal government was instituted, must decide, whether they will support their rank, as a nation, by maintaining the public faith at home or abroad; or whether, for want of a timely exertion in establishing a general revenue, and thereby giving strength to the confederacy, they will hazard, not only the existence of the Union, but of those great and invaluable privileges, for which they have so arduously and so honourably contended."[2] After the adoption of this report, three states, which had hitherto stood aloof, came into the measure. New-York alone

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1 2 Pitk. Hist. 185.

2 Journals of Congress, 1786, p. 34 to 36; 1 Amer. Museum, 282, &c. — The Committee, who made the Report, were Mr. King, Mr. Pinckney, Mr. Kean, Mr. Monroe, and Mr. Pettit.

refused to comply with it; and after a most animated debate in her legislature, she remained inflexible, and the fate of the measure was sealed forever by her solitary negative.[1]

§ 259. Independent, however, of this inability to lay taxes, or collect revenue, the want of any power in congress to regulate foreign or domestic commerce was deemed a leading defect in the confederation. This evil was felt in a comparatively slight degree during the war. But when the return of peace restored the country to its ordinary commercial relations, the want of some uniform system to regulate them was early perceived; and the calamities, which followed our shipping and navigation, our domestic, as well as our foreign trade, convinced the reflecting, that ruin impended upon these and other vital interests, unless a national remedy could be devised. We accordingly find the public papers of that period crowded with complaints on this subject. It was, indeed, idle and visionary to suppose, that while thirteen independent states possessed the exclusive power of regulating commerce, there could be found any uniformity of system, or any harmony and 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.

[1] 2 Pitk. Hist. 184. 222; 5 Marsh. Life of Washington, 62, 63, 124; 1 Tuck. Black. App. 158.—The speech of Col. Hamilton, in the legislature of New-York, in February, 1787, contains a very powerful argument in favour 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; Pensylvania, near the whole; and New-York, more than her quota. 1 Amer. Museum, 445, 448.

If one state should deem a navigation act favourable to its own growth, the efficacy of such a measure might be defeated by the jealousy or policy of a neighbouring state. If one should levy duties to maintain its own government and resources, there were many temptations for its neighbours to adopt the system of free trade, to draw to itself a larger share of foreign and domestic commerce. The agricultural states might easily suppose, that they had not an equal interest in a restrictive system with the navigating states. And, at all events, each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view. To do otherwise would be to sacrifice its immediate interests, without any adequate or enduring consideration; to legislate for others, and not for itself; to dispense blessings abroad, without regarding the security of those at home.[1]

§ 260. Such a state of things necessarily gave rise to serious dissensions among the states themselves. The difference of regulations was a perpetual source of irritation and jealousy. Real or imaginary grievances were multiplied in every direction; and thus state animosities and local prejudices were fostered to a high degree, so as to threaten at once the peace and safety of the Union.[2]

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[1] New Jersey early felt the want of a power in congress, to regulate foreign commerce, and made it one of her objections to adopting the articles of confederation, in her representation to congress.—2 Pitk. Hist. 23, 24; 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

§ 261. These evils were aggravated by the situation of our foreign commerce. During the war, our commerce was nearly annihilated by the superior naval power of the enemy; and the return of peace enabled foreign nations, and especially Great Britain, in a great measure to monopolize all the benefits of our home trade. In the first place, our navigation, having no protection, was unable to engage in competition with foreign ships. In the next place, our supplies were almost altogether furnished by foreign importers or on foreign account. We were almost flooded with foreign manufactures, while our own produce bore but a reduced price.[1] It was easy to foresee, that such a state of things must soon absorb all our means; and as our industry had but a narrow scope, would soon reduce us to absolute poverty. Our trade in our own ships with foreign nations was depressed in an equal degree; for it was loaded with heavy restrictions in their ports. While, for instance, British ships with their commodities had free admission into our ports, American ships and exports were loaded with heavy exactions, or prohibited from entry into British ports.[2] We were, therefore, the victims of our own imbecility, and reduced to a complete subjection to the commercial regula-

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the Finances of France, among other errors in our national policy, observed, that in the several states, "one fixed principle is established in regard to imposts. Each state is supposed to be at liberty to tax itself at pleasure, and to lay its taxes upon persons, consumptions, or importations; that is to say, *to erect an interest contrary to that of other states.*"— 1 Amer. Museum, 16.

[1] 5 Marsh. Life of Washington, 69, 72, 75, 79, 80.

[2] 1 Tuck. Black. App. 157, 159; 5 Marsh. Life of Wash. 77, 78; 2 Pitk. Hist. 186 to 192; 1 Amer. Museum, 282, 288; 2 Amer. Museum, 263 to 276; Id. 371 to 373; 3 Amer. Museum, 554 to 557, 562; North American Review, Oct. 1827, p. 249, 257, 258.

tions of other countries, notwithstanding our boasts of freedom and independence. Congress had been long sensible of the fatal effects flowing from this source; but their efforts to ward off the mischiefs had been unsuccessful. Being invested by the articles of confederation with a limited power to form commercial treaties, they endeavoured to enter into treaties with foreign powers upon principles of reciprocity. But these negotiations were, as might be anticipated, unsuccessful, for the parties met upon very unequal terms. Foreign nations, and especially Great Britain, felt secure in the possession of their present command of our trade, and had not the least inducement to part with a single advantage. It was further pressed upon us, with a truth equally humiliating and undeniable, that congress possessed no effectual power to guaranty the faithful observance of any commercial regulations; and there must in such cases be reciprocal obligations.[1] "America (said Washington) must appear in a very contemptible point of view to those, with whom she was endeavouring to form commercial treaties, without possessing the means of carrying them into effect. They must see and feel, that the Union, or the states individually, are sovereign, as best suits their purposes. In a word, that we are a nation to-day, and thirteen to-morrow. Who will treat with us on such terms?"[2]

§ 262. The difficulty of enforcing even the obligations of the treaty of peace of 1783 was a most serious national evil. Great Britain made loud complaints of infractions thereof on the part of the several states, and

[1] 5 Marsh. Life of Wash. 71, 72, 73; 2 Pitk. Hist. 189, 190; 3 Amer. Museum, 62, 64, 65.

[2] 5 Marsh. Life of Wash. 73; North American Review, Oct. 1827, p. 257, 258; Atcheson's Coll. of Reports, p. 55.

demanded redress. She refused on account of these alleged infractions to surrender [up] the western posts according to the stipulations of that treaty; and the whole confederacy was consequently threatened with the calamities of Indian depredations on the whole of our western borders, and was in danger of having its public peace subverted through its mere inability to enforce the treaty stipulations. The celebrated address of congress, in 1787, to the several states on this subject, is replete with admirable reasoning, and contains melancholy proofs of the utter inefficiency of the confederation, and of the disregard by the states in their legislation of the provisions of that treaty.[1]

§ 263. In April, 1784, congress passed a resolution, requesting the states to vest the general government with power, for fifteen years only, to prohibit the importation and exportation of goods in the ships of nations, with which we had no commercial treaties; and also to prohibit the subjects of foreign nations, unless authorized by treaty, to import any goods into the United States, not the produce or manufacture of the dominions of their own sovereign. Although congress expressly stated, that without such a power no reciprocal advantages could be acquired, the proposition was never assented to by the states; and their own countervailing laws were either rendered nugatory by the laws of other states, or were repealed by a regard to their own inter-

[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.

ests.[1] At a still later period a resolution was moved in congress, recommending it to the states to vest in the general government full authority to regulate external and internal commerce, and to impose such duties, as might be necessary for the purpose, which shared even a more mortifying fate; for it was rejected in that body, although all the duties were to be collected by, and paid over to the states.[2]

§ 264. Various reasons concurred to produce these extraordinary results. But the leading cause was a growing jealousy of the general government; and a more devoted attachment to the local interests of the states; — a jealousy, which soon found its way even into the councils of congress, and enervated the little power, which it was yet suffered to exert. One memorable instance occurred, when it was expected, that the British garrisons would surrender the western posts, and it was thought necessary to provide some regular troops to take possession of them on the part of America. The power of congress to make a requisition on the states for this purpose was gravely contested; and, as connected with the right to borrow money and emit bills of credit, was asserted to be dangerous to liberty, and alarming to the states. The measure was rejected, and militia were ordered in their stead.[3]

§ 265. There were other defects seriously urged against the confederation, which, although not of such a fatal tendency, as those already enumerated, were deemed of sufficient importance to justify doubts, as to its efficacy as a bond of union, or an enduring scheme

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1 2 Pitk. Hist. 192; 5 Marsh. Life of Wash. 70.

2 5 Marsh. Life of Washington, 80, 81.

3 5 Marsh. Life of Washington, App. note 1.

of government. It is not necessary to go at large into a consideration of them. It will suffice for the present purpose to enumerate the principal heads. (1.) The principle of regulating the contributions of the states into the common treasury by quotas, apportioned according to the value of lands, which (as has been already suggested) was objected to, as unjust, unequal, and inconvenient in its operation.[1] (2.) The want of a mutual guaranty of the state governments, so as to protect them against domestic insurrections, and usurpations destructive of their liberty.[2] (3.) The want of a direct power to raise armies, which was objected to, as unfriendly to vigour and promptitude of action, as well as to economy and a just distribution of the public burthens.[3] (4.) The right of equal suffrage among all the states, so that the least in point of wealth, population, and means stood equal in the scale of representation with those, which were the largest. From this circumstance it might, nay it must happen, that a majority of the states, constituting a third only of the people of America, could control the rights and interests of the other two thirds.[4] Nay, it was constitutionally, not only possible, but true in fact, that even the votes of nine states might not comprehend a majority of the people in the Union. The minority, therefore, possessed a negative upon the majority. (5.) The organization of the whole powers of the general government in a single assembly, without any separate or distinct distribution of the executive, judicial, and legislative

[1] The Federalist, No. 21; 3 Amer. Museum, 62, 63, 64.
[2] The Federalist, No. 21; 3 Amer. Museum, 62, 65.
[3] The Federalist, No. 22.
[4] The Federalist, No. 22; 1 Amer. Museum, 275; 3 Amer. Museum, 62, 66.

functions.[1] It was objected, that either the whole superstructure would thus fall, from its own intrinsic feebleness; or, engrossing all the attributes of sovereignty, entail upon the country a most execrable form of government in the shape of an irresponsible aristocracy. (6.) The want of an *exclusive* power in the general government to issue paper money; and thus to prevent the inundation of the country with a base currency, calculated to destroy public faith, as well as private morals.[2] (7.) The too frequent rotation required by the confederation in the office of members of congress, by which the advantages, resulting from long experience and knowledge in the public affairs, were lost to the public councils.[3] (8.) The want of judiciary power co-extensive with the powers of the general government.

§ 266. In respect to this last defect, the language of the Federalist[4] contains so full an exposition, that no farther comment is required. "Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. And this tribunal ought to be instituted under the same authority, which forms the treaties themselves. These ingredi-

[1] The Federalist, No. 22; 1 Amer. Museum, 8, 9; Id. 272; 3 Amer. Museum, 62, 66; 1 Kent's Comm. Lect. 10, p. 200. [2d edit. p. 212.]

[2] 1 Amer. Museum, 8, 9; Id. 363.

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

[4] The Federalist, No. 22.

ents are both indispensable. If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point, as there are courts. There are endless diversities in the opinions of men. We often see not only different courts, but the judges of the same court differing from each other. To avoid the confusion, which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one tribunal paramount to the rest, possessing a general superintendence, and authorized to settle and declare, in the last resort, an uniform rule of justice."

§ 267. "This is the more necessary, where the frame of government is so compounded, that the laws of the whole are in danger of being contravened by the laws of the parts, &c. The treaties of the United States, under the present confederation, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of these legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member, of which these are composed. Is it possible, under such circumstances, that foreign nations can either respect, or confide in such a government? Is it possible, that the people of America will longer consent to trust their honour, their happiness, their safety, on so precarious a foundation?" It might have been added, that the rights of individuals, so far as they depended upon acts or authorities derived from the confederation, were liable to the same difficulties, as the rights of other nations dependent upon treaties.[1]

[1] See *Chisholm* v. *Georgia*, 2 Dall. R. 419, 447.

§ 268. The last defect, which seems worthy of enumeration, is, that the confederation never had a ratification of the PEOPLE. Upon this objection, it will be sufficient to quote a single passage from the same celebrated work, as it affords a very striking commentary upon some extraordinary doctrines recently promulgated.[1] "Resting on no better foundation than the consent of the state legislatures, it [the confederation] has been exposed to frequent and intricate questions concerning the validity of its powers; and has, in some instances, given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to a law of a state, it has been contended, that the same authority might repeal the law, by which it was ratified. However gross a heresy it may be to maintain, that a party to a compact has a right to revoke that compact, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper, than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority." [2]

§ 269. The very defects of the confederation seem also to have led congress, from the pressure of public necessity, into some usurpations of authority; and the states into many gross infractions of its legitimate sovereignty.[3] "A list of the cases, (says the Federalist,) in which congress have been betrayed or forced by the

1 The Federalist, No. 22. 2 The Federalist, No. 43.
3 The Federalist, No. 43; 1 Kent's Comm. Lect. 10, p. 201. [2d edit. p. 214, 215.]

defects of the confederation, into violations of their chartered authorities, would not a little surprise those, who have paid no attention to the subject."[1] (Again, speaking of the western territory, and referring to the ordinance of 1787, for the government thereof, it is observed: "Congress have assumed the administration of this stock. They have begun to render it productive. Congress have undertaken to do more; they have proceeded to form new states, to erect temporary governments, to appoint officers for them, and to prescribe the conditions, on which such states shall be admitted into the confederacy. All this has been done, and done without the least colour of constitutional authority. Yet no blame has been whispered; no alarm has been sounded."[2]

§ 270. Whatever may be thought as to some of these enumerated defects, whether they were radical deficiences or not, there cannot be a doubt, that others of them went to the very marrow and essence of government. There had been, and in fact then were, different parties in the several states, entertaining opinions hostile, or friendly to the existence of a general government.[3] The former would naturally cling to the state governments with a close and unabated zeal, and deem the least possible delegation of power to the Union sufficient, (if any were to be permitted,) with which it could creep on in a semi-animated state. The latter would as naturally desire, that the powers of the general government should have a real, and not merely a suspended vitality; that it should act, and move, and guide, and not merely totter under its own weight, or sink into a drowsy decrepitude, powerless and palsied. But each party must

[1] The Federalist, No. 42. [2] The Federalist, No. 38.
[3] 5 Marsh. Life of Washington, 33.

have felt, that the confederation had at last totally failed, as an effectual instrument of government; that its glory was departed, and its days of labour done; that it stood the shadow of a mighty name; that it was seen only, as a decayed monument of the past, incapable of any enduring record; that the steps of its decline were numbered and finished; and that it was now pausing at the very door of that common sepulchre of the dead, whose inscription is, *Nulla vestigia retrorsum.*

§ 271. If this language should be thought too figurative to suit the sobriety of historical narration, we might avail ourselves of language as strongly coloured, and as desponding, which was at that period wrung from the hearts of our wisest patriots and statesmen.[1] It is, indeed, difficult to overcharge any picture of the gloom and apprehensions, which then pervaded the public councils, as well as the private meditations of the ablest men of the country. We are told by an historian of almost unexampled fidelity and moderation, and himself a witness of these scenes,[2] that "the confederation was apparently expiring from mere debility. Indeed, its preservation in its actual condition, had it been practicable, was scarcely to be desired. Without the ability to exercise them, it withheld from the states powers, which are essential to their sovereignty. The last hope of its friends having been destroyed, the vital necessity of some measure, which might prevent the separation of the integral parts, of which the American empire was composed, became apparent even to those, who had been unwilling to perceive it."[3]

[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.

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 in March, in that year, felt the want of more enlarged powers, and particularly of powers to provide for a local naval force, and a tariff of duties upon imports. Upon receiving their recommendation, the legislature of Virginia passed a resolution for laying the subject of a tariff before all the states composing the Union. Soon afterwards, in January, 1786, the legislature adopted another resolution, appointing commissioners, "who were to meet such, as might be appointed by the other states in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situation and trade of the states; to consider how far a uniform system in their commercial relations may be necessary to their

common interest, and their permanent harmony; and to report to the several states such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States in congress assembled to provide for the same."[1]

§ 273. These resolutions were communicated to the states, and a convention of commissioners from five states only, viz. New-York, New-Jersey, Pennsylvania, Delaware, and Virginia, met at Annapolis in September, 1786.[2] After discussing the subject, they deemed more ample powers necessary, and as well from this consideration, as because a small number only of the states was represented, they agreed to come to no decision, but to frame a report to be laid before the several states, as well as before congress.[3] In this report they recommended the appointment of commissioners from all the states, "to meet at Philadelphia, on the second Monday of May, then next, to take into consideration the situation of the United States; to devise such further provisions, as shall appear to them necessary, to render the constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every state, will effectually provide for the same."[4]

§ 274. On receiving this report, the legislature of Virginia passed an act for the appointment of delegates to meet such, as might be appointed by other states, at Philadelphia.[5] The report was also received in congress.

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[1] 5 Marsh. Life of Wash. 90, 91; 1 Kent's Comm. 203.

[2] 1 Amer. Museum, 267; 2 Pitk. Hist. 218.

[3] 5 Marsh. Life of Wash. 97; 2 Pitk. Hist. 218; 1 U. S. Laws, (Bioren & Duane's edit. 1815,) p. 55, &c. to 58.

[4] 1 Amer. Museum, 267, 268. [5] Marsh. Life of Wash. 98.

But no step was taken, until the legislature of 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.[1] On the 21st of February, 1787, a resolution was accordingly moved and carried in congress, recommending a convention to meet in Philadelphia, on the second Monday of May ensuing, "for the purpose of revising the articles of confederation, and reporting to congress, and the several legislatures, such alterations and provisions therein, as shall, when agreed to in congress, and confirmed by the states, render the federal constitution adequate to the exigencies of government, and the preservation of the Union."[2] The alarming insurrection then existing in Massachusetts, without doubt, had no small share in producing this result. The report of congress, on that subject, at once demonstrates their fears, and their political weakness.[3]

§ 275. At the time and place appointed, the representatives of twelve states assembled. Rhode-Island alone declined to appoint any on this momentous occasion.[4] After very protracted deliberations, the convention finally adopted the plan of the present constitution on the 17th of September, 1787; and by a contemporaneous resolution, directed it to be "laid before the United States in congress assembled," and declared their opinion, "that it should afterwards be submit-

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

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

[3] 2 Pitk. Hist. 220, 221; Journ. of Congress, Oct. 1786; 1 Secret Journ. 268.

[4] 5 Marsh. Life of Wash. 128.

ted to a convention of delegates chosen in each state by the *people* thereof, under a recommendation of its legislature for their *assent* and *ratification;*"[1] and that each convention, assenting to and ratifying the same, should give notice thereof to congress. The convention, by a further resolution, declared their opinion, that as soon as nine states had ratified the constitution, congress should fix a day, on which electors should be appointed by the states, which should have ratified the same, and a day, on which the electors should assemble and vote for the president, and the time and place of commencing proceedings under the constitution; and that after such publication, the electors should be appointed, and the senators and representatives elected. The same resolution contained further recommendations for the purpose of carrying the constitution into effect.

§ 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 sev-

[1] 5 Marsh. Life of Washington, 128, 129; Journ. of Convention, 370; 12 Journ. of Congress, 109; 2 Pitk. Hist. 224, 264.

eral states, as to their situation, extent, habits, and particular interests. In all our deliberations on this subject, we kept steadily in our view that, which appears to us the greatest interest of every true American, *the consolidation of our Union*, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the convention to be less rigid on points of inferior magnitude, than might have been otherwise expected. And thus *the constitution*, which we now present, is *the result of a spirit of amity, and of that mutual deference and concession*, which the peculiarity of our political situation rendered indispensable." [1]

§ 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]

§ 278. Conventions in the various states, which had been represented in the general convention, were accordingly called by their respective legislatures; and the constitution having been ratified by eleven out of the twelve states, congress, on the 13th of September, 1788, passed a resolution appointing the first Wednesday in January following, for the choice of electors of presi-

[1] 12 Journ. of Congress, 109, 110; Journ. of Convention, 367, 368; 5 Marsh. Life of Wash. 129.

[2] 5 Marsh. Life of Wash. 128; 12 Journ. of Congress, 99, 110; Journ. of Convention, App. 391.

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

dent; the first Wednesday of February following, for the assembling of the electors to vote for a president; and the first Wednesday of March following, at the then seat of congress [New-York] the time and place for commencing proceedings under the constitution. Electors were accordingly appointed in the several states, who met and gave their votes for a president; and the other elections for senators and representatives having been duly made, on Wednesday, the 4th of March, 1789, congress assembled under the new constitution, and commenced proceedings under it. A quorum of both houses, however, did not assemble until the 6th of April, when the votes for president being counted, it was found that George Washington was unanimously elected president, and John Adams was elected vice president.[1] On the 30th of April, president Washington was sworn into office, and the government then went into full operation in all its departments.

§ 279. North-Carolina had not, as yet, ratified the constitution. The first convention called in that state, in August, 1788, refused to ratify it without some previous amendments, and a declaration of rights. In a second convention, however, called in November, 1789, this state adopted the constitution.[2] The state of Rhode-Island had declined to call a convention; but finally, by a convention held in May, 1790, its assent was obtained; and thus all the thirteen original states became parties to the new government.[3]

§ 280. Thus was achieved another, and still more glorious triumph in the cause of national liberty, than

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

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

[3] 2 Pitk. Hist. 265; Journ. of Convention, App. 452, 458.

even that, which separated us from the mother country. By it we fondly trust, that our republican institutions will grow up, and be nurtured into more mature strength and vigour; our independence be secured against foreign usurpation and aggression; our domestic blessings be widely diffused, and generally felt; and our union, as a people, be perpetuated, as our own truest glory and support, and as a proud example of a wise and beneficent government, entitled to the respect, if not to the admiration of mankind.

CHAPTER II.

OBJECTIONS TO THE CONSTITUTION.

§ 281. LET it not, however, be supposed, that a constitution, which is now looked upon with such general favour and affection by the people, had no difficulties to encounter at its birth. The history of those times is full of melancholy instruction on this subject, at once to admonish us of past dangers, and to awaken us to a lively sense of the necessity of future vigilance. The constitution was adopted unanimously by Georgia, New-Jersey, and Delaware. It was supported by large majorities in Pennsylvania, Connecticut, Maryland, and South-Carolina. It was carried in the other states by small majorities, and especially in Massachusetts, New-York, and Virginia by little more than a preponderating vote.[1] Indeed, it is believed, that in each of these states, at the first assembling of the conventions, there was a decided majority opposed to the constitution. The ability of the debates, the impending evils, and the absolute necessity of the case seem to have reconciled some persons to the adoption of it, whose opinions had been strenuously the other way.[2] "In our endeavours," said Washington, "to establish a new general government, the contest nationally considered, seems not to have been so much for glory, as for existence. It was for a long time doubtful, whether we were to survive, as an indepen-

[1] 2 Pitk. Hist. 265, 268, 273, 279, 281; North Amer. Rev. Oct. 1827, p. 270 to 278.

[2] 2 Pitk. Hist. 266, 269, 281; 5 Marshall's Life of Washington, 132, 133, 188.

dent republic, or decline from our federal dignity into insignificant and withered fragments of empire."[1]

§ 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 a confederation, jealousies began to be entertained in respect to the nature and extent of the authority, which should be exercised by the national government. The large states would naturally feel, that in proportion as congress should exercise sovereign powers, their own local importance and sovereignty would be diminished injuriously to their general influence on other states from their strength, population, and character. On the other hand, by an opposite course of reasoning, the small states had arrived nearly at the same result. Their dread seems to have been, lest they should be swallowed up by the power of the large states in the general government, through common combinations of interest or ambition.[2]

§ 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 was exhibited on this subject. The original draft, submit-

1 5 Marshall's Life of Washington, 138.

2 5 Marshall's Life of Washington, 130, 131; 4 Elliot's Debates, &c.

ted by Dr. Franklin, in July, 1775, contained a much more ample grant of powers, than that actually adopted; for congress were to be invested with power to make ordinances relating "to our general commerce, or general currency," to establish posts, &c. and to possess other important powers of a different character.[1] The draft submitted by Mr. Dickenson, on the 12th of July, 1776, contains less ample powers; but still more broad, than the articles of confederation.[2] In the subsequent discussions few amendments were adopted, which were not of a restrictive character; and the real difficulties of the task of overcoming the prejudices, and soothing the fears of the different states, are amply displayed in the secret journals now made public. In truth, the continent soon became divided into two great political parties, "the one of which contemplated America as a nation, and laboured incessantly to invest the federal head with powers competent to the preservation of the Union; the other attached itself to the state authorities; viewed all the powers of congress with jealousy; and assented reluctantly to measures, which would enable the head to act in any respect independently of the members."[3] During the war, the necessities of the country confined the operations of both parties within comparatively narrow limits. But the return of peace, and the total imbecility of the general government, gave (as we have seen) increased activity and confidence to both.

§ 285. The differences of opinion between these parties were too honest, too earnest, and too deep to be reconciled, or surrendered. They equally per-

1 1 Secret Journals, 285, Art. 5.
2 1 Secret Journals, 290.
3 5 Marshall's Life of Washington, 33.

vaded the public councils of the states, and the private intercourse of social life. They became more warm, not to say violent, as the contest became more close, and the exigency more appalling. They were inflamed by new causes, of which some were of a permanent, and some of a temporary character. The field of argument was wide; and experience had not, as yet, furnished the advocates on either side with such a variety of political tests, as were calculated to satisfy doubts, allay prejudices, or dissipate the fears and illusions of the imagination.

§ 486. In this state of things the embarrassments of the country in its financial concerns, the general pecuniary distress among the people from the exhausting operations of the war, the total prostration of commerce, and the languishing unthriftiness of agriculture, gave new impulses to the already marked political divisions in the legislative councils. Efforts were made, on one side, to relieve the pressure of the public calamities by a resort to the issue of paper money, to tender laws, and instalment and other laws, having for their object the postponement of the payment of private debts, and a diminution of the public taxes. On the other side, public as well as private creditors became alarmed from the increased dangers to property, and the increased facility of perpetrating frauds to the destruction of all private faith and credit. And they insisted strenuously upon the establishment of a government, and system of laws, which should preserve the public faith, and redeem the country from that ruin, which always follows upon the violation of the principles of justice, and the moral obligation of contracts. "At length," we are told,[1] "two great parties were formed in

[1] 5 Marshall's Life of Washington, 83.

every state, which were distinctly marked, and which pursued distinct objects with systematic arrangement. The one struggled with unabated zeal for the exact observance of public and private engagements. The distresses of individuals were, they thought, to be alleviated by industry and frugality, and not by a relaxation of the laws, or by a sacrifice of the rights of others. They were consequently uniform friends of a regular administration of justice, and of a vigorous course of taxation, which would enable the state to comply with its engagements. By a natural association of ideas, they were also, with very few exceptions, in favour of enlarging the powers of the federal government, and of enabling it to protect the dignity and character of the nation abroad, and its interests at home. The other party marked out for itself a more indulgent course. They were uniformly in favour of relaxing the administration of justice, of affording facilities for the payment of debts, or of suspending their collection, and of remitting taxes. The same course of opinion led them to resist every attempt to transfer from their own hands into those of congress powers, which were by others deemed essential to the preservation of the Union. In many of the states the party last mentioned constituted a decided majority of the people; and in all of them it was very powerful." Such is the language of one of our best historians in treating of the period immediately preceding the formation of the constitution of the United States.[1]

§ 287. Without supposing, that the parties, here alluded to, were in all respects identified with those, of which we have already spoken, as contemporaneous with the confederation, it is easy to perceive, what pro-

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

digious means were already in existence to oppose a new constitution of government, which not only transferred from the states some of the highest sovereign prerogatives, but laid prohibitions upon the exercise of other powers, which were at that time in possession of the popular favour. The wonder, indeed, is not, under such circumstances, that the constitution should have encountered the most ardent opposition; but that it should ever have been adopted at all by a majority of the states.

§ 288. In the convention itself, which framed it, there was a great diversity of judgment, and upon some vital subjects, an intense and irreconcilable hostility of opinion.[1] It is understood, that at several periods, the convention were upon the point of breaking up without accomplishing any thing.[2] In the state conventions, in which the constitution was presented for ratification, the debates were long, and animated, and eloquent; and, imperfect as the printed collections of those debates are, enough remains to establish the consummate ability, with which every part of the constitution was successively attacked, and defended.[3] Nor did the struggle end here. The parties, which were then formed, continued for a long time afterwards to be known and felt in our legislative and other public deliberations. Perhaps they have never entirely ceased.

[1] 2 Pitk. Hist. 225 to 260; Dr. Franklin's Speech, 2 Amer. Museum, 534, 538; 3 Amer. Museum, 62, 66, 70, 157, 559, 560; 4 Elliot's Debates. — Three members of the convention, Mr. Gerry of Massachusetts, and Mr. Mason and Mr. Randolph of Virginia, declined signing the constitution; 3 Amer. Museum, 68. See also Mr. Jay's Letter in 1787; 3 Amer. Museum, 554 to 565.

[2] 5 Marshall's Life of Washington, 128.

[3] 2 Pitk. Hist. 265 to 283.

§ 289. Perhaps, from the very nature and organization of our government, being partly federal and partly national in its character, whatever modifications in other respects parties may undergo, there will forever continue to be a strong line of division between those, who adhere to the state governments, and those, who adhere to the national government, in respect to principles and policy. It was long ago remarked, that in a contest for power, "the body of the people will always be on the side of the state governments. This will not only result from their love of liberty and regard to their own safety, but from other strong principles of human nature. The state governments operate upon those familiar personal concerns, to which the sensibility of individuals is awake. The distribution of private justice, in a great measure belonging to them, they must always appear to the sense of the people, as the immediate guardians of their rights. They will of course have the strongest hold on their attachment, respect, and obedience."[1] To which it may be added, that the state governments must naturally open an easier field for the operation of domestic ambition, of local interests, of personal popularity, and of flattering influence to those, who have no eager desire for a wide spread fame, or no acquirements to justify it.

§ 290. On the other hand, if the votaries of the national government are fewer in number, they are likely to enlist in its favour men of ardent ambition, comprehensive views, and powerful genius. A love of the Union; a sense of its importance, nay, of its necessity, to secure permanence and safety to our political liberty; a consciousness, that the powers of the national consti-

[1] Gen. Hamilton's Speech in 1786; 1 Amer. Museum, 445, 447. See also The Federalist, No. 17, 31, 45, 46.

tution are eminently calculated to preserve peace at home, and dignity abroad, and to give value to property, and system and harmony to the great interests of agriculture, commerce, and manufactures; a consciousness, too, that the restraints, which it imposes upon the states, are the only efficient means to preserve public and private justice, and to ensure 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

[1] The Federalist, No. 38, 39; 2 Amer. Museum, 422; Id. 543, 546.
[2] The Federalist, No. 39; Id. No. 38; 2 Pitk. Hist. 270, 272.

to the extent proposed. It is obvious, that this objection, pushed to its full extent, went to the old question of the confederation; and was but a re-argument of the point, whether there should exist a national government adequate to the protection and support of the Union. In its mitigated form it was a mere question, as to the extent of powers to be confided to the general government, and was to be classed accordingly. It was urged, however, with no inconsiderable force and emphasis; and its supporters predicted with confidence, that a government so organized would soon become corrupt and tyrannical, "and absorb the legislative, executive, and judicial powers of the several states, and produce from their ruins one consolidated government, which, from the nature of things, would be an iron-handed despotism."[1] Uniform experience (it was said) had demonstrated,[2] "that a very extensive territory cannot be governed on the principles of freedom otherwise, than by a confederacy of republics, possessing all the powers of internal government, but united in the management of their general and foreign concerns."[3] Indeed, any scheme of a general government, however guarded, appeared to some minds (which possessed the public confidence) so entirely impracticable, by reason of the extensive territory of the United States, that they did not hesitate to declare their opinion, that it would be destructive of the civil liberty of the citizens.[4] And

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

[2] 2 Amer. Museum, 542.

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

[4] Yates and Lansing's Letter, 3 Amer. Museum, 156, 157; Mr. Jay's Letter, 1787, 3 Amer. Museum, 554, 562. — The same objection is repeatedly taken notice of in the Federalist, as one then beginning to be prevalent. The Federalist, No. 1, 2, 9, 13, 14, 23.

others of equal eminence foretold, that it would commence in a moderate aristocracy, and end either in a monarchy, or a corrupt, oppressive aristocracy.[1] It was not denied, that, in form, the constitution was strictly republican; for all its powers were derived directly or indirectly from the people, and were administered by functionaries holding their offices during pleasure, or for a limited period, or during good behaviour; and in the sere-spects it bore an exact similitude to the state governments, whose republican character had never been doubted.[2]

§ 294. But the friends of the constitution met the objection by asserting the indispensable necessity of a form of government, like that proposed, and demonstrating the utter imbecility of a mere confederation, without powers acting directly upon individuals. They considered, that the constitution was partly federal, and partly national in its character, and distribution of powers. In its origin and establishment it was federal.[3] In some of its relations it was federal; in others, national. In the senate it was federal; in the house of representatives it was national; in the executive it was of a compound character; in the operation of its powers it was national; in the extent of its powers, federal. It acted on individuals, and not on states merely. But its powers were limited, and left a large mass of sovereignty in the states. In making amendments, it was also of a compound character, requiring the concurrence of more than a majority, and less than the whole of the states. So, that on the whole their conclusion was, that "the constitution is, in strictness, neither a national nor a federal constitution,

[1] Mr. George Mason's Letter, 2 Amer. Museum, 534, 536.
[2] The Federalist, No. 39.
[3] The Federalist, No. 39.

but a composition of both. In its foundation it is federal, not national; in the sources, from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers it is national, not federal; in the extent of them again it is federal, not national; and, finally, in the authoritative mode of introducing amendments it is neither wholly federal, nor wholly national.[1]

§ 295. Time has in this, as in many other respects, assuaged the fears, and disproved the prophesies of the opponents of the constitution. It has gained friends in its progress. The states still flourish under it with a salutary and invigorating energy; and its power of direct action upon the people has hitherto proved a common blessing, giving dignity and spirit to the government, adequate to the exigencies of war, and preserving us from domestic dissensions, and unreasonable burthens in times of peace.

§ 296. If the original structure of the government was, as has been shown, a fertile source of opposition, another objection of a more wide and imposing nature was drawn from the nature and extent of its powers. This, indeed, like the former, gave rise to most animated discussions, in which reason was employed to demonstrate the mischiefs of the system, and imagination to portray them in all the exaggerations, which fear and prophesy could invent. Looking back, indeed, to that period with the calmness, with which we naturally

[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.

review events and occurrences, which are now felt only as matters of history, one is surprised at the futility of some of the objections, the absurdity of others, and the overwrought colouring of almost all, which were urged on this head against the constitution. That some of them had a just foundation, need not be denied or concealed; for the system was human, and the result of compromise and conciliation, in which something of the correctness of theory was yielded to the interests or prejudices of particular states, and something of inequality of benefit borne for the common good.

§ 297. The objections from different quarters were not only of different degrees and magnitude, but often of totally opposite natures. With some persons the mass of the powers was a formidable objection; with others, the distribution of those powers. With some the equality of vote in the senate was exceptionable; with others the inequality of representation in the house. With some the power of regulating the times and places of elections was fatal; with others the power of regulating commerce by a bare majority. With some the power of *direct* taxation was an intolerable grievance; with others the power of *indirect* taxation by duties on 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

[1] 2 Amer. Museum, 534, 536, 540; Id. 427, 435; Id. 547, 555.

[2] 3 Amer. Museum, 62; 2 Pitk. Hist. 283, 284; The Federalist, No. 71, 72.

the legislative, executive, and judicial functions in the senate was a mischievous departure from all ideas of regular government; with others the non-participation of the house of representatives in the same functions was the alarming evil. With some the powers of the president were alarming and dangerous to liberty; with others the participation of the senate in some of those powers. With some the powers of the judiciary were far too extensive; with others the power to make treaties even with the consent of two thirds of the senate. With some the power to keep up a standing army was a sure introduction to despotism; with others the power over the militia.[1] With some the paramount authority of the constitution, treaties, and laws of the United States was a dangerous feature; with others the small number composing the senate and the house of representatives was an alarming and corrupting evil.[2]

§ 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

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[1] See 2 Amer. Museum, 422, &c.; Id. 435; Id. 534; Id. 540, &c. 543, &c.; Id. 553; 3 Amer. Museum, 62; Id. 157; Id. 419, 420, &c.

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

imposts upon commerce, they may impose what land taxes, and taxes, excises, and duties on all instruments, and duties on every fine article, that they may judge proper." "Congress may monopolize every source of revenue, and thus indirectly demolish the state governments; for without funds they could not exist." "As congress have the control over the time of the appointment of the president, of the senators, and of the representatives of the United States, they may prolong their existence in office for life by postponing the time of their election and appointment from period to period, under various 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

[1] Address of the minority in the Pennsylvania Convention, 2 Amer. Museum, 536, 543, 544, 545. See also the Address of Virginia, 2 Pitk. History, 334.

on the states. Thus presenting, as has been justly observed, the extraordinary phenomenon of declaring certain powers in the federal government absolutely necessary, and at the same time rendering them absolutely nugatory.[1]

§ 300. Another class of objections urged against the constitution was founded upon its deficiencies and omissions. It cannot be denied, that some of the objections on this head were well taken, and that there was a fitness in incorporating some provision on the subject into the fundamental articles of a free government. There were others again, which might fairly enough be left to the legislative discretion and to the natural influences of the popular voice in a republican form of government. There were others again so doubtful, both in principle and policy, that they might properly be excluded from any system aiming at permanence in its securities as well as its foundations.

§ 301. Among the defects which were enumerated, none attracted more attention, or were urged with more zeal, than the want of a distinct bill of rights, which should recognise the fundamental principles of a free republican government, and the right of the people to the enjoyment of life, liberty, property, and the pursuit of happiness. It was contended, that it was indispensable, that express provision should be made for the trial by jury in civil cases, and in criminal cases upon a presentment by a grand jury only; and that all criminal trials should be public, and the party be confronted with the witnesses against him; that freedom of speech and freedom of the press should be secured; that there should be no national religion, and the rights of con-

[1] The Federalist, No. 38.

science should be inviolable; that excessive bail should not be required, nor cruel and unusual punishments inflicted; that the people should have a right to bear arms; that persons conscientiously scrupulous should not be compelled to bear arms; that every person should be entitled of right to petition for the redress of grievances; that search warrants should not be granted without oath, nor general warrants at all; that soldiers should not be enlisted except for a short, limited term; and not be quartered in time of peace upon private houses without the consent of the owners; that mutiny bills should continue in force for two years only; that causes once tried by a jury should not be re-examinable upon appeal, otherwise than according to the course of the common law; and that the powers not expressly delegated to the general government should be declared to be reserved to the states. In all these particulars the constitution was obviously defective; and yet (it was contended) they were vital to the public security.[1]

§ 302. Besides these, there were other defects relied on, such as the want of a suitable provision for a rotation in office, to prevent persons enjoying them for life; the want of an executive council for the president; the want of a provision limiting the duration of standing armies; the want of a clause securing the people the enjoyment of the common law;[2] the want of security for proper elections of public officers; the want of a prohibition of members of congress holding any public offices, and of judges holding any other offices; and

[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.

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

finally the want of drawing a clear and direct line between the powers to be exercised by congress and by the states.[1]

§ 303. Many of these objections found their way into the amendments, which, simultaneously with the ratification, were adopted in many of the state conventions. With the view of carrying into effect the popular will, and also of disarming the opponents of the constitution of all reasonable grounds of complaint, congress, at its very first session, took into consideration the amendments so proposed; and by a succession of supplementary articles provided, in substance, a bill of rights, and secured by constitutional declarations most of the other important objects thus suggested. These articles (in all, twelve) were submitted by congress to the states for their ratification; and ten of them were finally ratified by the requisite number of states; and thus became incorporated into the constitution.[2] It is a curious fact, however, that although the necessity of these amendments had been urged by the enemies of the constitution, and denied by its friends, they encountered scarcely any other opposition in the state legislatures, than what was given by the very party, which had raised the objections.[3] The friends of the constitution generally supported them upon the ground of a large public policy, to quiet jealousies, and to disarm resentments.

§ 304. It is perhaps due to the latter to state, that they believed, that some of the objections to the constitution existed only in imagination, and that others derived their sole support from an erroneous construction

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[1] 2 Amer. Museum, 426, 428; Id. 534, 537; Id. 557, 549; 3 Amer. Mus. 62; Id. 419, 420, &c.; 2 Pitk. Hist. 267, 218, 280, 282, 283, 284.

[2] 2 Pitk. Hist. 332, 334.

[3] 5 Marshall's Life of Washington, 209, 210.

of that instrument.[1] In respect to a bill of rights, it was stated, that several of the state constitutions contained none in form; and yet were not on that account thought objectionable. That it was not true, that the constitution of the United States did not, in the true sense of the terms, contain a bill of rights. It was emphatically found in those clauses, which respected political rights, the guaranty of republican forms of government, the trial of crimes by jury, the definition of treason, the prohibition against bills of attainder and *ex post facto* laws and titles of nobility, the trial by impeachment, and the privilege of the writ of *habeas corpus*. That a general bill of rights would be improper in a constitution of limited powers, like that of the United States; and might even be dangerous, as by containing exceptions from powers not granted it might give rise to implications of constructive power. That in a government, like ours, founded by the people, and managed by the people, and especially in one of limited authority, there was no necessity of any bill of rights; for all powers not granted were reserved; and even those granted might at will be resumed, or altered by the people. That a bill of rights might be fit in a monarchy, where there were struggles between the crown and the people about prerogatives and privileges. But, here, the government is the government of the people; all its officers are their officers; and they can exercise no rights or powers, but such as the people commit to them. In such a case the silence of the constitution argues nothing. The trial by jury, the freedom of the press, and the liberty of conscience are not taken away, because they are not secured. They

[1] 5 Marshall's Life of Washington, 207, 208.

remain with the people among the mass of ungranted powers, or find an appropriate place in the laws and institutions of each particular state.[1]

§ 305. Notwithstanding the force of these suggestions, candour 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 which the friends of the constitution supported these amendments, evince the good faith and sincerity of their opinions, and increase our reverence for their labours, as well as our sense of their wisdom and patriotism.

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

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 are at length arrived at the point, at which it may be proper to enter upon the consideration of the actual structure, organization, and powers, which belong to it. Our main object will henceforth be to unfold in detail all its principal provisions, with such commentaries, as may explain their import and effect, and with such illustrations, historical and otherwise, as will enable the reader fully to understand the objections, which have been urged against each of them respectively; the amendments, which have been proposed to them; and the arguments, which have sustained them in their present form.

§ 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 determine its validity and construction? Who are to decide upon the supposed infractions and violations of it? These are questions often asked, and often discussed, not merely for the purpose of theoretical speculation; but as matters of practical importance, and of earnest and even of vehement debate. The answers given to them by statesmen and jurists are often contradictory, and irreconcilable with each other; and the consequences, deduced from the views taken of some of them, go very deep into the foundations of the government itself, and expose it, if not to utter destruction, at least to evils, which threaten its existence, and disturb the just operation of its powers.

§ 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

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

states, and ratified by the people thereof respectively; whereby the several states, and the people thereof, respectively have bound themselves to each other, and to the federal government of the United States, and by which the federal government is bound to the several states and to every citizen of the United States. The author proceeds to expound every part of this definition at large. It is (says he) a compact, by which it is distinguished from a charter or grant, which is either the act of a superior to an inferior, or is founded upon some consideration moving from one of the parties to the other, and operates as an exchange or sale.[1] But here the contracting parties, whether considered as states in their political capacity and character, or as individuals, are all equal; nor is there any thing granted from one to another; but each stipulates to part with, and receive the same thing precisely without any distinction or difference between any of the parties.

§ 311. It is a federal compact.[2] Several sovereign and independent states may unite themselves together by a perpetual confederation, without each ceasing to be a perfect state. They will together form a federal republic. The deliberations in common will offer no

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

[2] Mr. Jefferson asserts, that the constitution of the United States is a compact between the states. "They entered into a compact," says he, (in a paper designed to be adopted by the legislature of Virginia, as a solemn protest,) "which is called the Constitution of the United States of America, by which they agreed to unite in a single government, as to their relations with each, and with foreign nations, and as to certain other articles particularly specified."* It would, I imagine, be very difficult to point out when, and in what manner, any such compact was made. The constitution was neither made, nor ratified by the states, as sovereignties, or political communities. It was framed by a convention, proposed to the people of the states for their adoption by congress; and was adopted by state conventions, — the immediate representatives of the people.

* 4 Jefferson's Corresp. 415.

violence to each member, though they may in certain respects put some constraint on the exercise of it in virtue of voluntary engagements. The extent, modifications, and objects of the federal authority are mere matters of discretion.[1] So long, as the separate organization of the members remains; and, from the nature of the compact, must continue to exist both for local and domestic, and for federal purposes, the union is in fact, as well as in theory, an association of states, or a confederacy.

§ 312. It is, also, to a certain extent, a social compact. In the act of association, in virtue of which a multitude of men form together a state or nation, each individual is supposed to have entered into engagements with all, to procure the common welfare; and all are supposed to have entered into engagements with each other, to facilitate the means of supplying the necessities of each individual, and to protect and defend him.[2] And this is what is ordinarily meant by the original contract of society. But a contract of this nature actually existed in a visible form between the citizens of each state in their several constitutions. It might, therefore, be deemed somewhat extraordinary, that in the establishment of a federal republic, it should have been thought necessary to extend its operation to the persons of individuals, as well as to the states composing the confederacy.

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

[1] 1 Tucker's Black. Comm. Appx. note D. p. 141.
[2] Id. p. 144. [3] Id. 145.

social compact is understood to mean the act of individuals about to create, and establish a state or body politic among themselves. If one nation binds itself by treaty to pay a certain tribute to another; or if all the members of the same confederacy oblige themselves to furnish their 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.[1]

§ 314. It is an original compact. Whatever political relation existed between the American colonies antecedent to the Revolution, as constituent parts of the British empire, or as dependencies upon it, that relation was completely dissolved, and annihilated from that period. From the moment of the Revolution they became severally independent and sovereign 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.[2]

[1] 1 Tucker's Black. Comm. App. note D. p. 145.

[2] Id. 150. — These views are very different from those, which Mr. Dane has, with so much force 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

§ 315. It is a written compact. Considered as a federal compact or alliance between the states, there is nothing new or singular in this circumstance, as all national compacts since the invention of letters have probably been reduced to that form. But considered in the light of an original social compact, the American Revolution seems to have given birth to this new political phenomenon. In every state a written constitution was framed, and adopted by the people both in their individual and sovereign capacity and character.[1]

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this subordination, we must go back as far as January, 1774, when the thirteen states existed *constitutionally*, in the condition of thirteen *British colonies*, yet, *de facto*, *the people* of them exercised original, sovereign power in their institution in 1774, of the continental congress; and, especially, in June, 1775, then vesting in it the great national powers, that will be described; scarcely any of which were resumed. The result will show, that, on *revolutionary* principles, the general government was, by the *sovereign 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 4th, 1776, created by the general government, empowered to do it by the people, acting on revolutionary principles, and in their *original, sovereign capacity*; and that all the state governments, *as such*, have been instituted during the existence of the general government, and in subordination to it, and two thirds of them since the constitution of the United States was *ordained and established* by all the people thereof, in that sovereign capacity. These *state* governments have been, by the people of each state, instituted under, and, expressly or impliedly, in subordination to the general government, which is expressly recognized by all to be supreme law; and as the power of the whole is, in the nature of things, superior to the power of a part, other things being equal, the power of a state, a part, is inferior to the power of all the states. Assertions, that each of the twenty-four states is completely *sovereign*, that is, as *sovereign* as Russia, or France, of course as sovereign as all the states, and that this sovereignty is above judicial cognizance, merit special attention."

[1] 1 Tucker's Black. Comm. App. note D. p. 153. — There is an inaccuracy here; Connecticut did not form a constitution until 1818, and existed until that period under her colonial charter. Rhode-Island still

§ 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 the spontaneous acts of the state legislatures, prompted by a due sense of the necessity of some change in the existing confederation; and solemnly, as having been discussed, not only in the general convention, which proposed and framed it; but afterwards in the legislatures of the several states; and finally in the conventions of all the states, by whom it was adopted and ratified.[1]

§ 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,

is without any constitution, and exercises the powers of government under her colonial charter.

[1] Id. 155, 156.

[2] Id. 169.

by which the rights of the people might be diminished, or submitted to a new jurisdiction, or in any manner affected. From hence, not only the body politic of the several states, but every citizen thereof, may be considered as parties to the compact, and to have bound themselves reciprocally to each other for the due observance of it; and also to have bound themselves to the federal government, whose authority has been thereby created and established.[1]

§ 318. Lastly. It is a compact, by which the federal government is bound to the several states, and to every citizen of the United States. Although the federal government can in no possible view be considered as a party to a compact made anterior to its existence, and by which it was in fact created; yet, as the creature of that compact, it must be bound by it to its creators, the several states in the union, and the citizens thereof. Having no existence, but under the constitution, nor any rights, but such as that instrument confers; and those very rights being in fact duties, it can possess no legitimate power, but such as is absolutely necessary for the performance of a duty prescribed, and enjoined by the constitution.[2] Its duties then became the exact measure of its powers; and whenever it exerts a power for any other purpose, than the performance of a duty prescribed by the constitution, it transgresses its proper limits, and violates the public trust. Its duties being moreover imposed for the general benefit and security of the several states in their political character, and of the people, both in their sovereign and individual capacity, if these objects be not obtained, the government does not answer the end of its creation. It is, there-

[1] Tucker's Black. Comm. note D. p. 170. [2] Id. 170.

fore, bound to the several states respectively, and to every citizen thereof, for the due execution of those duties, and the observance of this obligation is enforced under the solemn sanction of an oath from those, who administer the government.

§ 319. Such is a summary of the reasoning of the learned author, by which he has undertaken to vindicate his views of the nature of the constitution. That reasoning has been quoted at large, and for the most part in his own words; not merely as his own, but as representing, in a general sense, the opinions of a large body of statesmen and jurists in different parts of the Union, avowed and acted upon in former times; and recently revived under circumstances, which have given them increased importance, if not a perilous influence.[1]

§ 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 op-

[1] Many traces of these opinions will be found in the public debates in the state legislatures and in congress at different periods. In the resolutions of Mr. Taylor, in the Virginia legislature in 1798, it was resolved, "that this assembly doth explicitly and peremptorily declare, that it views the powers of the federal government as resulting from the compact, *to which the states are parties.*" — See Dane's Appendix, p. 17. The original resolution had the word "*alone*" after "states," which was struck out upon the motion of the original mover, it having been asserted in the debate, that the *people* were parties also, and by some of the speakers, that the people were exclusively parties.

erates as a mere treaty, or convention between them, and has an obligatory force upon each state no longer, than suits its pleasure, or its consent continues; that each state has a right to judge for itself in relation to the nature, extent, and obligations of the instrument, without being at all bound by the interpretation of the federal government, or by that of any other state; and that each retains the power to withdraw from the confederacy and to dissolve the connexion, when such shall be its choice; and may suspend the operations of the federal government, and nullify its acts within its own territorial limits, whenever, in its own opinion, the exi-

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The Kentucky Resolutions of 1797, (which were drafted by Mr. Jefferson,) declare, "that to this compact [the federal constitution] each state acceded as a state, and is an integral party." North American Review, Oct. 1830, p. 501, 545. In the resolutions of the senate of South Carolina, in Nov. 1817, it is declared, "that the constitution of the United States is a compact between the people of the different states with each other, as separate and independent sovereignties." In Nov. 1799 the Kentucky legislature passed a resolution, declaring, that the federal states had a right to judge of any infraction of the constitution, and, that a nullification by those sovereignties of all unauthorized acts done under color of that instrument is the rightful remedy. North American Review, Id. 503. Mr. Madison, in the Virginia Report of 1800, re-asserts the right of the states, as parties, to decide upon the unconstitutionality of any measure. Report, p. 6, 7, 8, 9. The Virginia legislature, in 1829, passed a resolution, declaring, that "the constitution of the United States being a federative compact between sovereign states, in construing which no common arbiter is known, each state has the right to construe the compact for itself.* Mr. Vice President Calhoun's letter to Gov. Hamilton of Aug. 28, 1832, contains a very eloborate 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 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.

* 3 American Annual Register; Local History, 131.

gency of the case may require.[1] These conclusions may not always be avowed; but they flow naturally from the doctrines, which we have under consideration.[2] They go to the extent of reducing the government to a mere confederacy during pleasure; and of thus presenting the extraordinary spectacle of a nation existing only at the will of each of its constituent parts.

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[1] Virginia, in the resolutions of her legislature on the tariff, in Feb. 1829, declared, "that there is no common arbiter to construe the constitution; *being a federative compact between* sovereign states, each state has a right to construe the compact for itself." 9 Dane's Abridg. ch. 187, art. 20, § 14, p. 589. See also North American Review, Oct. 1830, p. 488 to 528. The resolutions of Kentucky of 1798 contain a like declaration, that "to this compact [the constitution] each state acceded as a state, and is an integral party; that the government created by this compact was not made the exclusive, or final judge of the powers delegated to itself, &c.; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, *as well of infractions, as of the mode and measure of redress.*" North American Review, Oct. 1830, p. 501. The Kentucky resolutions of 1799 go further, and assert, "that the several states, who formed that instrument, [the constitution] being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification by those sovereignties of all unauthorized acts done under colour of that instrument is the rightful remedy." North American Review, Id. 503; 4 Elliot's Debates, 315, 322. In Mr. Madison's Report in the Virginia legislature, in January, 1800, it is also affirmed, that the states are parties to the constitution; but by *states* he here means (as the context explains) the people of the states. That report insists, that the states are in the last resort the ultimate judges of the infractions of the constitution. p. 6, 7, 8, 9.

[2] I do not mean to assert, that all those, who held these doctrines, have adopted the conclusions drawn from them. There are eminent exceptions; and among them the learned commentator on Blackstone's Commentaries seems properly numbered. See 1 Tucker's Black. App. 170, 171, § 8. See the Debates in the senate on Mr. Foot's Resolution in 1830, and Mr. Dane's Appendix, and his Abridgment and Digest, 9th Vol. ch. 187, art. 20, § 13 to 22, p. 588 et seq.; North American Review for Oct. 1830, on the Debates on the Public Lands, p. 481 to 486, 488 to 528; 4 Elliot's Debates, 315 to 330; Madison's Virginia Report, Jan. 1800, p. 6, 7, 8, 9; 4 Jefferson's Correspondence, 415; Vice President Calhoun's Letter to Gov. Hamilton, Aug. 28, 1832.

§ 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 deliverence. For the power to operate upon individuals, instead of operating merely on states, is of little consequence, though yielded by the constitution, if that power is to depend for its exercise upon the continual consent of all the members upon every emergency. We have already seen, that the framers of the instrument contemplated no such dependence. Even under the confederation it was deemed a gross heresy to maintain, that a party to a compact has a right to revoke that compact; and the possibility of a question of this nature was deemed to prove the necessity of laying the foundations of our national government deeper, than in the mere sanction of delegated authority.[1] "A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity, than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others, and authorizes them, if they please, to pronounce the compact violated and void."[2] Consequences like these, which place the dissolution

[1] The Federalist, No. 22; Id. No. 43; see also Mr. Patterson's Opinion in the Convention, 4 Elliot's Debates, 74, 75; and Yates's Minutes.

[2] The Federalist, No. 43. — Mr. Madison, in the Virginia Report of January 1800, asserts, (p. 6, 7,) that "the states being parties to the constitutional compact, and in their sovereign capacity, it follows 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 conse-

of the government in the hands of a single state, and enable it at will to defeat, or suspend the operation of the laws of the union, are too serious, not to require us to scrutinize with the utmost care and caution the principles, from which they flow, and by which they are attempted to be justified.

§ 323. The word "compact," like many other important words in our language, is susceptible of different shades of meaning, and may be used in different senses. It is sometimes used merely to express a deliberate and voluntary assent to any act or thing. Thus, it has been said by Dr. South, that "in the beginnings of speech, there was an implicit *compact* founded upon common consent, that such words, voices, or gestures, should be signs, whereby they would express their thoughts;"[1] where, it is obvious, that nothing more is meant, than a mutual and settled appointment in the use of language. It is also used to express any agreement or contract between parties, by which they are bound, and incur legal obligations.[2] Thus we say, that one person has entered into a compact with another, meaning, that the contracting parties have entered

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quently, that, as the parties to it, they must themselves decide in the last resort such questions, as may be of sufficient magnitude to require their interposition." Id. p. 8, 9.

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

[2] Pothier distinguishes between a contract and an agreement. An agreement, he says, is the consent of two or more persons to form some engagement, or to rescind, or modify an engagement already made. Duorum vel plurium in idem placitum consensus. Pand. Lib. 1, § 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.

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.

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1 Vattel, B. 2, ch. 12, § 152; 1 Black. Comm. 43.
2 2 Black. Comm. 442.

§ 325. The doctrine maintained by many eminent writers upon public law in modern times is, that civil society has its foundation in a voluntary consent or submission ;[1] and, therefore, it is often said to depend upon a social compact of the people composing the nation. And this, indeed, does not, in substance, differ from the definition of it by Cicero, *Multitudo, juris consensu et utilitatis communione sociata ;* that is, (as Burlamaqui gives it,) a multitude of people united together by a common interest, and by common laws, to which they submit with one accord.[2]

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1 Woodeson's Elements of Jurisprudence, 21, 22; 1 Wilson's Law Lect. 304, 305 ; Vattel, B. 1, ch. 1, § 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.

2 2 Burlamaqui, Part 1, ch. 4, § 9 ; Heinecc. Elem. Juris. Natur. L. 2, ch. 6, § 107.

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.*"* And he considers this consent to be bound by the will of the majority, as the indispensable result of becoming a community ; "else," says he, "this original compact, whereby he, with others, incorporates into one society, would signify nothing, and be no compact at all." † Doctor Paley has urged some very forcible objections against this doctrine, both as matter of theory and of fact, with which, however, it is unnecessary here to intermeddle. The discussion of them would more properly belong to lectures upon natural and political law.‡ Mr. Burke has, in one of his most splendid performances, made some profound reflections on this subject, the conclusion of which seems to be, that 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 more occasional interest may be deposited at pleasure. But the state ought not to be considered as nothing better than a partnership agree-

* Locke on Government, B. 2, ch. 8, § 95.

† Locke on Government, B. 2, § 96, 97, 98, 99 ; Id. § 119, 120.

‡ Paley on Moral and Political Philosophy, B. 6, ch. 3.

§ 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 natural foundation, as well

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ment in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things, subservient only to the gross animal existence, of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those, who are living, but between those, who are living, those, who are dead, and those, who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact, sanctioned by the inviolable oath, which holds all physical and all moral natures, each in their appointed place. This law is not subject to the will of those, who by an obligation above them, and infinitely superior, are bound to submit their will to that law. The municipal corporations of that universal kingdom are not morally at liberty at their pleasure, and on their speculations of a contingent improvement, wholly to separate and tear asunder the bands of their subordinate community, and to dissolve it into an unsocial, uncivil, unconnected chaos of elementary principles. It is the first and supreme necessity only, a necessity, that is not chosen, but chooses, a necessity paramount to deliberation, that admits no discussion, and demands no evidence, which alone can justify a resort to anarchy. This necessity is no exception to the rule; because this necessity itself is a part too of that moral and physical disposition of things, to which man must 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.

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

[1] 1 Black. Comm. 47; see also 1 Hume's Essays, Essay 12. — Mr. Hume considers, that the notion of government, being universally founded in original contract, is visionary, unless in the sense of its being founded upon the consent of those, who first associate together, and subject themselves to authority. He has discussed the subject at large in an elaborate Essay. Essay 12, p. 491.

[2] *Chisholm* v. *State of Georgia*, 3 Dall. R. 419; 2 Cond. Rep. 635, 668; see also 1 Wilson's Law Lect. 305.

made by the people of the United States, to govern themselves as to general objects in a certain manner." He had immediately before stated, with reference to the preamble of the constitution, "Here we see the people acting, as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution, by which it was *their will*, that the state governments should be bound, and to which the state constitutions should be made to conform."[1]

§ 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

[1] In the ordinance of congress of 1787, for the government of the territory of the United States northwest of river Ohio, in which the settlement of the territory, and the establishment of several states therein, was contemplated, it was declared, that certain articles therein enumerated "shall be considered as *articles of compact* between the original states and the people and states in the said territory, and for ever remain unalterable, unless by common consent." Here is an express enumeration of parties, some of whom were not then in existence, and the articles of compact attached as such only, when they were brought into life. And then to avoid all doubt, as to their obligatory force, they were to be unalterable, except by *common consent*. One party could not change or absolve itself from the obligation to obey them.

[2] See Burke's Appeal from the New to the Old Whigs.

never assented thereto, and may by those very laws be disabled from such an act. Even our most solemn instruments of government, framed and adopted as the constitutions of our state governments, are not only not founded upon the assent of all the people within the territorial jurisdiction; but that assent is expressly excluded by the very manner, in which the ratification is required to be made. That ratification is restricted to those, who are qualified voters; and who are, or shall be qualified voters, is decided by the majority in the convention or other body, which submits the constitution to the people. All of the American constitutions have been formed in this manner. The assent of minors, of women, and of unqualified voters has never been asked or allowed; yet these embrace a majority of the whole population in every organized society, and are governed by its existing institutions. Nay more; a majority only of the qualified voters is deemed sufficient to change the fundamental institutions of the state, upon the general principle, that the majority has at all times a right to govern the minority, and to bind the latter to obedience to the will of the former. And if more than a plurality is, in any case, required, to amend or change the actual constitution of the society, it is a matter of political choice with the majority for the time being, and not of right on the part of the minority.

§ 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 all the inhabitants of the country. So, that this great and glorious change in the organization of our government owes its whole authority to the efforts of a triumphant majority. And the dissent on the part of the minority was deemed in many cases a crime, carrying along with it the penalty of confiscation, forfeiture, and personal, and even capital punishment; and in its mildest form was deemed an unwarrantable outrage upon the public rights, and a total disregard of the duties of patriotism.

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

§ 330. The truth is, that the majority of every organized society has always claimed, and exercised the right to govern the whole of that society, in the manner pointed out by the fundamental laws, which from time to time have existed in such society.[1] Every revolution, at least when not produced by positive force, has been founded upon the authority of such majority. And the right results from the very necessities of our nature; for universal consent can never be practically required or obtained. The minority are bound, whether they have assented or not; for the plain reason, that opposite wills in the same society, on the same subjects, cannot prevail at the same time; and, as society is instituted for the general safety and happiness, in a conflict of opinion the majority must have a right to accomplish that object by the means, which they deem adequate for the end. The majority may, indeed, decide, how far they will respect the rights or claims of the minority; and how far they will, from policy or principle, insist upon or absolve them from obedience. But this is a matter, on which it decides for itself, according to its own notions of justice or convenience. In a general sense the will of the majority of the people is absolute and sovereign, limited only by its means and power to make its will effectual.[2] The declaration of independence (which, it is historically known, was not the act of the whole American people) puts the doc-

[1] 1 Tucker's Black. Comm. App. 168; Id. 172, 173; Burke's Appeal from the New to the Old Whigs.

[2] Mr. Dane, in his Appendix to the ninth volume of his Abridgment, has examined this subject very much at large. See, especially, pages 37 to 43. Mr. Locke, the most strenuous asserter of liberty and of the original compact of society, contends resolutely for this power of the majority to bind the minority, as a necessary condition in the original formation of society. Locke on Government, B. 2, ch. 8, from § 95 to § 100.

trine on its true grounds. Men are endowed, it declares, with certain unalienable rights, and among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the *consent* of the governed. Whenever any form of government becomes destructive of these ends, it is the right of the people (plainly intending, the majority of the people) to alter, or to abolish it, and to institute a new government, laying its 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]

[1] It was the consideration of the consequences deducible from the theory of an original subsisting compact between the people, upon the

§ 332. Admitting, therefore, for the sake of argument, that the institution of a government is to be deemed, in the restricted sense already suggested, an original compact or contract between each citizen and the whole community, is it to be construed, as a continuing contract after its adoption, so as to involve the notion of there being still distinct and independent parties to the instrument, capable, and entitled, as matter of right, to judge and act upon its construction, according to their own views of its import and obligations? to resist the enforcement of the powers delegated to the government at the good pleasure of each? to dissolve all connexion with it, whenever there is a supposed breach of it on the other side?[1] These are momentous questions, and go to the very foundation of every government founded on the voluntary choice of the people; and they should be seriously investigated, before we admit the conclusions, which may be drawn from one aspect of them.[2]

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first formation of civil societies and governments, that induced Doctor Paley to reject it. He supposed, that, if admitted, its fundamental principles were still disputable and uncertain; that, if founded on compact, the form of government, however absurd or inconvenient, was still obligatory; and that every violation of the compact involved a right of rebellion and a dissolution of the government.* Mr. Wilson (afterwards Mr. Justice Wilson) urged the same objection very forcibly in the 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 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,

* Paley's Moral Philosophy, B. 6, ch. 3. But see Burke's Reflections on the French Revolution, ante, p. 293, 294.

† 1 Hume's Essays, Essay 12.

§ 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 re-assert it to-morrow? May one claim the protection and assistance of the laws and institutions to-day, and to-morrow repudiate them? May one declare war against all the others for a supposed

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or *quasi* compact. This theory is a material basis of political rights; and as a theoretical point, is not difficult to be maintained, &c. &c. Not that such consent is subsequently revokable at the will, even of all the subjects of the state, for that would be making a part of the community equal in power to the whole originally, and superior to the rulers thereof after their establishment." However questionable this latter position may be, (and it is open to many objections,*) it is certain, that a right of the minority to withdraw from the government, and to overthrow its powers, has no foundation in any just reasoning.

* See 1 Wilson's Lectures, 417, 418, 419, 420.

infringement of the constitution? If he may, then each one has the same right in relation to all others; and anarchy and confusion, and not order and good government and obedience, are the ingredients, which are mainly at work in all free institutions, founded upon the will, and choice, and compact of the people. The existence of the government, and its peace, and its vital interests will, under such circumstances, be at the mercy and even at the caprice of a single individual. It would not only be vain, but unjust to punish him for disturbing society, when it is but by a just exercise of the original rights reserved to him by the compact. The maxim, that in every government the will of the majority shall, and ought to govern the rest, would be thus subverted; and society would, in effect, be reduced to its original elements. The association would be temporary and fugitive, like those voluntary meetings among barbarous and savage communities, where each acts for himself, and submits only, while it is his pleasure.

§ 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 arbitor, *pro hac vice,* whom they invest with such power; or thirdly, by a resort to arms, which is the *ultima ratio regum,* or the last appeal between sovereigns.

§ 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 by the government for such pur-

[1] Dane's App. § 14, p. 25, 26.

poses; or if these should fail, by the ultimate appeal to the good sense, and integrity, and justice of the majority of the people. And this, according to Mr. Locke, is the true sense of the original compact, by which every individual has surrendered to the majority of the society the right permanently to control, and direct the operations of government therein.[1]

§ 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 con-

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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 Heinecc. Elem. Juris. Natur. L. 2, ch. 6, § 109 to 115. (2 Turnbull, Hein. p. 95, &c.)

tract. In general the import is, that the people "ordain and establish," that is, in their sovereign capacity, meet and declare, what shall be the fundamental LAW for the government of themselves and their posterity. Even in the constitution of Massachusetts, which, more than any other, wears the air of contract, the compact is declared to be a "mere constitution of civil government," and the people "do agree on, ordain, and establish the following declaration of rights, and frame of government, as the constitution of government." In this very bill of rights, the people are declared "to have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state"; and that "they have an incontestible, unalienable, and indefeasible right to institute government, and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it." It is, and accordingly has always been, treated as a fundamental *law*, and not as a mere contract of government, during the good pleasure of all the persons, who were originally bound by it, or assented to it.[1]

§ 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

[1] Mr. Justice Chase, in *Ware* v. *Hylton*, 3 Dall. R. 199, 1 Condensed R. 99, 112, declares the constitution of a state to be the fundamental law of the state. — Mr. Dane has with great force said, that a constitution is a thing constituted, an instrument ordained and established. If a committee frame a constitution for a state, and the people thereof meet in their several counties, and ratify it, it is a constitution ordained and established, and not a compact, or contract among the counties. So, if they meet in several towns and ratify it, it is not a compact among them. A compact among states is a confederation, and is always so named, (as was the old confederation,) and never a constitution. 9 Dane's Abridgment, ch. 187, art. 20, § 15, p. 590.

rule of action, prescribed by the supreme power in a state, regulating the rights and duties of the whole community. It is a *rule*, as contradistinguished from a temporary or sudden order; permanent, uniform, and universal. It is also called a rule, to distinguish it from a compact, or agreement; for a compact (he adds) is a promise proceeding from us; law is a command directed to us. The language of a compact is, I will, or will not do this; that of a law is, Thou shalt, or shalt not do it.[1] "In compacts we ourselves determine and promise, what shall be done, before we are obliged to do it. In laws, we are obliged to act without ourselves determining, or promising any thing at all."[2] It is a rule prescribed; that is, it is laid down, promulgated, and established. It is prescribed by the supreme power in a state, that is, among us, by the people, or a 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 the Federalist) results from the very nature of political institutions. A law, by the very meaning of the terms, includes supremacy.[3] If individuals enter into

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

[2] 1 Black. Comm. 45.

[3] The Federalist, No. 33. See also, No. 15.

a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws, which the latter may enact, pursuant to the powers entrusted to it by its constitution, must be supreme over those societies, and the individuals, of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a *government*, which is only another word for political power and supremacy.[1] A state constitution is then in a just and appropriate sense, not only a *law*, but a supreme *law*, for the government of the whole people, within the range of the powers actually contemplated, and the rights secured by it. It would, indeed, be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights, which it proclaims to be "unalienable and indefeasible," to be a matter of *contract*, and resting on such a basis, rather than a solemn recognition and admission of those rights, arising from the law of nature, and the gift of Providence, and incapable of being transferred or surrendered.[2]

1 The Federalist, No. 33.

2 Mr. Adams, in his Oration on the 4th of July, 1831, uses the following language: "In the constitution of this commonwealth [Massachusetts] it is declared, that the body politic is formed by a voluntary association of individuals. That it is a social compact, &c. The body politic of the United States was formed by a voluntary association of the people of the United Colonies. The Declaration of Independence was a social compact, by which the whole people covenanted with each citizen of the united colonies, and each citizen with the whole people, that the united colonies were, and of right ought to be, free and independent states. To this compact, union was as vital, as freedom and independence. From the hour of that independence, no one of the states, whose people were parties to it, could, without a violation of that primitive compact, secede, or separate from the rest. Each was pledged to all; and all were pledged to each other by a concert of soul, without

§ 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 endeavoured to subvert the constitution of the kingdom *by breaking the original contract between king and people;* and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and withdrawn himself out of the kingdom, hath abdicated the government, and that the throne is thereby become vacant." [1]

§ 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

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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.

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

both houses, in which the most animated debates took place between some of the most distinguished men in the kingdom. But the commons adhering to their vote, the lords finally acceded to it. The whole debate is preserved; and the reasoning on each side is given at large.[1] In the course of the debate notice was frequently taken of the expression of breaking the original contract between king and people. The Bishop of Ely said, "I may say, that this breaking the original contract is a language, that hath not been long used in this place, nor known in any of our law books or public records. It is sprung up, but as taken from some late authors, and those none of the best received; and the very phrase might bear a great debate, if that were now to be spoken to." — "The making of new laws being as much a part of the original compact, as the observing old ones, or any thing else, we are obliged to pursue those laws, till altered by the legislative power, which, singly or jointly, without the royal assent, I suppose we do not pretend to." — "We must think sure that meant of the compact, that was made at first time, when the government was first instituted, and the conditions, that each part of the government should observe on their part; of which this was most fundamental, that king, lords, and commons in parliament assembled shall have the power of making new laws and altering of old ones."[2] Sir George Treby said, "We are gone too far, when we offer to inquire into the original contract, whether any such thing is known, or understood in our law or constitution, and whether it be new language among us." First, it is a phrase used by the learned

[1] Parliamentary Debates, 1688, edit. 1742, p. 203 et seq.
[2] Id. p. 217, 218.

Mr. Hooker in his book of Ecclesiastical Polity, whom I mention as a valuable authority, &c. "But I have yet a greater authority than this to influence this matter, and that is your lordship's own, who have agreed to all the vote, but this word, *abdicated*, and the vacancy of the throne." He then supposes the king to say, "The title of kingship I hold by original contract, and the fundamental constitutions of the government, and my succession to, and possession of the crown on these terms is a part of that contract. This part of the contract I am weary of," &c.[1] The Earl of Nottingham said, "I know no laws, as laws, but what are fundamental constitutions, as the laws are necessary so far to support the foundation."[2] Sir Thomas Lee said, "The contract was to settle the constitution, as to the legislature; and it is true, that it is a part of the contract, the making of laws, and that those laws should oblige all sides when made. But yet not so as to exclude this original constitution in all governments, that commence by compact, that there should be a power in the states to make provision in all times, and upon all occasions for extraordinary cases of necessity, such as ours now is."[3] Sir George Treby again said, "The laws made are certainly part of the original contract, and by the laws made, &c. we are tied up to keep in the hereditary line," &c.[4] Mr. Sergeant Holt (afterwards Lord Chief Justice) said, "The government and magistracy are all under a trust, and any acting contrary to that trust is a renouncing of the trust, though it be not a renouncing by formal deed. For it is a plain declaration by act and deed, though not in writing,

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

that he, who hath the trust, acting contrary, is a disclaimer of the trust."[1] Mr. Sergeant Maynard said, "The constitution, notwithstanding the vacancy, is the same. The laws, that are the foundations and rules of that constitution, are the same. But if there be in any instance a breach of that constitution, that will be an abdication, and that abdication will confer a vacancy."[2] Lord Nottingham said, "Acting against a man's trust (says Mr. Sergeant Holt) is a renunciation of that trust. I agree, it is a violation of his trust to act contrary to it. And he is accountable for that violation to answer, what the trust suffers out of his own estate. But I deny it to be presently a renunciation of the trust, and that such a one is no longer a trustee."[3]

§ 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.

[1] Parliamentary Debates, 1688, edit. 1742, p. 213.
[2] Id. p. 213, 214. [3] Id. 220.

§ 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 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

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

their own right, and by the commons by their representatives, both being assembled in convention expressly to meet the exigency. "For," says Blackstone, "whenever a question arises between the society at large, and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of that society itself. There is not upon earth any other tribunal to resort to."[1]

§ 346. This was precisely the view entertained by the great revolutionary whigs in 1688. They did not declare the government dissolved, because the king had violated the fundamental laws and obligations of the constitution. But they declared, that those acts amounted to a renunciation and abdication of the government by him; and that the throne was vacant, and must be supplied by a new choice. The original contract with him was gone. He had repudiated it; and lost all rights under it. But these violations did not dissolve the social organization, or vary the existing constitution and laws, or justify any of the subjects in renouncing their own allegiance to the government; but only to King James."[2] In short, the government was no more dissolved, than our own would be, if the president of the United States should violate his constitutional duties, and, upon an impeachment and trial, should be removed from office.

§ 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

[1] 1 Black. Comm. 211.

[2] 1 Black. Comm. 212, 213. — The same doctrines were avowed by the great whig leaders of the house of commons on the trial of Doctor Sacheverill, in 1709. Mr. Burke, in his Appeal from the New to the Old Whigs, has given a summary of the reasoning, and supported it by copious extracts from the trial.

adopted by a people. If there were any analogy, it would follow, that every violation of the constitution of the United States by any department of the government would amount to a renunciation by the incumbent or incumbents of all rights and powers conferred on that department by the constitution, *ipso facto*, leaving a vacancy to be filled up by a new choice; a doctrine, that has never yet been broached, and indeed is utterly unmaintainable, unless that violation is ascertained in some mode known to the constitution, and a removal takes place accordingly. For otherwise such a violation by any functionary of the government would amount to a renunciation of the constitution by all the people of the United States, and thus produce a dissolution of the government *eo instanti;* a doctrine so extravagant, and so subversive of the rights and liberties of the people, and so utterly at war with all principles of common sense and common justice, that it could never find its way into public favour by any ingenuity of reasoning, or any vagaries of theory.

§ 348. In short, it never entered into the heads of the great men, who accomplished the glorious revolution of 1688, that a constitution of government, however originating, whether in positive compact, or in silent assent and acquiescence, after it was adopted by the people, remained a mere contract or treaty, open to question by all, and to be annihilated at the will of any of them for any supposed or real violations of its provisions. They supposed, that from the moment it became a constitution, it ceased to be a compact, and became a fundamental law of absolute paramount obligation, until changed by the whole people in the manner prescribed by its own rules, or by the implied resulting power, belonging to the people in all cases of necessity to pro-

vide for their own safety. Their reasoning was addressed, not to the constitution, but to the functionaries, who were called to administer it. They deemed, that the constitution was immortal, and could not be forfeited; for it was prescribed by and for the benefit of the people. But they deemed, and wisely deemed, that magistracy is a trust, a solemn public trust; and he, who violates his duties, forfeits his own right to office, but cannot forfeit the rights of the people.

§ 349. The subject has been, thus far, considered chiefly in reference to the point, how far government is to be considered as a *compact*, in the sense of a contract, as contradistinguished from an act of solemn acknowledgment or assent; and how far our state constitutions are to be deemed such contracts, rather than fundamental laws, prescribed by the sovereign power. The conclusion, to which we have arrived, is, that a state constitution is no farther to be deemed a compact, than that it is a matter of consent by the people, binding them to obedience to its requisitions; and that its proper character is that of a fundamental law, prescribed by the will of the majority of the people of the state, (who are entitled to prescribe it,) for the government and regulation of the whole people.[1] It binds them, as a supreme compact, ordained by the sovereign power,

[1] It is in this sense, that Mr. Chief Justice Jay is to be understood in his opinion in *Chisholm* v. *Georgia*, (2 Dall. R. 419; S. C. Peters's Cond. R. 635, 668,) when he says, "every state constitution is a compact, made by and between the citizens of the state to govern themselves in a certain manner; and the constitution of the United States is likewise a compact, made by the people of the United States to govern themselves, as to general objects, in a certain manner." The context abundantly shows, that he considered it a fundamental law of government; and that its powers did not rest on mere treaty; but were supreme, and were to be construed by the judicial department; and that the states were bound to obey.

and not merely as a voluntary contract, entered into by parties capable of contracting, and binding themselves by such terms, as they choose to select.[1] If this be a correct view of the subject, it will enable us to enter upon the other parts of the proposed discussion with principles to guide us in the illustration of the controversy.

§ 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.

§ 352. There is nowhere found upon the face of the constitution any clause, intimating it to be a compact, or in anywise providing for its interpretation, as such.

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

On the contrary, the preamble emphatically speaks of it, as a solemn ordinance and establishment of government. The language is, "We, the people of the United States, do *ordain* and *establish* this *constitution* for the United States of America." *The people* do *ordain* and *establish*, not contract and stipulate with each other.[1] The people of the *United States*, not the distinct people of a *particular state* with the people of the other states. The people ordain and establish a "*constitution*," not a "*confederation*." The distinction between a constitution and a confederation is well known and understood. The latter, or at least a pure confederation, is a mere treaty or league between independent states, and binds no longer, than during the good pleasure of each.[2] It rests forever in articles of compact, where each is, or may be the supreme judge of its own rights and duties. The former is a permanent form of government, where the powers, once given, are irrevocable, and cannot be resumed or withdrawn at pleasure. Whether formed by a single people, or by different societies of people,

[1] The words "ordain and establish" are also found in the 3d article of the constitution. "The judicial power shall be vested in one supreme court, and in such inferior courts, as the congress may from time to time *ordain* and *establish*." How is this to be done by congress? Plainly by a law; and when ordained and established, is such a law a contract or compact between the legislature and the people, or the court, or the different departments of the government? No. It is neither more nor less than a law, made by competent authority, upon an assent or agreement of minds. In *Martin* v. *Hunter*, (1 Wheat. R. 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 opinion of the court in *M'Culloch* v. *Maryland*, (4 Wheaton, 316, 402 to 405, already cited.)

[2] The Federalist, No. 9, 15, 17, 18, 33; Webster's Speeches, 1830; Dane's App. § 2, p. 11, § 14, p. 25, &c.; Id. § 10, p. 21; Mr. Martin's Letter, 3 Elliot, 53; 1 Tucker's Black. Comm. App. 146.

in their political capacity, a constitution, though originating in consent, becomes, when ratified, obligatory, as a fundamental ordinance or law.[1] The constitution of a confederated republic, that is, of a national republic formed of several states, is, or at least may be, not less an irrevokable form of government, than the constitution of a state formed and ratified by the aggregate of the several counties of the state.[2]

§ 353. If it had been the design of the framers of the constitution or of the people, who ratified it, to consider it a mere confederation, resting on treaty stipulations, it is difficult to conceive, that the appropriate terms should not have been found in it. The United States were no strangers to compacts of this nature.[3] They had subsisted to a limited extent before the revolution. The articles of confederation, though in some few respects national, were mainly of a pure federative character, and were treated as stipulations between states for many purposes independent and sovereign.[4] And yet (as has been already seen) it was deemed a political heresy to maintain, that under it any state had a right

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1 1 Wilson's Lectures, 417.

2 See The Federalist, No. 9; Id. No. 15, 16; Id. No. 33; Id. No. 39.

3 New-England Confederacy of 1643; 3 Kent. Comm. 190, 191, 192; Rawle on Const. Introduct. p. 24, 25. — In the ordinance of 1787, for the government of the territory northwest of the Ohio, certain articles were expressly declared to be "articles of *compact* between the original states, [i. e. the United States,] and the people and states [states *in 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?

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

to withdraw from it at pleasure, and repeal its operation; and that a party to the compact had a right to revoke that compact.[1] The only places, where the terms, *confederation* or *compact*, are found in the constitution, apply to subjects of an entirely different nature, and manifestly in contradistinction to *constitution*. Thus, in the tenth section of the first article it is declared, that "no state shall enter into any treaty, alliance, or *confederation;*" "no state shall, without the consent of congress, &c. enter into any agreement or *compact* with another state, or with a foreign power." Again, in the sixth article it is declared, that "all debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this *constitution*, as under the *confederation*." Again, in the tenth amendment it is declared, that "the powers not *delegated* by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." A contract can in no just sense be called a delegation of powers.

§ 354. But that, which would seem conclusive on the subject, (as has been already stated,) is, the very language of the constitution itself, declaring it to be a supreme fundamental law, and to be of judicial obligation, and recognition in the administration of justice. "This constitution," says the sixth article, "and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, *shall be the supreme law of the land;* and the *judges* in every state shall be bound thereby, *any thing in the constitution or laws* of any state to the contrary notwithstand-

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

ing." If it is the supreme law, how can the people of any state, either by any form of its own constitution, or laws, or other proceedings, repeal, or abrogate, or suspend it?

§ 355. But, if the language of the constitution were less explicit and irresistible, no other inference could be correctly deduced from a view of the nature and objects of the instrument. The design is to establish a form of government. This, of itself, imports legal obligation, permanence, and uncontrollability by any, but the authorities authorized to alter, or abolish it. The object was to secure the blessings of liberty to the people, and to their posterity. The avowed intention was to supercede the old confederation, and substitute in its place a new form of government. We have seen, that the inefficiency of the old confederation forced the states to surrender the league then existing, and to establish a national constitution.[1] The convention also, which framed the constitution, declared this in the letter accompanying it. "It is obviously impracticable in the federal government of these states," says that letter, "to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest."[2] "In all our delibera-

[1] The very first resolution adopted by the convention (six states to two states) was in the following words: "Resolved, that it is the opinion of this committee, that a national government ought to be established of a supreme legislative, judiciary, and executive;"* plainly showing, that it was a national government, not a compact, which they were about to establish; a supreme legislative, judiciary, and executive, and not a mere treaty for the exercise of dependent powers during the good pleasure of all the contracting parties.

[2] Journal of Convention, p. 367, 368.

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

tions on this subject, we kept steadily in our view that, which appeared to us the greatest interest of every true American, the *consolidation of our Union*, in which is involved our prosperity, felicity, safety, perhaps our national existence." Could this be attained consistently with the notion of an existing treaty or confederacy, which each at its pleasure was at liberty to dissolve?[1]

§ 356. It is also historically known, that one of the objections taken by the opponents of the constitution was, "that it is not a *confederation* of the states, but a *government* of individuals."[2] It was, nevertheless, in the solemn instruments of ratification by the people of the several states, assented to, as a constitution. The language of those instruments uniformly is, "We, &c. do *assent* to, and *ratify* the said *constitution*."[3] The forms of the convention of Massachusetts and New-Hampshire are somewhat peculiar in their language. "The convention, &c. acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the Uni-

[1] The language of the Supreme Court in *Gibbons* v. *Ogden*, (9 Wheat. R. 1, 187,) is very expressive on this subject.

"As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character, in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument, by which that change was effected."

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

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

verse in affording the people of the United States, in the course of his providence, an opportunity, deliberately and peaceably, without force or surprise, of entering into an *explicit* and *solemn compact* with each other, *by assenting to, and ratifying a new constitution*, &c. do assent to, and ratify the said constitution."[1] And although many declarations of rights, many propositions of amendments, and many protestations of reserved powers are to be found accompanying the ratifications of the various conventions, sufficiently evincive of the extreme caution and jealousy 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 or compact of states in their sovereign capacity, and no reservation of any right, on the part of any state, to dissolve its connexion, or to abrogate its assent, or to suspend the operations of the constitution, as to itself. On the contrary, that of Virginia, which speaks most pointedly to the topic, merely declares, "that the powers granted under the constitution, *being derived from the people of the United States*, may be resumed by *them* [not by any one of the states] whenever the same shall be perverted to their injury or oppression."[2]

§ 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

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

[2] Id. p. 416. — Of the right of a majority of the whole people to change their constitution, at will, there is no doubt. See 1 Wilson's Lectures, 418; 1 Tucker's Black. Comm. 165.

face to be a mere confederacy. The language of the third article was, "The said states hereby severally enter into a firm *league* of friendship with each other for their common defence, &c. binding themselves to assist each other." And the ratification was by delegates of the state legislatures, who solemnly plighted and engaged the *faith* of their respective constituents, that they should abide by the determination of the United States in congress assembled on all questions, which, by the said confederation, are submitted to them; and that the articles thereof should be inviolably observed by the states they respectively represented.[1]

§ 358. It is not unworthy of observation, that in the debates of the various conventions called to examine and ratify the constitution, this subject did not pass without discussion. The opponents, on many occasions, pressed the objection, that it was a consolidated government, and contrasted it with the confederation.[2] None of its advocates pretended to deny, that its design was to establish a national government, as contradistinguished from a mere league or treaty, however they might oppose the suggestions, that it was a consolidation of the states.[3] In the North Carolina de-

[1] Articles of Confederation, 1781, art. 13.

[2] I do not say, that the manner of stating the objection was just, but the fact abundantly appears in the printed debates. For instance, in the Virginia debates, (2 Elliot's Deb. 47,) Mr. Henry said, "That this is a consolidated government is demonstrably clear." "The language [is] 'We, the people,' instead of, 'We, the *states*.' *States* are the characteristics and soul of a confederation. If the states be not the agents of this compact, it must be one great consolidated national government of the people of all the states." The like suggestion will be found in various places in Mr. Elliot's 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.

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

bates, 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 monarchical governments in Europe. Our government is founded on much nobler principles. The people are known with certainty to have originated it themselves. Those in power are their servants and agents. And the people, without their consent, may new-model the government, whenever they think proper, not merely because it is oppressively exercised, but because they think another form will be more conducive to their welfare."[1]

§ 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.[2] It is matter of surprise, therefore, that

[1] Mr. Iredell, 3 Elliot's Debates, 24, 25; Id. 200, Mr. McClure, Id. 25; Mr. Spencer, Id. 26, 27; Id. 139. See also 3 Elliot's Debates, 156; See also *Chisholm* v. *Georgia*, 3 Dall, 419; 2 Condensed Rep. 635, 667, 668. See also in Penn. Debates, Mr. Wilson's denial, that the constitution was a compact; 3 Elliot's Debates, 286, 287. See also *McCulloch* v. *Maryland*, 4 Wheaton, 316, 404.

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

a learned commentator should have admitted the right of any state, or of the people of any state, without the consent of the rest, to secede from the Union at its own pleasure.[1] The people of the United States have a right to abolish, or alter the constitution of the United States; but that the people of a single state have such a right, is a proposition requiring some reasoning beyond the suggestion, that it is implied in the principles, on which our political systems are founded.[2] It seems, indeed, to have its origin in the notion of all governments being founded in *compact*, and therefore liable to be dissolved by the parties, or either of them; a notion, which it has been our purpose to question, at least in the sense, to which the objection applies.

§ 360. To us the doctrine of Mr. Dane appears far better founded, that "the constitution of the United States is not a compact or contract agreed to by two or more parties, to be construed by each for itself, and here to stop for the want of a common arbiter to revise the construction of each party or state. But that it is, as the people have named and called it, truly a Constitution; and they properly said, 'We, the people of the United States, do ordain and establish this constitution,' and not, we, the people of each state."[3] Andthis expo-

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

[2] Dane's App. § 59, 60, p. 69, 71.

[3] Mr. (afterwards Mr. Justice) Wilson, who was a member of the Federal Convention, uses, in the Pennsylvania Debates, the following language: "We were told, &c. that the convention no doubt thought they were forming a *compact* or contract of the greatest importance. It was matter of surprise to see the great 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

tion has been sustained by opinions of some of our most eminent statesmen and judges.[1] It was truly remarked by the Federalist,[2] that the constitution was the result neither from the decision of a majority of the people of the union, nor from that of a majority of the states. It resulted from the unanimous assent of the several states that are parties to it, differing no otherwise from their ordinary assent, than its being expressed, not by the legislative authority but by that of the people themselves.

§ 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 contract? We have already seen, that the learned commentator on Blackstone, deems it a compact with several aspects, and first between the *states*, (as contradistinguished from the *people* of the states) by which the several states have bound themselves to each other, and to the fed-

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 endeavoured to be established by gentlemen in the opposition; their state sovereignties wish to be represented. But far other were the ideas of the convention. *This is not a government founded upon compact. It is founded upon the power of the people.* They express in their name and their authority, we, the people, do ordain and establish," &c. 3 Elliot's Debates, 286, 287. He adds (Id. 288) "This system is not a compact or contract. The system tells you, what it is; it is an ordinance and establishment of the people." 9 Dane's Abridg. ch. 187, art. 20, § 15, p. 589, 590; Dane's App. § 10, p. 21, § 59, p. 69.

[1] See *Ware* v. *Hylton*, 3 Dall. 199; 1 Cond. Rep. 99, 112; *Chisholm* v. *Georgia*, 3 Dall. 419; 2 Cond. R. 668, 671; Elliot's Debates, 72; 2 Elliot's Debates, 47; Webster's Speeches, p. 410; The Federalist, No. 22, 33, 39; 2 Amer. Museum, 536, 546; Virginia Debates in 1798, on the Alien Laws, p. 111, 136, 138, 140; North Amer. Rev. Oct. 1830, p. 437, 444.

[2] No. 39.

eral government.[1] The Virginia Resolutions of 1798, assert, that "Virginia views the powers of the federal government, as resulting from the *compact, to which the states are parties.*" This declaration was, at the time, matter of much debate and difference of opinion among the ablest representatives in the legislature. But when it was subsequently expounded by Mr. Madison in the celebrated Report of January, 1800, after admitting, that the term "states" is used in different senses, and among others, that it sometimes means the *people* composing a political society in their highest sovereign capacity, he considers the resolution unobjectionable, at least in this last sense, because in that sense the constitution was submitted to the "states"; in that sense the "states" ratified it; and in that sense the states are consequently parties to the compact, from which the powers of the federal government result.[2] And that is the sense, in which he considers the states parties in his still later and more deliberate examinations.[3]

§ 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

[1] 1 Tuck. Black. Comm. 169; Haynes's Speech in the Senate, in 1830; 4 Elliot's Debates, 315, 316.

[2] Resolutions of 1800, p. 5, 6.

[3] North American Review, Oct. 1830, p. 537, 544.

for the same reasons the governor, or senate, or house of representatives, or judges, either of a state or of the United States, are parties thereto. No state, as such, that is the body politic, as it was actually organized, had any power to establish a contract for the establishment of any new government over the people thereof, or to delegate the powers of government in whole, or in part to any other sovereignty. The state governments were framed by the people to administer the state constitutions, such as they were, and not to transfer the administration thereof to any other persons, or sovereignty. They had no authority to enter into any compact or contract for such a purpose. It is no where given, or implied in the state constitutions; and consequently, if actually entered into, (as it was not,) would have had no obligatory force. The people, and the people only, in their original sovereign capacity, had a right to change their form of government, to enter into a compact, and to transfer any sovereignty to the national government.[1] And the states never, in fact, did in their political capacity, as contradistinguished from the people thereof, ratify the constitution. They were not called upon to do it by congress; and were not contemplated, as essential to give validity to it.[2]

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[1] 4 Wheaton, 404.

[2] The Federalist, No. 39. — In confirmation of this view, we may quote the reasoning of the Supreme Court in the case of *McCulloch* v. *Maryland*, (4 Wheaton's R. 316,) in answer to the very argument. "The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

"It would be difficult to sustain this proposition. The convention, which framed the constitution, was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the

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

then existing congress of the United States, with a request, that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner, in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states — and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines, which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

"From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic 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.

distinguished statesman,[1] "the constitution itself in its very front refutes that. It declares, that it is ordained and established *by the* PEOPLE *of the United States.* So far from saying, that it is established by the governments of the several states, it does not even say, that it is established *by the people of the several states.* But it pronounces, that it is established by the people of the United States in the aggregate. Doubtless the people of the several states, taken collectively, constitute the people of the United States. But it is in this their collective capacity, it is as all the people of the United States, that they establish the constitution."[2]

"The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."

1 Webster's Speeches, 1830, p. 431; 4 Elliot's Debates, 326.

2 Mr. Dane reasons to the same effect, though it is obvious, that he could not, at the time, have had any knowledge of the views of Mr. Webster.* He adds, "If a contract, when and how did the Union become a party to it? If a compact, why is it never so denominated, but often and invariably in the instrument itself, and in its amendments, styled, "*this* constitution? and if a contract, why did the framers and people call it the supreme law."† In *Martin* v. *Hunter*, (1 Wheat. R. 304, 324,) the supreme court expressly declared, that "the constitution was ordained and established," not by the states in their sovereign capacity, but emphatically, as the preamble of the constitution declares, "by the people of the United States."

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

§ 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 statesmen,[1] "are warranted by no just reason. Because, if the constitution be a compact between the states, still that constitution or that compact has established a government with certain powers; and whether it be one of these powers, that it shall construe and interpret for itself the terms of the compact in doubtful cases, can only be decided by looking to the compact, and inquiring, what provisions it contains on that point. Without any inconsistency with natural reason, the government even thus created might be trusted with this power of construction. The extent of its powers must, therefore, be sought in the instrument itself." "If the constitution were the mere creation of the state governments, it might be modified, interpreted, or construed according to their pleasure. But even in that case, it would be necessary, that they should agree. One alone could not interpret it conclusively. One alone could not construe it. One alone could not modify it." "If all the states are parties to it, one alone can have no right to fix upon it her own peculiar construction."[2]

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

[2] Even under the confederation, which was confessedly, in many respects, a mere league or treaty, though in other respects national, congress unanimously resolved, that it was not within the competency of any state to pass acts for interpreting, explaining, or construing a national treaty, or any part or clause of it. Yet in that instrument there was no express judicial powers given to the general government to construe it. It was, however, deemed an irresistible and exclusive authority in the general government, from the very nature of the other powers given to them; and especially from the power to make war and peace, and to form treaties. Journals of Congress, April 13, 1787, p. 32, &c.; Rawle on Const. App. 2, p. 316, 320.

§ 365. Then, is it a compact between the people of the several states, each contracting with all the people of the other states?[1] It may be admitted, as was the early exposition of its advocates, "that the constitution is founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but that this assent and ratification is to be given by the whole people, not as individuals, composing one entire nation, but as composing the distinct and independent states, to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state, the authority of the people themselves. The act, therefore, establishing the constitution will not be [is not to be] a national, but a federal act."[2] "It may also be admitted," in the language of one of its most enlightened commentators, that "it was formed, not by the governments of the component states, as the federal government, for which it was substituted, was formed. Nor was it formed by a majority of the people of the United States, as a single community, in the manner of a consolidated government. It was formed by the states, that is, by the people in each of the states acting in their highest sovereign capacity; and formed consequently by the same authority, which formed the state constitutions."[3] But this would not necessarily

[1] In the resolutions passed by the senate of South-Carolina, in December, 1827, it was declared, that "the constitution of the United States is a compact between the people of the different states with each other, as separate and independent sovereignties." Mr. Grimké filed a protest founded on different views of it. See Grimké's Address and Resolutions in 1828, (edition, 1829, at Charleston,) where his exposition of the constitution is given at large, and maintained in a very able speech.

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

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

draw after it the conclusion, that it was to be deemed a compact, (in the sense, to which we have so often alluded,) by which each state was still, after the ratification, to act upon it, as a league or treaty, and to withdraw from it at pleasure. A government may originate in the voluntary compact or assent of the people of several states, or of a people never before united, and yet when adopted and ratified by them, be no longer a matter resting in compact; but become an executed government or constitution, a fundamental law, and not a mere league. But the difficulty in asserting it to be a compact between the people of each state, and all the people of the other states is, that the constitution itself contains no such expression, and no such designation of parties.[1] We, "the people of the United States, &c. do *ordain*, and *establish* this *constitution*," is the language; and not we, the people of each state, do establish this *compact* between ourselves, and the people of all the other states. We are obliged to depart from the words of the instrument, to sustain the other interpretation; an interpretation, which can serve no better purpose, than to confuse the mind in relation to a subject otherwise clear. It is for this reason, that we should prefer an adherence to the words of the constitution, and to the judicial exposition of these words according to their plain and common import.[2]

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

[2] *Chisholm* v. *Georgia*, 2 Dall. 419; 2 Cond. Rep. 668, 671; *Martin* v. *Hunter*, 1 Wheat. R. 304, 324; Dane's App. p. 22, 24, 29, 30, 37, 39, 40, 41, 42, 43, 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 view-

§ 366. But supposing, that it were to be deemed such a compact among the people of the several states, let us see what the enlightened statesman, who vindi-

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ed in no other light. The people, the highest authority known to our system, from whom all our institutions spring, and on whom they depend, formed it. Had the people of the several states thought proper to incorporate themselves into one community under one government, they might have done it. They had the power, and there was nothing then, nor is there any thing now, should they be so disposed, to prevent it. They wisely stopped, however, at a certain point, extending the incorporation to that point, making the national government, thus far, a consolidated government, and preserving the state governments, without that limit, perfectly sovereign and independent of the national government. Had the people of the several states incorporated themselves into one community, they must have remained such; their constitution becoming then, like the constitutions of the several states, incapable of change, until altered by the will of the majority. In the institution of a state government by the citizens of a state, a compact is formed, to which all and every citizen are equal parties. They are also the sole parties, and may amend it at pleasure. In the institution of the government of the United States, by the citizens of every state, a compact was formed between the whole American people, which has the same force, and partakes of all the qualities, to the extent of its powers, as a compact between the citizens of a state, in the formation of their own constitution. It cannot be altered, except by those who formed it, or in the mode prescribed by the parties to the compact itself.

"This constitution was adopted for the purpose of remedying all the defects of the confederation; and in this, it has succeeded, beyond any calculation, that could have been formed of any human institution. By binding the states together, the constitution performs the great office of the confederation, but it is in that sense only, that it has any of the properties of that compact, and in that it is more effectual, to the purpose, as it holds them together by a much stronger bond, and in all other respects, in which the confederation failed, the constitution has been blessed with complete success. The confederation was a compact between separate and independent states; the execution of whose articles, in the powers which operated internally, depended on the state governments. But the great office of the constitution, by incorporating the people of the several states, to the extent of its powers, into one community, and enabling it to act directly on the people, was to annul the powers of the state 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

cates that opinion, holds as the appropriate deduction from it. "Being thus derived (says he) from the same source, as the constitutions of the states, it has, within each state, the same authority, as the constitution of the state; and is as much a constitution within the strict sense of the term, within its prescribed sphere, as the constitutions of the states are, within their respective spheres. But with this obvious and essential 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." [1]

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."

[1] Mr. Madison's Letter, North American Review, Oct. 1830, p. 538.— Mr. Paterson (afterwards Mr. Justice Paterson) in the convention, which framed the constitution, held the doctrine, that under the confederation no state had a right to withdraw from the Union without the consent of all. "The confederation (said he) is in the nature of a compact; and can any state, unless by the consent of the whole, either in politics or law, withdraw their powers? Let it be said by Pennsylvania and the other large states, that they, for the sake of peace, assented to the confederation; can she now resume her original right without the consent of the donee?"* Mr. Dane unequivocally holds the same language in respect to the constitution. "It is clear (says he) the people of any *one* state alone never can take, or withdraw power from the United States, which was granted to it by all, as the people of *all* the states can do rightfully in a justifiable revolution, or as the people can do in the manner their constitution prescribes." Dane's App. § 10, p. 21.

* Yates's Debates, 4 Elliot's Debates, 75.

§ 367. The other branch of the proposition, we have been considering, is, that it is not only a compact between the several states, and the people thereof, but also a compact between the states and the *federal government*; and *e converso* between the *federal government*, and the several states, and every citizen of the United States.[1] This seems to be a doctrine far more involved, and extraordinary, and incomprehensible, than any part of the preceding. The difficulties have not escaped the observation of those, by whom it has been advanced. "Although (says the learned commentator) the federal government can, in no *possible view*, be considered as a party to a compact made anterior to its existence; yet, as the creature of that compact, it must be bound by it to its creators, the several states in the Union, and the citizens thereof."[2] If by this, no more were meant than to state, that the federal government cannot lawfully exercise any powers, except those conferred on it by the constitution, its truth could not admit of dispute. But it is plain, that something more was in the author's mind. At the same time, that he admits, that the federal government could not be a party to the compact of the constitution "in any possible view," he still seems to insist upon it, as a compact, by which the federal government is bound to the several states, and to every citizen; that is, that it has entered into a contract with them for the due execution of its duties.

The ordinance of 1787, for the government of the western territory, contains (as we have seen) certain articles declared to be "articles of *compact*;" but they are also declared to "remain for ever unalterable, except by *common consent*." So, that there may be a compact, and yet by the stipulations neither party may be at liberty to withdraw from it, or absolve itself from its obligations. Ante, p. 269.

[1] 1 Tucker's Black. Comm. 169, 170.

[2] 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

[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.

of the several states, or between the whole people of the United States, and the people of the several states, or between each citizen of all the states, and all other citizens, are, if not absolutely insuperable, so serious, and so wholly founded upon mere implication, that it is matter of surprise, that they should have been so extensively adopted, and so zealously propagated. These theories, too, seem mainly urged with a view to draw conclusions, which are at war with the known powers, and reasonable objects of the constitution; and which, if successful, would reduce the government to a mere confederation. They are objectionable, then, in every way; first, because they are not justified by the language of the constitution; secondly, because they have a tendency to impair, and indeed to destroy, its express powers and objects; and thirdly, because they involve consequences, which, at the will of a single state, may overthrow the constitution itself. One of the fundamental rules in the exposition of every instrument is, so to construe its terms, if possible, as not to make them the source of their own destruction, or to make them utterly void, and nugatory. And if this be generally true, with how much more force does the rule apply to a constitution of government, framed for the general good, and designed for perpetuity? Surely, if any implications are to be made beyond its terms, they are implications to preserve, and not to destroy it.[1]

[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.

§ 370. The cardinal conclusion, for which this doctrine of a compact has been, with so much ingenuity and ability, forced into the language of the constitution, (for the language no where alludes to it,) is avowedly to establish, that in construing the constitution, there is no common umpire; but that each state, nay each department of the government of each state, is the supreme judge for itself, of the powers, and rights, and duties, arising under that instrument.[1] Thus, it has been solemnly asserted on more than one occasion, by some of the state legislatures, that there is no common arbiter, or tribunal, authorized to decide in the last resort, upon the powers and the interpretation of the constitution. And the doctrine has been recently revived with extraordinary zeal, and vindicated with uncommon vigour.[2] A majority of the states, however, have never as-

Bad as individuals are, states are worse. Clothe men with public authority, and almost universally they consider themselves, as liberated from the obligations of moral rectitude, because they are no longer amenable to justice." 1 Amer. Mus. 290.

[1] Madison's Virginia Report, January, 1800, p. 6, 7, 8, 9; Webster's Speeches, 407 to 409, 410, 411, 419 to 421.

[2] The legislature of Virginia, in 1829, resolved, that there is no common arbiter to construe the constitution of the United States; the constitution being a federative compact between sovereign states, each state has a right to construe the compact for itself." Georgia and South-Carolina have recently maintained the same doctrine; and it has been asserted in the senate of the United States, with an uncommon display of eloquence and pertinacity.* It is not a little remarkable, that in 1810, the legislature of Virginia thought very differently, and then deemed the supreme court a fit and impartial tribunal.† Pennsylvania at the same time, though she did not deny the court to be, under the constitution, the appropriate tribunal, was desirous of substituting some other arbiter.‡ The recent resolutions of her own legislature (in March, 1831) show, that she now approves of the supreme court, as the true and common ar-

* 9 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.

† North American Review, October, 1830, p. 509, 512; 6 Wheat. R. 358.

‡ North American Review, id. 507, 508.

sented to this doctrine; and it has been, at different times, resisted by the legislatures of several of the states, in the most formal declarations.[1]

§ 371. But if it were admitted, that the constitution is a compact, the conclusion, that there is no common arbiter, would neither be a necessary, nor natural conclusion from that fact standing alone. To decide upon the point, it would still behove us to examine the very terms of the constitution, and the delegation of powers under it. It would be perfectly competent even for confederated states to agree upon, and delegate authority to construe the compact to a common arbiter. The people of the United States had an unquestionable right to confide this power to the government of the United States, or to any department thereof, if they chose so

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biter. One of the expositions of the doctrine is, that if a single state denies a power to exist under the constitution, that power is to be deemed defunct, unless three-fourths of the states shall afterwards reinstate that power by an amendment to the constitution.* What, then, is to be done, where ten states resolve, that a power exists, and one, that it does not exist? See Mr. Vice-President Calhoun's Letter of 28th August, 1832, to Gov. Hamilton.

1 Massachusetts openly opposed it in the resolutions of her legislature of the 12th of February, 1799, and declared, "that the decision of all cases in law and equity arising under the constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people, in the judicial courts of the United States."† Six other states, at that time, seem to have come to the same result.‡ And on other occasions, a larger number have concurred on the same point.§ Similar resolutions have been passed by the legislatures of Delaware and Connecticut in 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?" ‖

* 4 Elliot's Debates, 320, 321 † Dane's App. 58.
‡ North American Review, October, 1830, p. 500.
§ Dane's App. 67; Id. 52 to 59.
‖ Journals of Convention, 83; 4 Elliot's Deb. 49.

to do. The question is, whether they have done it. If they have, it becomes obligatory and binding upon all the states.

§ 372. It is not, then, by artificial reasoning founded upon theory, but upon a careful survey of the language of the constitution itself, that we are to interpret its powers, and its obligations. We are to treat it, as it purports on its face to be, as a CONSTITUTION of government; and we are to reject all other appellations, and definitions of it, such, as that it is a compact, especially as they may mislead us into false constructions and glosses, and can have no tendency to instruct us in its real objects.

CHAPTER IV.

WHO IS FINAL JUDGE OR INTERPRETER IN CONSTITUTIONAL CONTROVERSIES.

§ 373. THE consideration of the question, whether the constitution has made provision for any common arbiter to construe its powers and obligations, would properly find a place in the analysis of the different clauses of that instrument. But, as it is immediately connected with the subject before us, it seems expedient in this place to give it a deliberate attention.[1]

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[1] The point was very strongly argued, and much considered, in the case of *Cohens* v. *Virginia*, in the Supreme Court in 1821, (6 Wheat. R. 264.) The whole argument, as well as the judgment, deserves an attentive reading. The result, to which the argument against the existence of a common arbiter leads, is presented in a very forcible manner by Mr. Chief Justice Marshall, in pages 376, 377.

"The questions presented to the court by the two first points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry, whether the constitution and laws of the United States have been violated by the judgment, which the plaintiffs in error seek to review; and maintain, that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain, that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts, which 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.

§ 374. In order to clear the question of all minor points, which might embarrass us in the discussion, it is necessary to suggest a few preliminary remarks. The constitution, contemplating the grant of limited powers, and distributing them among various functionaries, and the state governments, and their functionaries, being also clothed with limited powers, subordinate to those granted to the general government, whenever any question arises, as to the exercise of any power by any of these functionaries under the state, or federal government, it is of necessity, that such functionaries must, in the first instance, decide upon the constitutionality of the exercise of such power.[1] It may arise in the course of the discharge of the functions of any one, or of all, of the great departments of government, the executive, the legislative, and the judicial. The officers of each of these departments are equally bound by their oaths of office to support the constitution of the United States, and are therefore conscientiously bound to abstain from all acts, which are inconsistent with it. Whenever, therefore, they are required to act in a case, not hitherto settled by any proper authority, these functionaries must, in the first instance, decide, each for himself, whether, consistently with the constitution, the act can be done. If, for instance, the president is required to do any act, he is not only authorized, but required, to decide for himself, whether, consistently with his constitutional duties, he can do the act.[2] So, if a proposition be be-

"If such be the constitution, it is the duty of this court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so; and to perform that task, which the American people have assigned to the judicial department."

[1] See the Federalist, No. 33.

[2] Mr. Jefferson carries his doctrine much farther, and holds, that each

fore congress, every member of the legislative body is bound to examine, and decide for himself, whether the bill or resolution is within the constitutional reach of the legislative powers confided to congress. And in many cases the decisions of the executive and legislative departments, thus made, become final and conclusive, being from their very nature and character incapable of revision. Thus, in measures exclusively of a political, legislative, or executive character, it is plain, that as the supreme authority, as to these questions, belongs to the legislative and executive departments, they cannot be re-examined elsewhere. Thus, congress having the power to declare war, to levy taxes, to appropriate money, to regulate intercourse and commerce with foreign nations, their mode of executing these powers can never become the subject of 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

department of government has an exclusive right, independent of the judiciary, to decide for itself, as to the true construction of the constitution. "My construction," says he, "is very different from that, you quote. It is, that each department of the government is truly independent of the others, and has an equal right to decide for itself, what is the meaning of the constitution in the laws submitted to its action, and especially, when it is to act ultimately and without appeal." And he proceeds to give examples, in which he disregarded, when president, the decisions of the judiciary, and refers to the alien and sedition laws, and the case of *Marbury* v. *Madison*, (1 Cranch, 137.) 4 Jefferson's Corresp. 316, 317. See also 4 Jefferson's Corresp. 27; Id. 75; Id. 372, 374

[1] See 4 Elliot's Debates, 315 to 320.

remedy, however, in such cases is solely by an appeal to the people at the elections; or by the salutary power of amendment, provided by the constitution itself.[1]

§ 375. But, where the question is of a different nature, and capable of judicial inquiry and decision, there it admits of a very different consideration. The decision then made, whether in favour, or against the constitutionality of the act, by the state, or by the national authority, by the legislature, or by the executive, being capable, in its own nature, of being brought to the test of the constitution, is subject to judicial revision. It is in such cases, as we conceive, that there is a final and common arbiter provided by the constitution itself, to whose decisions all others are subordinate; and that arbiter is the supreme judicial authority of the courts of the Union.[2]

§ 376. Let us examine the grounds, on which this doctrine is maintained. The constitution declares, (Art. 6,) that "*This constitution*, and the *laws* of the United States, which shall be made in pursuance thereof, and all *treaties*, &c. shall be the *supreme law* of the

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[1] The Federalist, No. 44. — Mr. Madison, in the Virginia Report of Jan. 1800, has gone into a consideration of this point, and very properly suggested, that there may be infractions of the constitution not within the reach of the judicial power, or capable of remedial redress through the instrumentality of courts of law. But we cannot agree with him, that in such cases, each state may take the construction of the constitution into its own hands, and decide for itself in the last resort; much less, that in a case of judicial cognizance, the decision is not binding on the states. See Report, p. 6, 7, 8, 9.

[2] Dane's App. § 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

land." It also declares, (Art. 3,) that "The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States and treaties made, and which shall be made under their authority." It further declares, (Art. 3,) that the judicial power of the United States "shall be vested in one Supreme Court, and in such inferior courts, as the congress may, from time to time, ordain and establish." Here, then, we have express, and determinate provisions upon the very subject. Nothing is imperfect, and nothing is left to implication. The constitution is the supreme law; the judicial power extends to all cases arising in law and equity under it; and the courts of the United States are, and, in the last resort, the Supreme Court of the United States is, to be vested with this judicial power. No man can doubt or deny, that the power to construe the constitution is a judicial power.[1] The power to construe a treaty is clearly so, when the case arises in judgment in a controversy between individuals.[2] The like principle must apply, where the meaning of the constitution arises in a judicial controversy; for it is an appropriate function of the judiciary to construe laws.[3] If, then, a case under the constitu-

to result, as a necessary consequence, from the union of these states in one national government, and they may be considered as requisite to its existence. The judicial power in every government must be co-extensive with the power of legislation. Were there no power to interpret, pronounce, and execute the law, the government would either perish through its own imbecility, as was the case with the old confederation, or other powers must be assumed by the legislative body to the destruction of liberty." 1 Kent's Comm. (2d ed. p. 296,) Lect. 14, 277.

[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.

tion does arise, if it is capable of judicial examination and decision, we see, that the very tribunal is appointed to make the decision. The only point left open for controversy is, whether such decision, when made, is conclusive and binding upon the states, and the people of the states. The reasons, why it should be so deemed, will now be submitted.

§ 377. In the first place, the judicial power of the United States rightfully extending to all such cases, its judgment becomes *ipso facto* conclusive between the parties before it, in respect to the points decided, unless some mode be pointed out by the constitution, in which that judgment may be revised. No such mode is pointed out. Congress is vested with ample authority to provide for the exercise by the Supreme Court of appellate jurisdiction from the decisions of all inferior tribunals, whether state or national, in cases within the purview of the judicial power of the United States; but no mode is provided, by which any superior tribunal can re-examine, what the Supreme Court has itself decided. Ours is emphatically a government of laws, and not of men; and judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it. The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly

deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.

§ 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 for ever, and beyond the possible reach of any rightful remedy, the very constitution, which all were instituted to preserve."[1] Now, it is certainly possible, that all the departments of a government may conspire to subvert the constitution of that government, by which they are created. But if they should so conspire, there would still remain an adequate remedy to redress the evil. In the first place, the people, by the exercise of the elective franchise, can easily check and remedy any dangerous, palpable, and deliberate infraction of the constitution in two of the great departments of government; and, in the third department, they can remove the judges, by impeachment, for any corrupt conspiracies. Besides these ordinary remedies, there is a still more extensive one, embodied in the form of the constitution, by the power of amending it, which is always in the power of three fourths of the states. It is a supposition not to be endured for a moment, that three fourths of the states would conspire in any deliberate, dangerous, and palpable breach of the constitution. And if the judicial department alone should

[1] Madison's Virginia Report, Jan. 1800, p. 8, 9.

attempt any usurpation, congress, in its legislative capacity, has full power to abrogate the injurious effects of such a decision. Practically speaking, therefore, there can be very little danger of any such usurpation or deliberate breach.

§ 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

[1] See *Anderson* v. *Dunn*, 6 Wheaton's R. 204, 232.

arbiter; in 1829 she thought differently.[1] What, then, is to become of the constitution, if its powers are thus perpetually to be the subject of debate and controversy? What exposition is to be allowed to be of authority? Is the exposition of one state to be of authority there, and the reverse to be of authority in a neighbouring state, entertaining an opposite exposition? Then, there would be at no time in the United States the same constitution in operation over the whole people. Is a power, which is doubted, or denied by a single state, to be suspended either wholly, or in that state? Then, the constitution is practically gone, as a uniform system, or indeed, as any system at all, at the pleasure of any state. If the power to nullify the constitution exists in a single state, it may rightfully exercise it at its pleasure. Would not this be a far more dangerous and mischievous power, than a power granted by all the states to the judiciary to construe the constitution? Would not a tribunal, appointed under the authority of all, be more safe, than twenty-four tribunals acting at their own pleasure, and upon no common principles and co-operation? Suppose congress should declare war; shall one state have power to suspend it? Suppose congress should make peace; shall one state have power to involve the whole country in war? Suppose the president and senate should make a treaty; shall one state declare it a nullity, or subject the whole country to reprisals for refusing to obey it? Yet, if every state may for itself judge of its obligations under the constitution, it may disobey a particular law or treaty, because it may deem it an unconstitutional exercise of power,

[1] Dane's App. § 44, 45, p. 52 to 59, § 54, p. 66; 4 Elliot's Debates, 338, 339.

although every other state shall concur in a contrary opinion. Suppose congress should lay a tax upon imports burthensome to a particular state, or for purposes, which such state deems unconstitutional, and yet all the other states are in its favour; is the law laying the tax to become a nullity? That would be to allow one state to withdraw a power from the Union, which was given by the people of all the states. That would be to make the general government the servant of 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 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

[1] Webster's Speeches, 420; 4 Elliot's Debates, 339.

legislatures, executives, and judiciaries. It binds them; and yet it does not bind the people of the states, or the states in their sovereign capacity. The states may maintain one construction of it, and the functionaries of the state are bound by another. If, on the other hand, the state functionaries are to follow the construction of the state, in opposition to the construction of the Supreme Court, then the constitution, as actually administered by the different functionaries, is different; and the duties required of them may be opposite, and in collision with each other. If such a state of things is the just result of the reasoning, may it not justly be suspected, that the reasoning itself is unsound?

§ 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 delegating it." Who then are the parties to this contract? Who did delegate the judicial power? Let the instrument answer for itself. The people of the United States are the parties to the constitution. The people of the United States delegated the judicial 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 favour the construction of all the rest? Would not this be justly deemed a delegation of judicial power, which would annul the authority

delegating it?[1] Since the whole people of the United States have concurred in establishing the constitution, it would seem most consonant with reason to presume, in the absence of all contrary stipulations, that they did not mean, that its obligatory force should depend upon the dictate or opinion of any single state. Even under the confederation, (as has been already stated,) it was unanimously resolved by congress, that "as state legislatures are not competent to the making of such compacts or treaties, [with foreign states,] *so neither are they competent in that capacity authoritatively to decide on*, or ascertain the construction and sense of them." And the reasoning, by which this opinion is supported, seems absolutely unanswerable.[2] If this was true under such an instrument, and that construction was avowed before the whole American people, and brought home to the knowledge of the state legislatures, how can we avoid the inference, that under the constitution, where an express judicial power in cases arising under the constitution was provided for, the people must have understood and intended, that the states should have no right to question, or control such judicial interpretation?

§ 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 ex-

[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.

[2] Journals of Congress, April 13, 1787, p. 32. &c. Rawle on the Constitution, App. 2, p. 316, &c.

tend, not only over the citizens, but over the states.[1] This, however, is not left to implication, for it is declared to be the supreme law of the land, "any thing in the constitution or laws of any state to the contrary notwithstanding." The people of any state cannot, then, by any alteration of their state constitution, destroy, or impair that supremacy. How, then, can they do it in any other less direct manner? Now, it is the proper function of the judicial department to interpret laws, and by the very terms of the constitution to interpret the supreme law. Its interpretation, then, becomes obligatory and conclusive upon all the departments of the federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by that constitution. If then all the departments of the national government may rightfully exercise all the powers, which the judicial department has, by its interpretation, declared to be granted by the constitution; and are prohibited from exercising those, which are thus declared not to be granted by it, would it not be a solecism to hold, notwithstanding, that such rightful exercise should not be deemed the supreme law of the land, and such prohibited powers should still be deemed granted? It would seem repugnant to the first notions of justice, that in respect to the same instrument of government, different powers, and duties, and obligations should arise, and different rules should prevail, at the same time among the governed, from a right of interpreting the same words (manifestly used in one sense only) in different, nay, in opposite senses. If there ever was a case, in which uniformity of interpretation might well be deemed a necessary postulate, it

[1] The Federalist, No. 33.

would seem to be that of a fundamental law of a government. It might otherwise follow, that the same individual, as a magistrate, might be bound by one rule, and in his private capacity by another, at the very same moment.

§ 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 dissensions, and perhaps to civil broils, from the perpetually recurring conflicts upon constitutional questions. On the other hand, the worst, that could happen from a wrong decision of the judicial department, would be, that it might require the interposition of congress, or, in the last resort, of the amendatory power of the states, to redress the grievance.

§ 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 entrusted with a like power, is it not an irresistible presumption, that it had the same object, and was to have the same universally conclusive effect? Even under the confederation, an instrument framed with infinitely more jealousy and deference for state rights, the judgments of the judicial department appointed to decide controversies between states was declared to be final and conclusive; and the appellate power in other

[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.

cases was held to overrule all state decisions and state legislation.[1]

§ 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[2] says, "Under the national government, treaties and articles of treaties, as well as the law of nations, will always be expounded in one sense, and executed in the same manner; whereas, adjudications on the same points and questions in thirteen states, or three or four confederacies, will not always accord, or be consistent; and that as well from the variety of independent courts and judges appointed by different and independent governments, as from the different local laws, which may affect and influence them. The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to, one national government, cannot be too much commended." Again, referring to the objection taken, that the government was national, and not a confederacy of sovereign states, and after stating, that the jurisdiction of the national government extended to certain enumerated objects only, and left the resi-

[1] 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.

[2] The Federalist, No. 3.

due to the several states, it proceeds to say:[1] "It is true, that in controversies between the two jurisdictions (state and national) the tribunal, *which is ultimately to decide*, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made according to the rules of the constitution, and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact. And that it ought to be established under the general, rather than under the local governments, or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated."[2]

§ 389. The subject is still more elaborately considered in another number,[3] which treats of the judicial department in relation to the extent of its powers. It is there said, that there ought always to be a constitutional method of giving efficacy to constitutional provisions; that if there are such things as political axioms, the propriety of the judicial department of a government being co-extensive with its legislature, may be ranked among the number;[4] that the mere necessity of uniformity in the interpretation of the national law decides the question; that thirteen independent courts of final jurisdiction over the same causes is a hydra of government, from which nothing but contradiction and confusion can proceed; that controversies between the

1 The Federalist, No. 39.

2 See also The Federalist, No. 33.

3 The Federalist, No. 80.

4 The same remarks will be found pressed with great force by Mr. Chief Justice Marshall, in delivering the opinion of the court in *Cohens v. Virginia*, (6 Wheat. 264, 384.)

nation and its members can only be properly referred to the national tribunal; that the peace of the whole ought not to be left at the disposal of a part; and that whatever practices may have a tendency to disturb the harmony of the states, are proper objects of federal superintendence and control.[1]

§ 390. The same doctrine was constantly avowed in the state conventions, called to ratify the constitution. With some persons it formed a strong objection to the constitution; with others it was deemed vital to its ex-

[1] In The Federalist, No. 78 and 82, the same course of reasoning is pursued, and the final nature of the appellate jurisdiction of the Supreme Court is largely insisted on. In the Convention of Connecticut, Mr. Ellsworth (afterwards Chief Justice of the United States) used the following language: "This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is the constitutional check. If the United States go beyond their powers; if they make a law, which the constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it void. On the other hand, if the states go beyond their limits; if they make a law, which is a usurpation upon the general government, the law is void, and upright and independent judges will declare it. Still, however, if the United States and the individual states will quarrel; if they want to fight, they may do it, and no frame of government can possibly prevent it." In the debates in the South Carolina legislature, when the subject of calling a convention to ratify or reject the constitution was before them,* Mr. Charles Pinckney (one of the members of the convention) avowed the doctrine in the strongest terms. "That a supreme federal jurisdiction was indispensable," said he, "cannot be denied. It is equally true, that in order to ensure the administration of justice, it was necessary to give all the powers, original as well as appellate, the constitution has enumerated. Without it we could not expect a due observance of treaties; that the state judiciaries would confine themselves within their proper sphere; or that a general sense of justice would pervade the Union, &c. That to ensure these, extensive authorities were necessary; particularly so, were they in a tribunal, constituted as this is, whose duty it would be, not only to decide all national questions, which should arise within the Union; but to control and keep the state judiciaries within their proper limits, whenever they should attempt to interfere with the power."

* Debates in 1788, printed by A. E. Miller, 1831, Charleston, p. 7.

istence and value.[1] So, that it is indisputable, that the constitution was adopted under a full knowledge of this exposition of its grant of power to the judicial department.[2]

§ 391. This is not all. The constitution has now been in full operation more than forty years; and during this period the Supreme Court has constantly exercised this power of final interpretation in relation, not only to the constitution, and laws of the Union, but in relation to state acts and state constitutions and laws, so far as they affected the constitution, and laws, and treaties of the United States.[3] Their decisions upon these grave questions have never been repudiated, or impaired by congress.[4] No state has ever deliberately or forcibly resisted the execution of the judgments founded upon

[1] It would occupy too much space to quote the passages at large. Take for an instance, in the Virginia debates, Mr. Madison's remarks. "It may be a misfortune, that in organizing any government, the explication of its authority should be left to any of its co-ordinate branches. There is no example in any country, where it is otherwise. There is no new policy in submitting it to the judiciary of the United States." 2 Elliot's Debates, 390. See also Id. 380, 383, 395, 400, 404, 418. See also North Carolina Debates, 3 Elliot's Debates, 125, 127, 128, 130, 133, 134, 139, 141, 142, 143; Pennsylvania Debates, 3 Elliot's Debates, 280, 313. Mr. Luther Martin, in his letter to the Maryland Convention, said: "By the third article the judicial power is vested in one Supreme Court, &c. These courts, and *these only*, will have a right to decide upon the laws of the United States, and *all questions arising upon their construction*, &c. Whether, therefore, any laws, &c. of congress, or acts of its president, &c. are contrary to, or warranted by the constitution, rests only with the judges, who are appointed by congress to determine; *by whose determinations every state is bound.*" 3 Elliot's Debates, 44, 45; Yates's Minutes, &c. See also The Federalist, No. 78.

[2] See Mr. Pinckney's Observations cited in Grimké's Speech in 1828, p. 86, 87.

[3] Dane's App. § 44, p. 53, 54, 55; Grimké's Speech, 1828, p. 34 to 42.

[4] 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.

them; and the highest state tribunals have, with scarcely a single exception, acquiesced in, and, in most instances, assisted in executing them.[1] During the same period, eleven states have been admitted into the Union, under a full persuasion, that the same power would be exerted over them. Many of the states have, at different times within the same period, been called upon to consider, and examine the grounds, on which the doctrine has been maintained, at the solicitation of other states, which felt, that it operated injuriously, or might operate injuriously upon their interests. A great majority of the states, which have been thus called upon in their legislative capacities to express opinions, have maintained the correctness of the doctrine, and the beneficial effects of the power, as a bond of union, in terms of the most unequivocal nature.[2] Whenever any

[1] Chief Justice M'Kean, in *Commonwealth* v. *Cobbett*, (3 Dall. 473,) seems to have adopted a modified doctrine, and to have held, that the Supreme Court was not the common arbiter; but if not, the only remedy was, not by a state deciding for itself, as in case of a treaty between independent governments, but by a constitutional amendment by the states. But see, on the other hand, the opinion of Chief Justice Spencer, in *Andrews* v. *Montgomery*, 19 Johns. R. 164.

[2] Massachusetts, in her Resolve of February 12, 1799, (p. 57,) in answer to the Resolutions of Virginia of 1798, declared, "that the decision of all cases in law and equity, arising under the constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States;" and "that the people in that solemn compact, which is declared to be the supreme law of the land, have not constituted the state legislatures the judges of the acts or measures of the federal government, but have confided to them the power of proposing such amendments," &c.; and "that by this construction of the constitution, an amicable and dispassionate remedy is pointed out for any evil, which experience may prove to exist, and the peace and prosperity of the United States may be preserved without interruption." See also Dane's App. § 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

amendment has been proposed to change the tribunal, and substitute another common umpire or interpreter, it has rarely received the concurrence of more than two or three states, and has been uniformly rejected by a great majority, either silently, or by an express dissent. And instances have occurred, in which the legislature of the same state has, at different times, avowed opposite opinions, approving at one time, what it had denied, or at least questioned at another. So, that it may be asserted with entire confidence, that for forty years three fourths of all the states composing the Union have expressly assented to, or silently approved, this construction of the constitution, and have resisted every effort to restrict, or alter it. A weight of public opinion among the people for such a period, uniformly thrown into one scale so strongly, and so decisively, in the midst of all the extraordinary changes of parties, the events of peace and of war, and the trying conflicts of public policy and state interests, is perhaps unexampled in the history of all other free governments.[1] It affords,

up (as is understood) by one of her most distinguished statesmen, asserting the same doctrines. Delaware, in January, 1831, and Connecticut and Massachusetts held the same, in May, 1831.

[1] Virginia and Kentucky denied the power in 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

as satisfactory a testimony in favour of the just and safe operation of the system, as can well be imagined; and, as a commentary upon the constitution itself, it is as absolutely conclusive, as any ever can be, and affords the only escape from the occurrence of civil conflicts, and the delivery over of the subject to interminable disputes.[1]

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jurisdiction from state courts on constitutional questions, is authorized by the constitution, and sanctioned by experience, and also all other laws empowering the federal judiciary to maintain the supreme laws.

1 Upon this subject the speech of Mr. Webster in the Senate, in 1830, presents the whole argument in a very condensed and powerful form. The following passage is selected, as peculiarly appropriate: "The people, then, sir, erected this government. They gave it a constitution, and in that constitution they have enumerated the powers, which they bestow on it. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of such powers, as are granted; and all others, they declare, are reserved to the states, or the people. But, sir, they have not stopped here. If they had, they would have accomplished but half their work. No definition can be so clear, as to avoid possibility of doubt; no limitation so precise, as to exclude all uncertainty. Who, then, shall construe this grant of the people? Who shall interpret their will, where it may be supposed they have left it doubtful? With whom do they repose this ultimate right of deciding on the powers of the government? Sir, they have settled all this in the fullest manner. They have left it, with the government itself, in its appropriate branches. Sir, the very chief end, the main design, for which the whole constitution was framed and adopted, was to establish a government, that should not be obliged to act through state agency, or depend on state opinion and state discretion. The people had had quite enough of that kind of government, under the confederacy. Under that system, the legal action — the application of law to individuals, belonged exclusively to the states. Congress could only recommend — their acts were not of binding force, till the states had adopted and sanctioned them. Are we in that condition still? Are we yet at the mercy of state discretion, and state construction? Sir, if we are, then vain will be our attempt to maintain the constitution, under which we sit.

"But, sir, the people have wisely provided, in the constitution itself, a proper, suitable mode and tribunal for settling questions of constitutional law. There are, in the constitution, grants of powers to Congress; and restrictions on these powers. There are, also, prohibitions on the states. Some authority must, therefore, necessarily exist, having the ultimate

§ 392. In this review of the power of the judicial department, upon a question of its supremacy in the interpretation of the constitution, it has not been thought.

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jurisdiction to fix and ascertain the interpretation of these grants, restrictions, and prohibitions. The constitution has itself pointed out, ordained, and established that authority. How has it accomplished this great and essential end? By declaring, sir, that '*the constitution and the laws of the United States, made in pursuance thereof, shall be the supreme law of the land, any thing in the constitution or laws of any state to the contrary notwithstanding.*'

"This, sir, was the first great step. By this, the supremacy of the constitution and laws of the United States is declared. The people so will it. No state law is to be valid, which comes in conflict with the constitution, or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To whom lies the last appeal? This, sir, the constitution itself decides, also, by declaring, '*that the judicial power shall extend to all cases arising under the constitution and laws of the United States.*' These two provisions, sir, cover the whole ground. They are, in truth, the keystone of the arch. With these, it is a constitution; without them, it is a confederacy. In pursuance of these clear and express provisions, congress established, at its very first session, in the judicial act, a mode for carrying them into full effect, and for bringing all questions of constitutional power to the final decision of the Supreme Court. It then, sir, became a government. It then had the means of self-protection; and, but for this, it would, in all probability, have been now among things, which are past. Having constituted the government, and declared its powers, the people have further said, that since somebody must decide on the extent of these powers, the government shall itself decide; subject, always, like other popular governments, to its responsibility to the people. And now, sir, I repeat, how is it, that a state legislature acquires any power to interfere? Who, or what, gives them the right to say to the people, 'We, who are your agents and servants for one purpose, will undertake to decide, that your other agents and servants, appointed by you for another purpose, have transcended the authority you gave them!' The reply would be, I think, not impertinent — 'Who made you a judge over another's servants? To their own masters they stand or fall.'

"Sir, I deny this power of state legislatures altogether. It cannot stand the test of examination. Gentlemen may say, that in an extreme case, a state government might protect the people from intolerable oppression. Sir, in such a case, the people might protect themselves, without the aid of the state governments. Such a case warrants revolution. It must make, when it comes, a law for itself. A nullifying act of a state legislature cannot alter the case, nor make resistance any more lawful.

necessary to rely on the deliberate judgments of that department in affirmance of it. But it may be proper to add, that the judicial department has not only constantly exercised this right of interpretation in the last resort; but its whole course of reasonings and operations has proceeded upon the ground, that, once made, the interpretation was conclusive, as well upon the states, as the people.[1]

In maintaining these sentiments, sir, I am but asserting the rights of the people. I state what they have declared, and insist on their right to declare it. They have chosen to repose this power in the general government, and I think it my duty to support it, like other constitutional powers."

See also 1 Wilson's Law Lectures, 461, 462. — It is truly surprising, that Mr. Vice-President Calhoun, in his Letter of the 28th of August, 1832, to Governor Hamilton, (published while the present work was passing through the press,) should have thought, that a proposition merely offered in the convention, and referred to a committee for their consideration, that "the jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual state, or the United States and the citizens of an individual state,"* should, in connexion with others, giving a negative on state laws, establish the conclusion, that the convention, which framed the constitution, was opposed to granting the power to the general government, in any form, to exercise any control whatever over a state by force, veto, or judicial process, or in any other form. This clause for conferring jurisdiction on the Supreme Court in controversies between the United States and the states, must, like the other controversies between states, or between individuals, referred to the judicial power, have been intended to apply exclusively to suits of a civil nature, respecting property, debts, contracts, or other claims by the United States against a state; and not to the decision of constitutional questions in the abstract. At a subsequent period of the convention, the judicial power was expressly extended to all cases arising under the *constitution*, *laws*, and *treaties* of the United States, and to all controversies, to which the United States should be a party,† thus covering the whole ground of a right to decide constitutional questions of a judicial nature. And this, as the Federalist informs us, was the substitute for a negative upon state laws, and the only one, which was deemed safe or efficient. The Federalist, No. 80.

[1] *Martin* v. *Hunter*, 1 Wheat. R. 304, 334, &c. 342 to 348; *Cohens* v. *The State of Virginia*, 6 Wheat. R. 264, 376, 377 to 392; Id. 413 to

* Journal of Convention, 20th Aug. p. 235. † Journal of Convention, 27th Aug. p. 298.

§ 393. But it may be asked, as it has been asked, what is to be the remedy, if there be any misconstruction of the constitution on the part of the government

423; *Bank of Hamilton* v. *Dudley*, 2 Peters's R. 524; *Ware* v. *Hylton*, 3 Dall. 199; 1 Cond. R. 99, 112. The language of Mr. Chief Justice Marshall, in delivering the opinion of the court in *Cohens* v. *Virginia*, (6 Wheat. 384 to 390,) presents the argument in favour of the jurisdiction of the judicial department in a very forcible manner. "While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction, which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question, which grows out of 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 co-extensive with the legislative, merely because it is fit, that it should be so; but we mean to say, that this fitness furnishes an argument in construing the constitution, which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument, which purport to establish this principle, shall be contracted for the purpose of destroying it.

"The mischievous consequences of the construction, contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every state in the Union. And would not this be its effect? What power of the government could be executed by its own means, in any state disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several states. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments, by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a *veto* on the will of the whole.

"The answer, which has been given to this argument, does not deny its truth, but insists, that confidence is reposed, and may be safely re-

of the United States, or its functionaries, and any powers exercised by them, not warranted by its true meaning? To this question a general answer may be given

posed, in the state institutions; and that, if they shall ever become so insane, or so wicked, as to seek the destruction of the government, they may accomplish their object by refusing to perform the functions assigned to them.

"We readily concur with the counsel for the defendant in the declaration, that the cases, which have been put, of direct legislative resistance for the purpose of opposing the acknowledged powers of the government, are extreme cases, and in the hope, that they will never occur; 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 decisions in such cases should be final!

"These collisions may take place in times of no extraordinary com-

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

motion. But a constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of 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, 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 endeavour to obviate the force of these arguments by saying, that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise, until there shall be a disposition so hostile to the present political system, as to produce a determination to destroy it; and, when that de-

be by congress, "the success of the usurpation will depend on the executive and judiciary departments, which are to expound, and give effect to the legislative acts; and, in the last resort, a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers." The

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termination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the constitution will not then depend on judicial decisions. But, should no appeal be made to force, the states can put an end to the government by refusing to act. They have only not to elect senators, and it expires without a struggle.

"It is very true, that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make, or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those, to whom the people have delegated their power of repelling it.

"The acknowledged inability of the government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation acting in opposition to the general will.

"It is true, that if all the states, or a majority of them, refuse to elect senators, the legislative powers of the Union will be suspended. But if any one state shall refuse to elect them, the senate will not, on that account, be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole, than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions, which should protect that instrument against a general combination of the states, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one state, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think they have attempted it."

See also *M'Culloch* v. *Maryland*, (4 Wheat. 316, 405, 406.) See also the reasoning of Mr. Chief Justice Jay, in *Chisholm* v. *Georgia*, (2 Dall. 419, S. C. 2 Peters's Cond. R. 635, 670 to 675.) *Osborn* v. *Bank of the United States*, (9 Wheat. 738, 818, 819;) and *Gibbons* v. *Ogden*, (9 Wheat. 1, 210.)

truth is, that this ultimate redress may be more confided in against unconstitutional acts of the federal, than of the state legislatures, for this plain reason, that, as every act of the former will be an invasion of the rights of the latter, these will ever be ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives. There being no such intermediate body between the state legislatures and the people, interested in watching the conduct of the former, violations of the state constitution are more likely to remain unnoticed and unredressed." [1]

§ 394. In the next place, if the usurpation should be by the president, an adequate check may be generally found, not only in the elective franchise, but also in the controlling power of congress, in its legislative or impeaching capacity, and in an appeal to the judicial department. In the next place, if the usurpation should be by the judiciary, and arise from corrupt motives, the power of impeachment would remove the offenders; and in most other cases the legislative and executive authorities could interpose an efficient barrier. A declaratory or prohibitory law would, in many cases, be a complete remedy. We have, also, so far at least as a conscientious sense of the obligations of duty, sanctioned by an oath of office, and an indissoluble responsibility to the people for the exercise and abuse of power, on the part of different departments of the government, can influence human minds, some additional guards against known and deliberate usurpations; for both are provided for in the constitution itself. "The wisdom and the discretion of congress, (it has been justly observed,) their identity with the people,

[1] The Federalist, No. 44; 1 Wilson's Law Lectures, 461, 462; Dane's App. § 58, p. 68.

and the influence, which their constituents possess at elections, are, in this, as in many other instances, as, for example, that of declaring war, the sole restraints; on this they have relied, to secure them from abuse. They are the restraints, on which the people must often solely rely in all representative governments."[1]

§ 395. But in the next place, (and it is that, which would furnish a case of most difficulty and danger, though it may fairly be presumed to be of rare occurrence,) if the legislative, executive, and judicial departments should all concur in a gross usurpation, there is still a peaceable remedy provided by the constitution. It is by the power of amendment, which may always be applied at the will of three fourths of the states. If, therefore, there should be a corrupt co-operation of three fourths of the states for permanent usurpation, (a case not to be supposed, or if supposed, it differs not at all in principle or redress from the case of a majority of a state or nation having the same intent,) the case is certainly irremediable under any known forms of the constitution. The states may now by a constitutional amendment, with few limitations, change the whole structure and powers of the government, and thus legalize any present excess of power. And the general right of a society in other cases to change the government 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

[1] *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 197.— See also, on the same subject, the observations of Mr. Justice Johnson in delivering the opinion of the court, in *Anderson* v. *Dunn*, 6 Wheat. R. 204, 226.

resort to the ultimate right of all human beings in extreme cases to resist oppression, and to apply force against ruinous injustice.[1]

§ 396. As a fit conclusion to this part of these commentaries, we cannot do better than to refer to a confirmatory view, which has been recently presented to the public by one of the framers of the constitution, who is now, it is believed, the only surviving member of the federal convention, and who, by his early as well as his later labours, has entitled himself to the gratitude of his country, as one of its truest patriots, and most enlightened friends. Venerable, as he now is, from age and character, and absolved from all those political connexions, which may influence the judgment, and mislead the mind, he speaks from his retirement in a voice, which cannot be disregarded, when it instructs us by its profound reasoning, or admonishes us of our dangers by its searching appeals. However particular passages may seem open to criticism, the general structure of the argument stands on immovable foundations, and can scarcely perish, but with the constitution, which it seeks to uphold.[2]

[1] See Webster's Speeches, p. 408, 409; 1 Black. Comm. 161, 162. See also 1 Tucker's Black. Comm. App. 73 to 75.

[2] Reference is here made to Mr. Madison's Letter, dated August, 1830, to Mr. Edward Everett, published in the North American Review for October, 1830. The following extract is taken from p. 537, et seq.

"In order to understand the true character of the constitution of the United States, the error, not uncommon, must be avoided, of viewing it through the medium, either of a 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 indepen-

dent decisions must altogether distract the government of the union, and speedily put an end to the union itself. A uniform authority of the laws, is in itself a vital principle. Some of the most important laws could not be partially executed. They must be executed in all the states, or they could be duly executed in none. An impost, or an excise, for example, if not in force in some states, would be defeated in others. It is well known, that this was among the lessons of experience, which had a primary influence in bringing about the existing constitution. A loss of its general authority would moreover revive the exasperating questions between the states holding ports for foreign commerce, and the adjoining states without them; to which are now added, all the inland states, necessarily carrying on their foreign commerce through other states.

"To have made the decisions under the authority of the individual states, co-ordinate, in all cases, with decisions under the authority of the United States, would unavoidably produce collisions incompatible with the peace of society, and with that regular and efficient administration, which is of the essence of free governments. Scenes could not be avoided, in which a ministerial officer of the United States, and the correspondent officer of an individual state, would have rencounters in executing conflicting decrees; the result of which would depend on the comparative force of the local posses attending them; and that, a casualty depending on the political opinions and party feelings in different states.

"To have referred every clashing decision, under the two authorities, for a final decision, to the states as parties to the constitution, would be attended with delays, with inconveniencies, 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 pusuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land; 2, that the judges of every state shall be bound thereby, any thing in the constitution and laws of any state to the contrary notwithstanding; 3, that the judicial power of the United States shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made under their authority, &c.'

"On the other hand, as a security of the rights and powers of the states, in their individual capacities, against an undue preponderance of the powers granted to the government over them in their united capacity, the constitution has relied on, (1,) the responsibility of the senators and representatives in the legislature of the United States to the legislatures and people of the states; (2,) the responsibility of the president to the people of the United States; and (3,) the liability of the executive and judicial functionaries of the United States to impeachment by the representatives of the people of the states, in one branch of the legislature of the United States, and trial by the representatives of the states, in the other branch: the state functionaries, legislative, executive, and judicial, being, at the same time, in their appointment and responsibility, altogether independent of the agency or authority of the United States.

"How far this structure of the government of the United States is adequate and safe for its objects, time alone can absolutely determine. Experience seems to have shewn, that whatever may grow out of future stages of our national career, there is, as yet, a sufficient control, in the popular will, over the executive and legislative departments of the government. When the alien and sedition laws were passed, in contravention to the opinions and feelings of the community, the first elections, that ensued, put an end to them. And whatever may have been the character of other acts, in the judgment of many of us, it is but true, that they have generally accorded with the views of the majority of the states and of the people. At the present day it seems well understood, that the laws, which have created most dissatisfaction, have had a like sanction without doors: and that, whether continued, varied, or repealed, a like proof will be given of the sympathy and responsibility of the representative body to the constituent body. Indeed, the great complaint now is, against the results of this sympathy and responsibility in the legislative policy of the nation.

"With respect to the judicial power of the United States, and the authority of the Supreme Court in relation to the boundary of jurisdiction between the federal and the state governments, I may be permitted to refer to the thirty-ninth number of the Federalist for the light, in which the subject was regarded by its writer at the period, when the constitution was depending; and it is believed, that the same was the prevailing view then taken of it; that the same view has continued to prevail; and that it does so at this time, notwithstanding the eminent exceptions to it.

"But it is perfectly consistent with the concession of this power to the Supreme Court, in cases falling within the course of its functions, to maintain, that the power has not always been rightly exercised. To say nothing of the period, happily a short one, when judges in their seats did not abstain from intemperate and party harangues, equally at variance with their duty and their dignity; there have been occasional decisions from the bench, which have incurred serious and extensive disapprobation. Still it would seem, that, with but few exceptions, the course of the judiciary has been hitherto sustained by the prominent sense of the nation.

"Those who have denied, or doubted the supremacy of the judicial power of the United States, and denounce at the same time a nullifying power in a state, seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition and execution of the law: nor to the destruction of all equipoise between the federal government and the state governments, if, whilst the functionaries of the federal government are directly or indirectly elected by, and responsible to the states, and the functionaries of the states are in their appointment and responsibility wholly independent of the United States, no constitutional control of any sort belonged to the United States over the states. Under such an organization, it is evident, that it would be in the power of the states, individually, to pass unauthorized laws, and to carry them into complete effect, any thing in the constitution and laws of the United States to the contrary notwithstanding. This would be a nullifying power in its plenary character; and whether it had its final effect, through the legislative, executive, or judiciary organ of the state, would be equally fatal to the constituted relation between the two governments.

"Should the provisions of the constitution as here reviewed, be found not to secure the government and rights of the states, against usurpations and abuses on the part of the United States, the final resort within the purview of the constitution, lies in an amendment of the constitution, according to a process applicable by the states.

"And in the event of a failure of every constitutional resort, and an accumulation of usurpations and abuses, rendering passive obedience and non-resistance a greater evil, than resistance and revolution, there can remain but one resort, the last of all; an appeal from the can-

celled obligations of the constitutional compact, to original rights and the law of self-preservation. This is the *ultima ratio* under all governments, whether consolidated, confederated, or a compound of both; and it cannot be doubted, that a single member of the Union, in the extremity supposed, but in that only, would have a right, as an extra and ultra constitutional right, to make the appeal.

"This brings us to the expedient lately advanced, which claims for a single state a right to appeal against an exercise of power by the government of the United States, decided by the state to be unconstitutional, to the parties to the constitutional compact; the decision of the state to have the effect of nullifying the act of the government 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]

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1 "The government of the Union," says Mr. Chief Justice Marshall, in delivering the opinion of the court in *McCulloch* v. *Maryland*, 4 Wheat. 316, "is emphatically and truly a government of the people. It emanates from them; its powers are granted by them, and are to be exercised directly on them and for their benefit." Id. 404, 405; see also *Cohens* v. *Virginia*, 6 Wheat. R. 264, 413, 414.

"The government of the United States was erected," says Mr. Chancellor Kent, with equal force and accuracy, "by the free voice and the joint will of the people of America for their common defence and general welfare." 1 Kent's Comm. Lect. 10, p. 189.

2 I have used the expressive words of Mr. Webster, deeming them as exact as any that could be used. See Webster's Speeches, p, 410, 418, 419; 4 Elliot's Debates, 338, 343.

§ 398. In this view of the matter, let us now proceed to consider the rules, by which it ought to be interpreted; for, if these rules are correctly laid down, it will save us from many embarrassments in examining and defining its powers. Much of the difficulty, which has arisen in all the public discussions on this subject, has had its origin in the want of some uniform rules of interpretation, expressly or tacitly agreed on by the disputants. Very different doctrines on this point have been adopted by different commentators; and not unfrequently very different language held by the same parties at different periods. In short, the rules of interpretation have often been shifted to suit the emergency; and the passions and prejudices of the day, or the favour and odium of a particular measure, have not unfrequently furnished a mode of argument, which would, on the one hand, leave the constitution crippled and inanimate, or, on other hand, give it an extent and elasticity, subversive of all rational boundaries.

§ 399. Let us, then, endeavour to ascertain, what are the true rules of interpretation applicable to the constitution; so that we may have some fixed standard, by which to measure its powers, and limit its prohibitions, and guard its obligations, and enforce its securities of our rights and liberties.

§ 400. I. The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties. Mr. Justice Blackstone has remarked, that the intention of a law is to be gathered from the words, the context, the subject-matter, the effects and consequence, or the reason and spirit of the law.[1] He

[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. Treatise on Laws, ch. 12, p. 74.

goes on to justify the remark by stating, that words are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar, as their general and popular use; that if words happen to be dubious, their meaning may be established by the context, or by comparing them with other words and sentences in the same instrument; that illustrations may be further derived from the subject-matter, with reference to which the expressions are used; that the effect and consequence of a particular construction is to be examined, because, if a literal meaning would involve a manifest absurdity, it ought not to be adopted; and that the reason and spirit of the law, or the causes, which led to its enactment, are often the best exponents of the words, and limit their application.[1]

§ 401. Where the words are plain and clear, and the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation. It is only, when there is some ambiguity or doubt arising from other sources, that interpretation has its proper office. There may be obscurity, as to the meaning, from the doubtful character of the words used, from other clauses in the same instrument, or from an incongruity or repugnancy between the words, and the apparent intention derived from the whole structure of the instrument, or its avowed object. In all such cases interpretation becomes indispensable.

[1] Id. See also Woodes. Elem. of Jurisp. p. 36. — Rules of a similar nature will be found laid down in Vattel, B. 2, ch. 17, from § 262 to 310, with more ample illustrations and more various qualifications. But not a few of his rules appear to me to want accuracy and soundness. Bacon's Abridg. title, Statute I. contains an excellent summary of the rules for construing statutes. Domat, also, contains many valuable 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.

§ 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

[1] Book 2, ch. 7, § 3.

we speak of a strict or large interpretation. When common usage has given two senses to the same word, one of which is more confined, or includes fewer particulars than the other, the former is called its strict sense, and the latter, which is more comprehensive or includes more particulars, is called its large sense. If we find such a word in a law, and we take it in its more confined sense, we are said to interpret it strictly. If we take it in its more comprehensive sense, we are said to interpret it largely. But whether we do the one or the other, we still keep to the letter of the law. But strict and large interpretation are frequently opposed to each other in a different sense. The words of a law may sometimes express the meaning of the legislator imperfectly. They may, in their common acceptation, include either more or less than his intention. And as, on the one hand, we call it a strict interpretation, where we contend, that the letter is to be adhered to precisely; so, on the other hand, we call it a large interpretation, where we contend, that the words ought to be taken in such a sense, as common usage will not fully justify; or that the meaning of the legislator is something different from what his words in any usage would import. In this sense a large interpretation is synonymous with what has before been called a rational interpretation. And a strict interpretation, in this sense, includes both literal and mixed interpretation; and may, as contradistinguished from the former, be called a close, in opposition to a free or liberal interpretation.[1]

[1] The foregoing remarks are borrowed almost in terms from Rutherforth's Institutes of Natural Law (B. 2, ch. 7, § 4 to 11), which contain a very lucid exposition of the general rules of interpretation. The whole chapter deserves an attentive perusal.

§ 404. These elementary explanations furnish little room for controversy; but they may nevertheles aid us in making a closer practical application, when we arrive at more definite rules.

§ 405. II. In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts. Where its words are plain, clear, and determinate, they require no interpretation; and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil. Where the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design of the instrument. Where the words are unambiguous, but the provision may cover more or less ground according to the intention, which is yet subject to conjecture; or where it may include in its general terms more or less, than might seem dictated by the general design, as that may be gathered from other parts of the instrument, there is much more room for controversy; and the argument from inconvenience will probably have different influences upon different minds. Whenever such questions arise, they will probably be settled, each upon its own peculiar grounds; and whenever it is a question of power, it should be approached with infinite caution, and affirmed only upon the most persuasive reasons. In examining the constitution, the antecedent situation of the country, and its institutions, the existence and opera-

tions of the state governments, the powers and operations of the confederation, in short all the circumstances, which had a tendency to produce, or to obstruct its formation and ratification, deserve a careful attention. Much, also, may be gathered from contemporary history, and contemporary interpretation, to aid us in just conclusions.[1]

§ 406. It is obvious, however, that contemporary interpretation must be resorted to with much qualification and reserve. In the first place, the private interpretation of any particular man, or body of men, must manifestly be open to much observation. The constitution was adopted by the people of the United States; and it was submitted to the whole upon a just survey of its provisions, as they stood in the text itself. In different states and in different conventions, different and very opposite objections are known to have prevailed; and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favour. And there can be no certainty, either that the different state conventions in ratifying the constitution, gave the same uniform interpretation to its language, or that, even in a single

[1] The value of contemporary interpretation is much insisted on by the Supreme Court, in *Stuart* v. *Laird*, 2 Cranch, 299, 309, in *Martin* v. *Hunter*, 1 Wheat. R. 304, and in *Cohens* v. *Virginia*, 6 Wheat. R. 264, 418 to 421. There are several instances, however, in which the contemporary interpretations by some of the most distinguished founders of the constitution have been overruled. One of the most striking is to be found in the decision of the Supreme Court of the suability of a state by any citizen of another state;* and another in the decision by the Executive and the Senate, that the consent of the latter is not necessary to removals from office, although it is for appointments.†

* *Chisholm* v. *Georgia*, 2 Dall. 419. † The Federalist, No. 77.

state convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it. In the interpretation of a state statute, no man is insensible of the extreme danger of resorting to the opinions of those, who framed it, or those who passed it. Its terms may have differently impressed different minds. Some may have implied limitations and objects, which others would have rejected. Some may have taken a cursory view of its enactments, and others have studied them with profound attention. Some may have been governed by a temporary interest or excitement, and have acted upon that exposition, which most favoured their present views. Others may have seen lurking beneath its text, what commended it to their judgment against even present interests. Some may have interpreted its language strictly and closely; others from a different habit of thinking may have given it a large and liberal meaning. It is not to be presumed, that, even in the convention, which framed the constitution, from the causes above-mentioned, and other causes, the clauses were always understood in the same sense, or had precisely the same extent of operation. Every member necessarily judged for himself; and the judgment of no one could, or ought to be, conclusive upon that of others. The known diversity of construction of different parts of it, as well of the mass of its powers, in the different state conventions; the total silence upon many objections, which have since been started; and the strong reliance upon others, which have since been universally abandoned, add weight to these suggestions. Nothing but the text itself was adopted by the people. And it would certainly be a most extravagant doctrine to give to any commentary then made, and, *à fortiori*, to any

commentary since made under a very different posture of feeling and opinion, an authority, which should operate an absolute limit upon the text, or should supersede its natural and just interpretation.

§ 407. Contemporary construction is properly resorted to, to illustrate, and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and talents of those, by whom it was given, is the credit, to which it is entitled. It can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.[1]

[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 favour of the states in the former, if *possible*, to be so construed." Now, the very theory, on which this canon is founded, is contradicted by the provisions of the constitution itself. 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.† But if this general theory were true, it would furnish no just rule of interpretation, since a particular clause might form an exception to it; and, indeed, every clause ought, at all events, to be construed according to its fair intent and objects, as disclosed in its language. What sort of a rule is that, which, without regard to the intent or objects of a particular clause, insists, that it shall, if *possible*, (not if *reasonable*) be construed in favour of the states, simply because it respects their citizens? The second canon is, "On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying, what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed." Now, who does not see the utter looseness, and incoherence

* 4 Jefferson's Corresp. 373; Id. 391, 392; Id. 396.

† 4 Jefferson's Corresp. 391, 392, 396.

We shall have abundant reason hereafter to observe, when we enter upon the analysis of the particular clauses of the constitution, how many loose interpreta-

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of this canon. How are we to know, what was thought of particular clauses of the constitution at the time of its adoption? In many cases, no printed debates give any account of any construction; and where any is given, different persons held different doctrines. Whose is to prevail? Besides; of all the state conventions, the debates of five only are preserved, and these very imperfectly. What is to be done, as to the other eight states? What is to be done, as to the eleven new states, which have come into the Union under constructions, which have been established, against what some persons may deem the meaning of the framers of it? How are we to arrive at what is the most probable meaning? Are Mr. Hamilton, and Mr. Madison, and Mr. Jay, the expounders in the Federalist, to be followed. Or are others of a different opinion to guide us? Are we to be governed by the opinions of a few, now dead, who have left them on record? Or by those of a few now living, simply because they were actors in those days, (constituting not one in a thousand of those, who were called to deliberate upon the constitution, and not one in ten thousand of those, who were in favour or against it, among the people)? Or are we to be governed by the opinions of those, who constituted a majority of those, who were called to act on that occasion, either as framers of, or voters upon, the constitution? If by the latter, in what manner can we know those opinions? Are we to be governed by the sense of a majority of a particular state, or of all of the United States? If so, how are we to ascertain, what that sense was? Is the sense of the constitution to be ascertained, not by its own text, but by the "*probable meaning*" to be gathered by conjectures from scattered documents, from private papers, from the table talk of some statesmen, or the jealous exaggerations of others? Is the constitution of the United States to be the only instrument, which is not to be interpreted by what is written, but by probable guesses, aside from the text? What would be said of interpreting a statute of a state legislature, by endeavouring to find out, from private sources, the objects and opinions of every member; how every one thought; what he wished; how he interpreted it? Suppose different persons had different opinions, what is to be done? Suppose different persons are not agreed, as to "the probable meaning" of the framers or of the people, what interpretation is to be followed? These, and many questions of the same sort, might be asked. It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text; but the words are to be bent and broken by the "probable meaning" of persons, whom

tions, and plausible conjectures were hazarded at an early period, which have since silently died away, and are now retained in no living memory, as a topic either of praise or blame, of alarm or of congratulation.

§ 408. And, after all, the most unexceptionable source of collateral interpretation is from the practical exposition of the government itself in its various departments upon particular questions discussed, and settled upon their own single merits. These approach the nearest in their own nature to judicial expositions; and have the same general recommendation, that belongs to the latter. They are decided upon solemn argument, *pro re 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 absorbing topic. How light, compared with these means of instruction, are the private lucubrations of the closet, or the retired speculations of ingenious minds, intent on theory, or general views, and unused to encounter a practical difficulty at every step!

§ 409. But to return to the rules of interpretation arising *ex directo* from the text of the constitution.

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they never knew, and whose opinions, and means of information, may be no better than their own? The people adopted the constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men. The opinions of the latter may sometimes aid us in arriving at just results; but they can never be conclusive. The Federalist denied, that the president could remove a public officer without the consent of the senate. The first congress affirmed his right by a mere majority. Which is to be followed?

And first the rules to be drawn from the nature of the instrument. (1.) It is to be construed, as a *frame*, or *fundamental law* of government, established by the PEOPLE of the United States, according to their own free pleasure and sovereign will. In this respect it is in no wise distinguishable from the constitutions of the state governments. Each of them is established by the people for their own purposes, and each is founded on their supreme authority. The powers, which are conferred, the restrictions, which are imposed, the authorities, which are exercised, the organization and distribution thereof, which are provided, are in each case for the same object, the common benefit of the governed, and not for the profit or dignity of the rulers.

§ 410. And yet it has been a very common mode of interpretation to insist upon a diversity of rules in construing the state constitutions, and that of the general government. Thus, in the Commentaries of Mr Tucker upon Blackstone, we find it laid down, as if 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, of personal security, or of private property may become the object of dispute; because every person, whose liberty or property was thereby rendered subject to the new government, *was antecedently a member of a civil society, to whose regulations he had submitted himself, and under whose authority and protection he still remains,*

in all cases not expressly submitted to the new government." [1]

§ 411. We here see, that the whole reasoning is founded, not on the notion, that the rights of the *people* are concerned, but the rights of the *states*. And by strict construction is obviously meant the most limited sense belonging to the words. And the learned author relies, for the support of his reasoning, upon some rules laid down by Vattel in relation to the interpretation of treaties in relation to *odious* things. It would seem, then, that the constitution of the United States is to be deemed an odious instrument. And why, it may be asked? Was it not framed for the good of the people, and by the people? One of the sections of Vattel, which is relied on, states this proposition,[2] "That whatever tends to change the present state of things, is also to be ranked in the class of odious things." Is it not most manifest, that this proposition is, or at least may be, in many cases, fundamentally wrong? If a people free themselves from a despotism, is it to be said, that the change of government is odious, and ought to be construed strictly? What, upon such a principle, is to become of the American Revolution; and of our state governments, and state constitutions? Suppose a well-ordered government arises out of a state of disorder and anarchy, is such a government to be considered odious? Another 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

[1] 1 Tucker's Black. Comm. App. 151. [2] B. 2, § 305. [3] § 508.

question of odious things, interpret the terms in the most limited sense. We may even, to a certain degree, adopt a figurative meaning in order to avert the oppressive consequences of the proper and literal sense, or any thing of an odious nature, which it would involve." Does not this section contain most lax and unsatisfactory ingredients for interpretation? Who is to decide, whether it is most conformable to equity to extend, or to restrict the se se? Who is to decide, whether the provision is odious? According to this rule, the most opposite interpretations of the same words would be equally correct, according as the interpretator should deem it odious or salutary. Nay, the words are to be deserted, and a figurative sense adopted, whenever he deems it advisable, looking to the odious nature or consequence of the common sense. He, who believes the general government founded in wisdom, and sound policy, and the public safety, may extend the words. He, who deems it odious, or the state governments the truest protection of all our rights, must limit the words to the narrowest meaning.

§ 412. The twelfth amendment to the constitution is also relied on by the same author, which declares, "that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the *states* respectively, or to the *people*." He evidently supposes, that this means "in all cases not *expressly* submitted to the new government"; yet the word "expressly" is no where found in the amendment. But we are not considering, whether any powers can be implied; the only point now before us is, how the express powers are to be construed. Are they to be construed strictly, that is, in their most limited sense? Or are they to receive a fair and reason-

able construction, according to the plain meaning of the terms and the objects, for which they are used?

§ 413. When it is said, that the constitution of the United States should be construed strictly, viewed as a social compact, whenever it touches the rights of property, or of personal security, or liberty, the rule is equally applicable to the state constitutions in the like 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 rights and interests. But in construing a constitution of government, framed by the *people* for their own benefit and protection, for the preservation of their rights, and property, and liberty; where the delegated powers are not, and cannot be used for the benefit of their rulers, who are but their temporary servants and agents; but are intended solely for the benefit of the people, no such presumption of an intention to use the words in the most restricted sense necessa-

rily arises. The strict, or the more extended sense, both being within the letter, may be fairly held to be within their intention, as either shall best promote the very objects of the people in the grant; as either shall best promote or secure their rights, property, or liberty. The words are not, indeed, to be stretched beyond their fair sense; but within that range, the rule of interpretation must be taken, which best follows out the apparent intention.[1] This is the mode (it is believed) universally adopted in construing the state constitutions. It has its origin in common sense. And it never can be a matter of just jealousy; because the rulers can have no permanent interest in a free government, distinct from that of the people, of whom they are a part, and to whom they are responsible. Why the same reasoning should not apply to the government of the United States, it is not very easy to conjecture.

§ 414. But it is said, that the state governments being already in existence, and the people subjected to them, their obedience to the new government may endanger their obedience to the *states*, or involve them in a conflict of authority, and thus produce inconvenience. In the first place, it is not true, in a just sense, (if we are right in our view of the constitution of the United States,) that such a conflict can ultimately exist. For if the powers of the general government are of paramount and supreme obligation, if they constitute the supreme law of the land, no conflict, as to obedience, can be found. Whenever the question arises, as to whom obedience is due, it is to be judicially settled; and being settled, it regulates, at once, the rights and duties of all the citizens.

[1] Rawle on the Constitution, ch. 1, p. 31.

§ 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, the authority of the people, in their sovereign capacity, to withdraw power from their state functionaries, and to confide it to the functionaries of the general government, cannot be doubted or denied.[1] If they withdraw the power from the state functionaries, it must be presumed to be, because they deem it more useful for themselves, more for the common benefit, and common protection, than to leave it, where it has been hitherto deposited. Why should a power in the hands of one functionary be differently construed in the hands of another functionary, if, in each case, the same object is in view, the safety of the people? The state governments have no right to assume, that the power is more safe or more useful with them, than with the general government; that they have a higher capacity and a more honest desire to preserve the rights and liberties of the people, than the general government; that there is no danger in trusting them; but that all the peril and all the oppression impend on the other side. The people have not so said, or thought; and they have the exclusive right to judge for themselves on the subject. They avow, that the constitution of the United States was adopted by them, "in order to form a more perfect union, establish justice, ensure domestic 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

[1] *Martin* v. *Hunter*, 1 Wheat. R. 304, 325.

ask, if these are odious objects. If these require every grant of power, withdrawn from the state governments, to be deemed *strictissimi juris*, and construed in the most limited sense, even if it should defeat these objects. What peculiar sanctity have the state governments in the eyes of the people beyond these objects? Are they not framed for the same general ends? Was not the very inability of the state governments suitably to provide for our national wants, and national independence, and national protection, the very groundwork of the whole system?

§ 416. If this be the true view of the subject, the constitution of the United States is to receive as favourable a construction, as those of the states. Neither is to be construed alone; but each with a reference to the other. Each belongs to the same system of government; each is limited in its powers; and within the scope of its powers each is supreme. Each, by the theory of our government, is essential to the existence and due preservation of the powers and obligations of the other. The destruction of either would be equally calamitous, since it would involve the ruin of that beautiful fabric of balanced government, which has been reared with so much care and wisdom, and in which the people have reposed their confidence, as the truest safeguard 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 developement of

[1] The Federalist, No. 37.

the peculiar functions of each, the part of true wisdom would seem to be, to leave in every practicable direction a wide, if not an unmeasured, distance between the actual exercise of the sovereignty of each. In every complicated machine slight causes may disturb the operations; and it is often more easy to detect the defects, than to apply a safe and adequate remedy.

§ 417. The language of the Supreme Court, in the case of *Martin* v. *Hunter*,[1] seems peculiarly appropriate to this part of our subject. "The constitution of the United States," say the court, "was ordained and established, not by the *states* in their sovereign capacities, but emphatically, as the preample of the constitution declares, by the people of the United States.[2] There can be no doubt, that it was competent to the people to invest the general government with all the powers, which they might deem proper and necessary; to extend or restrain those powers according to their own good pleasure; and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers, which were in their judgment incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation; or to reserve to themselves those sovereign authorities, which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions. For the powers of

[1] 1 Wheat. R. 304; S. C. 3 Peters's Cond. R. 575.

[2] This is still more forcibly stated by Mr. Chief Justice Marshall in delivering the opinion of the court in *McCulloch* v. *Maryland*, in a passage already cited. 4 Wheat. R. 316, 402 to 405.

the state governments depend upon their own constitutions; and the people of every state had a right to modify or restrain them according to their own views of policy or principle. On the other hand, it is perfectly clear, that the sovereign powers, vested in the state governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." These deductions do not rest upon general reason, plain and obvious as they seem to be. They have been positively recognised by one of the articles in amendment of the constitution, which declares, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the *states* respectively, or to the *people*." [1]

"The government, then, of the United States, can claim no powers, which are not granted to it by the constitution; and the powers actually granted must be such, as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction according to the import of its terms. And where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grow out of the context expressly, or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."

§ 418. A still more striking response to the argument for a strict construction of the constitution will be found in the language of the court, in the case of *Gibbons* v. *Ogden*, (9 Wheat. 1, &c.) Mr. Chief Justice Marshall, in delivering the opinion of the court, says,

[1] See also *McCulloch* v. *Maryland*, 4 Wheat. R. 316, 402 to 406.

"This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution, which gives countenance to this rule? In the last of the enumerated powers, that, which grants expressly the means for carrying all others into execution, congress is authorized "to make all laws, which shall be necessary and proper" for the purpose. But this limitation on the means, which may be used, is not extended to the powers, which are conferred; nor is there one sentence in the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the terms, but should not controvert the principle. If they contend for that narrow construction, which, in support of some theory not to be found in the constitution, would deny to the government those powers, which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects, for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule, by which the constitution is to be expounded. As men, whose intentions require no

concealment, generally employ the words, which most directly and aptly express the ideas they intend to convey; the enlightened patriots, who framed our constitution, and the people, who adopted it, must be understood to have employed words in their natural sense, and to have intended, what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects, for which it was given, especially, when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power, which might be beneficial to the grantor, if retained by himself, or which can 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 connexion 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 of the national government have been stretched to their extremest tension by that party when in power, which has been most tenderly scrupulous of the state sovereignty, when uninvested with the authority of the union themselves." He adds, "Of these inconsistencies, our two great parties can have little to say in reproof of each other." Without inquiring into the justice of the remark in general, it may be truly stated, that the Embargo of 1807, and the admission of Louisiana into the Union, are very striking illustrations of the application of constructive powers.

§ 419. IV. From the foregoing considerations we deduce the conclusion, that as a frame or fundamental law of government, (2.) The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which those powers were conferred. By a reasonable interpretation, we mean, that in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted, which is most consonant with the apparent objects and intent of the constitution; that, which will give it efficacy and force, as a *government*, rather than that, which will impair its operations, and reduce it to a state of imbecility. Of course we do not mean, that the words for this purpose are to be strained beyond their common and natural sense; but keeping within that limit, the exposition is to have a fair and just latitude, so as on the one hand to avoid obvious mischief, and on the other hand to promote the public good.[1]

§ 420. This consideration is of great importance in construing a frame of government; and *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 favourably

[1] See *Ogden* v. *Saunders*, 12 Wheat. R. 332, Opinion of Mr. Chief Justice Marshall.

for the grantee; because, though in derogation of the rights of the grantor, they are promotive of the general rights secured to the grantee. But, where the grant enures, solely and exclusively, for the benefit of the grantor himself, no one would deny the propriety of giving to the words of the grant a benign and liberal interpretation. In cases, however, of private grants, the objects generally are few; they are certain; they are limited; they neither require, nor look to a variety of means or changes, which are to control, or modify either the end, or the means.

§ 421. In regard also to municipal charters, or public grants, similar considerations usually apply. They are generally deemed restrictive of the royal or public prerogative, or of the common rights secured by the actual organization of the government to other individuals, or communities. They are supposed to be procured, not so much for public good, as for private or local convenience. They are supposed to arise from personal solicitation, upon general suggestions, and not *ex certâ causâ*, or *ex mero motu* of the king, or government itself. Hence, such charters are often required by the municipal jurisprudence to be construed strictly, because they yield something, which is common, for the benefit of a few. And yet, where it is apparent, that they proceed upon greater or broader motives, a liberal exposition is not only indulged, but is encouraged, if it manifestly promotes the public good.[1] So that we see, that even in these cases, common sense often dictates a departure from a narrow and strict construction of the terms, though the ordinary rules of mere municipal law may not have favoured it.

[1] See *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 189.

§ 422. But a constitution of government, founded by the people for themselves and their posterity, and for objects of the most momentous nature, for perpetual union, for the establishment of justice, for the general welfare, and for a perpetuation of the blessings of liberty, necessarily requires, that every interpretation of its powers should have a constant reference to these objects. No interpretation of the words, in which those powers are granted, can be a sound one, which narrows down their ordinary import, so as to defeat those objects. That would be to destroy the spirit, and to cramp the letter. It has been justly observed, that "the constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specification of its powers, or to declare the means, by which those powers should be carried into execution. It was foreseen, that it would be a perilous, and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years; but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require."[1] Lan-

[1] *Hunter* v. *Martin*, 1 Wheat. R. 304, 326, 327; S. C. 3 Peters's Cond. R. 575, 583.

guage to the same effect will be found in other judgments of the same tribunal.[1]

§ 423. If, then, we are to give a reasonable construction to this instrument, as a constitution of government established for the common good, we must throw aside all notions of subjecting it to a strict interpretation, as if it were subversive of the great interests of society, or derogated from the inherent sovereignty of the people. And this will naturally lead us to some other rules properly belonging to the subject.

§ 424. V. Where the power is granted in general terms, the power is to be construed, as co-extensive with the terms, unless some clear restriction upon it is deducible from the context. We do not mean to assert, that it is necessary, that such restriction should be expressly found in the context. It will be sufficient, if it arise by necessary implication. But it is not sufficient to show, that there was, or might have been, a sound or probable motive to restrict it. A restriction founded on conjecture is wholly inadmissible. The reason is obvious: the text was adopted by the people in its obvious, and general sense. We have no means of knowing, that any particular gloss, short of this sense, was either contemplated, or approved by the people; and such a gloss might, though satisfactory in one state, have been the very ground of objection in another. It might have formed a motive to reject it in one, and to adopt it in another. The sense of a part of the people has no title to be deemed the sense of the whole. Motives of state policy, or state interest, may properly have influence in the question of ratifying it; but the constitution itself must be expounded, as it stands; and

[1] See *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 187, &c. 222, &c.

not as that policy, or that interest may seem now to dictate. We are to construe, and not to frame the instrument.[1]

§ 425. VI. A power, given in general terms, is not to be restricted to particular cases, merely because it may be susceptible of abuse, and, if abused, may lead to mischievous consequences. This argument is often used in public debate ; and in its common aspect addresses itself so much to popular fears and prejudices, that it insensibly acquires a weight in the public mind, to which it is no wise entitled. The argument *ab inconvenienti* is sufficiently open to question, from the laxity of application, as well as of opinion, to which it leads. But the argument from a possible abuse of a power against its existence or use, is, in its nature, not only perilous, but, in respect to governments, would shake their very foundation. Every form of government unavoidably includes a grant of some discretionary powers. It would be wholly imbecile without them. It is impossible to foresee all the exigencies, which may arise in the progress of events, connected with the rights, duties, and operations of a government. If they could be foreseen, it would be impossible *ab ante* to provide for them. The means must be subject to perpetual modification, and change ; they must be adapted to the existing manners, habits, and institutions of society, which are never stationary ; to the pressure of dangers, or necessities ; to the ends in view ; to general and permanent operations, as well as to fugitive and extraordinary emergencies. In short, if the whole society is not to be revolutionized at every critical period, and remodeled in every generation, there must be

1 See *Sturgis* v. *Crowninshield*, 4 Wheat. R. 112, 202.

left to those, who administer the government, a very large mass of discretionary powers, capable of greater or less actual expansion according to circumstances, and sufficiently flexible not to involve the nation in utter destruction from the rigid limitations imposed upon it by an improvident jealousy. Every power, however limited, as well as broad, is in its own nature susceptible of abuse. No constitution can provide perfect guards against it. Confidence must be reposed some where; and in free governments, the ordinary securities against abuse are found in the responsibility of rulers to the people, and in the just exercise of their elective franchise; and ultimately in the sovereign power of change belonging to them, in cases requiring extraordinary remedies. Few cases are to be supposed, in which a power, however general, will be exerted for the permanent oppression of the people.[1] And yet, cases may easily be put, in which a limitation upon such a power might be found in practice to work mischief; to incite foreign aggression; or encourage domestic disorder. The power of taxation, for instance, may be carried to a ruinous excess; and yet, a limitation upon that power might, in a given case, involve the destruction of the independence of the country.

§ 426. VII. On the other hand, a rule of equal importance is, not to enlarge the construction of a given

[1] Mr. Justice Johnson, in delivering the opinion of the court in *Anderson* v. *Dunn*, (6 Wheat. 204, 226,) uses the following expressive language: "The idea is Utopian, that government can exist without leaving the exercise of discretion some where. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their own wills, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger."

power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous.[1] If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment. If they do not choose to apply the remedy, it may fairly be presumed, that the mischief is less than what would arise from a further extension of the power; or that it is the least of two evils. Nor should it ever be lost sight of, that the government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is, *pro tanto*, the establishment of a new constitution. It is doing for the people, what they 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 for ever.

[1] See *United States* v. *Fisher*, 2 Cranch, 358; S. C. Peters's Cond. R. 421.

§ 427. It has been observed with great correctness, that although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from the letter. It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case, for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one, where the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.[1] This language has reference to a case where the words of a constitutional provision are sought to be restricted. But it appears with equal force where they are sought to be enlarged.

§ 428. VIII. No construction of a given power is to be allowed, which plainly defeats, or impairs its avowed objects. If, therefore, the words are fairly susceptible of two interpretations, according to their common sense and use, the one of which would defeat one, or all of the objects, for which it was obviously given, and the other of which would preserve and promote all, the former interpretation ought to be rejected, and the lat-

[1] *Sturgis* v. *Crowninshield*, 4 Wheat. R. 122, 202.

ter be held the true interpretation. This rule results from the dictates of mere common sense; for every instrument ought to be so construed, *ut magis valeat, quam pereat.*[1] For instance, the constitution confers on congress the power to declare war. Now the word *declare* has several senses. It may mean to proclaim, or publish. But no person would imagine, that this was the whole sense, in which the word is used in this connexion. It should be interpreted in the sense, in which the phrase is used among nations, when applied to such a subject matter. A power to declare war is a power to make, and carry on war. It is not a mere power to make known an existing thing, but to give life and effect to the thing itself.[2] The true doctrine has been expressed by the Supreme Court: "If from the imperfection of human language there should be any serious doubts respecting the extent of any given power, the objects, for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction."[3]

§ 429. IX. Where a power is remedial in its nature, there is much reason to contend, that it ought to be construed liberally. That was the doctrine of Mr. Chief Justice Jay, in *Chisholm* v. *Georgia*;[4] and it is generally adopted in the interpretation of laws.[5] But this liberality of exposition is clearly inadmissible, if it extends beyond the just and ordinary sense of the terms.

§ 430. X. In the interpretation of a power, all the ordinary and appropriate means to execute it are to be

[1] See Bacon's Abridg. Statute I; Vattel, B. 2, ch. 17, § 277 to 285, 299 to 302.

[2] See *Bas* v. *Tingey*, 4 Dall. R. 37; S. C. 1 Peters's Cond. R. 221.

[3] *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 188, 189.

[4] 2 Dall. R. 419; S. C. 2 Cond. R. 635, 652.

[5] Bacon's Abridg. Statute I. 8.

deemed a part of the power itself. This results from the very nature and design of a constitution. In giving the power, it does not intend to limit it to any one mode of exercising it, exclusive of all others. It must be obvious, (as has been already suggested,) that the means of carrying into effect the objects of a power may, nay, must be varied, in order to adapt themselves to the exigencies of the nation at different times.[1] A mode efficacious and useful in one age, or under one posture of circumstances, may be wholly vain, or even mischievous at another time. Government presupposes the existence of a perpetual mutability in its own operations on those, who are its subjects; and a perpetual flexibility in adapting itself to their wants, their interests, their habits, their occupations, and their infirmities.[2]

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[1] The Federalist, No. 44.

[2] The reasoning of Mr. Chief Justice Marshall on this subject, in *M'Culloch* 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

§ 431. Besides; if the power only is given, without pointing out the means, how are we to ascertain, that any one means, rather than another, is exclusively within its scope? The same course of reasoning, which

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those alone, without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation, that we shall be compelled to discard it. The powers vested in congress may certainly be 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 subject. The oath, which might be exacted — that of fidelity to the constitution — is prescribed, and no other can be required. Yet, he would be charged with insanity, who should contend, that the legislature might not superadd, to the oath directed by the constitution, such other oath of office, as its wisdom might suggest.

"So, with respect to the whole penal code of the United States: whence arises the power to punish, in cases not prescribed by the constitution? All admit, that the government may legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered 'to provide for the punishment of counterfeiting the securities and current coin of the United States,' and 'to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.' The several powers of congress may exist, in a very imperfect state to be sure, but they may exist, and be carried into execution, although no punishment should be inflicted in cases, where the right to punish is not expressly given.

"Take, for example, the power 'to establish post offices and post roads.' This power is executed by the single act of making the establishment. But, from this has been inferred the power, and duty of carrying the mail along the post road, from one post office to another. And, from this implied power has again been inferred the right to punish those, who steal letters from the post office, or rob the mail. It may be

would deny a choice of means to execute the power, would reduce the power itself to a nullity. For, as it never could be demonstrated, that any one mode in particular was intended, and to be exclusively employed; and, as it might be demonstrated, that other means might be employed, the question, whether the power were rightfully put into exercise, would for ever be subject to doubt and controversy.[1] If one means is adopted to give it effect, and is within its scope, because it is appropriate, how are we to escape from the argument, that another, falling within the same predicament, is equally within its scope? If each is equally appropriate, how is the choice to be made between them? If one is selected, how does that exclude all others? If one is more appropriate at one time, and another at another time, where is the restriction to be found, which allows the one, and denies the other? A

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said, with some plausibility, that the right to carry the mail, and to punish those, who rob it, is not indispensably necessary to the establishment of a post office, and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record, or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

"The baneful influence of this narrow construction, on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced without hesitation, that the power of punishment appertains to sovereignty, and may be exercised, whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise."

[1] See *United States* v. *Fisher*, 2 Cranch, 358; S. C. 1 Peters's Cond. R. 421, 429.

power granted in a frame of government is not contemplated to be exhausted in a single exertion of it, or *uno flatu*. It is intended for free and permanent exercise; and if the discretion of the functionaries, who are to exercise it, is not limited, that discretion, especially, as those functionaries must necessarily change, must be coextensive with the power itself. Take, for instance, the power to make war. In one age, this would authorize the purchase and employment of the weapons then ordinarily used for this purpose. But suppose these weapons are wholly laid aside, and others substituted, more efficient and powerful; is the government prohibited from employing the new modes of offence and defence? Surely not. The invention of gunpowder superseded the old modes of warfare, and may perhaps, by future inventions, be superseded in its turn. No one can seriously doubt, that the new modes would be within the scope of the power to make war, if they were appropriate to the end. It would, indeed, be a most extraordinary mode of interpretation of the constitution, to give such a restrictive meaning to its powers, as should obstruct their fair operation. A power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to be their intention, to clog and embarrass its execution, by withholding the most appropriate means. There can be no reasonable ground for preferring that construction, which would render the operations of the government difficult, hazardous, and expensive; or for imputing to the framers of the constitution a design to impede the exercise of its powers, by withholding a choice of means.[1]

[1] *M'Culloch* v. *Maryland*, 4 Wheat. R. 316, 408.

§ 432. In the practical application of government, then, the public functionaries must be left at liberty to exercise the powers, with which the people by the constitution and laws have entrusted them. They must have a wide discretion, as to the choice of means; and the only limitation upon that discretion would seem to be, that the means are appropriate to the end. And this must naturally admit of considerable latitude; for the relation between the action and the end (as has been justly remarked) is not always so direct and palpable, as to strike the eye of every observer.[1] If the end be legitimate and within the scope of the constitution, all the means, which are appropriate, and which are plainly adapted to that end, and which are not prohibited, may be constitutionally employed to carry it into effect.[2] When, then, it is asked, who is to judge of the necessity and propriety of the laws to be passed for executing the powers of the Union, the true answer is, that the national government, like every other, must judge in the first instance of the proper exercise of its powers; and its constituents in the last. If the means are within the reach of the power, no other department can inquire into the policy or convenience of the use of them. If there be an excess by overleaping the just boundary of the power, the judiciary may generally afford the proper relief; and in the last resort the people, by adopting such measures to redress it, as the exigency may suggest, and prudence may dictate.[3]

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[1] See the remarks of Mr. Justice Johnson, in delivering the opinion of the court in *Anderson* v. *Dunn*, 6 Wheat. R. 204, 226; *United States* v. *Fisher*, 2 Cranch. 358; S. C. 1 Peters's Cond. R. 421, 429.

[2] *M'Culloch* v. *Maryland*, 4 Wheat. R. 316, 409, 410, 421, 423; *United States* v. *Fisher*, 2 Cranch, 358; S. C. 1 Peters's Cond. R. 421.

[3] The Federalist, No. 33, 44; *M'Culloch* v. *Maryland*, 4 Wheat. R. 316, 423.

§ 433. XI. And this leads us to remark, in the next place, that in the interpretation of the constitution there is no solid objection to implied powers.[1] Had the faculties of man been competent to the framing of a system of government, which would leave nothing to implication, it cannot be doubted, that the effort would have been made by the framers of our constitution. The fact, however, is otherwise. There is not in the whole of that admirable instrument a grant of powers, which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.[2] There is no phrase in it, which, like the articles of confederation,[3] excludes incidental and implied powers, and which requires, that every thing granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies, which had been excited, omits the word "expressly," (which was contained in the articles of confederation,) and declares only, that "the powers, not delegated to the United States, nor prohibited by it to the states, are reserved to the states respectively, or to the people;" thus leaving the question, whether the particular power, which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend upon a fair construc-

[1] In the discussions, as to the constitutionality of the Bank of the United States, in the cabinet of President Washington, upon the original establishment of the Bank, there was a large range of argument, *pro 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.

[2] *Anderson* v. *Dunn*, 6 Wheat. 204, 226.

[3] Article 2.

tion of the whole instrument. The men, who drew and adopted this amendment, had experienced the embarrassments, resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions, of which its great powers will admit, and of all the means, by which these may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor 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

[1] Per Mr. Chief Justice Marshall, in *M'Culloch* v. *Maryland*, 4 Wheat. R. 316, 406, 407, 421.

thing? What is the ability to do a thing, but the power of employing the means necessary to its execution? What is a legislative power, but a power of making laws? What are the means to execute a legislative power, but laws?[1] No axiom, indeed, is more clearly established in law or in reason, than that, where the end is required, the means are authorized. Whenever a general power to do a thing is given, every particular power necessary for doing it is included. In every new application of a general power, the particular power, which are the means of attaining the object of the general power, must always necessarily vary with that object; and be often properly varied, whilst the object remains the same.[2] Even under the confederation, where the delegation of authority was confined to *express* powers, the Federalist remarks, that it would be easy to show, that no important power delegated by the articles of confederation had been, or could be, executed by congress, without recurring more or less to the doctrine of construction or implication![3]

§ 435. XII. Another point, in regard to the interpretation of the constitution, requires us to advert to the rules applicable to cases of concurrent and exclusive powers. In what cases are the powers given to the general government exclusive, and in what cases may the states maintain a concurrent exercise? Upon this subject we have an elaborate exposition by the authors of the Federalist;[4] and as it involves some of the most delicate questions growing out of the constitution, and those, in which a conflict with the states is most likely to arise, we cannot do better than to quote the reasoning.

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[1] The Federalist, No. 33.
[2] The Federalist, No. 44.
[3] The Federalist, No. 44.
[4] The Federalist, No. 32.

§ 436. "An entire consolidation of the states into one complete national sovereignty, would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether dependent on the general will. But as the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty, which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the Union; where it granted, in one instance, an authority to the Union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*. I use these terms to distinguish this last case from another, which might appear to resemble it; but which would, in fact, be essentially different: I mean, where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government, may be exemplified by the following instances. The last clause but one in the eighth section of the first article, provides expressly, that congress shall exercise '*exclusive legislation*' over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers congress '*to lay and collect taxes, duties, imposts, and excises;*' and the second clause of

'the tenth section of the same article declares, that '*no state shall*, without the consent of congress, *lay any imposts or duties on imports or exports*, except for the purpose of executing its inspection laws.' Hence would result an exclusive power in the Union to lay duties on imports and exports, with the particular exception mentioned. But this power is abridged by another clause, which declares, that no tax or duty shall be laid on articles exported from any state; in consequence of which qualification, it now only extends to the *duties on imports*. This answers to the second case. The third will be found in that clause, which declares, that congress shall have power 'to establish an *uniform rule* of naturalization throughout the United States.' This must necessarily be exclusive; because, if each state had power to prescribe a *distinct rule*, there could be no *uniform rule*." The correctness of these rules of interpretation has never been controverted; and they have been often recognised by the Supreme Court.[1]

§ 437. The two first rules are so completely 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 treaties in

[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.

pursuance of it shall be the supreme law of the land; it would be absurd to say, that a state law, repugnant to it, might have concurrent operation and validity; and especially, as it is expressly added, any thing in the constitution or laws of any state to the contrary notwithstanding. The repugnancy, then, being made out, it follows, that the state law is just as much void, as though it had been expressly declared to be void; or the power in congress had been expressly declared to be exclusive. Every power given to congress is by the constitution necessarily supreme; and if, from its nature, or from the words of the grant, it is apparently intended to be exclusive, it is as much so, as if the states were expressly forbidden to exercise it.[1]

§ 438. The principal difficulty lies, not so much in the rule, as in its application to particular cases. Here, the field for discussion is wide, and the argument upon construction is susceptible of great modifications, and of very various force. But unless, from the nature of the power, or from the obvious results of its operations, a repugnancy must exist, so as to lead to a necessary conclusion, that the power was intended to be exclusive, the true rule of interpretation is, that the power is merely concurrent. Thus, for instance, an affirmative power in congress to lay taxes, is not necessarily incompatible with a like power in the States. Both may exist without interference; and if any interference should arise in a particular case, the question of supremacy would turn, not upon the nature of the power, but upon supremacy of right in the exercise of the power in that case.[2] In our complex system, presenting

[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.

the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only enumerated powers, and of numerous state governments, which retain and exercise many powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would be often of the same description, and might sometimes interfere. This, however, does not prove, that the one is exercising, or has a right to exercise, the powers of the other.[1]

§ 439. And this leads us to remark, that in the exercise of concurrent powers, if there be a conflict between the laws of the Union and the laws of the 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 passes a law inconsistent with the constitution of the United States it is a mere nullity. If it passes a law clearly within its own constitutional powers, still if it conflicts with the exercise of a power given to congress, to the extent of the interference its operation is suspended; for, in a conflict of laws, that which is supreme must govern. Therefore, it has often been adjudged, that if a state law is in conflict with a treaty, or an act of congress, it becomes *ipso facto* inoperative to the extent of the conflict.[2]

[1] *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 205. — Mr. Chancellor Kent has given this whole subject of exclusive and concurrent power a thorough examination; and the result will be found most ably stated in his learned Commentaries, Lecture 18. 1 Kent. Comm. 364 to 379, 2d edit. p. 387 to 405.

[2] *Ware* v. *Hylton*, 3 Dall. 199, S. C. 1, Conden. R. 99, 112, 127, 128, 129; *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 210, 211; *McCulloch* v. *Maryland*, 4 Wheat. R. 316, 405, 406, 425 to 436; *Houston* v. *Moore*. 5 Wheat.

§ 440. From this great rule, that the constitution and laws, made in pursuance thereof, are supreme; and that they control the constitutions and laws of the states, and cannot be controlled by them, from this, which may be deemed an axiom, other auxiliary corollaries may be deduced. In the first place, that, if a power is given to create a thing, it implies a power to preserve it. Secondly, that a power to destroy, if wielded by a different hand, is hostile to and incompatible with this power to create and preserve. Thirdly, that where this repugnancy exists, the authority, which is supreme, must control, and not yield to that, over which it is supreme.[1] Consequently, the inferior power becomes a nullity.[2]

§ 441. But a question of a still more delicate nature may arise; and that is, how far in the exercise of a concurrent power, the actual legislation of congress supersedes the state legislation, or suspends its operation over the subject matter. Are the state laws inoperative only to the extent of the actual conflict; or does the legislation of congress suspend the legislative power of the states over the *subject matter?* To such an inquiry, probably, no universal answer could be given. It may depend upon the nature of the power, the effect of the actual exercise, and the extent of the subject matter.

§ 442. This may, perhaps, be best illustrated by putting a case, which has been reasoned out by a very learned judge, in his own words:[3] "Congress has

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, 449.

[1] *M'Culloh* v. *Maryland*, 4 Wheat. R. 316, 426.

[2] *Sturgis* v. *Crowninshield*, 4 Wheat. R. 1, 193.

[3] Mr. Justice Washington, *Houston* v. *Moore*, 5 Wheat. R. 1, 21, 22.

power," says he, "to provide for organizing, arming, and disciplining the militia; and it is presumable, that the framers of the constitution contemplated a full exercise of all these powers. Nevertheless, if congress had declined to exercise them, it was competent to the state governments to provide for organizing, arming, and disciplining their respective militia in such manner, as they might think proper. But congress has provided for these subjects in the way, which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defence. After this, can the state governments enter upon the same ground, provide for the same objects, as they may think proper, and punish, in their own way, violations of the laws they have so enacted? The affirmative of this question is asserted by counsel, &c. who contend, that unless such state laws are in direct contradiction to those of the United States, they are not repugnant to the constitution of the United States. — From this doctrine I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution without violating the injunctions of the other; and yet the will of the one legislature may be in direct collision with that of the other. This will is to be discovered, as well by what the legislature has not declared, as by what they have expressed. Congress, for example, have declared, that the punishment for disobedience of the act of congress shall be a certain fine. If that provided by the state legislature for the same offence be a similar fine with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of Congress

is nevertheless thwarted and opposed."[1] He adds, "I consider it a novel and unconstitutional doctrine, that in cases, where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject, on which congress has acted, provided the two laws are not in terms, or in their operation contradictory and repugnant to each other."[2]

§ 443. Another illustration may be drawn from the opinion of the court in another highly important case. One question was, whether the power of congress to establish uniform laws on the subject of bankruptcies was exclusive, or concurrent with the states. "It does not appear," it was then said, "to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases, as the laws of the Union may not reach. Be this as it may, the power of congress may be exercised, or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws; but their actual establishment, which is inconsistent with the partial acts of the states. If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished. It can only be suspended by the enactment of a general bankrupt law. The repeal of that

[1] 5 Wheat R. p. 22.

[2] Id. 24. See also *Golden* v. *Prince*, 3 Wash. C. C. R. 313, 324, &c.

law cannot, it is true, confer the power on the states; but it removes a disability to its exercise, which was created by the act of congress" [1]

It is not our intention to comment on these cases; but to offer them as examples of reasoning in favour and against the exclusive power, where a positive repugnancy cannot be predicated.

§ 444. It has been sometimes argued, that when a power is granted to congress to legislate in specific cases, for purposes growing out of the Union, the natural conclusion is, that the power is designed to be exclusive; that the power is to be exercised for the good of the whole by the will of the whole, and consistently with the interests of the whole; and that these objects can no where be so clearly seen, or so thoroughly weighed, as in congress, where the whole nation is represented. But the argument proves too much; and pursued to its full extent, it would establish, that all the powers granted to congress are exclusive, unless where concurrent authority is expressly reserved to the states.[2] For instance, upon this reasoning the power of taxation in congress would annul the whole power of taxation of the states; and thus operate a virtual dissolution of their sovereignty. Such a pretension has been constantly disclaimed.

[1] *Sturgis* v *Crowninshield*, 4 Wheat. R. 122, 195, 196. See also *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 197, 227, 235, 238; *Houston* v *Moore*, 5 Wheat. R. 34, 49, 52, 54, 55. — This opinion, that the power to pass bankrupt laws is not exclusive, has not been unanimously adopted by the Supreme Court. Mr. Justice Washington maintained at all times an opposite opinion; and his opinion is known to have been adopted by at least one other of the judges of the Supreme Court. The reasons, on which Mr. J. Washington's opinion is founded, will be found at large in the case of *Golden* v. *Prince*, 3 Wash. C. C. R. 313, 322, &c. See also *Ogden* v. *Saunders*, 12 Wheat. R. 213, 264, 265, and *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 209, 226, 238.

[2] *Houston* v. *Moore*, 5 Wheat. R. 1, 49, 55, 56.

§ 445. On the other hand, it has been maintained with great pertinacity, that the states possess concurrent authority with congress in all cases, where the power is not expressly declared to be exclusive, or expressly prohibited to the states; and if, in the exercise of a concurrent power, a conflict arises, there is no reason, why each should not be deemed equally rightful.[1] But it is plain, that this reasoning goes to the direct overthrow of the principle of supremacy; and, if admitted, it would enable the subordinate sovereignty to annul the powers of the superior. There is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to these very measures, is declared to be supreme over that, which exerts the control.[2] For instance, the states have acknowledgedly a concurrent power of taxation. But it is wholly inadmissible to allow that power to be exerted over any instrument employed by the general government to execute its own powers; for such a power to tax involves a power to destroy; and this power to destroy may defeat, and render useless the power to create.[3] Thus a state may not tax the mail, the mint, patent rights, custom-house papers, or judicial process of the courts of the United States.[4] And yet there is no clause in the constitution, which prohibits the states from exercising the power; nor any exclusive grant to the United States. The apparent repugnancy creates, by implication, the prohibition. So congress, by the constitution, possess power to provide for governing such part of

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1 See *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 197, 210; *M'Culloh* v. *Maryland*, 4 Wheat. R. 316, 527.

2 *M'Culloh* v *Maryland*, 4 Wheat. R. 316, 431.

3 Ibid. 4 Id. 432.

the militia, as may be employed in the service of the United States. Yet it is not said, that such power of government is exclusive. But it results from the nature of the power. No person would contend, that a state militia, while in the actual service and employment of the United States, might yet be, at the same time, governed and controlled by the laws of the state. The very nature of military operations would, in such case, require unity of command and direction. And the argument from inconvenience would be absolutely irresistible to establish an implied prohibition.[1] On the other hand, congress have power to provide for organizing, arming, and disciplining the militia; but if congress should make no such provision, there seems no reason, why the states may not organize, arm, and discipline their own militia. No necessary incompatibility would exist in the nature of the power; though, when exercised by congress, the authority of the states must necessarily yield. And, here, the argument from inconvenience would be very persuasive the other way. For the power to organize, arm, and discipline the militia, in the absence of congressional legislation, would seem indispensable for the defence and security of the states.[2] Again, congress have power to call forth the militia to execute the laws of the Union, to suppress insurrections, and repel invasions. But there does not seem any incompatibility in the states calling out their own militia as auxiliaries for the same purpose.[3]

§ 446. In considering, then, this subject, it would be impracticable to lay down any universal rule, as to what powers are, by implication, exclusive in the general

1 *Houston* v. *Moore*, 5 Wheat. R. 1, 53.
2 *Houston* v *Moore*, 5 Wheat. R. 50, 51, 52.
3 Id. 54, 55.

government, or concurrent in the states; and in relation to the latter, what restrictions either on the power itself, or on the actual exercise of the power, arise by implication. In some cases, as we have seen, there may exist a concurrent power, and yet restrictions upon it must exist in regard to objects. In other cases, the actual operations of the power only are suspended or controlled, when there arises a conflict with the actual operations of the Union. Every question of this sort must be decided by itself upon its own circumstances and reasons. Because the power to regulate commerce, from its nature and objects, is exclusive, it does not follow, that the power to pass bankrupt laws also is exclusive.[1]

§ 447. We may, however, lay down some few rules, deducible from what has been already said, in respect to cases of implied prohibitions upon the existence or exercise of powers by the states, as guides to aid our inquiries. (1.) Wherever the power given to the general government requires, that, to be efficacious and adequate to its end, it should be exclusive, there arises a just implication for deeming it exclusive. Whether exercised, or not, in such a case makes no difference. (2.) Wherever the power in its own nature is not incompatible with a concurrent power in the states, either in its nature or exercise, there the power belongs to the states. (3.) But in such a case, the concurrency of the power may admit of restrictions or qualifications in its nature, or exercise. In its nature, when it is capable from its general character of being applied to objects or purposes, which would control, defeat, or de-

[1] *Sturgis* v. *Crowninshield*, 4 Wheat. 122, 195, 197, 199; *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 196, 197, 209.

stroy the powers of the general government. In its exercise, when there arises a conflict in the actual laws and regulations made in pursuance of the power by the general and state governments. In the former case there is a qualification engrafted upon the generality of the power, excluding its application to such objects and purposes. In the latter, there is (at least generally) a qualification, not upon the power itself, but only upon its exercise, to the extent of the actual conflict in the operations of each. (4.) In cases of implied limitations or prohibitions of power, it is not sufficient to show a possible, or potential inconvenience. There must be a plain incompatibility, a direct repugnancy, or an extreme practical inconvenience, leading irresistibly to the same conclusion. (5.) If such incompatibility, repugnancy, or extreme inconvenience would result, it is no answer, that in the actual exercise of the power, each party may, if it chooses, avoid a positive interference with the other. The objection lies to the power itself, and not to the exercise of it. If it exist, it may be applied to the extent of controlling, defeating, or destroying the other. It can never be presumed, that the framers of the constitution, declared to be supreme, could intend to put its powers at hazard upon the good wishes, or good intentions, or discretion of the states in the exercise of their acknowledged powers. (6.) Where no such repugnancy, incompatibility, or extreme inconvenience would result, then the power in the states is restrained, not in its nature, but in its operations, and then only to the extent of the actual interference. In fact, it is obvious, that the same means may often be applied to carry into operation different powers. And a state may use the same means to effectuate an acknowledged power in itself, which congress may apply for an-

other purpose in the acknowledged exercise of a very different power. Congress may make that a regulation of commerce, which a state may employ as a guard for its internal policy, or to preserve the public health or peace, or to promote its own peculiar interests.[1] These rules seem clearly deducible from the nature of the instrument; and they are confirmed by the positive injunctions of the tenth 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

[1] See *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 203, to 210.
[2] See The Federalist, No. 83, 84.

reasoning.[1] Thus, it was objected to the constitution, that, having provided for the trial by jury in criminal cases, there was an implied exclusion of it in civil cases. As if there was not an essential difference between silence and abolition, between a positive adoption of it in one class of cases, and a discretionary right (it being clearly within the reach of the judicial powers confided to the Union) to adopt, or reject it in all or any other cases.[2] One might with just as much propriety hold, that, because congress has power "to declare war," but no power is expressly given to make peace, the latter is excluded; or that, because it is declared, that "no bill of attainder, or *ex post facto* law shall be passed" by congress, therefore congress possess in all other cases the right to pass any laws. The truth is, that in order to ascertain, how far an affirmative or negative provision excludes, or implies others, we must look to the nature of the provision, the subject matter, the objects, and the scope of the instrument. These, and these only, can properly determine the rule of construction. There can be no doubt, that an affirmative grant of powers in many cases will imply an exclusion of all others. As, for instance, the constitution declares, that the powers of congress shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretensions to a general legislative authority. Why? Because an affirmative grant of special powers would be absurd, as well as useless, if a general authority were intended.[3] In relation, then, to such a subject as a constitution, the natural and obvious sense

[1] *Cohens* v. *Virginia*, 6 Wheat. R. 395 to 401.
[2] The Federalist, No. 83.
[3] The Federalist, No. 83. See Vattel, B. 2, ch 17, § 282.

of its provisions, apart from any technical or artificial rules, is the true criterion of construction.[1]

§ 449. XIV. Another rule of interpretation of the constitution, suggested by the foregoing, is, that the natural import of a single clause is not to be narrowed, so as to exclude implied powers resulting from its character, simply because there is another clause, which enumerates certain powers, which might otherwise be deemed implied powers within its scope; for in such cases we are not, as a matter of course, to assume, that the affirmative specification excludes all other implications. This rule has been put in a clear and just light by one of our most distinguished statesmen; and his illustration will be more satisfactory, perhaps, than any other, 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 captures,' &c. from offending neutrals. So, also, a power 'to coin money' would, doubtless, include that of 'regulating its value,' had not the latter power been expressly inserted. The term *taxes*, if standing alone, would certainly have included 'duties, imposts, and excises.' In another clause it is said, 'no tax or duty shall be laid on exports.' Here the two

[1] The Federalist, No. 83.

terms are used as synonymous. And in another clause, where it is said 'no state shall lay any imposts or duties,' &c. the terms *imposts* and *duties* are synonymous. Pleonasms, tautologies, and the promiscuous use of terms and phrases, differing in their shades of meaning, (always to be expounded with reference to the context, and under the control of the general character and scope of the instrument, in which they are found,) are to be ascribed, sometimes to the purposes of greater caution, sometimes to the imperfection of language, and sometimes to the imperfection of man himself. In this view of the subject it was quite natural, however certainly the power to regulate trade might include a power to impose duties on it, not to omit it in a clause enumerating the several modes of revenue authorized by the construction. In few cases could the [rule], *ex majori cautela*, occur with more claim to respect."[1]

§ 450. We may close this view of some of the more important rules to be employed in the interpretation of the constitution, by adverting to a few belonging to mere verbal criticism, which are indeed but corollaries from what has been said, and have been already alluded to; but which, at the same time, it may be of some use again distinctly to enunciate.

§ 451. XV. In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial research.

[1] Mr. Madison's Letter to Mr. Cabell, 18th September, 1828.

They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.

§ 452. XVI. But, in the next place, words, from the necessary imperfection of all human language, acquire different shades of meaning, each of which is equally appropriate, and equally legitimate; each of which recedes in a wider or narrower degree from the others, according to circumstances; and each of which receives from its general use some indefiniteness and obscurity, as to its exact boundary and extent.[1] We are, indeed, often driven to multiply commentaries from the vagueness of words in themselves; and perhaps still more often from the different manner, in which different minds are accustomed to employ them. They expand or contract, not only from the conventional modifications introduced by the changes of society; but also from the more loose or more exact uses, to which men of different talents, acquirements, and tastes, from choice or necessity apply them. No person can fail to remark the gradual deflections in the meaning of words from one age to another; and so constantly is this process going on, that the daily language of life in one generation sometimes requires the aid of a glossary in another. It has been justly remarked,[2] that no language is so copious, as to supply words and phrases for every complex idea; or so correct, as not to include many, equiv-

[1] See Vattel, B. 2, ch. 17, § 262, § 299.
[2] The Federalist, No. 37.

ocally denoting different ideas. Hence it must happen, that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms, in which it is delivered. We must resort then to the context, and shape the particular meaning, so as to make it fit that of the connecting words, and agree with the subject matter.

§ 453. XVII. In the next place, where technical words are used, the technical meaning is to be applied to them, unless it is repelled by the context.[1] But the same word often possesses a technical, and a common sense. In such a case the latter is to be preferred, unless some attendant circumstance points clearly to the former. No one would doubt, when the constitution has declared, that "the privilege of the writ of *habeas corpus* shall not be suspended, unless" under peculiar circumstances, that it referred, not to every sort of writ, which has acquired that name; but to that, which has been emphatically so called, on account of its remedial power to free a party from arbitrary imprisonment.[2] So, again, when it declares, that in suits at *common law*, &c. the right of trial by jury shall be preserved, though the phrase "common law" admits of different meanings, no one can doubt, that it is used in a technical sense. When, again, it declares, that congress shall have power to *provide* a navy, we readily comprehend, that authority is given to construct, prepare, or in any other manner to obtain a navy. But when congress is further authorized to *provide* for calling forth the militia, we

1 See Vattel, B. 2, ch. 17, § 276, 277.

2 Ex parte *Bollman & Swartout*, 4 Cranch, 75; S. C. 2 Peters's Cond. R. 33.

perceive at once, that the word "provide" is used in a somewhat different sense.

§ 454. XVIII. And this leads us to remark, in the next place, that it is by no means a correct rule of interpretation to construe the same word in the same sense, wherever it occurs in the same instrument. It does not follow, either logically or grammatically, that because a word is found in one connexion in the constitution, with a definite sense, therefore the same sense is to be adopted in every other connexion, in which it occurs.[1] This would be to suppose, that the framers weighed only the force of single words, as philologists or critics, and not whole clauses and objects, as statesmen, and practical reasoners. And yet nothing has been more common, than to subject the constitution to this narrow and mischievous criticism. Men of ingenious and subtle minds, who seek for symmetry and harmony in language, having found in the constitution a word used in some sense, which falls in with their favourite theory of interpreting it, have made that the standard, by which to measure its use in every other part of the instrument. They have thus stretched it, as it were, on the bed of Procrustes, lopping off its meaning, when it seemed too large for their purposes, and extending it, when it seemed too short. They have thus distorted it to the most unnatural shapes, and crippled, where they have sought only to adjust its proportions according to their own opinions. It was very justly observed by Mr. Chief Justice Marshall, in *The Cherokee Nation* v. *The State of Georgia*,[2] that "it has been said, that the same words have not necessarily the same meaning attached to

[1] Vattel, B. 2, ch. 17, § 281. [2] 5 Peters's Rep. 1, 19.

them, when found in different parts of the same instrument. Their meaning is controlled by the context. This is undoubtedly true. In common language, the same word has various meanings; and the peculiar sense, in which it is used in any sentence, is to be determined by the context." A very easy example of this sort will be found in the use of the word "establish," which is found in various places in the constitution. Thus, in the preamble, one object of the constitution is avowed to be "to establish justice," which seems here to mean to settle firmly, to fix unalterably, or rather, perhaps, as justice, abstractedly considered, must be considered as forever fixed and unalterable, to dispense or administer justice. Again, the constitution declares, that congress shall have power "to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies," where it is manifestly used as equivalent to make, or form, and not to fix or settle unalterably and forever. Again, "congress shall have power to establish 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 recognise, found, confirm, or patronize any particular religion, or form of religion, whether permanent or temporary, whether already existing, or to arise in future. In this clause, establishment seems equivalent in meaning to settlement, recognition, or support. And again, in the preamble, it is said, "We, the people, &c. do ordain and establish this constitution," &c. where the most appropriate sense seems to be to

create, to ratify, and to confirm. So, the word "state" will be found used in the constitution in all the various senses, to which we have before alluded. It sometimes means, the separate sections of territory occupied by the political societies within each; sometimes the particular governments established by these societies; sometimes these societies as organized into these particular governments; and lastly, sometimes the people composing these political societies in their highest sovereign capacity.[1]

§ 455. XIX. But the most important rule, in cases of this nature, is, that a constitution of government does not, and cannot, from its nature, depend in any great degree upon mere verbal criticism, or upon the import of single words. Such criticism may not be wholly without use; it may sometimes illustrate, or unfold the appropriate sense; but unless it stands well with the context and subject-matter, it must yield to the latter. While, then, we may well resort to the meaning of single words to assist our inquiries, we should never forget, that it is an instrument of government we are to construe; and, as has been already stated, that must be the truest exposition, which best harmonizes with its design, its objects, and its general structure.[2]

§ 456. The remark of Mr. Burke may, with a very slight change of phrase be addressed as an admonition to all those, who are called upon to frame, or to interpret a constitution. Government is a practical thing made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of

[1] Mr. Madison's Virginia Report, 7 January, 1800, p. 5; ante, § 208, p. 193.

[2] See Vattel, B. 2, ch. 17, § 285, 286.

visionary politicians. The business of those, who are called to administer it, is to rule, and not to wrangle. It would be a poor compensation, that one had triumphed in a dispute, whilst we had lost an empire;[1] that we had frittered down a power, and at the same time had destroyed the republic.

[1] Burke's Letter to the Sheriffs of Bristol in 1777.

CHAPTER VI.

THE PREAMBLE.

§ 457. HAVING disposed of these preliminary inquiries, we are now arrived at that part of our labours, which involves a commentary upon the actual provisions of the constitution of the United States. It is proposed to take up the successive clauses in the order in which they stand in the instrument itself, so that the exposition may naturally flow from the terms of the text.

§ 458. We begin then with the preamble of the constitution. It is in the following words:

"We, the people of the United States, in order "to form a more perfect union, establish justice, insure "domestic 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 exposition of every code of written law, from the universal principle of interpretation, that the will and intention of the legislature is to be regarded and followed. It is properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct overthrow of the intention expressed in the preamble.

§ 460. There does not seem any reason why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the preamble. And accordingly we find, that it has been constantly referred to by statesmen and jurists to aid them in the exposition of its provisions.[2]

§ 461. The language of the preamble of the constitution was probably in a good measure drawn from that of the third article of the confederation, which declared, that "The said states hereby severally enter into a firm *league* of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare. And we accordingly find, that the first resolution proposed, in the convention which framed the constitution, was, that the articles of the confederation ought to be so corrected and enlarged, as to accomplish the objects proposed by their institution, namely, common defence, security of liberty, and general welfare.[3]

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1 Bac. Abridg. Statute I.; 2 Plowden R. 369; 1 Inst. 79.

2 See *Chisholm* v. *Georgia*, Chief Justice Jay's opinion, 2 Dall. 419; 2 Cond. Rep. 635, 671.

3 Journal of Convention, 67; Id. 83.

§ 462. And, here, we must guard ourselves against an error, which is too often allowed to creep into the discussions upon this subject. The preamble never can be resorted to, to enlarge the powers confided to the general government, or any of its departments. It cannot confer any power *per se*; it can never amount, by implication, to an enlargement of any power expressly given. It can never be the legitimate source of any implied power, when otherwise withdrawn from the constitution. Its true office is to expound the nature, and extent, and application 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.[1] But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one would promote, and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation to be adopted? Are we at liberty, upon any principles of reason, or common sense, to adopt a restrictive meaning, which will defeat an avowed object of the constitution, when another equally natural and more appropriate to the object is before us? Would not this be to destroy an instrument by a measure of its words, which that instrument itself repudiates?

[1] Yet, strangely enough, this objection was urged very vehemently against the adoption of the constitution; 1 Elliot's Debates, 293, 300.

§ 463. We have already had occasion, in considering the nature of the constitution, to dwell upon the terms, in which the preamble is conceived, and the proper conclusion deducible from it. It is an act of the people, and not of the states in their political capacities.[1] It is an ordinance or establishment of government and not a compact, though originating in consent, and it binds as a fundamental law promulgated by the sovereign authority, and not as a compact or treaty entered into and *in fieri*, between each and all the citizens of the United States, as distinct parties. The language is, "We, the *people* of the United States," not, We, the *states*, "do *ordain* and *establish*;" not, do *contract* and enter into a *treaty* with each other; "this *constitution* for the United States of America," not this *treaty* between the several states. And it is, therefore, an unwarrantable assumption, not to call it a most extravagant stretch of interpretation, wholly at variance with the language, to substitute other words and other senses for the words and senses incorporated, in this solemn manner, into the substance of the instrument itself. We have the strongest assurances, that this preamble was not adopted as a mere formulary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the government. The obvious object was to substitute a government of the people, for a confederacy of states; a constitution for a compact.[2] The difficulties arising from this source

[1] See 2 Lloyd's Debates, 1789, p. 178, 180, 181.

[2] By a constitution, is to be understood (says Mr. Justice Wilson) a supreme law, made and ratified by those, in whom the sovereign power of the state resides, which prescribes the manner, in which that sovereign power wills that the government should be instituted and administered.*

It contributed not a little to the infirmities of the articles of the confederation, that it never had a ratification by the people. The Federalist, 22.

* 1 Wilson's Lect. 417.

were not slight; for a notion commonly enough, however incorrectly, prevailed, that, as it was ratified by the states only, the states respectively, at their pleasure, might repeal it; and this, of itself, proved the necessity of laying the foundations of a national government deeper than in the mere sanction of delegated power. The convention determined, that the fabric of American empire ought to rest and should rest on the solid basis of the consent of the people. The streams of national power ought to flow and should 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 favour of its adoption. "The constitution," said the Federalist, "is to be founded on the assent and ratification of the people of America, given by deputies elected for that purpose; but this assent and ratification is to be given by the people, not as individuals composing a whole nation, but as composing the distinct and independent states, to which they belong."[2] And the uniform doctrine of the highest judicial authority has accordingly been, that it was the act of the people, and not of the states; and that it bound the latter, as subordinate to the people. "Let us turn," said Mr. Chief Justice Jay, "to the constitution. The people therein declare, that their design in establishing it comprehended six objects: (1.) To form a more perfect union; (2.) to establish justice; (3.) to insure domestic tranquillity; (4.) to provide for the common defence; (5.) to promote the general welfare; (6.) to secure the blessings of liberty to themselves and their posterity. It would," he added, "be pleasing and useful

[1] The Federalist, No. 22; see also No. 43; 4 Elliot's Debates, 75; ante, p. 248.

[2] The Federalist, No. 39; Id. No. 84.

to consider and trace the relations, which each of these objects bears to the others; and to show, that, collectively, they comprise every thing requisite, with the blessing of Divine Providence, to render a people prosperous and happy."[1] In *Hunter* v. *Martin*, (1 Wheat. R. 305, 324,) the Supreme Court say, (as we have seen,) "the constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by the people of the United States;" and language still more expressive will be found used on other solemn occasions.[2]

§ 464. But this point has been so much dwelt upon in the discussion of other topics,[3] that it is wholly unnecessary to pursue it further. It does, however, deserve notice, that this phraseology was a matter of much critical debate in some of the conventions called to ratify the constitution. On the one hand, it was pressed, as a subject of just alarm to the states, that the people were substituted for the states; that this would involve a destruction of the states in one consolidated national government; and would terminate in the subversion of the public liberties. On the other hand, it was urged, as the only safe course for the preservation of the Union and the liberties of the people, that the government should emanate from the people, and not from the states; that it should not be, like the confederation, a mere treaty, operating by requisitions on the states; and that the people, for whose benefit it

[1] *Chisholm* v. *Georgia*, 2 Dall. 419; 2 Cond. R. p. 635, 671.

[2] See *M'Culloh* v. *Maryland*, 4 Wheat. R. 316, 404, 405; *Cohens* v. *Virginia*, 6 Wheat. R. 264, 413, 414; see also 1 Kent's Comm. Lect. 10, p. 189.

[3] Ante, p. 318 to 322.

was framed, ought to have the sole and exclusive right to ratify, amend, and control its provisions.[1]

§ 465. At this distance of time, after all the passions and interests, which then agitated the country have passed away, it cannot but be matter of surprise, that it should have been urged, as a solid objection to a government intended for the benefit of the people, and to operate directly on them, that it was required to be ratified by them, and not by bodies politic created by them for other purposes, and having no implied authority to act on the subject.

§ 466. The constitution having been in operation more than forty years, and being generally approved, it may, at first sight, seem unnecessary to enter upon any examination of the manner and extent, to which it is calculated to accomplish the objects proposed in the preamble, or the importance of those objects, not merely to the whole, in a national view, but also to the individual states. Attempts have, however, been made at different times, in different parts of the Union, to stir up a disaffection to the theory, as well as the actual exercise of the powers of the general government; to doubt its advantages; to exaggerate the unavoidable inequalities of its operations; to accustom the minds of the people to contemplate the consequences of a division, as fraught with no dangerous evils; and thus to

[1] The debates in the Virginia Convention are very pointed on this subject. Mr. Henry, in an especial manner, urged these objections against it in a very forcible manner; (2 Elliot's Virginia Debates, 47, 61, 131;) and he was replied to, and the preamble vindicated with great ability by Mr. Randolph, Mr. Pendleton, Mr. Lee, Mr. Nicholas, and Mr. Corbin. 2 Elliot's Virginia Debates, 51, 57, 97, 98. The subject is also discussed in the North Carolina Debates, (3 Elliot's Deb. 134, 145,) and in the Massachusetts Debates. 1 Elliot's Deb. 72, 110. See also 2 Pitk. Hist. 270; 3 Amer. Museum, 536, 546.

lead the way, if not designedly, at least insensibly, to a separation, as involving no necessary sacrifice of important blessings, or principles, and, on the whole, under some circumstances, as not undesirable or improbable.

§ 467. It is easy to see, how many different, and even opposite motives may, in different parts of the Union, at different times, give rise to, and encourage such speculations. Political passions and prejudices, the disappointments of personal ambition, the excitements and mortifications of party strife, the struggles for particular systems and measures, the interests, jealousies, and rivalries of particular states, the unequal local pressure of a particular system of policy, either temporary or permanent, the honest zeal of mere theorists and enthusiasts in relation to government, the real or imaginary dread of a national consolidation, the debasive and corrupt projects of mere demagogues; these, and many other influences of more or less purity and extent, may, and we almost fear, must, among a free people, open to argument, and eager for discussion, and anxious for a more perfect organization of society, for ever preserve the elements of doubt and discord, and bring into inquiry among many minds, the question of the value of the Union.

§ 468. Under these circumstances it may not be without some use to condense, in an abridged form, some of those reasons, which became, with reflecting minds, the solid foundation, on which the adoption of the constitution was originally vested, and which, being permanent in their nature, ought to secure its perpetuity, as the sheet anchor of our political hopes. Let us follow out, then, the suggestion of Mr. Chief Justice Jay, in the passage already cited.[1]

[1] *Chisholm* v. *Georgia*, 2 Dall. R. 419. — We shall freely use the admirable reasoning of the Federalist on the subject of the Union, with-

§ 469. The constitution, then, was adopted first "to form a more perfect union." Why this was desirable has been in some measure anticipated in considering the defects of the confederation. When the constitution, however, was before the people for ratification, suggestions were frequently made by those, who were opposed to it, that the country was too extensive for a single national government, and ought to be broken up into several distinct confederacies, or sovereignties; and some even went so far, as to doubt, whether it were not, on the whole, best, that each state should retain a separate, independent, and sovereign political existence.[1] Those, who contemplated several confederacies, speculated upon a dismemberment into three great confederacies, one of the northern, another of the middle, and a third of the southern states. The greater probability, certainly, then was of a separation into two confederacies; the one composed of the northern and middle states, and the other of the southern. The reasoning of the Federalist on this subject seems absolutely irresistible.[2] The progress of the population in the western territory, since that period, has materially changed the basis of all that reasoning. There could scarcely now, upon any dismemberment, exist, with a 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 slave-holding from the non-slave-

out in every instance quoting the particular citations, as they would incumber the text.

1 The Federalist, No. 1, 2, 9, 13, 14; 3 Wilson's Works, 285, 286; Paley's Moral and Political Philosophy, B. 4, ch. 6.

2 The Federalist, No. 13, 14.

holding states. Such a distinction in government is so fraught with causes of irritation and alarm, that no honest patriot could contemplate it without many painful and distressing fears.

§ 470. But the material consideration, which should be kept steadily in view, is, that under such circumstances a national government, clothed with powers at least equally extensive with those given by the constitution, would be indispensable for the preservation of each separate confederacy. Nay, it cannot be doubted, that much larger powers, and much heavier expenditures would be necessary. No nation could long maintain its public liberties, surrounded by powerful and vigilant neighbours, unless it possessed a government clothed with powers of great efficiency, prompt to act, and able to repel every invasion of its rights. Nor would it afford the slightest security, that all the confederacies were composed of a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, and possessing similar manners, habits, and customs. If it be true, that these circumstances would not be sufficient to hold them in a bond of peace and union, when forming one government, acting for the interests, and as the representatives of the rights of the whole; how could a better fate be expected, when the interests and the representation were separate; and ambition, and local interests, and feelings, and peculiarities of climate, and products, and institutions, and imaginary or real aggressions and grievances, and the rivalries of commerce, and the jealousies of dominion, should spread themselves over the distinct councils, which would regulate their concerns by inde-

pendent legislation?[1] The experience of the whole world is against any reliance for security and peace between neighbouring nations, under such circumstances. The Abbe Mably has forcibly stated in a single passage the whole result of human experience on this subject. "Neighbouring states," 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 neighbourhood occasions, extinguishing that secret jealousy, which disposes all states to aggrandize themselves at the expense of their neighbours." This passage, as has been truly observed, at the same time points out the evil, and suggests the remedy.[2]

§ 471. The same reasoning would apply with augmented force to the case of a dismemberment, when each state should by itself constitute a nation. The very inequalities in the size, the revenues, the population, the products, the interests, and even in the institutions and laws of each, would occasion a perpetual petty warfare of legislation, of border aggressions and violations, and of political and personal animosities, which, first or last, would terminate in the subjugation of the weaker to the arms of the stronger.[3] In our further observations on this subject, it is not proposed to distinguish the case of several confederacies from that of a complete separation of all the states; as in a general sense the remarks apply with irresistible, if not with uniform, force to each.

§ 472. Does, then, the extent of our territory form

[1] The Federalist, No. 2, 5, 6, 7; 3 Wilson's Works, 286; Paley's Moral and Political Philosophy, B. 4, ch. 6.

[2] The Federalist, No. 6.

[3] The Federalist, No. 5, 6, 7.

any solid objection against forming "this more perfect union?" This question, so far as respects the original territory included within the boundaries of the United States by treaty of peace of 1783, seems almost settled by the experience of the last forty years. It is no longer a matter of conjecture, how far the government is capable (all other things being equal) of being practically applied to the whole of that territory. The distance between the utmost limits of our present population, and the diversity of interests among the whole, seem to have presented no obstacles under the beneficent administration of the general government, to the most perfect harmony and general advancement of all. Perhaps it has been demonstrated, (so far as our limited experience goes,) that the increased facilities of intercourse, the uniformity of regulations and laws, the common protection, the mutual sacrifices of local interests, when incompatible with that of all, and the pride and confidence 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 the appropriate remedy of a confederate republic, (the very form adopted in the constitution,) as the proper means of at once securing safety and liberty with extensive territory.[2] The truth is, that what size is safe for a nation, with a view to the protection of its rights and liberties, is a question, which admits of no universal solution. Much depends upon its local position, its neighbours, its resources, the facilities of invasion, and of repelling invasion, the general state of the world, the means and weapons of warfare, the interests of other nations in preserving or destroying it, and other circumstances, which scarcely admit of enumeration. How far a republican government can, in a confederated form, be extended, and be at once efficient abroad and at home, can ensure general happiness to its own citizens, and perpetuate the principles of liberty, and preserve the substance of justice, is a great problem in the

[1] 1 Montesquieu's Spirit of Laws, B. 9, ch. 1. See also Beccaria, ch. 26.

[2] The Federalist, No. 9; 1 Wilson's Works, 347 to 350; 3 Wilson's Works, 276 to 278.

theory of government, which America is now endeavouring to unfold, and which, by the blessing of God, we must all earnestly hope, that she may successfully demonstrate.

§ 474. In the mean time, the following considerations may serve to cheer our hopes, and dispel our fears. First, (1.) that extent of territory is not incompatible with a just spirit of patriotism; (2.) nor with a general representation of all the interests and population within it; (3.) nor with a due regard to the peculiar local advantages or disadvantages of any part; (4.) nor with a rapid and convenient circulation of information useful to all, whether they are rulers or people. On the other hand, it has some advantages of a very important nature. (1.) It can afford greater protection against foreign enemies. (2.) It can give a wider range to enterprize and commerce. (3.) It can secure more thoroughly national independence to all the great interests of society, agriculture, commerce, manufactures, literature, learning, religion. (4.) It can more readily disarm and tranquillize domestic factions in a single state. (5.) It can administer justice more completely and perfectly. (6.) It can command larger revenues for public objects without oppression or heavy taxation. (7.) It can economise more in all its internal arrangements, whenever necessary. In short, as has been said, with equal truth and force: "One government can collect and avail itself of the talents and experience of the ablest men, in whatever part of the Union they may be found. It can move on uniform principles of policy. It can harmonize, assimilate, and protect the several parts and members, and extend the benefit of its foresight and precautions to each. In the formation of treaties, it will regard the interests of the whole, and the par-

ticular interests of the parts, as connected with that of the whole. It can apply the revenues of the whole to the defence of any particular part, and that more easily and expediciously, 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

§ 475. The union of these states, "the more perfect union" is, then, and must for ever be invaluable to all, in

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 citizens, will be diminished; and consequently, the stability and independence of some member of the government, the only other security, must be proportionably increased. Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit. In a society, under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature, where the weaker individual is not secured against the violence of the stronger. And, as in the latter state, even the stronger individuals are prompted by the uncertainty of their condition to submit to a government, which may protect the weak, as well as themselves: so, in the former state, will the more powerful factions be gradually induced, by a like motive, to wish for a government, which will protect all parties, the weaker, as well as the more powerful. It can be little doubted, that if the state of Rhode-Island was separated from the confederacy, and left to itself, the insecurity of rights, under the popular form of government within such narrow limits, would be displayed by such reiterated oppressions of the factious majorities, that some power, altogether independent of the people, would soon be called for by the voice of the very factions, whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects, which it embraces, a coalition of a majority of the whole society could seldom take place upon any other principles, than those of justice, and the general good; whilst there being thus less danger to a minor, from the will of the major party, there must be less pretext also to provide for the security of the former, by introducing into the government a will not dependent on the latter; or, in other words, a will independent of the society itself. It is no less certain, that it is important, notwithstanding the contrary opinions, which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government. And happily for the republican cause, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the federal principle."

respect both to foreign and domestic concerns. It will prevent some of the causes of war, that scourge of the human race, by enabling the general government, not only to negotiate suitable treaties for the protection of the rights and interests of all, but by compelling a general obedience to them, and a general respect for the obligations of the law of nations. It is notorious, that even under the confederation, the obligations of treaty stipulations, were openly violated, or silently disregarded; and the peace of the whole confederacy was at the mercy of the majority of any single state. If the states were separated, they would, or might, form separate and independent treaties with different nations, according to their peculiar interests. These treaties would, or might, involve jealousies and rivalries at home, as well as abroad, and introduce conflicts between nations struggling for a monoply of the trade with each state. Retaliatory or evasive stipulations would be made, to counteract the injurious system of a neighbouring or distant state, and thus the scene be again acted over with renewed violence, which succeeded the peace of 1783, when the common interests were forgotten in the general struggle for superiority. It would manifestly be the interest of foreign nations to promote these animosities and jealousies, that, in the general weakness, the states might seek their protection by an undue sacrifice of their interests, or fall an easy prey to their arms.[1]

§ 476. The dangers, too, to all the states, in case of division, from foreign wars and invasion, must be imminent, independent of those from the neighbourhood of the colonies and dependencies of other governments on this continent. Their very weakness would invite

[1] The Federalist, No. 2, 3, 4; 3 Wilson's Works, 290.

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 favourable to their interests, or most commanding over their resources.[1]

§ 477. There are also peculiar interests of some of the states, which would, upon a separation, be wholly sacrificed, or become the source of immeasurable calamities. The New-England states have a vital interest in the fisheries with their rivals, England and France; and how could New-England resist either of these powers in a struggle for the common right, if attempted to be restrained or abolished? What would become of Maryland and Virginia, if the Chesapeake were under the dominion of different foreign powers *de facto*, though not in form? The free navigation of the Mississippi and the lakes, and it may be added, the exclusive navigation of them, seems indispensable to to the security, as well as the prosperity of the western states. How otherwise, than by a general union, could this be maintained or guarantied?[2]

§ 478. And again, as to commerce, so important to the navigating states, and so productive to the agricultural states, it must be at once perceived, that no adequate pro-

[1] The Federalist, No. 3, 4, 5.
[2] The Federalist, No. 15.

tection could be given to either, unless by the strong and uniform operations of a general government. Each state by its own regulations would seek to promote its own interests, to the ruin or injury of those of others. The relative situation of these states; the number of rivers, by which they are intersected, and of bays, that wash their shores; the facility of communication in every direction; the affinity of language and manners; the familiar habits of intercourse; all these circumstances would conspire to render an illicit trade between them matter of little difficulty, and would insure frequent evasions of the commercial regulations of each other.[1] All foreign nations would have a common interest in crippling us; and all the evils of colonial servitude, and commercial monopoly would be inflicted upon us, by the hands of our own kindred and neighbours.[2] But this topic, though capable of being presented in detail from our past experience in such glowing colours, as to startle the most incredulous into a conviction of the ultimate poverty, wretchedness, and distress, which would overwhelm every state, does not require to be more than hinted at. We have already seen in our former examination of the defects of the confederation, that every state was ruined in its revenues, as well as in its commerce, by the want of a more efficient government.[3]

§ 479. Nor should it be imagined, that however injurious to commerce, the evils would be less in respect to domestic manufactures and agriculture. In respect to manufactures, the truth is so obvious, that it requires

[1] The Federalist, No. 12. [2] The Federalist, 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.

no argument to illustrate it. In relation to the agricultural states, however, an opinion has, at some times and in some sections of the country, been prevalent, that the agricultural interests would be equally safe without any general government. The following, among other considerations, may serve to show the fallacy of all such suggestions. A large and uniform market at home for native productions has a tendency to prevent those sudden rises and falls in prices, which are so deeply injurious to the farmer and the planter. The exclusive possession of the home market against all foreign competition gives a permanent security to investments, which slowly yield their returns, and encourages the laying out of capital in agricultural improvements. Suppose cotton, tobacco, and wheat were at all times admissible from foreign states without duty, would not the effect be permanently to check any cultivation beyond what at the moment seems sure of a safe sale? Would not foreign nations be perpetually tempted to send their surplus here, and thus, from time to time, depress or glut the home market?

§ 480. Again, the neighbouring states would often engage in the same species of cultivation; and yet with very different natural, or artificial means of making the products equally cheap. This inequality would immediately give rise to legislative measures to correct the evil, and to secure, if possible, superior advantages over the rival state. This would introduce endless crimination and retaliation, laws for defence, and laws for offence. Smuggling would be every where openly encouraged, or secretly connived at. The vital interests of a state would lie in many instances at the mercy of its neighbours, who might, at the same time,

feel, that their own interests were promoted by the ruin of their neighbours. And the distant states, knowing, that their own wants and pursuits were wholly disregarded, would become willing auxiliaries in any plans to encourage cultivation and consumption elsewhere. Such is human nature! Such are the infirmities, which history severely instructs us belong to neighbours and rivals; to those, who navigate, and those, who plant; to those, who desire, and those, who repine at the prosperity of surrounding states.[1]

§ 481. Again; foreign nations, under such circumstances, must have a common interest, as carriers, to bring to the agricultural states their own manufactures at as dear a rate as possible, and to depress the market of the domestic products to the minimum price of competition. They must have a common interest to stimulate the neighbouring states to a ruinous jealousy; or by fostering the interests of one, with whom they can deal upon more advantageous terms, or over whom they have acquired a decisive influence, to subject to a corresponding influence others, which struggle for an independent existence.[2] This is not mere theory. Examples, and successful examples of this policy, may be traced though the period between the peace of 1783 and the adoption of the constitution.

§ 482. But not to dwell farther on these important inducements "to form a more perfect union," let us pass to the next object, which is to "establish justice." This must for ever be one of the great ends of every wise government; and even in arbitrary governments it must, to a great extent, be practised, at least in respect to private persons, as the only security against rebel-

[1] The Federalist, No. 7.

[2] Id. No. 4, 5, 11.

lion, private vengeance, and popular cruelty. But in a free government it lies at the very basis of all its institutions. Without justice being freely, fully, and impartially administered, neither our persons, nor our rights, nor our property, can be protected. And if these, or either of them, are regulated by no certain laws, and are subject to no certain principles, and are held by no certain tenure, and are redressed, when violated, by no certain remedies, society fails of all its value; and men may as well return to a state of savage and barbarous independence. No one can doubt, therefore, that the establishment of justice must be one main object of all our state governments. Why, then, may it be asked, should it form so prominent a motive in the establishment of the national government?

§ 483. This is now proposed to be shown in a concise manner. In the administration of justice, foreign nations, and foreign individuals, as well as citizens, have a deep stake; but the former have not always as complete means of redress as the latter; for it may be presumed, that the state laws will always provide adequate tribunals to redress the grievances and sustain the rights of their own citizens. But this would be a very imperfect view of the subject. Citizens of contiguous states have a very deep interest in the administration of justice in each state; and even those, which are most distant, but belonging to the same confederacy, cannot but be affected by every inequality in the provisions, or the actual operations of the laws of each other. While every state remains at full liberty to legislate upon the subject of rights, preferences, contracts, and remedies, as it may please, it is scarcely to be expected, that they will all concur in the same general system of policy. The natural tendency of every

government is to favour its own citizens; and unjust preferences, not only in the administration of justice, but in the very structure of the laws, may reasonably be expected to arise. Popular prejudices, or passions, supposed or real injuries, the predominance of home pursuits and feelings over the comprehensive views of a liberal jurisprudence, will readily achieve the most mischievous projects for this purpose. And these, again, by a natural reaction, will introduce correspondent regulations, and retaliatory measures in other states.

§ 483. Now, exactly what this course of reasoning has led us to presume as probable, has been demonstrated by experience to be true in respect to our own confederacy during the short period of its existence, and under circumstances well calculated to induce each state to sacrifice many of its own objects for the general good. Nay, even when we were colonies, dependent upon the authority of the mother country, these inequalities were observable in the local legislation of several of the states, and produced heart-burnings and discontents, which were not easily appeased.

§ 484. First, in respect to foreign nations. After the confederacy was formed, and we had assumed the general rights of war as a sovereign belligerent nation, authority to make captures, and to bring in ships and cargoes for adjudication naturally flowed from the proper exercise of these rights by the law of nations. The states respectively retained the power of appointing prize tribunals, to take cognizance of these matters in the first instance; and thus thirteen distinct jurisdictions were established, which acted entirely independent of each other. It is true, that the articles of confederation had delegated to the general

government the authority of establishing courts for receiving and determining, finally, appeals in all cases of captures. Congress accordingly instituted proper appellate tribunals, to which the state courts were subordinate, and, upon constitutional principles, were bound to yield obedience. But it is notorious, that the decisions of the appellate tribunals were disregarded, and treated as mere nullities, for no power to enforce them was lodged in congress. They operated, therefore, merely by moral influence and requisition, and, as such, soon sunk into insignificance. Neutral individuals, as well as neutral nations, were left wholly without any adequate redress for the most inexcusable injustice, and the confederacy subjected to imminent hazards. And until the constitution of the United States was established, no remedy was ever effectually administered.[1] Treaties, too, were formed by congress with various nations; and above all, the treaty of peace of 1783, which gave complete stability to our independence against Great Britain. These treaties were, by the theory of the confederation, absolutely obligatory upon all the states. Yet their provisions were notoriously violated both by state legislation and state judicial tribunals. The non-fulfilment of the stipulations of the British treaty on our part more than once threatened to involve the whole country again in war. And the provision in that treaty for the payment of British debts was practically disregarded in many, if not in all, the state courts. These debts never were enforced, until the constitution gave them a direct and adequate

[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.

sanction, independently of state legislation and state courts.[1]

§ 485. Besides the debts due to foreigners, and the obligations to pay the same, the public debt of the United States was left utterly unprovided for; and the officers and soldiers of the revolution, who had achieved our independence, were, as we have had occasion to notice, suffered to languish in want, and their just demands evaded, or passed by with indifference.[2] No efficient system to pay the public creditors was ever carried into operation, until the constitution was adopted; and, notwithstanding the increase of the public debt, occasioned by intermediate wars, it is now on the very eve of a total extinguishment.

§ 486. These evils, whatever might be their magnitude, did not create so universal a distress, or so much private discontent, as others of a more domestic nature, which were subversive of the first principles of justice. Independent of the unjustifiable preferences, which were fostered in favour of citizens of the state over those belonging to other states, which were not few nor slight, there were certain calamities inflicted by the common course of legislation in most of the states, which went to the prostration of all public faith and all private credit. Laws were constantly made by the state legislatures violating, with more or less degrees of aggravation, the sacredness of private contracts. Laws compelling the receipt of a depreciated

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[1] See 1 Wait's State Papers, 226 to 388; *Ware* v. *Hylton*, 3 Dall. R. 199; *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.

and depreciating paper currency in payment of debts were generally, if not universally, prevalent. Laws authorizing the payment of debts by instalments, at periods differing entirely from the original terms of the contract; laws suspending, for a limited or uncertain period, the remedies to recover debts in the ordinary course of legal proceedings; laws authorizing the delivery of any sort of property, however unproductive or undesirable, in payment of debts upon an arbitrary or friendly appraisement; laws shutting up the courts for certain periods and under certain circumstances, were not infrequent upon the statute books of many of the states now composing the Union. In the rear of all these came the systems of general insolvent laws, some of which were of a permanent nature, and others again were adopted upon the spur of the occasion, like a sort of gaol delivery under the Lords' acts in England, which 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 any thing more than a nominal dividend; and sometimes even this vain mockery was dispensed with.[1] In short, by the operations of paper currency, tender laws, installment laws, suspension laws, appraisement laws, and insolvent laws, contrived with all the dexterous ingenuity of men oppressed by debt, and popular by the very extent of private embarrassments, the states were almost universally plunged into a ruinous poverty, distrust, debility, and indifference to justice. The local tribunals were bound to obey the legislative will; and in the few instances, in which it was resisted, the independence of the judges was sacrificed to the temper

[1] See Chase J. in *Ware* v. *Hylton*, 3 Dall. 199; 1 Cond. R. 99, 111.

of the times.[1] It is well known, that Shays's rebellion in Massachusetts took its origin from this source. The object was to prostrate the regular administration of justice by a system of terror, which should prevent the recovery of debts and taxes.[2]

§ 487. The Federalist speaks on this subject with unusual emphasis. "The loss, which America has sustained from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the states, chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power, which has been the instrument of it."[3] "Laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation."[4] And the Federalist dwells on the suggestion, that as such laws amount to an aggression on the rights of the citizens of those states, whose citizens are injured by them, they must necessarily form a probable source of hostilities among the states. Connecticut retaliated in an exem-

[1] The case of *Trevett* v. *Welden*, in 1786, in Rhode-Island, is an instance of this sort, which is in point, and illustrates the text, though it would not be difficult to draw others from states of larger extent. The judges in that case decided, that a law making paper money a tender in payment of debts was unconstitutional, and against the principles of magna charta. They were compelled to appear before the legislature to vindicate themselves; and the next year (being chosen annually) they were left out of office for questioning the legislative power.

[2] 5 Marshall's Life of Washington, 111, 112, &c.; 2 Pitk. Hist. 214; Minot's History of the Insurrection in Massachusetts.

[3] The Federalist, No. 44. [4] Id.

plary manner upon enormities of this sort, which she thought had been perpetrated by a neighbouring state upon the just rights of her citizens. Indeed, war constitutes almost the only remedy to chastise atrocious breaches of moral obligations, and social justice in respect to debts and other contracts."[1]

§ 488. So, that we see completely demonstrated by our own history the importance of a more effectual establishment of justice under the auspices of a national government.[2]

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[1] The Federalist, No. 7.

[2] The remarks of Mr. Chief Justice Jay in *Chisholm* v. *Georgia*, (2 Dall. R. 419, 474; S. C. 2 Peters's Cond. R. 635, 670,) illustrate the truth of these reasonings in an interesting manner. "Prior to the date," says he, "of the constitution, the people had not any national tribunal, to which they could resort for justice; the distribution of justice was then confined to state judicatories, in whose institution and organization the people of the other states had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction, by whom the errors of state courts, affecting either the nation at large, or the citizens of any other state, could be revised and corrected. Each state was obliged to acquiesce in the measure of justice, which another state might yield to her, or to her citizens; and that, even in cases where state considerations were not always favourable to the most exact measure. There was danger, that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent states, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

"Prior also to that period, the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed. In their national character and capacity, the United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to state courts, and particularly to the courts of delinquent states became apparent. While all the states were bound to protect each, and the citizens of each, it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done to

§ 489. The next clause in the preamble is "to ensure domestic tranquillity." The illustrations appropriate to this head have been in a great measure anticipated in our previous observations. The security of the states against foreign influence, domestic dissensions, commercial rivalries, legislative retaliations, territorial disputes, and the petty irritations of a border warfare for privileges, exemptions, and smuggling, have been already noticed.[1] The very habits of intercourse, to which the states were accustomed with each other during their colonial state, would, as has been justly remarked, give a keener edge to every discontent excited by any inequalities, preferences, or exclusions, growing out of the public policy of any of them.[2] These, however, are not the only evils. In small communities domestic factions may well be expected to arise, which, when honest, may lead to the most pernicious public measures; and when corrupt, to domestic insurrections, and even to an overthrow of the government. The dangers to a republican government from this source have been dwelt upon by the advocates of arbitrary government with much exultation; and it must be confessed, that the history of free governments has furnished but too many examples to apologize for, though not to justify their arguments, drawn not only against the forms of republican government, but against the principles of civil liberty. They have pointed out the brief duration of republics, the factions, by which they have been rent, and the miseries, which they have suffered from distracted councils, and time-serving policy,

each, and the citizens of each; but also to cause justice to be done by each, and the citizens of each; and that, not by violence and force, but in a stable, sedate, and regular course of judicial procedure."

[1] The Federalist, No. 6, 7, 12. [2] Id. No. 7.

and popular fury, and corruption, in a manner calculated to increase the solicitude of every well-wisher to the cause of rational liberty. And even those, who are most favourable in their views, seem to have thought, that the experience of the world had never yet furnished any conclusive proofs in its support.[1] We know but too well, that factions have been the special growth of republics. By a faction, we are to understand a number of citizens, whether amounting to a minority or majority of the whole, who are united by some common impulse of passion, or interest, or party, adverse to the rights of the other citizens, or to the permanent and aggregate interests of the community.[2]

§ 490. The latent causes of faction seem sown in the nature of man. A zeal for different opinions concerning religion, and government, and many other points, both of speculation and practice; an attachment to different leaders; mutual rivalries and animosities; the restlessness of ambition; the pride of opinion; the desire for popular favour; commonly supply a ready origin to factions. And where deeper causes are not at work, the most trivial differences, and the most accidental circumstances, occasionally excite the most severe conflicts. But the most durable, as well as the most alarming form, in which faction has displayed itself, has grown out of the unequal distribution of property. Those, who have, and those, who have not property, have, and must for ever have, distinct interests in society. The relation of debtor and creditor, at all times delicate, sometimes assumes a shape, which threatens the overthrow of the government itself.[3]

§ 491. There are but two methods of curing the mischiefs of faction; the one, by removing its causes,

[1] The Federalist, No. 9. [2] Id. No. 10. [3] Id. No. 10.

which, in a free government, is impracticable without the destruction of liberty; the other, by controlling its effects. If a faction be a minority, the majority may apply the proper corrective, by defeating or checking the violence of the minority in the regular course of legislation. In small states, however, this is not always easily attainable, from the difficulty of combining in a permanent form sufficient influence for this purpose. A feeble domestic faction will naturally avail itself, not only of all accidental causes of dissatisfaction at home, but also of all foreign aid and influence to carry its projects. And, indeed, in the gradual operations of factions, so many combinations are formed and dissolved, so many private resentments become embodied in public measures, and success and triumph so often follow after defeat, that the remnants of different factions, which have had a brief sway, however hostile to each other, have an interest to unite in order to put down their rivals. But if the faction be a majority, and stand unchecked, except by its own sense of duty, or its own fears, the dangers are imminent to all those, whose principles, or interests, or characters stand in the way of their supreme dominion.[1]

§ 492. These evils are felt in great states; but it has been justly observed, that in small states they are far more aggravated, bitter, cruel, and permanent. The most effectual means to control such effects seem to be in the formation of a confederate republic, consisting of several states.[2] It will be rare, under such circumstances, if proper powers are confided to the general government, that the state line does not form the natural, as it will the jurisdictional boundary of the opera-

[1] The Federalist, No. 10. [2] Id. No. 9.

tions of factions. The authority of the general government will have a natural tendency to suppress the violence of faction, by diminishing the chances of ultimate success; and the example of the neighbouring states, who will rarely, at the same time, partake of the same feelings, or have the same causes to excite them into action, will mitigate, if it does not wholly disarm, the violence of the predominant faction.[1]

§ 493. One of the ordinary results of disunion among neighbouring states is the necessity of creating and keeping up standing armies, and other institutions unfavourable to liberty. The immediate dangers from sudden inroads and invasions, and the perpetual jealousies and discords incident to their local position, compel them to resort to the establishment of armed forces, either disproportionate to their means, or inadequate for their defence. Either alternative is fraught with public mischiefs. If they do not possess an adequate military force to repel invasion, they have no security against aggression and insult. If they possess an adequate military force, there is much reason to dread, that it may, in the hands of aspiring or corrupt men, become the means of their subjugation.[2] There is no other refuge in such cases, but to seek an alliance always unequal, and to be obtained only by important concessions to some powerful nation, or to form a confederacy with other states, and thus to secure the co-operation and the terror of numbers. Nothing has so strong a tendency to suppress hostile enterprises, as the consciousness, that they will not be easily successful. Nothing is so sure to produce moderation, as the consciousness, that resistance will steadily maintain the

[1] The Federalist, No. 9, 10.

[2] Id. No. 41.

dictates of justice. Summary, nay, even arbitrary authority, must be granted, where the safety of a state cannot await the slow measures of ordinary legislation to protect it. That government is, therefore, most safe in its liberties, as well as in its domestic peace, whose numbers constitute a preventive guard against all internal, as well as external attacks.

§ 494. We now proceed to the next clause in the preamble, to "provide for the common defence." And many of the considerations already stated apply with still greater force under this head. One of the surest means of preserving peace is said to be, by being always prepared for war. But a still more sure means is the power to repel, with effect, every aggression. That power can scarcely be attained without a wide extent of population, and at least a moderate extent of territory. A country, which is large in its limits, even if thinly peopled, is not easily subdued. Its variety of soil and climate, its natural and artificial defences, nay, its very poverty and scantiness of supplies, make it difficult to gain, or to secure a permanent conquest. It is far easier to overrun, than to subdue it. Armies must be divided, distant posts must be maintained, and channels of supplies kept constantly open. But where the territory is not only large, but populous, permanent conquest can rarely occur, unless (which is not our case) there are very powerful neighbours on every side, having a common interest to assist each other, and to subjugate their enemy. It is far otherwise, where there are many rival and independent states, having no common union of government or interests. They are half subdued by their own dissensions, jealousies, and resentments before the conflict is begun. They are easily made to act a part in the destruction of each other, or

easily fall a prey for want of proper concert and energy of operations.

§ 495. Besides; — The resources of a confederacy must be far greater than those of any single state belonging to it, both for peace and war. It can command a wider range of revenue, of military power, of naval armaments, and of productive industry. It is more independent in its employments, in its capacities, and in its influences. In the present state of the world, a few great powers possess the command of commerce, both on land and at sea. In war, they trample upon the rights of neutrals who are feeble; for their weakness furnishes an excuse both for servility and disdain. In peace, they control the pursuits of the rest of the world, and force their trade into every channel by the activity of their enterprise, their extensive navigation, and their flourishing manufactures. They little regard the complaints of those, who are subvided into petty states with varying interests; and use them only as instruments to annoy or check the enterprise of each other. Such states are not formidable in peace or in war. To secure their rights and maintain their independence they must become a confederated nation, and speak with the force of numbers, as well as the eloquence of truth.[1] The navy or army, which could be maintained by any single state in the Union, would be scarcely formidable to any second rate power in Europe. It would be a grievous public burthen, and exhaust the whole resources of the state. But a navy or army for all the purposes of home defence, or protection upon the ocean, is within the compass of the resources of the general government, without any severe exaction. And

[1] The Federalist, No. 11.

with the growing strength of the Union must be at once more safe for us, and more formidable to foreign nations. The means, therefore, to provide for the common defence are ample; and they can only be rendered inert and inadequate by a division among the states, and a want of unity of operations.[1]

§ 496. We pass, in the next place, to the clause to "promote the general welfare." And it may be asked, as the state governments are formed for the same purpose by the people, why should this be set forth, as a peculiar or prominent object of the constitution of the United States? To such an inquiry two general answers may be given. The states, separately, would not possess the means. If they did possess the means, they would not possess the power to carry the appropriate measures into operation.

§ 497. First, in respect to means. It is obvious, that from the local position and size of several of the states, they must for ever possess but a moderate revenue, not more than what is indispensable for their own wants, and, in the strictest sense, for domestic improvements. In relation to others more favourably situated for commerce and navigation, the revenues from taxation may be larger; but the main reliance must be placed upon the taxation by way of imposts upon importations. Now, it is obvious, from the remarks already made, that no permanent revenue can be raised from this source, when the states are separated. The evasions of the laws, which will constantly take place from the rivalries, and various interests of the neighbouring states; the facilities afforded by the numerous harbours, rivers, and bays, which indent and intersect our coasts; the strong

[1] The Federalist, No. 24, 25.

interest of foreigners to promote smuggling; the want of uniformity in the duties laid by the different states; the means of intercourse along the internal territorial boundaries of the commercial states; these, and many other causes, would inevitably lead to a very feeble administration of any local revenue system, and would make its returns moderate and unsatisfactory. What could New-York do with a single sea-port, surrounded on each side by jealous maritime neighbours with numerous ports? What could Massachusetts, or Connecticut do with the intermediate territory of 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 neighbour, Delaware? What could any single state on the Mississippi do to force a steady trade for itself with adequate protecting duties? In short, turn to whichever part of the continent we may, the difficulties of maintaining an adequate system of revenue would be insurmountable, and the expenses of collecting it enormous. After some few struggles for uniformity, and co-operation for mutual support, each state would sink back into listless indifference or gloomy despondency; and rely, principally, upon direct taxation for its ordinary supplies.[1] The experience of the few years succeeding the peace of 1783 fully justifies the worst apprehensions on this head.

§ 498. On the other hand, a general government, clothed with suitable authority over all the states, could

[1] The Federalist, No. 12.

easily guard the whole Atlantic coast, and make it the interest of all honourable merchants to assist in a regular and punctilious payment of duties. Vessels arriving at different ports of the Union would rarely choose to expose themselves to the perils of seizure, not in a single state only, but in every state, into which the goods might be successively imported. The dangers upon the coast, from the vigilant operations of the revenue officers and revenue vessels, would be great; and they would be much enhanced by the expenses of concealment after the goods were landed.[1] And the fact has corresponded with the theory. Since the establishment of the national government, there has been comparatively little smuggling on our coasts; and the revenue from the duties upon importations has steadily increased with the developement of the other resources of the country.

§ 499. And this leads us to remark, in the next place, that the establishment of a general government is not only beneficial, as a source of revenue, but as a means of economy in its collection, distribution, and expenditure. Instead of a large civil list for each state, which shall be competent of itself to discharge all the functions applicable to a sovereign nation, a comparatively small one for the whole nation will suffice to carry into effect its powers, and to receive and disburse its revenues. Besides the economy in the civil department, we have already seen, how much less actual expenditures will be necessary for the military and naval departments, for the security of all the states, than would be, if each were compelled to maintain at all points its independent sovereignty. No fortifications,

[1] The Federalist, No. 12.

no commanding posts, no naval flotilla will be necessary to guard the states against each other; nor any corps of officers to protect the frontiers of each against invasion, or smuggling. The exterior boundary of the whole Union will be that alone, which will require to be protected at the national expense.[1] Besides; there will be a uniformity of operations and arrangements upon all subjects of the common welfare under the guidance of a single head; instead of multifarious, and often conflicting systems by distinct states.

§ 500. But if the means were completely within the power of the several states, it is obvious, that the jurisdiction would be wanting to carry into effect any great or comprehensive plan for the welfare of the whole. The idea of a permanent and zealous co-operation of thirteen (and now of twenty-four) distinct governments in any scheme for the common welfare, is of itself a visionary notion. In the first place, laying aside all local jealousies and accidental jars, there is no plan for the benefit of the whole, which would not bear unequally upon some particular parts. Is it a regulation of commerce or mutual intercourse, which is proposed? Who does not see, that the agricultural, the manufacturing, and the navigating states, may have a real or supposed difference of interest in its adoption. If a system of regulations, on the other hand, is prepared by a general government, the inequalities of one part may, and ordinarily will, under the guidance of wise councils, correct and meliorate those of another. The necessity of a sacrifice of one for the benefit of all may not, and probably will not, be felt at the moment by the state called upon to make it. But in a general govern-

[1] The Federalist, No. 13, 14.

ment, representing the interests of all, the sacrifice, though first opposed, will, in the end, be found adequately recompensed by other substantial good. Agriculture, commerce, manufactures, may, each in turn, be compelled to yield something of their peculiar benefits, and yet, on the whole, be still each a gainer by the general system. The very power of thus redressing the evils, felt by each in its intercourse with foreign nations, by prohibitory regulations, or countervailing duties, may secure permanent privileges of an incalculable value.[1] And the fact has been, as theoretical reasoning would lead us to suppose. The navigation and commerce, the agriculture and manufactures of all the states, have received an advancement in every direction by the union, which has far exceeded the most sanguine expectation of its warmest friends.

§ 501. But the fact alone of an unlimited intercourse, without duty or restriction, between all the states, is of itself a blessing of almost inconceivable value. It makes it an object with each permanently to look to the interests of all, and to withdraw its operations from the narrow sphere of its own exclusive territory. Without entering here into the inquiry, how far the general government possesses the power to make, or aid the making of roads, canals, and other general improvements, which will properly arise in our future discussions, it is clear, that if there were no general government, the interest of each state to undertake, or to promote in its own legislation any such project, would be far less strong, than it now is; since there would be no certainty, as to the value or duration of such improvements, looking beyond the boundaries of the state.

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[1] The Federalist, No. 11.

The consciousness, that the union of the states is permanent, and will not be broken up by rivalries, or conflicts of policy, that caprice, or resentment, will not divert any state from its proper duties, as a member of the Union, will give a solid character to all improvements. Independent of the exercise of any authority by the general government for this purpose, it was justly foreseen, that roads would be every where shortened and kept in better order; accommodations for travellers would be multiplied and meliorated; an interior navigation on our eastern side would be opened throughout the whole extent of our coast; and, by canals and improvements in river navigation, a boundless field opened to enterprise and emigration, to commerce and products, through the interior states, to the farthest limits of our western territories.[1]

§ 502. Passing from these general considerations to those of a direct practical nature, let us see, how far certain measures, confessedly promotive of the general welfare, have been, or would be, affected by a disunion of the states. Take, for example, the post-office establishment, the benefits of which can scarcely be too strongly stated in respect to the public interests, or to private convenience. With what a wonderful facility it now communicates intelligence, and transmits orders and directions, and money and negotiable paper to every extremity of the Union. The government is enabled to give the most prompt notice of approaching dangers, of its commands, its wishes, its duties, its interests, its laws, and its policy, to the most distant functionaries with incredible speed. Compare this with the old course of private posts, and special expresses. Look

[1] The Federalist, No. 14.

to the extensive advantages to trade, navigation, and commerce, to agriculture and manufactures, in the ready distribution of news, of knowledge of markets, and of transfers of funds, independent of the inestimable blessings of communication between distant friends, to relieve the heart from its oppressive anxieties. In our colonial state it took almost as long a period of time to convey a letter (independent of the insecurity and uncertainty of its transmission) from Philadelphia to Boston, as it now takes to pass from the seat of government to the farthest limits of any of the states. Even under the confederation, from the want of efficient funds and an efficient government, the post moved on with a tardy indifference and delay, which made it almost useless. We now communicate with England, and the continents of Europe, within periods not essentially different from those, which were then consumed in passing from the centre to the eastern and southern limits of the Union. Suppose the national government were now dissolved, how difficult would it be to get the twenty-four states to agree upon any uniform system of operations, or proper apportionment of the postage to be paid on the transmission of the mail. Each state must act continually by a separate legislation; and the least change by any one would disturb the harmony of the whole system. It is not at all improbable, that before a single letter could reach 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 burthens and the insecurity of the establishment would render it intolerable. With what admi-

rable ease, and expedition, and noiseless uniformity of movement, is the whole now accomplished through the instrumentality of the national government!

§ 503. Let us take another example, drawn from the perils of navigation; and ask ourselves, how it would be possible, without an efficient national government, to provide adequately for the erection and support of light-houses, monuments, buoys, and other guards against shipwreck. Many of these are maintained at an expense wholly disproportionate to their advantage to the state, in which they are situate. Many of them never would be maintained, except for the provident forecast of a national government, intent on the good of the whole, and possessing powers adequate to secure it. The same considerations apply to all measures of internal improvement, either to navigation by removing obstructions in rivers and inlets, or by erecting fortifications for purposes of defence, and to guard our harbours against the inroads of enemies.

§ 504. Independent of these means of promoting the general welfare, we shall at once see, in our negotiations with foreign powers, the vast superiority of a nation combining numbers and resources over states of small extent, and divided by different interests. If we are to negotiate for commercial or other advantages, the national government has more authority to speak, as well as more power to influence, than can belong to a single state. It has more valuable privileges to give in exchange, and more means of making those privileges felt by prohibitions, or relaxations of its commercial legislation. Is money wanted; how much more easy and cheap to borrow upon the faith of a nation competent to pay, than of a single state of fluctuating policy. Is confidence asked for the faithful fulfilment

of treaty stipulations; how much more strong the guaranty of the Union with suitable authorities, than any pledge of an individual state. Is a currency wanted at once fixed on a solid basis, and sustained by adequate sanctions to enlarge public or private credit; how much more decisive is the legislation of the Union, than of a single state with a view to extent, or uniformity of operations.

§ 505. Thus we see, that the national government, suitably organized, has more efficient means, and more extensive jurisdiction to promote the general welfare, than can belong to any single state of the confederacy. And there is much truth in the suggestion, that it will generally be directed by a more enlightened policy, a more liberal justice, and more comprehensive wisdom, in the application of its means and its powers to their appropriate end. Generally speaking, it will be better administered; because it will command higher talents, more extensive experience, more practical knowledge, and more various information of the wants of the whole community, than can belong to smaller societies.[1] The wider the sphere of action, the less reason there is to presume, that narrow views, or local prejudices will prevail in the public councils. The very diversities of opinion in the different representatives of distant regions will have a tendency, not only to introduce mutual concession and conciliation, but to elevate the policy, and instruct the judgment of those, who are to direct the public measures.

§ 506. The last clause in the preamble is to "secure the blessings of liberty to ourselves and our posterity." And surely no object could be more worthy of the wisdom and ambition of the best men in any age. If there

[1] The Federalist, No. 27.

be any thing, which may justly challenge the admiration of all mankind, it is that sublime patriotism, which, looking beyond its own times, and its own fleeting pursuits, aims to secure the permanent happiness of posterity by laying the broad foundations of government upon immovable principles of justice. Our affections, indeed, may naturally be presumed to outlive the brief limits of our own lives, and to repose with deep sensibility upon our own immediate descendants. But there is a noble disinterestedness in that forecast, which disregards present objects for the sake of all mankind, and erects structures to protect, support, and bless the most distant generations. He, who founds a hospital, a college, or even a more private and limited charity, is justly esteemed a benefactor of the human race. How much more do they deserve our reverence and praise, whose lives are devoted to the formation of institutions, which, when they and their children are mingled in the common dust, may continue to cherish the principles and the practice of liberty in perpetual freshness and vigour.

§ 507. The grand design of the state governments is, doubtless, to accomplish this important purpose; and there can be no doubt, that they are, when well administered, well adapted to the end. But the question is not so much, whether they conduce to the preservation of the blessings of liberty, as whether they of themselves furnish a complete and satisfactory security. If the remarks, which have been already offered, are founded in sound reasoning and human experience, they establish the position, that the state governments, *per se*, are incompetent and inadequate to furnish such guards and guaranties, as a free people have a right to require for the maintenance of their vital interests, and especially

of their liberty. The inquiry then naturally presents itself, whether the establishment of a national government will afford more effectual and adequate securities.

§ 508. The fact has been already adverted to, that when the constitution was before the people for adoption, it was generally represented by its opponents, that its obvious tendency to a consolidation of the powers of government would subvert the state sovereignties, and thus prove dangerous to the liberties of the people.[1] This indeed was a topic dwelt on with peculiar emphasis; and it produced so general an alarm and terror, that it came very nigh accomplishing the rejection of the constitution.[2] And yet the reasoning, by which it was supported, was so vague and unsatisfactory; and the reasoning, on the other side, was so cogent and just, that it seems difficult to conceive, how, at that time, or at any later time, (for it has often been resorted to for the same purpose,) the suggestion could have had any substantial influence upon the public opinion.

§ 509. Let us glance at a few considerations, (some of which have been already hinted at,) which are calculated to suppress all alarm upon this subject. In the first place, the government of the United States is one of limited powers, leaving all residuary general powers in the state governments, or in the people thereof. The jurisdiction of the general government is confined to a few enumerated objects, which concern the common welfare of all the states. The state governments have a full superintendence and control over the immense mass of local interests of their respective states, which con-

[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, No. 39, 45, 17, 31.

[2] The Federalist, No. 17.

nect themselves with the feelings, the affections, the municipal institutions, and the internal arrangements of the whole population.[1] They possess, too, the immediate administration of justice in all cases, civil and criminal, which concern the property, personal rights, and peaceful pursuits of their own citizens. They must of course possess a large share of influence; and being independent of each other, will have many opportunities to interpose checks, as well as to combine a common resistance, to any undue exercise of power by the general government, independent of direct force.[2]

§ 510. In the next place, the state governments are, by the very theory of the constitution, essential constituent parts of the general government. They can exist without the latter, but the latter cannot exist without them. Without the intervention of the state legislatures, the president of the United States cannot be elected at all; and the senate is exclusively and absolutely under the choice of the state legislatures. The representatives are chosen by the people of the states. So that the executive and legislative branches of the national government depend upon, and emanate from the states. Every where the state sovereignties are represented; and the national sovereignty, as such, has no representation.[3] How is it possible, under such circumstances, that the national government can be dangerous to the liberties of the people, unless the states, and the people of the states, conspire together for their overthrow? If there should be such a conspiracy, is not this more justly to be deemed an act of the states through their own agents, and by their own choice, rather than a corrupt usurpation by the general government?

[1] The Federalist, No. 14, 45. [2] Id. No. 45. [3] Id. No. 45.

§ 511. Besides; the perpetual organization of the state governments, in all their departments, executive, legislative, and judicial; their natural tendency to co-operation in cases of threatened danger to their common liberties; the perpetually recurring right of the elective franchise, at short intervals, must prevent the most formidable barriers against any deliberate usurpation, which does not arise from the hearty co-operation of the people of the states. And when such a general co-operation for usurpation shall exist, it is obvious, that neither the general, nor the state governments, can interpose any permanent protection. Each must submit to that public will, which created, and may destroy them.

§ 512. Another not unimportant consideration is, that the powers of the general government will be, and indeed must be, principally employed upon external objects, such as war, peace, negotiations with foreign powers, and foreign commerce. In its internal operations it can touch but few objects, except to introduce regulations beneficial to the commerce, intercourse, and other relations, between the states, and to lay taxes for the common good. The powers of the states, on the other hand, extend to all objects, which, in the ordinary course of affairs, concern the lives, and liberties, and property of the people, and the internal order, improvement, and prosperity of the state. The operations of the general government will be most extensive and important in times of war and danger; those of the state governments, in times of peace and security.[1] Independent of all other considerations, the fact, that the states possess a concurrent power of taxation, and an

[1] The Federalist, No. 45.

exclusive power to regulate the descents, devise, and distribution of estates, (a power the most formidable to despotism, and the most indispensable in its right exercise to republicanism,) will for ever give them an influence, which will be as commanding, as, with reference to the safety of the Union, they could deliberately desire.[1]

§ 513. Indeed, the constant apprehension of some of the most sincere patriots, who by their wisdom have graced our country, has been of an opposite character. They have believed, that the states would, in the event, prove too formidable for the Union. That the tendency would be to anarchy in the members, and not to tyranny in the head.[2] Whether their fears, in this respect, were not those of men, whose judgments were misled by extreme solicitude for the welfare of their country, or whether they but too well read the fate of our own in the history of other republics, time, the great expounder of such problems, can alone determine.[3]

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1 The Federalist, No. 31.

2 Id. 17, 45, 46, 31.

3 Mr. Turgot appears to have been strongly impressed with the difficulty of maintaining a national government, under such circumstances. In his letter to Dr. Price, he says: "In the general union of the states, I do not observe a coalition, a fusion of all the parts to form one homogeneous body. It is only a jumble of communities too discordant, and *which contain a constant tendency to separation*, owing to the diversity in their laws, customs, and opinions, to the inequality of their present strength, but still more to the inequality of their advances to greater strength. It is only a copy of the Dutch republic, with this difference, that the Dutch republic had nothing to fear, as the American republic has, from the future possible increase of any one of the provinces. All this edifice has been hitherto supported upon the erroneous foundation of the most ancient and vulgar policy; upon the prejudice, that nations and states, as such, may have an interest distinct from the interest, which individuals have to be free, and defend their property against the attacks of robbers and conquerors," &c. &c. Similar views seem to have

The reasoning on this subject, which has been with so much profoundness and ability advanced by the Federalist, will, in the mean time, deserve the attention of every considerate man in America.[1]

§ 514. Hitherto our experience has demonstrated the entire safety of the states, under the benign operations of the constitution. Each of the states has grown in power, in vigour of operation, in commanding influence, in wealth, revenue, population, commerce, agriculture, and general efficiency. No man will venture to affirm, that their power, relative to that of the Union, has been diminished, although our population has, in the intermediate period, passed from three to more than twelve millions. No man will pretend to say, that the affection for the state governments has been sensibly diminished by the operations of the general government. If the latter has become more deeply an object of regard and reverence, of attachment and pride, it is, because it is felt to be the parental guardian of our public and private rights, and the natural ally of all the state governments, in the administration of justice, and the promotion of the general prosperity. It is beloved, not for its power, but for its beneficence; not because it commands, but because it protects; not because it controls, but because it sustains the common interests, and the common liberties, and the common rights of the people.

§ 515. That there have been measures adopted by the general government, which have not met with universal approbation, must be admitted. But was not this

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, No. 45, 46, 31.

difference of opinion to be expected? Does it not exist in relation to the acts of the state governments? Must it not exist in every government, formed and directed by human beings of different talents, characters, passions, virtues, motives, and intelligence? That some of the measures of the general government have been deemed usurpations by some of the states is also true. But it is equally true, that those measures were deemed constitutional by a majority of the states, and as such, received the most hearty concurrence of the state authorities. It is also true, that some measures, whose constitutionality has been doubted or denied by some states, have, at other times, upon re-examination, been approved of by the same states. Not a single measure has ever induced three quarters of the states to adopt any amendment to the constitution founded upon the notion of usurpation.[1] Wherever an amendment has taken place, it has been to clear a real doubt, or obviate an inconvenience established by our experience. And this very power of amendment, at the command of the states themselves, forms the great balance-wheel of our system; and enables us silently and quietly to redress all irregularities, and to put down all practical oppressions. And what is not a little remarkable in the history of the government, is, that two measures, which stand confessedly upon the extreme limits of constitutional authority, and carry the doctrine of constructive power to the last verge, have been brought forward by those, who were the opponents of the constitution, or the known advocates for its most restricted construc-

[1] If there be any exception, it is the decision, as to the suability of the states. But even this deserves not the name of usurpation, for the case falls clearly within the words of the constitution.

tion. In each case, however, they received the decided support of a great majority of all the states of the Union; and the constitutionality of them is now universally acquiesced in, if not universally affirmed. We allude to the unlimited embargo, passed in 1807, and the purchase and admission of Louisiana into the Union, under the treaty with France in 1803.[1] That any act has ever been done by the general government, which even a majority of the states in the Union have deemed a clear and gross usurpation, may be safely denied. On the other hand, it is certain, that many powers positively belonging to the general government, have never yet been put into full operation. So that the influence of state opinions, and state jealousies, and state policy, may be clearly traced throughout the operations of the general government, and especially in the exercise of the legislative powers. This furnishes no just ground of complaint or accusation. It is right, that it should be so. But it demonstrates, that the general government has many salutary checks, silently at work to control its movements; and, that experience coincides with theory in establishing, that it is calculated to secure "the blessings of liberty to ourselves and our posterity."

§ 516. If, upon a closer survey of all the powers given by the constitution, and all the guards upon their exercise, we shall perceive still stronger inducements

[1] 4 Elliot's Debates, 257. — President Jefferson himself, under whose administration both these measures were passed, which were, in the highest sense, his own measures, was deliberately of opinion, that an amendment of the constitution was necessary, to authorize the general government to admit Louisiana into the Union. Yet he ratified the very treaty, which secured this right; and confirmed the laws, which gave it effect. 4 Jefferson's Corresp. 1, 2, 3. — A more particular consideration of these subjects will naturally arise in some future discussions.

to fortify this conclusion, and to increase our confidence in the constitution, may we not justly hope, that every honest American will concur in the dying expression of Father Paul, "Esto perpetua," *may it be perpetual.*

END OF VOL. I.