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A TREATISE
ON
GOVERNMENT
AND
CONSTITUTIONAL
LAW
AMERICAN THEORY

TIFFANY

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1867

A TREATISE

ON

GOVERNMENT,

AND CONSTITUTIONAL LAW

BEING AN INQUIRY INTO THE

SOURCE AND LIMITATION OF GOVERNMENTAL AUTHORITY,

ACCORDING TO THE

AMERICAN THEORY.

BY JOEL TIFFANY.

ALBANY, N. Y.:
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1867.

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PREFACE.

THERE are two theories respecting the source of governmental authority, which may be denominated the Monarchical and the Democratic. The first, is that of the monarch, who claims authority to govern by "*divine right.*" The second, is that of the people, who claim that all governmental authority proceeds from them; that governments derive their authority from the consent of the governed, and are amenable to them. This latter theory is denominated the American Theory; and the following treatise has been constructed upon such hypothesis.

The fundamental principles adhered to in this treatise are: That the people are the source of all governmental authority in the state or nation;—that they are the authors and proprietors of government, which, at most, is an institution created for the specific purpose of exercising such public authority as the people instituting the government see fit to confer;—that the public authority is the authority of society taken as a whole;—that the largest organized civil society is that of the nation;—that the nation, as an organized body, is absolutely sovereign in its authority to institute and endow its government; and, is independent of all other governments in its

organic structure, and self-governing authority;—that national sovereignty must necessarily extend over every inch of its territory, and over all the inhabitants thereof; and must include every iota of governmental authority within its limits;—that the nation has sovereign authority to institute as many, and such governments to administer its authority as it deems wise and good;—and that none can administer within its territorial limits, except by its expressed or implied authority. This theory is applied to the general and state governments in the United States.

JOEL TIFFANY.

ALBANY, 1867.

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INTRODUCTORY.

OF GOVERNMENT.

The American Theory.

SECTION 1. When the people of the American colonies had determined to sever the political ties that bound them to the British government, and to establish for themselves an independent political existence, they asserted certain fundamental principles as the basis of their right to do so; and they specified certain violations of those principles by the British crown as a justification of their conduct in throwing off their allegiance to that government.

§ 2. In their Declaration of Independence, the representatives of the colonies, in Congress assembled, in the name and by the authority of the good people of the colonies, put forth, among others, the following principles, as fundamental to the establishment and maintenance of just governments:

"We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new gov-

ernment, laying its foundations on such principles, and organizing its powers in such forms, as to them shall seem most likely to effect their safety and happiness; that when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under an absolute despotism, it is their right and their duty to throw off such government, and to provide new guards for their future security." (See Dec. Am. Ind.)

§ 3. The principles thus promulgated by that Declaration were accepted by the American people, after mature deliberation and full discussion; and to maintain them they pledged life, fortune and sacred honor, and fought the battles of the revolution.

§ 4. The grounds upon which they based their right to dissolve the political bands that bound them to Great Britain were embraced in the following affirmations of principles and rights:

1. The civil equality of all men.

2. Life, liberty, and the pursuit of happiness are gifts from God to man, and, therefore, the natural and unalienable right of all.

3. Governments derive their just powers from the consent of the governed, and are established for the protection of these rights.

4. When these governments become destructive of the ends for which they are established, they act without authority, and the people may resist and overthrow them.

5. When a government evinces a design to disregard the ends of justice, and seeks to reduce its subjects under an absolute despotism, it is the duty of the people to overthrow it, and establish new guards for their future security.

CHAPTER I.

THE CIVIL EQUALITY OF ALL MEN.

"*We hold these truths to be self-evident, that all men are created equal.*"

§ 5. This proposition separates man from acquirements, and considers him as possessed only of natural endowments; deriving them, with his existence, from God; as having God's warrant for that which he gave to him, and made indispensable to the accomplishment of a perfect destiny. It affirms in simple language, man's *natural* right to the *natural* means of supplying his *natural* necessities. That in these respects, all men are created equal.

§ 6. Man's creation under the divine government as a physical, social, moral, intellectual and religious being, is to be deemed conclusive evidence of his right to exist; and, hence, of his right to all those beneficent provisions which have been made indispensably necessary to the maintenance of such existence, as a physical, social, moral, intellectual and religious being.

§ 7. Man's natural rights are indicated by his natural necessities. As a physical being he is so constituted that he must have the power of locomotion, to maintain himself properly and perfect his physical and other faculties. He is so constituted, naturally, that he must walk because he cannot fly; and he must walk upon the earth because, naturally, he cannot tread the air or walk upon the water. Therefore, these natural necessities become indications of his natural rights. If his nature and constitution compel him to walk upon the earth, he has an indisputable right to walk upon it; and no one is authorized to question that right.[1]

[1] Necessity, when imposed upon us by the very constitution of our being, is above all conventional law. If the Author of our being has given us an existence upon the earth, and has made us constitutionally subject to certain necessities looking to the development, continuation and perfection of our existence, and has provided for us the means of supplying those necessities, he has, thereby, given us a perfect right to the use of those means; a right as

§ 8. Again, man is so constituted that he must breathe the pure air which God has provided, to maintain a healthy existence. It is a necessity which God has imposed upon him, and He has provided the appropriate supply free of expense. Therefore, man has an unalienable right to breathe the pure atmosphere of heaven, and he has God's warrant of authority for the same. Thus it is in respect to the sunlight, the rains and the dews, etc.

§ 9. Man must draw his physical supplies from the earth, gathering them from the gardens of nature as supplied without the labor of man, or produced through cultivation by his labor. In either case the supply must come from the earth. Hence, man has a natural right to have access to the bosom of the earth, that he may draw his necessary supplies therefrom.

§ 10. To maintain his existence and accomplish his destiny, man must exercise in a proper manner, the faculties and powers with which he is naturally endowed. If he must draw his supplies from the earth, he must be permitted to exercise those faculties and powers by which they are to be produced or obtained; and he must be permitted to possess and appropriate the supplies, thus obtained by his own labor or creation, to his own use to supply his needs.

§ 11. By thus making the necessities which God has imposed upon man, a clear indication of his right to use the natural means provided for their supply, we arrive without difficulty at the basis of man's natural rights, and, hence, at a just perception of their natural equality in all men.[1]

absolute as existence itself. The Almighty has not created man upon the earth, and by the very constitution of his existence compelled him to derive his physical subsistence therefrom, without, thereby, giving him an unalienable right to have access to the earth that he may draw his supplies thence. Hence, man's natural right to the use of the earth as a means of supplying his natural necessities, may be claimed as appurtenant to his existence.

[1] To make an inherent necessity an indication, or basis even, of a right, either in the individual or in the state, is no new doctrine. If an individual or state has a right to exist, he or it has, as a necessary incident to such right, the

§ 12. The affirmation that all men are created equal and are endowed by their Creator with certain unalienable rights, is an assertion that all men having the same origin, the same ultimate destiny to seek, and the same means by which to attain that destiny under the divine government, have the same natural necessities; and, hence, the same natural right to supply them. And, therefore, the power which cannot dispense with these necessities, has no authority to deny or question these natural rights.

§ 13. These natural rights are not only equal in all, but they are unalienable. Until man can become superior to his necessities, and can dispense with the means of supplying them, there is no consideration by which he, while he continues to exist, can separate himself from his right to seek their supply. Therefore, his natural rights are as unalienable as his natural necessities are constant. How far these rights may become forfeited will be considered when man is introduced into society and comes under the higher law of social necessity.

§ 14. The doctrine of the natural equality of all men, as indicated by their natural constitutions, implies: 1. That all men have a common origin, and a common destiny; and possess in common the natural means by

authority of the Author of that existence to use all necessary and just means to maintain and defend that existence. When President JEFFERSON assumed that France must not possess the territory of Louisiana, and occupy New Orleans, and that to do so would necessarily involve the two countries in war, he based the morality of his position upon the necessity of the case: to wit, the right on the part of the United States to do that which was indispensable to self-preservation. (See Life of Jefferson, 30, pp. 7, 8 and 9; see also his messages on the purchase of the Louisiana territory; see also *post*, ——.)

Says PUFFENDORF: "Since human nature agrees equally to all persons, and since no one can live a sociable life with another who does not own and respect him as a man, it follows as a command of the law of nature, that every man should esteem and treat another as one who is naturally his equal, or one who is a man as well as he." (Book iii, ch. 2, § 1.) Says Mr. BARBEYRAC, in his note to the same: "For every one having a perfect right to expect that he be regarded and treated as a man, he that doeth otherwise with him does him a real damage. This duty being founded on an immovable condition, namely, that men should be used precisely as men, is not only of general, but of perpetual obligation; insomuch, that notwithstanding all the inequality by the changes and diversity of addition, titles and degrees, the rights of natural equality always remain immovable, and agree to every one in relation to another, whatever condition he is in."

which that destiny is to be accomplished; 2. That it is their common right to use these means without let or hinderance for the accomplishment of that destiny. And as all are to unfold and perfect, if at all, under the divine government by obedience to the same laws, all have a natural and unalienable right to be permitted to obey those laws, physically, intellectually, morally and religiously.

§ 15. From these considerations it follows, that all men are created equal; equal in coming from the hand of the same Creator; equal in being possessed of the same natures, physical, intellectual, social, moral and religious; equal in having before them the same destiny to seek, to wit, the perfection of each of these natures; equal in deriving with their existence, from the hand of their Creator, the right to use the means provided for all for the unfoldment and perfection of these natures.

§ 16. The natural equality of all men does not imply that all have the same advantages which depend upon adventitious circumstances. Under the divine government, the constitution of the son is derived through the constitution of the sire; and the effect not unfrequently extends to the third and fourth generations, called in the decalogue, "visiting the iniquities of the fathers upon the children." This must be so under that government by which individualization is carried forward. It is in obedience to that law by which the individual can progress from the less perfect to the more perfect. If the sire could not transmit his infirmities, he could not transmit his excellencies to his child. The susceptibility to improvement implies the susceptibility to retrogression, which is simply susceptibility to change of condition.[1]

[1] Under the divine government, the laws of generation seem to be uniform, which are, that the offspring shall be begotten into the likeness of the parent; that is, every element, attribute and faculty of the parent is imparted to the offspring. This principle is manifest in the production of individuality in the several kingdoms.

The child necessarily derives its vital and mental constitution through its parents, and especially its mother. When there are no influences to compel a deviation, its vital and spiritual constitution must be in harmony with that of

§ 17. The doctrine of the natural equality of all men implies, that, however weak, feeble or imperfect may be the physical constitution of the individual at birth, there are natural means by which it may be improved; and the individual has the natural right to the use of those means for its improvement and perfection. The same implication is to be made also in respect to the intellectual, social, moral and religious constitution of the individual. He has a natural right to the use of all his powers and faculties to improve his condition, and to seek a perfect destiny. If they are naturally weak owing to unfavorable conditions attending parentage and infancy, so much greater the necessity that he enjoy all the means at hand, and that he be permitted to exercise all the faculties and powers with which he has been endowed to seek his better condition and higher destiny. The doctrine is, that, however unequal the advantages at the commencement of the race, each has an equal right to use the means God has given him, to win the prize.[1]

the mother; for, during the period of gestation, no influence can reach the infant except through her. Hence, ordinarily, the new-born infant is a record of the influences controlling the mother during the period of gestation. When the influence is of a marked character, it is recognized by ordinary observers. Such are instances termed "marking children." In families the differences which characterize children of the same parents, may be accounted for by the difference of *condition* in parents, and of *influencing circumstances* attending the respective periods of the generation, gestation and birth of their children.

This susceptibility to influences affecting the character of the offspring is incident to the law of progress. All individualities are produced under *general* and *special* conditions and relations to outward influences. General conditions and relations mark their general character; and special conditions and relations mark their specific character. Thus arise classes, orders, genera, species and varieties of individuals in the several kingdoms, each gradually advancing toward perfect individuality. From the lowest to the highest these advancing forms can be traced, perfecting in individuality at every step. Along the mighty chain, connecting the lowest with the highest, no link is absent; the chain is unbroken. Each individuality is developed under conditions peculiarly its own, and advances only with advancing conditions. It follows, necessarily, that in respect to physical and mental constitution, in respect to specific endowments, those only can be born equal who are equal in all these accidents of parentage, ante-natal and natal conditions and influences. But these only affect *state* and *degree* of endowment, which are not counted in the scale of *natural* rights. They belong to education and acquirement.

1 "For, as in well ordered commonwealths, one subject may exceed another in riches, or in honor, but all are equal sharers in the common liberty; so,

CHAPTER II.

Life, liberty and the right to seek one's own happiness, are gifts from God to man; and therefore the natural and unalienable right of all.

§ 18. This proposition necessarily follows the conclusion, that life, liberty and the right to seek a perfect destiny are incident to the right to exist. It also follows the conclusion, "that all men are created equal," and, hence, are equally entitled to that which is essential to their well-being and destiny. The proposition itself is so self-evidently true, that it cannot be made more certain by argument. It belongs rather to that class of conscious affirmations called axiomatic truths, than to that other class which are ascertained through a process of ratiocination.

§ 19. If, however, one were disposed to deny or question man's natural right to life, liberty, etc., and to set up an authority to the contrary, he would be obliged to show in some other being a superior right which must necessarily be sacrificed or endangered, by the existence of this right in man. For if this right be essential to the existence, well-being and final destiny of man, and if it does not conflict with any equal or superior right in another being, it cannot be denied or questioned.

§ 20. Whatever is the natural and unalienable right of one man, is the natural and unalienable right of all men. For when it is demonstrated that one man is immortal, it is to be assumed that all men are so, unless exceptions can be pointed out. When it is admitted that life, liberty, &c., are the natural and unalienable rights of one man, there appearing to be no exception, it is to be assumed that they are, likewise, the natural and unalienable rights of all men.

under this regulation of nature, how much soever a man may surpass his neighbors as to bodily or intellectual endowments, he is still obliged to pay all natural duties as readily and fully as he expects to receive them; nor do those advantages give him the least power or privilege to oppress his fellows." (PUFFENDORF, B. 3, ch. 2, § 2.)

§ 21. Again, whoever asserts that one man has natural rights superior to another, and before which the rights of others must yield, assumes an affirmative which cannot be admitted, until it is clearly and logically proved. If he has any special claim to the natural provisions which God has made for supplying the needs of his creatures not possessed in common by his fellows, he must produce his charter from the Almighty, and show by evidence that cannot be questioned, his superior origin, aim and destiny.

§ 22. The natural necessities of all men being the same, their natural rights are likewise the same. And, until it can be shown that a particular man has natural necessities not common to the race, it cannot be claimed that he has natural rights not common to all. In short, until it can be demonstrated that one man has a different origin from another, and is sustained by different means, and has a different destiny to accomplish, it cannot be claimed that he has been endowed with different and superior rights to others.

§ 23. The natural rights of man, as indicated by his natural necessities, are limited only by the equal rights of others; and the limit can generally be ascertained by the inquiry, "Should all others claim and exercise the same natural rights, would there necessarily be any conflict?" For no one can justly claim a natural right so broad that he cannot accord the same to all others; and when he does so, he is trespassing upon the common rights of the race; and he thereby authorizes them, in that respect, to trespass upon him. Therefore, in defining the sphere of individual rights, care must be observed to make the definition broad enough to meet the needs of the individual, and yet not so broad as to conflict with the like rights in others. RIGHT CANNOT CONFLICT WITH RIGHT, NOR CAN TRUTH CONTRADICT TRUTH.[1]

1 Nothing is conformable to the rules of wisdom which, being practiced by every one, becomes hurtful and evil. (Barbeyrac's note on Puf., B. III, ch. 2, § 4, quoting Lactantius' Inst., Div. 1, 3, ch. 23.)

§ 24. Man has that natural right to his life which can, under the same circumstances, be accorded to all other men. And where he has a right to the prolongation of his life, he has, as an incident thereto, the right to seek and use all proper means to support and defend it. When, under what circumstances, and upon what principle, man may forfeit the right to prolong his life, will be fully discussed when the social and governmental problems are under consideration.

§ 25. Liberty is the right to exercise all the faculties and powers with which man is endowed that he may protect himself and provide for his natural necessities; and also to do and perform whatsoever he pleases, so that he does not, in any way, interfere with, or violate the equal rights of, others, or endanger the well-being of society.

§ 26. The extent of man's natural liberty as an individual, is to be ascertained by considering his individual necessities as a physical, intellectual, social, moral and religious being. Whatever these natures may require for their proper development and perfection, he is at liberty so to provide for, as not to interfere with the like right in others. He is at liberty, naturally, to appropriate to his own use so much of that which nature has provided, without the labor of man, as his necessities require. He is at liberty so to bestow his labor, as by the aid of natural forces, to convert to his own use, not only that which is immediately necessary to supply his own wants, and the needs of those dependent upon him, but also to lay up in store for their future necessities. In short, his personal liberty gives him the right to use all his faculties and powers, and to possess himself of all the productions thereof, to the extent that the same right can be accorded to all others without necessitating conflict.

§ 27. Man's right to the enjoyment of perfect liberty as above defined also implies the right to possess himself of the means for defending and maintaining that liberty; and also the right to use the same for that purpose. For the right to enjoy is of no value unaccompanied

with the privilege of maintaining and defending that right. Therefore, when the right to life and liberty are conceded, it follows that every other right essential to the maintenance thereof, is also conceded. For the right to life would be of no value unless accompanied with the right to defend and maintain it; nor can the right to liberty be maintained without the accompanying right of self-defense.

§ 28. Man's right to pursue after or seek happiness, implies his right to acquire and enjoy that upon which his happiness or well-being depends. He can only be happy in the supply of all his needs. There cannot be contentment while the mind feels the demand of necessities it is unable to supply; and in the absence of contentment, there cannot be complete enjoyment. Thus, while there is hunger or thirst, and the means are not to be had to supply the demand, there can be no complete enjoyment. The higher necessities may be so abundantly supplied in the presence of such physical lack, as almost to overcome the lower disquiet; but, nevertheless, the demands of hunger and thirst will make themselves felt, unless consciousness be entirely withdrawn from the physical nature.

§ 29. But there are, also, social, intellectual, moral and religious needs, which must be supplied, to enable man to attain his true destiny; and those needs, unless properly supplied, have their hungerings and thirstings, creating an "aching void." Every nature has its needs, without the supply of which man cannot obtain happiness. The gratification he experiences in the appropriate supply of the need indicated by hunger or thirst, is but one of the many strings vibrating in harmony with his perfect destiny, and tending to produce that state in him known as happiness. When every need of his nature is supplied, so that, physically, intellectually, and affectionally, there is no lack, he will have attained the state of complete happiness. The affirmation, therefore, of the right of man to seek happiness, implies his

right to seek perfection in every department of his being. He has a right to perfect his physical nature, by supplying every need thereof; he has a right to perfect his intellectual nature, by seeking all knowledge; he has a right to perfect his social and affectional nature, by striving to come into true and just relations to man and God.[1]

§ 30. This natural right to seek happiness, and, hence, to employ the means by which alone it can be obtained, gives also the right of property, by means of which, in many respects, man's needs are to be supplied.[2] Man's

[1] Perfect happiness is an incident of a perfected individuality and character, and is the proposed end of every human being. Such destiny is the birthright of all, and hence, the desire for happiness is instinctive in man. But happiness is to be distinguished from mere gratification of desire. That state called desire, looking for gratification independent of the supply of needs, arises from a disregard of the demands of the higher nature, whence arise spiritual hunger and thirst, creating an "aching void,"—uneasiness, discontent—to silence which, gratification is sought, not by the supply of those higher needs, but by the excitation of the lower appetites and passions. This undue excitation tends to disease, suffering and death. This desire for gratification is denominated "lust."

Real happiness can result only from obedience to law. It is a state of consciousness in the individual, realizing the complete supply of everything essential to his present well-being, without regrets for the past or anxiety for the future. It implies a sense of duty performed to one's self, neighbor and God. By obedience of every law of his being, man dwells in the smile of Divine favor, hearing the voice of God saying, "Well done good and faithful servant, enter into the joy of thy Lord." *Perfect* happiness can result only from *perfect* obedience to every law promotive, in the individual, of his *perfect* destiny; consequently, when man seeks happiness through the gratification of his selfish desires, he must not only fail, but must involve himself in a degree of suffering incident to such disobedience of the requirements of his highest destiny. It is to be observed that happiness can never be obtained while it is made the object of pursuit. It can only follow as a result incident to a state or condition in the individual, in harmony with the divine attributes. Hence, happiness cannot properly be made the object of pursuit, except as an incident of perfected condition or state.

[2] *The subject of property, or that to which the doctrine of property relates.* GODWIN, in his treatise on Political Justice, says: "That it relates to all those things that conduce, or may be conceived to conduce, to the benefit or pleasure of man, and which cannot otherwise be applied to the use of one or more persons, than by a permanent or temporary exclusion of the rest of the species. Such things in particular are food, clothing, habitation and furniture. (Vol. 2, p. 415.)

Of the nature of property. PUFFENDORF (B. IV, ch. 4, § 1), says that property is a *moral* quality which does not affect the things themselves, or as to their intrinsic nature, but only produce a moral effect with regard to other persons; and that these qualities, as all others of the same kind, derive their birth from indisposition, &c. That the natural substance of things suffers no alteration, whether property be added to them or taken from them. He defines property

property rights are either in common, or such as belong to him exclusively as an individual. He has a right in common to that which nature has provided without the labor of man, and which is necessary or convenient for his use; to be so exercised, however, as not to interfere with the like right in others. He has a right in common to the use of the earth, and the natural products thereof; to the use of the water, and the natural products of the same; to the use of the sunlight, the air, etc., to be so used as not to interfere with the same right in others. But any appropriation of these natural provisions beyond the requirement of his wants, which necessarily excludes others, cannot be claimed as a natural right.[1]

§ 31. He has also a natural right to the products of his own labor. They are, so to speak, his creations, and he has a title thereto as the producer or creator of such products. This property belongs to the individual, and is not held in common, as in case of mere natural pro-

to be "a right by which the very substance, as it were, of a thing, so belongs to one person, that it doth not in whole belong, after the same manner, to any other." (*Idem*, § 2; see also Kaufmann's Mackeldey's Civil Law, § 260.) He uses the terms "dominion" and "property" as synonymous. The right constituting a thing property, he says, "strictly speaking, inheres in the person from which the things themselves derive some kind of extrinsic denomination." (*Idem.*) But aside from metaphysical disquisitions upon the question, my right of absolute property in a thing implies my right of dominion over, and of appropriation of, the thing; and my property therein, when limited to a particular use, or when qualified by a particular obligation, is not absolute as to the whole thing, but is deemed a limited or qualified property. But of this hereafter. (See *post*, ——; see Kaufmann's Mackeldey's Civil Law, § 260.)

1 Man's right to appropriate those things to his use which God has provided for the supply of his needs, is *absolute* in itself, but is only *inchoate* in respect to the things to be appropriated; and his absolute property in the thing does not commence until the appropriation has taken place. The right to appropriate for the supply of needs is absolute, but this right does not attach to a particular thing until exercised in respect to such thing. This *right*, which he holds in common with all mankind, to the use of those means provided by the Author of his being, without the labor of man, for the supply of his necessities, is, therefore, absolute, but it only attaches to the thing when exercised in respect thereto. Therefore, the right to appropriate must not be confounded with the act of appropriation. Before appropriation, his property in the thing is inchoate and conditional; after appropriation, as above, it is absolute. But this absolute right to appropriate these things made essential to the existence of man, extends only to the supply of his necessities; and when, by so extending this right, he interferes with the like necessary rights of others, he is acting without authority from nature.

ducts, upon which man has bestowed no labor.[1] He has an absolute right to apply to his own use that which he has produced without taxing the labor or invading the rights of others; and he has a natural right to keep or part with the same upon such terms as he thinks proper, subject, however, to such modifications as the rights of society impose.

§ 32. He may have property rights in whatever he takes from the common stock and renders more valuable to himself or to society by the bestowal of his labor upon it. Thus, he may take uncultivated land, and by his labor subdue it, until its products are more suited to the needs of man, or are produced in greater abundance. By so doing, he naturally acquires a property in such land, justly measured by the improved character imparted to it by his labor. The same principle is applicable to every natural thing made more valuable by the labor of man. His exclusive property in anything, naturally, is to be measured by what he has bestowed upon or imparted to it. Rights of property acquired by contract, etc., cannot properly be considered in this place.

CHAPTER III.

OF THE ORIGIN OF GOVERNMENTS.

§ 33. Civil governments are institutions of society, established for the aid and protection of the members thereof; and man's right to use his faculties and powers to provide for his present and future well-being,

[1] This right to the products of one's own labor is absolute, because such products are the creation of the laborer. His title thereto is original, and not derived after the thing has had an existence, as in case of title by appropriation or purchase. His title begins with the beginning of that to which he is entitled. This proposition presupposes the laborer to be the owner of himself, his faculties and his powers; and as such owner, to have the right to dispose of their use for a limited time, or of the products of their use; hence, by contract, he can transfer his title to the products of his labor to another, even before they have an existence, or, which is the same thing, he may hire out to another any lawful use of himself, his faculties and powers.

is the basis of the authority with which civil governments are necessarily invested. Were all men sufficiently wise, powerful and just to understand, respect and perform their various duties to themselves and others, the necessity for human governments would, in a measure, be obviated. But, as men are naturally weak, ignorant and selfish, and are inclined to prefer self to justice, human governments, established upon principles of impartial justice, become a necessity.[1]

§ 34. Man is so constituted, that, living alone, he cannot perfect himself in his social, moral and religious natures. He is constituted for society, and must live in it or fail of his destiny. He may live by himself as an animal, but he cannot as a social, moral and religious being. Hence, society is one of the necessities of his existence, giving birth to a class of rights to which those of the mere individual are necessarily subordinated.[2]

[1] "All men are endowed with certain unalienable rights, among which are life, liberty and the pursuit of happiness; that, for the protection of these rights, governments are instituted among men, deriving their just powers from the consent of the governed." (Declaration of Independence.)

[2] Man is so formed by nature that he cannot supply all his own wants, but necessarily stands in the need of the intercourse and assistance of his fellow creatures, whether for his immediate preservation, or for the sake of perfecting his nature, and enjoying such a life as is suitable to a rational being. (See Vattel's Law of Nations, Prelim., p 45, § 10.)

"The great end of every being endowed with intellect and sentiment, is happiness. It is by the desire alone of that happiness that we can bind a creature possessed of the faculty of thought, and form the ties of that obligation which shall make him submit to any rule. Now, by studying the nature of things, and that of men in particular, we may thence deduce the rules which man must follow in order to attain his great end — to obtain the most perfect happiness of which he is susceptible. We call those rules the natural laws, or the laws of nature. They are certain, they are sacred, and obligatory on every man possessed of reason, independently of every other consideration than that of his nature, and even though we should suppose him totally ignorant of the existence of a God. But the sublime consideration of an eternal, necessary, infinite Being, the Author of the universe, adds the most lively energy to the laws of nature, and carries it to the highest degree of perfection. That necessary being necessarily unites in himself all perfection; he is therefore superlatively good, and displays his goodness by forming creatures susceptible of happiness. It is then his wish that his creatures should be as happy as is consistent with their nature; consequently it is his will that they should, in their whole conduct, follow the rules which that same nature lays down for them as the most certain road to happiness. Thus the will of the Creator perfectly coincides with the simple indications of nature; and those two sources, producing the same law, unite in forming the same obligation. The whole

§ 35. As man is formed for society, and is endowed with faculties and powers which require, for their cultivation and perfection, the presence and aid of his fellow beings, he must submit to all such rules and regulations as are necessary for the establishment and maintenance of social existence and order. Hence, arises the doctrine, that, on coming into society, man, in consideration of the benefits and advantages to be derived therefrom, necessarily surrenders up a portion of his natural liberty.[1] By which is meant, the individual must surrender his claim to such rights and privileges as cannot be exercised consistently with the existence and welfare of society. He must claim for himself the exercise of no liberty which cannot be accorded to all others.

§ 36. Man must be faithful to himself if he would fulfill the destiny for which he is created. Every endow-

reverts to the first great end of man, which is happiness. It was to conduct him to that great end that the laws of nature were ordained; it is from the desire of happiness that his obligation to observe those laws arises. There is, therefore, no man—whatever may be his ideas respecting the origin of the universe, even if he had the misfortune to be an atheist—who is not bound to obey the laws of nature. They are necessary to the general happiness of mankind; and whoever should reject them, whoever should openly despise them, would, by such conduct alone, declare himself an enemy to the human race, and deserve to be treated as such. Now, one of the first truths which the study of man reveals to us, and which is a necessary consequence of his nature, is, that, in a state of lonely separation from the rest of his species, he cannot attain his great end, happiness; and the reason is, he was intended to live in society with his fellow creatures. Nature herself, therefore, has established that society, whose great end is the common advantage of all its members; and the means of attaining that end constitute the rules that each individual is bound to observe in his whole conduct. Such are the natural laws of human society." (See note on 43d p. Vattel's Law of Nations.)

1 BLACKSTONE, in his Commentaries (1 B., p. 125), has the following: The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists, properly, in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endowed him with the faculty of free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. * * * Political or civil liberty, therefore, is no other than natural liberty so far restrained by human laws—and no farther—as is necessary and expedient for the general advantage of the public. (1 Bl. Com., 125.)

ment of body and of mind is absolutely essential to the accomplishment of his true destiny. Therefore, he cannot surrender, on coming into society, any essential liberty or right. As his natural rights have their basis in his natural necessities, so far as society modifies or dispenses with these necessities, to that extent his natural rights are modified or changed. But he surrenders no essential right; he loses no privilege of injuring another, or of interfering with the equal rights of others.[1]

§ 37. The natural necessities of the individual while isolated from society, or dwelling in a savage state, are different from those of one enjoying the advantages of a high civilization. And the natural necessities being different, the natural rights incident to those necessities, are likewise different. The man advancing from a savage to a civilized condition does not thereby surrender the natural rights incident to his native state. Having put off his primitive condition, he has also put off with it, the incidents thereof, or, in other language, the condition ceasing, the incidents thereof cease with it.[2]

§ 38. Society being necessary to the individual to enable him to fulfill his true destiny, he has, as an incident, all the rights necessarily involved in the establishment and regulation of the society demanded. It being a natural necessity, it must be established upon such foundations as will secure its continuance, and

[1] "Moral or natural liberty is the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and that they do not any way abuse it to the prejudice of any other men." (Burlamaqui, ch. 3, § 15.)

[2] "The *libertas quidlibet faciendi*, or the liberty of doing everything which the passions of man may urge him to attempt, or his strength enable him to effect, is savage ferocity; it is the liberty of the tiger, and not the liberty of man." (Sharswood's note to 1 Bla. Com., p. 126.)

Man created in the image of his Maker, and, through his constitution, made the subject of moral government, is, by nature, invested with no liberty or endowed with no rights inconsistent with the requirements of that government to which he is subject. It would be a perversion of reason to say that man had the liberty or right to commit a wrong because the Almighty had intrusted him with power to do so.

enable it to accomplish the purposes for which it is constituted. And man coming into, and becoming a member of, civilized or enlightened society, and participating in its benefits as a refining and civilizing institution, ceases to be a savage; consequently the rights incident to the savage state cease to exist; not so much by a surrender of the right or liberty, as by a destruction of that condition out of which it arose.

§ 39. That society which is adapted to the natural necessities of the individual, must establish its foundations in natural justice. It must permit no necessary liberty or right of the individual to be abridged. It must not hinder him in the pursuit of a perfect destiny, and, hence, must not embarrass him in seeking the supply of his essential needs. Those necessities of the individual which call for the existence of society, require it for purposes of aid and protection. Therefore, society must be so constituted and used as not to interfere with the essential rights or liberties of the individual members thereof.

§ 40. Civil liberty consists in the right to seek after, and employ, every means essential to the perfection of the individual in every department of his being. Civil governments are instituted for the purpose of protecting man in the exercise of such liberty, and also for aiding him when such aid can be given without encroaching upon the equal liberty of others. Man is entitled to no greater liberty than that which leaves him free to seek the end for which he was created; and no government can be authorized to restrain him in the exercise of such liberty. A true civil government, therefore, is one so instituted and administered as leaves every subject thereof free to seek the supply of every need, and protects him in such endeavor.[1]

1 Civil liberty is "that of a member of society, and is no other than natural liberty so far restrained by human laws—and no farther—as is necessary and expedient for the general advantage of the public." (1 Bla. Com., 125.)

"Civil liberty is the not being restrained by any law but what conduces in a greater degree to the public welfare." (Paley on Civil Liberty, B. 6, c. 5.)

§ 41. Civil liberty, then, consists in living under the protection of a civil government, where the subject is left free to exercise fully all his faculties and powers in seeking the perfection of his being, or the attainment of a perfect destiny; and where he is fully protected in the exercise and enjoyment of such rights. A true government cannot restrain its subjects, as such, in the exercise of any individual right.[1] For government is not authorized to make unnecessary requirements of its subjects; and those which are essential to the existence and well-being of society, the subject has no individual right to retain or claim.[2]

§ 42. Society can have no rights not essentially in harmony with the rights of its individual members. For God, having ordained society as necessary for the perfection of the individual, has placed social and individual rights upon the same basis. The necessities of the individual give birth to those of the social. Hence, there must be agreement between individual

1 The terms "civil" liberty and "civil" rights, and "political" liberty and "political" rights, are usually treated as synonymous. In this work they will be carefully distinguished. By "civil" liberty and "civil" rights will be understood the liberty and rights appurtenant to the individual as a member of society and subject of civil government, whether he be an infant or an adult, a male or a female, a native or an alien. By "political" liberty and "political" rights are meant those rights and privileges conferred upon the subject by the government. That is, "civil" rights inhere in the individual; "political" rights are conferred upon him. "Civil" rights are a natural endowment; "political" rights are a *governmental* one. Government must concede "civil" rights and "civil" liberty to all; it confers political rights according to its discretion. This principle has its foundation in the law of necessity. The government must determine upon whom, and upon what conditions, it is safe to confer political power, having in view the existence and highest good of society; but it must respect the "civil" liberty and "civil" rights of all, or defeat the very end of its existence.

2 "Every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny; nay, even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of indifference, without any good end in view, are regulations destructive of liberty." (1 Bla. Com., 126.)

The right to regulate or constrain the conduct of the individual in one thing indifferent, implies the same right in all things, which would necessarily be destructive of all liberty and right in the subject. The exercise of such power is the characteristic of despotism; and it does not properly belong to a legitimate civil government, which derives all its right to govern upon the theory of a public authority created on account of a public necessity.

and social necessities — and, therefore, between individual and social rights — and civil government performs its office most perfectly when it so administers as not to abridge the rights of any of its subjects.

§ 43. Civil government is a necessity of society, and, hence, the necessity of every individual member thereof. Therefore, everything essential for the establishment and maintenance of such government becomes a like necessity. Whatever right or power is demonstrated to be indispensable to its existence and maintenance, society can properly confer upon it. Therefore, society has sovereign authority to invest civil government with every right and power essential to its existence and just administration; and the highest government thus constituted must have sovereign authority, absolute within such limits, and for such purposes.

§ 44. Every civil society must necessarily establish a public authority, under which its common affairs are to be regulated, and the civil conduct of each member, in respect to the public welfare, is to be prescribed. This authority belongs essentially to the whole body of the society, until it is vested in those intrusted with the administration of its government. But as soon as society institutes its government, and determines the mode of its administration, the public authority is vested therein, and can only be exercised thereby.[1]

§ 45. The fundamental regulations which determine the manner in which the public authority is to be executed, form the constitution of the government. And society, having instituted its government, determined the fundamental regulations by which it is to be administered, and invested it with the public authority, is bound by it, and must itself submit to that authority.

[1] All the members of a state cannot be called together to be consulted or to vote upon the enactment of its laws; or upon the adjudication or execution of them, and if they could be consulted, upon all questions of this character, they would not be able to agree unanimously. Hence, there must be an established public authority by which the laws of society are to be enacted, adjudged and executed, without which society could not exist.

It can, then, exercise its authority, civilly, in no other way, for, politically considered, the government represents, or stands for the society.[1]

§ 46. Between the body of society, and the government instituted by it, there is a manifest distinction. Society institutes its government and invests it with the public authority; and the government thus instituted executes that authority in the manner prescribed. Hence, while the body of society is the source of the authority, it is not the government itself, and it can execute the public authority only in the manner prescribed.[2]

CHAPTER IV.

Of the Nature of Governments, and their Natural Rights.

§ 47. Whatever may be the form of the government established by society, it is instituted to be intrusted with the execution of the public authority. By the act of association each citizen subjects himself to the authority of the entire body in everything relating to the common welfare.[3] The public authority emanates from the entire body of society, which, to be executed, must be vested somewhere; and wherever that authority is vested, there is to be found the government of that society. Therefore, while the authority of all over each member, belongs essentially to the body politic or

[1] For the necessity requiring society to establish a public authority, also requires it to submit to the execution of that authority in the manner and form prescribed. Where the constitution prescribes the manner in which the national authority is to be executed, or its fundamental laws are to be modified or repealed; or, in which the national will is to be ascertained, the nation is thereby estopped from adopting any other method, except by overturning the established authority, which is equivalent to revolution.

[2] "It is evident that, by the very act of civil or political association, each citizen subjects himself to the authority of the entire body in everything that relates to the common welfare. The authority of all over each member, therefore, essentially belongs to the body politic or state; but the exercise of that authority may be placed in different hands, according as the society may have ordained. (Vattel, B. 1, ch. 1, § 2.)

[3] Vatt. L. of N., B. 1, ch. 11, § 2.

state, the exercise of that authority may be placed in different hands, according as society ordains.[1]

§ 48. Society determines the form of its government, that is, the body to which the execution of the public authority is committed, which may be democratic, aristocratic or monarchical: that is, the public authority may be vested in a number of men elected by the people; or in a particular or select class of the people; or in a single individual; or the government may be a combination or a modification of these three kinds. But whatever its form or constitution, it is created for the purpose of executing the public authority; and derives its authority to act in the premises, from the body of society.[2]

§ 49. From the nature and constitution of men, and from their situation upon the earth, there must necessarily be many independent societies or nations. It is manifestly impossible for the whole race to dwell together in a single society, or to become subjects of a single civil government. No one government could adapt its administration to all; nor could it execute the public authority upon all. Hence, from necessity, the race must be gathered into many independent societies or nations; and governments must be devised adapted to the conditions and necessities of these various societies; and hence, being separate from, and independent of, each other, each must be sovereign within its own limits.

§ 50. The largest societies of men civilly associated together constitute nations: consequently, the highest public authority to be executed by any civil government is the authority of the nation. As nations are consti-

1 Idem.

2 "In Europe, sovereignty is of feudal origin, and imports no more than the state of the sovereign. It comprises his rights, duties, exemptions, prerogatives and powers. But with us, all power is with the people. They alone are sovereign; and they erect what government they please. None of these governments are sovereign in the European sense of the word, all being restrained by written constitutions." (See WEBSTER'S reply to CALHOUN, in the Senate of the U. S., Feb. 16, 1833.)

tuted of societies composed of the largest number of individuals civilly associated together, and as the public authority consists of the authority of all over each, it follows that the public authority of the nation is sovereign within its limits.[1]

§ 51. Sovereignty is the supreme authority and power by which a state is governed.[2] It implies the right of commanding in the last resort.[3] As an attribute of civil government, it is the right of commanding civil society in all matters pertaining to the public welfare, in the last resort; which right the members of such society have conferred on one and the same person — which may be an individual or a body corporate — with a view to preserve order and security in the commonwealth;

[1] It does not follow that all national societies are equally numerous, wealthy or powerful. One nation may be much inferior to another in each of these particulars — may, in fact, be obliged to seek alliance with another and more powerful nation, to protect itself against the encroachments of other powers. But this does not abridge its sovereignty or lessen its authority to command within its own limits, or its right to claim its position in the family of nations. Nations, as individuals, may differ in wisdom, wealth and power; but, like individuals, they are also equal in their rights as sovereign states, which do not depend upon considerations of that character. Says VATTEL (Prelim., § 15), "Nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not, in this respect, produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom."

From the very design that induces a number of men to form a society which has its common interests, and which is to act in concert, it is necessary that there should be established a public authority to order and direct what is to be done by each in relation to the end of the association. This political authority is the sovereignty; and he or they who are invested with it are the sovereign. (Vattel, B. 1, ch, 1, § 1.)

[2] "Sovereignty is that public authority which has no superior, and which commands in an independent civil society, ordering and directing what each must do to acquire its ends. It is the union of all the powers; it is the power to do any and everything in a state, without being accountable to any one." (Bouv. Inst., vol. 1, p. 8. See, also, Lawrence Wheat., p. 35; also note 1 to § 49, *ante*.)

[3] This right of commanding in the last resort must not be the subject of appeal to other authority. It must include the right to command each and every member of the nation, or all residing within its local jurisdiction, in all matters in any way pertaining to the public welfare, without authority left in any one or anywhere, to resist. For if its authority may be resisted, then there must be superior authority within the same jurisdiction. This is impossible. For the nation being the highest form of civil society, its government is the highest in authority, and is, therefore, supreme. (See, also, Burlamaqui, P. L., ch. 5, § 3; Vattel, B. 1, ch. 1, § 4.)

to promote the general welfare, and to secure the blessings of liberty.[1]

§ 52. To entitle a society to rank as a nation, and to figure in the family of nations, it must become actually sovereign and independent within the limits of its assumed jurisdiction. It must have the power to command therein in the last resort. It must have instituted a government and invested it with sovereign authority; and before it can claim recognition, it must give *prima facie* evidence of its ability to execute the public authority against all resistance within its limits.

§ 53. Before a society is morally entitled to attempt establishing for itself an independent national existence, there must exist a necessity for it so imperative that the failure to establish it would be a public misfortune. That is, the social necessity for it must be such that it cannot be otherwise supplied.

§ 54. That social necessity which calls for the establishment of a nation as a sovereign and independent

[1]See Preamble to Const. U. S., also Burlamaqui P. of Pol. Law, chap. 5, §§ 1, 2, 3, 4.

"This supreme authority may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any state, or vested in its rulers by its municipal constitution or fundamental law. This is the object of what has been called 'INTERNAL PUBLIC LAW,' but which may more properly be termed 'CONSTITUTIONAL LAW.' External sovereignty consists in the independence of one political society in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace or war, with all other political societies. The law by which it is regulated has, therefore, been called 'EXTERNAL PUBLIC LAW,' but more properly termed 'INTERNATIONAL LAW,' (Lawrence Wheat. Int'l Law, pp. 35 and 36.)

The rules applicable to the establishment of nations are quite similar to those by which the natural rights of the individual are determined. No nation should arrogate to itself rights and privileges in its institution, establishment and administration which cannot be awarded to all other nations. For, as all are equally sovereign and independent, and are to co-exist as such, they must mutually recognize this sovereignty as belonging to each, and must consider the necessary incidents of sovereignty as being the same in each and all. The logic is this: If God has made the existence of nations upon the earth a necessity, then must the nations be entitled to territorial locations upon the earth, and to such locations as are suited to their existence and security; and he has clothed each nation with those natural rights which are essential to establish, maintain and perfect its existence, and to accomplish the purposes for which it has been established; and these rights, naturally incident to the sovereign and independent condition of the several nations, must harmonize; so that, if observed, the highest interest of each nation could be secured.

state, naturally limits it to the occupation of such territory as is essential to enable it to fulfill the purpose for which it was established, and to maintain and perpetuate its existence. It has a natural right to so much territory as is not occupied by, or is not essential to, the existence and safety of an existing nation. For, if the establishment of a particular nation as a sovereign and independent state is a necessity of society, then has society a natural right to such boundaries as are essential to its existence and security.

§ 55. The necessity requiring the establishment of independent societies or nations, has its limits in those principles essential to the existence, security and preservation of the nation when established. Whatever is essential to national existence and security, must attend the right to establish a nation. Hence, in asserting the right to establish a new nation, the right to everything essential to the existence and security of that nation, must also be considered. If such essential rights cannot be asserted and maintained without violating other essential principles and rights, the moral right to establish such nation is not perfect.

§ 56. Territorial extent, natural limits, homogeneousness of people, indicating a geographical, moral and commercial unity, suited to form one nation, are among the essentials to a healthy, prosperous and secure political existence as a nation.[1] Neither requisite may be perfect, naturally; but each should be so nearly so, that the spirit and genius of the people can readily supply that which is lacking.

§ 57. That social necessity which requires the establishment of a nation, demands that it shall be so established and located as to secure permanence and safety. This demand is as imperative as the necessity calling for its existence. Hence, a nation is under the highest obligations to itself to provide, in every way

[1] See "State Rights," a Photograph from the ruins of ancient Greece," by Prof. Tayler Lewis, LL. D., pp. 5, 6, 7, 8, &c.

possible, for its own perpetuity and security. It must seek such natural boundaries as indicate separation and are most easily defended. It must secure to itself means of external communication with the civil, social and commercial world; and, hence, should hold in its own hands the key by which such communication is secured.[1]

[1] Some of these considerations are alluded to by President LINCOLN in his Annual Message to Congress, December 1, 1862.

"Physically speaking we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them." * * * "There is no line, straight or crooked, suitable for a national boundary upon which to divide. Trace through from east to west upon the line between the free and slave country, and we shall find a little more than one-third of its length are rivers easy to be crossed, and populated, or soon to be populated, thickly upon both sides; while nearly all its remaining length are merely surveyor's lines over which people may walk back and forth without any consciousness of their presence. No part of this line can be made more difficult to pass by writing it down on paper or parchment as a national boundary." * * *

"There is another difficulty. The great interior region bounded east by the Alleghanies, north by the British dominions, west by the Rocky Mountains, and south by the line along which the culture of corn and cotton meets, and which includes part of Virginia, part of Tennessee, all of Kentucky, Ohio, Indiana, Michigan, Wisconsin, Illinois, Missouri, Kansas, Iowa, Minnesota, and the Territories of Dakota, Nebraska and part of Colorado, already has about ten millions of people, and will have fifty millions within fifty years, if not prevented by any political folly or mistake. It contains more than one-third of the country owned by the United States. Certainly more than one million of square miles. Once half as populous as Massachusetts already is, it would have more than seventy-five millions of people. A glance at the map shows, that territorially speaking, it is the great body of the Republic. The other parts are but marginal borders to it, the magnificent region sloping west from the Rocky Mountains to the Pacific being the deepest, and also the richest in undeveloped resources. In the production of provisions, grains and grasses, and all which proceed from them, this great interior region is naturally one of the most important of the world. Ascertain from the statistics the small proportion of the region which has as yet been brought into cultivation, and also the large and rapidly increasing amount of its products, and we shall be overwhelmed with the magnitude of the prospect presented. And yet this region has no seacoast, touches no ocean anywhere. As part of one nation, its people now find, and may forever find, their way to Europe by New York; to South America and Africa by New Orleans, and to Asia by San Francisco. But separate our common country into two nations, as designed by the present rebellion, and every man of the great interior region is thereby cut off from some one or more of these outlets, not perhaps by a physical barrier, but by embarrassing and onerous trade regulations."

"And this is true wherever a dividing or boundary line may be fixed. Place it between the now free and slave country, or place it south of Kentucky or north of Ohio, and still the truth remains that none south of it can trade to any port or place north of it, except upon terms dictated by a government foreign to them. Those outlets east, west and south, are indispensable to the well-being of the people inhabiting and to inhabit this vast interior region. Which of the three may be the best is no proper question. All are better than either, and all of right belong to that people and to their successors forever.

§ 58. The duty of self-protection and self-preservation which a nation owes to itself, requires that it should prevent any other power taking a position in reference to itself, by which its security or prosperity could be made dependent upon a foreign will. Hence, it has a right to demand that another nation shall not, unnecessarily, take such a position or occupy such territory, as will give it power over the existence, security or prosperity of its own people.[1]

§ 59. A State[2] consists of an association of individuals united together under an organized government,[3] instituted to aid and protect the members thereof in the exercise of their civil liberty and the enjoyment of their just rights; and for that purpose, intrusted with the execution of the public authority.[4] In its organic exist-

True to themselves, they will not ask *where* a line of separation shall be, but will vow rather, that there shall be no such line. Nor are the marginal regions less interested in those communications to and through them to the great outside world. They too, and each of them, must have access to this Egypt of the west without paying toll at the crossing of any national boundary."

"Our national strife springs not from our permanent part; not from the land we inhabit; not from our national homestead. There is no possible severing of this, but would multiply, and not mitigate, evils among us. In all its adaptations and aptitudes, it demands union and abhors separation. In fact it would ere long force re-union, however much of blood and treasure the separation might have cost."

[1] See the letter of President JEFFERSON to the American Minister in France—Mr. LIVINGSTON—dated April 18, 1802, touching the cession of Louisiana and the Floridas by Spain to France. (Life of JEFFERSON by RANDALL, vol. 3, p. 6.) The position taken by the President is, substantially, that the United States cannot permit France to possess the mouth of the Mississippi, &c.; the right of self-preservation prohibited it. See, also, his message to Congress on that subject. Necessity is above conventional law.

[2] The term state and nation are here used synonymously.

[3] "The government of a state is that organization in which the political power resides. It is the political being created by the Constitution or fundamental law. A government is a body politic; it has a will of its own; and it possesses powers and faculties to execute its own purposes." (WEBSTER'S speech in U. S. Senate, February 16, 1833.)

[4] BURLAMAQUI says: "The state may be defined a society by which a multitude of people unite together under an organized government in order to find, through its protection and care, the happiness to which they naturally aspire." (Polit. Law, ch. 4, § 9.)

VATTEL says: "A nation or state is a body politic or society of men, united together for the purpose of promoting their mutual safety and advantage, by their combined strength." (Law of Nations, B. 1, ch. 1, § 1.)

CICERO gives substantially the same definition. (De Rep., 1, § 25.)

TULLY says: "Multitudo juris consensu, et utilitatis communione sociata."

ence, it is a body corporate, having an individual will, purpose and power, by which only it can be known in its volitions, purposes and actions.[1]

§ 60. Nations, as sovereign states, are bodies corporate, free and independent, living together as equal members of the universal national family, having no superior except nature and God, under whom they exist and by whose laws they must be governed to perpetuate that existence. Hence, they are to be considered as so many persons living together in a state of nature, free and unrestrained, except so far as governed by the end for which they were created, under the laws of nature thereto applicable.

[1] Two things are essential to the formation of a sovereign state. (1.) It is necessary to unite permanently the wills of all the members of the society in such a manner, that from that time forward they should never desire but one and the same thing, in whatever relates to the end and purpose of society. (2.) To establish a supreme authority, supported by the strength of the whole body, by which to enforce obedience to all rules and regulations of the state established by the public authority. This union of the will and power of society constitutes the body corporate and politic thereof, and without which civil society could not exist. This union of wills in the body corporate is by the expressed or implied agreement of every one in society, by which he undertakes to submit his private judgment and will in all matters pertaining to the public interest, to the determination of those intrusted with the execution of the public authority; and to yield himself to obey, and to give his power to the government to compel others to obey, whatever in that respect the public authority constitutionally requires. (See Burlamaqui's Prin. of Polit. Law, ch. 4, §§ 4, *et seq.*)

This union of strength, which produces the sovereign power of the state, is not formed by each man communicating his physical strength to the corporate body so as to remain utterly weak and impotent himself; but by an engagement by which all in general and each in particular oblige themselves to use their strength for the public only in the manner prescribed by the public authority. By this union each member of society is under the protection of the power of the whole society united. This multiplication of strength in the body politic resembles that of each member of the human body. Take them asunder and they are powerless; unite them and their strength increases, until together they form a robust and powerful organism, or human body. (See also, Burlamaqui, *supra.*)

Nations being composed of men naturally free and independent and who, before the establishment of civil societies, lived together in a state of nature, are to be considered as so many free persons, living together in a state of nature. (Vattel, B. 1, ch. 1, § 4.) All men are subject to the laws of nature, and as their union in civil society cannot have exempted them from their obligation to observe those laws, since by that union they do not cease to be men, the entire nation—whose common will is but the result of the united wills of the citizens—remains subject to the laws of nature and is bound to respect them in all her proceedings; and since rights have their basis in needs, the nation possesses also the same rights which nature has conferred upon men, in order to enable them to perform their duties. (See Vattel, B. 1, ch. 1, § 5.)

§ 61. Since nations, as civil institutions, are an outbirth from the social necessities of men, there are certain laws having their basis in such necessities, which are fundamental to the existence and security of nations. These laws are the laws of nature as applicable to them. They are necessarily immutable, being founded on the nature of man and his relation to his fellows as members of society. Therefore, to constitute, maintain and perpetuate such society as an organized, orderly and healthy body, these laws must be observed and enforced. They constitute the necessary laws of nations.[1]

§ 62. The universal society of the human race being an institution of nature, that is, a necessary consequence of the nature of man, all men in every station are bound to cultivate it and discharge its duties. They cannot liberate themselves from the obligation by any convention or private association. When, therefore, they unite in civil society for the purpose of forming a separate state or nation, they still remain bound to the performance of their duties toward the rest of mankind. Hence civil societies, thus constituted of persons owing these moral duties, become moral persons, possessed of an understanding, a volition and strength, and are under the like obligations to other nations, as men are to other men.[2]

§ 63. The object of the establishment of civil societies among men being to enable each member to attain that

[1] Vattel, Prelim. § 7.

"There are things just in themselves and allowable by the necessary law of nations, on which states may mutually agree with each other, and which they may consecrate and enforce by their manners and customs. There are others of an indifferent nature, respecting which it rests in the option of nations to make in their treaties whatever agreements they please, or to introduce whatever customs or practices they think proper. But every treaty, every custom which contravenes the injunctions and prohibitions of the necessary law of nations, is unlawful. * * * Nations being free and independent, though the conduct of one of them be illegal and condemnable by the laws of the conscience, the others are bound to acquiesce in it where it does not infringe upon their perfect rights. The liberty of that nation could not remain entire if others were to arrogate to themselves the right of inspecting and regulating her actions." (Vattel, Gen. Prin., § 9.)

[2] See Vattel, Prelim., § 11.

perfection of individuality and character for which he was created; and the government being bound to do everything in its power to accomplish the object for which it was instituted, it follows as a fundamental law of nations, that, in their conduct in respect to each other, each is bound to do everything in its power, consistent with its duties to itself and its subjects, to contribute to the perfection and consequent happiness of other nations.[1]

§ 64. As a consequence of the freedom and independence of nations, each is entitled to the enjoyment of that perfect liberty she inherited from nature; and, hence, it is, also, a fundamental law of national existence, that, in respect to all matters depending upon judgment, or conscience, as to what she may or may not do, it must rest solely with herself to determine. This is a fundamental law, because a nation cannot exist, and perform its duties in executing the public authority, without this absolute right to examine and determine such questions.[2]

[1] The duties a nation owes to itself are, unquestionably, paramount to those it owes to other nations. When, therefore, she cannot contribute to the welfare of another nation without doing an essential injury to herself, her obligation, in that respect, ceases, because she is then under a disability to perform the office in question. (Vattel, Prelim., § 14.)

The golden rule is as applicable to nations as to individuals: "Whatsoever ye would that men should do unto you, do ye even so to them;" and as it is according to the nature of men, that kindness and good office should, in turn, beget kindness and good office, and that unkindness should beget unkindness, God has made it for the interests of individuals and nations to do each other all the good possible. Says XENOPHON: "If we see a man who is uniformly eager to pursue his own private advantage without regard to the rules of honor or the duties of friendship, why should we, in any emergency, think of sparing him?"

[2] Whatever is fundamentally essential to the existence and security of nations, is conferred by natural law, which may be denominated *a fundamental law*, or *a necessary law of nations*.

The rights of nations, incident to their sovereignty and equality, are not unlike those natural rights incident to individuals, as equals, in their individual sovereignty. In matters of duty and conscience, or of judicial determination, individuals have a right to examine and determine all questions for themselves, being answerable only for an abuse of such liberty. We cannot constrain a person to perform a particular act or service for us except when there is a legal obligation by which he is bound to perform for us the particular thing or service, independent of the determination of his conscience or judgment. When one has a right to do or not to do a particular thing, or has a discretionary duty to perform, his obligation is said to be *imperfect*, because

§ 65. That necessity which requires the institution of nations, and the establishment of civil governments, requires, also, that they shall be maintained and preserved. Therefore, all sovereign states have a perfect right to those things which, by the laws of nature, are necessary for their security and preservation.[1]

§ 66. All nations being equally sovereign and independent in their intercourse with each other, each is bound to respect the other as possessing the same prerogatives, as entitled to the same rights, and bound to the same duties as itself. Hence, the golden rule applicable to individuals, requiring them to do unto others as they would that others should do unto them, is likewise applicable unto nations requiring the same conduct between them.

§ 67. Nations being sovereign and independent, have perfect authority to enter into treaty stipulations with each other, by which they can bind themselves to do or

there is no authority to compel his determination or action. But where he may be compelled to perform the act, whether he will or no, his obligation is said to be *perfect.*

Says VATTEL: "*The perfect right* is that which is accompanied by the right of compelling those who refuse, to fulfill the corresponding obligation. The *imperfect right* is unaccompanied by that right of compulsion—it gives him only the right to ask." (Prelim., § 17.) For where one is subject to compulsion in respect to his action, he is no longer free in that respect.

Also, as a necessary consequence of the civil equality of nations, whatever, in principle, is lawful for one nation, is lawful for another; and whatever, in principle, is unjustifiable in one, is also, in the other. Each, alike, is mistress of her own actions so long as they do not affect the perfect rights of other nations. (See Vattel, Prelim. § 19.)

[1] It, therefore, follqws that all nations have a right to resort to forcible means for the purpose of repressing any particular nation, which openly violates the laws of society, and thereby endanger the security and stability of nations.

"The laws of natural society are of such importance to the safety of states, that, if the custom of trampling them under foot once prevailed, no nation could flatter herself with the hope of preserving her national existence, and enjoying domestic tranquillity, &c. All nations have, therefore, the right to resort to forcible means for the purpose of repressing any one particular nation who openly violates the laws of society which nature has established between them, or who directly attacks the welfare and safety of that society." (Vattel, Prelim., § 22.)

But, as nations are free and independent, they have no authority to interfere with the conduct of one another, where perfect rights are not infringed. Thus, though the conduct of those intrusted with the administration of public authority be against good conscience, in respect to the subjects of that authority, other nations cannot interfere without infringing the fundamental principle of national sovereignty and equality.

not to do, any particular act or thing, within the permission of natural law, in harmony with the purposes of their institution, and not prohibited by their fundamental law.

A TREATISE ON GOVERNMENT.

CHAPTER I.

OF THE UNITED STATES AS A NATION.

§ 68. WHEN the people of the American colonies promulgated their declaration of independence, it was necessary for them to unite, that they might provide for their common defense, promote their general welfare, and secure to themselves and their posterity, the blessings of civil liberty.[1] That necessity was a warrant of their authority to establish for themselves, an

[1] In the Declaration of American Independence is set forth the following catalogue of grievances, which impelled the Colonies to a political separation from the mother country:

"The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world."

"He has refused his assent to laws the most wholesome and necessary for the public good; he has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained, and when so suspended, he has utterly neglected to attend to them."

"He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature; a right inestimable to them, and formidable to tyrants only."

"He has called together legislative bodies at places unusual, uncomfortable, and distant from the respository of their public records, for the sole purpose of fatiguing them into compliance with his measures."

"He has dissolved representative houses repeatedly for opposing with manly firmness his invasion on the rights of the people."

"He has refused, for a long time after such dissolutions, to cause others to be elected, whereby the legislative powers, incapable of annihilation, have returned to the people at large, for their exercise, the State remaining in the mean time, exposed to all the dangers of invasion from without, and convulsions within."

"He has endeavored to prevent the population of these States, for that purpose, obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands."

"He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers; he has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

"He has created a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out their substance; he has kept among us in times of peace, standing armies without the consent of our legislatures; he has affected to render the military independent of, and superior to, the civil power; he has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation."

independent national existence;[1] and being successful in their undertaking, they became a nation *de facto;* and their independence being recognized by the nations, they became a nation *de jure.*

§ 69. American independence was proclaimed "in the name and by the authority of the good people of the colonies;" it was established by their united power, acting under a common executive head[2], and obeying a

"For quartering large bodies of armed troops among us; for protecting them by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States; for cutting off our trade with all parts of the world; for imposing taxes on us without our consent; for depriving us, in many cases, of the benefits of trial by jury; for transporting us beyond seas to be tried for pretended offenses; for abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies; for taking away our charters; abolishing our most valuable laws and altering fundamentally the forms of our government; for suspending our own legislatures and declaring themselves invested with power to legislate for us in all cases whatsoever."

"He has abdicated government here, by declaring us out of his protection, and waging war against us; he has plundered our seas; ravaged our coast; burnt our towns, and destroyed the lives of our people; he is at this time transporting large armies of foreign mercenaries to complete the work of death, desolation and tyranny already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation."

"He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country; to become the executioners of their friends and brethren, or to fall themselves by their hands."

"He has excited domestic insurrection amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian savage, whose known rule of warfare is an undistinguished distinction of all ages, sexes and conditions."

"In every stage of these oppressions we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people. Nor have we been wanting in our attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us; we have reminded them of the circumstances of our emigration and settlement here; we have appealed to their native justice and magnanimity; and we have conjured them by the ties of our common kindred to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the NECESSITY which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace, friends."

[1] "We, therefore, the representatives of the United States of America, in general Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by the authority of the good people of these Colonies, solemnly publish and declare that these United States are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes and our sacred honor." — *Declaration of American Independence.*

The obligations of protection on the part of the government, and allegiance on the part of the subjects, are mutual. If, therefore, a province or body of people, who are exposed to imminent peril, are utterly neglected or abandoned, or, worse than either, are wantonly oppressed by their government, without any prospect or hope of redress or protection, they become perfectly free to provide for their own safety and preservation, in whatever manner they find most convenient, without paying any regard to those who, by their conduct or neglect, were the first to fail in their duty. *See Vattel,* § 200; *see also Dec. Am. Ind., as to the rights of a people to throw off their allegiance to government.*

[2] On the 19th day of June, 1775, a commission for George Washington was made out and signed by the President of Congress, in the words following:

"*In Congress.* The delegates of the United Colonies of New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Penn-

common legislative authority;[1] it was recognized by the nations as the achievement of the people of all the Colonies; therefore, nationality attached to them in their associated capacity, as *one* people, constituting *one* nation; and not as *thirteen* peoples, constituting *thirteen* nations.[2]

§ 70. The people of the American colonies becoming a nation *de facto* and *de jure*, by the establishment of their

sylvania, New Castle, Kent and Sussex, on Delaware, Maryland, Virginia, North Carolina and South Carolina, to George Washington, Esquire: We, reposing especial trust and confidence in your patriotism, conduct and fidelity, do, by these presents, constitute and appoint you to be general and commander-in-chief of the army of the United Colonies, and of all the forces raised or to be raised by them, and of all others who shall voluntarily offer their services, and join the said army for the defense of the American liberty and for repelling every hostile invasion thereof; and you are hereby vested with full power and authority to act as you shall think fit, for the good and welfare of the service. And we do hereby strictly charge and require all officers and soldiers under your command, to be obedient to your orders, and diligent in the exercise of their several duties. And we do also enjoin and require you to be careful in executing the great trust reposed in you, by causing strict discipline and order to be observed in the army, and that the soldiers are duly exercised and provided with all convenient necessaries. And you are to regulate your conduct, in every respect, by the rules and discipline of war, as herewith given to you, and punctually to observe and follow such orders and directions from time to time, as you shall receive from this or a future Congress of the said United Colonies, or a committee of Congress for that purpose appointed. By order of Congress. JOHN HANCOCK, President. Dated Philadelphia, June 19, 1775. Attest, CHARLES THOMPSON, Secretary."

[1] The first Congress of delegates appointed by the Colonies to take into consideration the situation of the provinces in North America, and the differences subsisting between them and Great Britain, met at Carpenter's Hall, in the city of Philadelphia, on the 5th of September, 1774, and organized by electing Peyton Randolph their President, and Charles Thompson their Secretary. This Congress continued in session until 26th of October following, when, having passed a resolution on the 22d of October, recommending the delegates to meet again at Philadelphia on the 10th of May, 1775, they dissolved their first session. The delegates, in pursuance of such recommendation, met again at Philadelphia on the 10th of May, 1775, and again elected Peyton Randolph President, and Charles Thompson Secretary. This Congress was composed of delegates from New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, New Castle, Kent and Sussex, on Delaware, Maryland, Virginia, North and South Carolina, and Georgia. The President, Peyton Randolph, being obliged to return home, on the 24th of May, 1775, John Hancock was unanimously elected President. This Congress commissioned Washington as the commander-in-chief (see preceding note) of the army of the United Colonies, on the 19th of June, 1775, and on the first of August adjourned to the 5th of September, 1775. On the 5th of September they again convened, and continued in session from time to time until the 4th of July, 1776, when they promulgated to the world the Declaration of American Independence, and ordered it to be sent to the several assemblies, conventions and committees or councils of safety, and to the several commanding officers of the Continental troops, and to be proclaimed in each of the United States, and at the head of the army.

[2] The people of the American colonies, in their united character and effort, denominated themselves THE UNITED COLONIES or THE UNITED STATES. As a common society they were known by no other name. In the origin of the term, it signified the unity of the people of the colonies in the great work of achieving their common independence. The term, "THE UNITED STATES," usually applied to the people composing the several States, rather than to the States themselves as political institutions. The Union was that of the people, and not of the governments of the States. The State, as a political institution, had no national authority, for it had been created for no such purpose. The term "UNITED STATES" was sometimes used both as a description, and also as a limitation, of the territory and of the people to whom nationality was accorded. Thus, in the definitive treaty of peace between the United States of America and Great Britain, September 3d, 1783, "His Britannic Majesty acknowledged the said UNITED STATES, viz., New Hampshire, &c., to be free, sovereign and independent States; that he treats with them as such," &c. It is to be observed that he treats with them in their common or united character and capacity, and not in severalty. Great Britain, by her minister plenipotentiary, D. Hartly, was treating with the United States through her ministers plenipotentiary, John Adams, Benjamin Franklin and John Jay, who represented the people of all the States constituting the American nation.

independence, and the recognition of the same among the family of nations, they had sovereign authority to establish such a government as they deemed essential to the protection, security and prosperity of the American people, as a nation; hence, they had authority to institute a confederacy of the States, and vest in it the execution of the public authority; or to establish a national government of the people, making the governments of the several States subordinate thereto.[1]

§ 71. Whenever the people institute a government to be intrusted with the execution of the public authority, the authority of such government must be derived from the people in whom sovereignty inheres; and in the institution and endowment of such government, the nation necessarily asserts its authority to create, endow or revoke at pleasure. Hence, having tried the form of a confederated government, and found it inadequate to the needs of a sovereign nation, they had authority to lay it aside, and institute in its place, a national government of the people; and to intrust it with the execution of such public authority as they deemed proper.

§ 72. Prior to the American revolution, the citizens of the American Colonies did not claim to be national subjects of any other government than that of Great Britain.[2] Hence, when they attempted to throw off

[1] Sovereign authority to establish for itself such a form of government, and to invest it with the execution of such public authority, in respect to matters of the general welfare, as it deems proper, must inhere in every nation. Sovereignty is an essential attribute of nationality. If it has not the authority to command in the last resort, but is amenable to higher authority, it has not the essential attribute of an independent nation. But it is to be remembered that this sovereignty inheres in the people constituting the nation — not in the government instituted by them. The authority of the government established by them is derivative, and may be general or limited, according to the constitution by which it is instituted and invested with authority; and having instituted a form of government, and intrusted it with the execution of the public authority, if it becomes destructive of the ends for which it was instituted, or even fails to accomplish the purpose of its creation, the people have the right to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. *See Dec. Am. Ind.*

[2] "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. The term "sovereign," or "sovereignty," is used in different senses, which often leads to 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*, the absolute right to govern. A State or nation is a body politic or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength. 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. A State which possesses this absolute power without any dependence upon any foreign power or State, is, in the largest sense a sovereign State; 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

their allegiance to the British crown, they assumed to act in virtue of their original authority as men, and not as citizens of any government. They repudiated their allegiance to, and hence their nationality through, the

monarchy. 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 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." Now in every limited government the power of legislation is, or at least may be, limited at the will of the nation, and therefore the legislature is not, in an absolute sense, sovereign. It is in the same sense that Blackstone says, "the law ascribes to the King of England the attribute of sovereignty or preëminence," because, in respect to the powers confided to him, he is dependent on no man, and accountable to no man, and subject 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 void." Story on the Constitution, § 207.

The Colonial Congress that assembled in Philadelphia on the 5th of September, 1774, published a declaration of the rights of the subjects of Great Britain in the colonies, which contained the following: "The good people of the several colonies of New Hampshire, Massachusetts Bay, Rhode Island and the Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Newcastle, Kent, and Sussex, on Delaware, Maryland, Virginia, North Carolina and South Carolina, justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted and appointed deputies to meet and sit in general Congress in the city of Philadelphia, in order to obtain such establishment as that their religion, laws and liberties may not be subverted. Whereupon the deputies so appointed, being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do, in the first place as Englishmen, their ancestors, in like cases have usually done for asserting and vindicating their rights and liberties, DECLARE,

That the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following rights:

"*Resolved*, N. C. D. 1. That they are entitled to life, liberty and property; and that 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 external, for raising a revenue on the subjects in America, without their consent.

"*Resolved*, N. C. D. 5. That the respective colonies are entitled to the common law of England, and more especially, to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of the 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.

British crown, that they might achieve for themselves a new nationality.[1]

§ 73. As the people of the several Colonies were united in the assertion of their independence, and unitedly achieved it; and as they unitedly claimed recognition, and were recognized as one nation; they could claim and exercise national authority only as citizens of the nation. As citizens of a separate Colony or State, they had no claim to national authority, either from the necessity of the case, or from their individual achievement, or from the assent of the American people. Hence, neither the people of a separate Colony, nor the government thereof, had any authority to set up for themselves alone, a separate nationality; or to exercise national prerogatives in derogation of the common sovereignty of the American people.[2]

§ 74. In all democratic nations, national authority belongs to the people constituting the nation. This authority, with such limitations and restrictions as they

"*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 the 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."

[1] "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these, are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right 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 form, as to them shall seem most likely to effect their safety and happiness." *Dec. Am. Ind.*

[2] The highest public authority to be executed by any civil government, is the authority of the nation; because it is composed of the largest association of individuals for the purposes of civil government; and the public authority consists of the authority of all over each. Hence a limited portion of such society, as a neighborhood or district, cannot possess as high public authority as the whole society together, upon the principle that the whole is greater than any of its parts.

By the declaration that a nation is composed of the largest association of individuals, is not meant that all nations are composed of equal numbers of individuals, or that there may not be sovereign and independent nations composed of fewer persons than a moiety of another nation. The authority of a nation does not depend upon the number of persons constituting it. Nations, as individuals, may differ in wisdom, wealth and power; but, like individuals, they are also equal in their rights as sovereign States, which do not depend upon considerations of that character. (*See Vattel, Prelim.*, § 15.) By the declaration that nations are composed of the largest number of individuals civilly associated together is meant, that a nation, as a society, can be included in no other civil association; that the highest civil jurisdiction over any territory or people is that of the nation.

Again, national authority extends uniformly over all the territory embraced within the national domain. Hence, all citizens have equal national authority in every part of the nation. National laws, applicable to all, are enacted, adjudged and executed by the same government.

think proper to impose, is, by them, vested in a body selected or created for that purpose, that it may be executed in respect to matters pertaining to the general welfare. Hence, in the United States, national authority belongs to the people as constituents of the nation, and not as citizens of any domestic State or territory; and they have sovereign authority to institute such forms of government, and to intrust them with the execution of such public authority, as they deem proper.[1]

§ 75. The sovereign authority essential to the establishment and maintenance of government, inheres in, and resides with the people; and hence, the authority of government is derivative. In democratic republican countries, government is an institution of the people, established by them to be intrusted with the execution of the public authority. Hence, in such countries, governments derive their authority from the people; and can act only in virtue of the authority intrusted to them.[2]

[1] Not unfrequently the authority of the government is confounded with the authority of the people instituting it. It should never be forgotten that governments are institutions of the people, and possess no original authority. In the discussion of questions connected with the origin of the national government, a class of politicians commit this error, and are constantly talking of the sovereignty of the States, from which they argue that the national government is but a creation of the State governments, instituted by them, and not by the people of the United States. They seek to make the State governments the source and fountain of political sovereignty, as though the people, in the institution and endowment of these governments, had exhausted their own authority, by transferring it irretrievably to these State institutions; and from thenceforth these State governments had authority to do what they pleased, and the people had none except through them. If these State governments have such absolute authority, from whence did they receive it? Not, certainly, from Great Britain, while they were provincial Colonies. Not from the people, when they united to declare and achieve their common independence. Not by the recognition of the nations as constituting such an independent nation. As Colonies they set up no claim to national sovereignty, and would not have been entitled to recognition had they done so. Independence was proclaimed and achieved in the name and by the authority of "*the people*," and not in the name and by the authority of the several local governments; and the independence achieved was recognized as applying to the *united*, not the *separate* States. The State governments, as political institutions, were derived from the people, and existed and acted only by the authority of the people. As such governments, they had no original sovereignty, and hence could act in virtue of no such authority. The people could use them in providing means to assert and maintain their independence; but could derive no authority from them to proclaim and establish the same, for that authority inhered in the people themselves, independent of all governments.

The true statement of the case is simply this: The people who severally instituted these State governments, and intrusted them with the execution of the public authority in certain matters, wished to unite all the Colonies or States *as one people*, to resist the aggressions of the British crown, and, if necessary, to establish a common independence. They did not resort to these institutions of theirs to obtain authority to form this union, or to proclaim their independence. In this respect, they acted in virtue of their inherent sovereignty. They used their State governments as instruments to bring about the necessary union of action, and also to furnish the means necessary for accomplishing their undertaking. These State governments were institutions of their own creating, over which they had sovereign authority.

And when they had achieved their common independence, and had become national, as well as State citizens, they had authority to establish for themselves as a nation, such a form of government as they deemed most expedient. They could confederate their several governments for national purposes, and delegate to the confederation such authority as they thought proper, trusting to the faith of the States; or they might institute a government of the people, and vest in it the execution of all national authority.

[2] "State legislatures as political bodies, however sovereign, are yet not sovereign over the people. So far as the people have given power to the gen-

§ 76. When the people institute a government, and intrust it with the execution of the public authority, they do not thereby divest themselves of, or in any degree abridge, their inherent sovereignty. That is inalienable. In the institution of government, they merely create a body or person to be intrusted with the execution of their authority, to the extent and in the manner by them prescribed in their Constitution; and when the government is so intrusted with the execution of the public authority, it is, nevertheless, subject to that sovereignty that gave it existence.[1]

§ 77. As sovereignty is the supreme authority and power by which a State is governed, and implies the right of commanding in the last resort, it follows, that as an attribute of civil society, it can only attach to the people as a whole or nation; and not to them, as a limited portion or moiety of a nation; for, as the largest

eral government, so far the grant is unquestionably good, and the government holds of the people and not of the State governments. We are all agents of the same supreme power, the people. The general government, and the State governments derive their authority from the same source." *Webster in U. S. Senate, in reply to Hayne: Gales and Seaton's Reg. Vol. 6, pt. 1, p. 74, 1829, 1830.*

"In Europe, sovereignty is of feudal origin, and imports no more than the state of the sovereign. It comprises his rights, duties, exemptions, prerogatives and powers. But with us, all power is with the people. They alone are sovereign, and they erect what government they please. None of these governments are sovereign in the European sense of the word, all being restrained by written Constitutions." *See Webster's reply to Calhoun in the Senate of the United States, Feb. 16, 1833.*

1 Says BURLAMAQUI: "This sovereignty resides originally in the people. But when they have once transferred it, they cannot, without contradiction, be supposed to continue masters of it. When the people establish a government and confer upon it the supreme power, that is, the power to determine what measures are necessary to preserve civil society, to promote its prosperity; to punish those who disturb its peace or plot its destruction; to settle differences among its members, and to enforce the judgments which it pronounces, it is evident that they part with their sovereignty." He adds: "The government m y enact laws to which the people are opposed; yet there is no question that they are bound to obey them, and that the government has the right to enforce obedience, and was instituted for that purpose." *See Principles of Politic Laws, Ch. 7, §§ 10, 11 and 12.*

The error in the reasoning of the learned author consists in this: He separates between the authority of the people and the authority of their government. This attribute of sovereignty in the people exists because of the necessity of the case, as society could not exist without it. But this sovereign authority must be executed, or it might as well not exist; and society as an unorganized mass, cannot execute it; therefore, necessity compels society to institute means for executing *their* authority, not the authority of the agent employed. Hence, the necessity of establishing a government, to be the agent or instrument of the people in executing their authority. It is true that the people individually are bound to obey the laws enacted and adjudged by the government, because they are enacted by the sovereign authority of the people, through the instrumentality ordained by them for that purpose; but if the government departs from that authority, and enacts laws upon its own responsibility alone, individuals, even, are not bound to obey them.

BURLAMAQUI overturns his own theory on this point in the very next section. He says, § 13: "It may be asked if the people have parted with their sovereignty by establishing a government, what control have they over it, and in what does their power consist? We answer, that they still retain the power to alter or abolish it at their pleasure."

What! have the people surrendered to the government, their sovereignty, and yet retained it to be exercised at their pleasure? This cannot be. They have intrusted the government with the execution of their authority over matters committed to it, because it could be executed in no other way. But the government, in all it has a right to do, is but the servant of the people and answerable to them.

societies of men, civilly associated, constitute nations, and as the highest public authority to be executed by civil government is the authority of the nation, it follows that the authority of the nation must be sovereign within its territorial limits; that is, it cannot be subject to question or resistance by any other lawful authority.

§ 78. That necessity which requires the people of a nation to possess sovereign authority in all matters pertaining to the general welfare, is incident to national existence. Hence sovereignty is a necessary attribute of every nation — one which inheres in the people in their national character. The people of the United States, as a nation, possess this necessary attribute, and hence, have sovereign authority over all matters of general interest within their territorial limits.

§ 79. This sovereignty pertains to the people of the United States as national citizens only, and not as citizens of any other government. There cannot be two separate and independent sovereignties within the same limits or jurisdiction; nor can there be two distinct and separate sources of sovereign authority within the same jurisdiction. The right of commanding in the last resort can be possessed only by one body of people inhabiting the same territory,[1] and can be executed only by those intrusted with the execution of such authority.

§ 80. The people of the United States, as a nation, have supreme authority over all matters pertaining to the general welfare, within the territorial limits of the nation; and they have authority to determine by whom, and in what mode the public authority shall be executed; what rights, duties and powers shall pertain to

1 The characteristics of sovereignty are such as to demonstrate the correctness of the above. Sovereignty necessarily inheres in the people of a nation, to be used for the establishment and maintenance of public order and security, and for the protection of private rights. And being the right of commanding in the last resort in all matters pertaining to the public weal, certain characteristics must inevitably attend upon it.

1. The first characteristic of sovereignty is, that it is a *supreme and independent power* — one which judges and determines in the last resort of whatever is susceptible of human direction, relating to the welfare and advantage of society, and can acknowledge no superior on earth. Whatever it ordains in the plenitude of its power, cannot be reversed by any other human will as superior to it. Since human power cannot be increased to infinity, there must necessarily be a limit, beyond which there is no superior authority. And whatever the form of government, there must inevitably be a supreme tribunal, beyond which there can be no appeal.

2. A second characteristic of sovereignty is, that it is not accountable for the exercise of its authority, nor liable to punishment; for it has no superior. Hence, it is manifestly apparent that sovereignty belongs to the people in their highest civil character alone, and not to any person or body having only derivative authority; that while governments exercise sovereign authority, it is the sovereign authority of the people, and not of the government as the mere institution of the people. *See Burlamaqui's Prin. Pol. Law, ch.* 7, §§ 1–5.

the national government, and what to the governments of the States.[1]

§ 81. The sovereign authority essential to the establishment and maintenance of a national government inhering in, and remaining with, the people of the United States, they are authorized to establish a national government in such form, and vest in it such powers in respect to the general welfare, as they deem proper.[2] And they, also, have authority to establish State governments, and vest in them the execution of such public authority as they deem expedient; and, in virtue of the same sovereignty, they can enlarge or restrict the limits of State or national authority at pleasure.[3]

§ 82. Sovereignty, as an attribute of the people of the United States as a nation, excludes the like sovereignty

1 "If the government of the United States be the agent of the State governments, then they may control it, restrain it, modify it, or reform it. It is observable enough that the doctrine for which the gentleman contends leads him to the necessity of maintaining, not only that this general government is the creature of the States, but that it is the creature of each of the States severally; so that each may assert the power for itself, of determining whether it acts within the limits of its authority. It is the servant of four and twenty masters of different wills and different purposes, and yet bound to obey all. This absurdity — for it seems no less — arises from a misconception as to the origin of this government in its true character. It is, sir, the people's constitution, the people's government; made for the people; made by the people, and answerable to the people. The people of the United States have declared that this constitution shall be the supreme law. We must either admit the proposition or dispute their authority. The States are unquestionably sovereign, so far as their sovereignty is not affected by this supreme law. But the State legislatures, as political bodies, however sovereign, are yet not sovereign over the people. So far as the people have given power to the general government, so far the grant is unquestionably good, and the government holds of the people, and not of the State governments. We are all agents of the same supreme power — the people. The general government and the State governments derive their authority from the same source. Neither can, in relation to the other, be called primary, though one is definite and restricted, and the other general and residuary. The National government possesses those powers which it can be shown the people have conferred upon it, and no more. All the rest belongs to the State governments or to the people. So far as the people have restrained State sovereignty by the expression of their will in the Constitution of the United States, so far it must be admitted State sovereignty is effectually controlled." *Webster's reply to Hayne in United States Senate, Jan.* 27, 1830. *G. & S. Reg. of Cong. Deb., Vol.* 6, *p.* 1, *page* 74.

2 This follows from the doctrine that the sovereignty essential to the establishment and maintenance of government, inheres in, and remains with the people; together with the further principle or doctrine, that the authority to legislate for the government of society belongs to the sovereignty. Says Blackstone: "The very essence of a law is, that it be made by the supreme power. Sovereignty and legislature are, indeed, convertible terms; one cannot exist without the other." (1 *Black. Com.*, 46.) By which is meant, the authority to make a law binding upon the people must be sovereign. In other words, he defines municipal or civil law to be, "a rule of civil conduct prescribed by the supreme power in a State," &c. (1 *Com.*, 44); "for legislature is the greatest act of superiority that can be exercised by one being over another," (*idem*, *p.* 46.)

3 The territory constituting the field of State jurisdiction, is within the jurisdiction of the nation; and the American people as a nation, possess and exercise the authority of drawing the line of jurisdiction between the State and national government according to their sovereign pleasure. Besides, as has already been stated (*ante.* § 79 *and note*), there cannot be two independent sovereignties within the same limits or jurisdiction; nor can there be two distinct and separate sources of sovereignty within the same jurisdiction. If the people of the nation, as a nation, possess sovereign authority in respect to all matters pertaining to the general welfare, then the people of the State, as State citizens merely, cannot possess such authority, except as derived from the nation.

of the people of a single State, as State citizens merely. Hence, the authority of a citizen as a constituent of the nation, is superior to his authority as a constituent of a mere State or territory. Hence, also, when the nation assumes to confer upon the national government exclusive authority over any particular class of subjects, the people of a particular State have no legal power to question or deny such grant, though it encroach upon what before belonged to their peculiar jurisdiction.[1]

§ 83. In the United States, the people of a particular territory have no authority to vest themselves with the rights, powers and prerogatives of a State; nor can they lawfully exercise any public authority, except under the enabling power conferred by the nation. They can draft the frame-work of a government, and the form of a constitution; and can ask to be endowed with authority to govern themselves in all matters local and domestic. But they can give to their constitution no authority, and to their government no life or power. That must come from *those in whom sovereignty resides.*[2]

§ 84. The national and State governments are institutions of the people, and each derives its existence and authority from the same source. Hence, they are instituted in such form, clothed with such powers, and subject to such limitations, as the people of the nation in their sovereignty ordain.[3]

[1] This likewise is a corollary flowing from the propositions that sovereignty is an essential attribute of nationality (§ 77 *ante*); and that there cannot exist, at the same time, and within the same limits or jurisdiction, two separate and distinct sovereignties or sources of sovereign authority. (§ 79 *ante.*) Hence, if the people of the United States as a nation, are sovereign, and can exercise sovereign authority throughout the territorial limits of the United States, they have the authority to determine in what body or bodies, the execution of the public authority shall be vested; and from them as a nation, must come the authority to exercise the functions of government within the national limits. Practically, in the institution of local or State governments, this doctrine is observed. The people of a territory within the United States, however numerous, cannot clothe themselves with the authority of self-government even in local and domestic matters. They are obliged to obtain the consent of the nation through the national legislature, which, so to speak, becomes an act of political enfranchisement. This will be fully considered when the origin, nature and authority of the States within the Union come under consideration.

[2] According to the Constitution of the United States, the territories are to be under the regulation and control of Congress; and no new State can be formed or admitted except by the authority of Congress, as expressing the legislative will of the nation in respect thereto; and besides, the United States or nation, are to determine the *form* of the State government, and to guarantee that it shall be republican. (See §§ 3 and 4 of the 4th Art. of Const. U. S.) But this subject will be fully considered when the State governments come under consideration.

[3] See Webster's reply to ROBERT Y. HAYNE, in the United States Senate, Jan. 27, 1830, where this proposition is fully discussed. (See *Appendix.*)

The truth of this proposition in respect to the general government is apparent from the manner in which the government was established, the object of its institution, and the subject matters of its jurisdiction and administration. The preamble of the Constitution of the United States recites it as an ordinance of the people. "We the people of the United States * * * do ordain and establish this Constitution." It was framed by delegates from the several States then existing; it was submitted to the people of the States to be ratified

§ 85. State governments being instituted by, and deriving their authority from, the nation, they are invested with the same authority over matters within their jurisdiction, as the national government, over matters within its jurisdiction, to wit: the authority of the nation. Hence, the authority exercised by the State over matters within its jurisdiction, is sovereign and absolute; they are commissioned to execute the will of the nation in respect to public interests of a local and domestic character.[1]

§ 86. The national and State governments being institutions of the nation, and amenable to its authority, hold the authority with which they are intrusted, at the pleasure of the nation. As in their origin, the people determined the extent and limitation of the authority to be intrusted to each, so, in their continuance, they are subject to the supervision and control of the same supreme authority.[2]

§ 87. Neither the national nor the State governments, as political institutions, are constituent elements of the Union. They are each institutions of the nation — corporate instruments, created by it, to execute its authority

by them; it was thus ratified by the people of all the States, and in their name, and by their authority, it became the Constitution of the United States. It provided that the Constitution, and the laws of the United States made in pursuance thereof, and all treaties made, or which should be made, under the authority of the United States, should be the supreme law of the land; and the judges in every State should be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. (Art. 6, 2d clause.) Article 5 also provides that the Congress, whenever two-thirds of both Houses should deem it necessary, should propose amendments to this Constitution; or on the application of the legislatures of two-thirds of the several States, should call a convention for proposing amendments, which in either case, should be valid to all intents and purposes as part of the 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 might be proposed by the Congress.

By an examination of these provisions it will be manifest that the governmental authority of the whole country was conceded to be in the people of the United States as a nation; to be exercised by them, through the agency of such governments as they deemed necessary and proper to establish. This will be made clearly to appear, in the chapter upon States within the limits of the United States. (See *post.*)

1 The people of the nation, in the institution of the national government, assigned to the then existing States the limits of their jurisdiction, by superimposing the national government with its jurisdiction; and the same authority which thus circumscribed the authority to be exercised by the then existing States, could, at its pleasure, withdraw every subject from their jurisdiction, and confer upon the national government plenary powers in respect to all governmental matters within the territorial limits of the United States. Is it objected that the people of the several States would never agree to amendments of the national Constitution giving such plenary powers to be exercised by the national government? That may be so. But, as citizens of the nation, they have authority to agree to it, and that is all that is contended for. Thus, it will be perceived, that the jurisdiction reserved to the several States then existing, was by the permission or authority of the nation: that in respect to new States, none can be organized and enfranchised with political rights as States, except by the authority of Congress, and in such form, and under such a Constitution as it shall approve. Thus the State governments, as political institutions, take their existence and authority from the nation, and hence administer under such authority. This will more fully appear hereafter. (See *post.*)

2 (See *post.*)

within their respective jurisdictions. They cannot be considered *constituent elements* of the nation, since they were instituted by it, to be intrusted with the execution of its authority.[1]

§ 88. Since the national and State governments derive their existence and authority from the NATIONAL WILL, and are not constituent elements of the Union, national existence, sovereignty and integrity depend not upon the continuance of these governments. The institution of a State government within the Union adds nothing to the sovereignty or administrative authority of the nation. Hence, the dissolution of such a government can take nothing therefrom.

CHAPTER II.

OF THE UNITED STATES AS A GOVERNMENT.

§ 89. THE United States as a civil government, was instituted by the people, who constitute the United States as a nation. As a government of the people, it was instituted by them in order to form a more perfect union; to establish justice; to insure domestic tran quillity; to provide for the common defense; to promote the general welfare, and to secure the blessings of liberty to themselves and their posterity.[2]

[1] A constituent element of a body is that which is essential to its existence as a component part thereof. Hence, if the people of the United States were a nation *prior* to the institution of the general government by them, then such government cannot be a constituent element or component part of the nation. So of the State governments. The political existence of each State in the Union is not a component part of the nation, because the national unity is the same whether there are few or many States. When the government was instituted there were thirteen of these local institutions, since which there have been created twenty-three more; yet the nation has not been changed in its existence or political character. Its authority remains unchanged. It is the same nation, and will continue the same, should the number of States be increased indefinitely. Now, it is most manifest that the nation does not depend upon the institution of these local governments for its existence or authority. Those which were in existence at the time of the adoption of the national constitution, continued by the permission of the people as a nation; and they possess such governmental authority as remained to them after the nation had ordained what should belong to the general government. Those twenty-three States or local governments which have since been instituted, have taken their charter to govern, from the nation—hence are institutions of the nation.

[1] "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, DO ORDAIN AND ESTABLISH this Constitution of the United States of America." *Preamble to the Constitution of the United States.*

The draft of this Constitution was prepared by delegates from all the States, who were appointed for that purpose by their several legislatures, on the recommendation of Congress, dated Feb. 21, 1787. A part of these deputies, or delegates, met in convention at the State House, in Philadelphia, on the 14th day of May, 1787, and adjourned, from time to time, until a quorum appeared, on the 25th of May. They continued in session until the 17th of September following, when, having perfected the draft of the Constitution, they signed it,

§ 90. By government is here meant, that body corporate to which the people have committed the exercise of their authority over matters pertaining to their general welfare as a nation. It is a corporation of offices, to which are attached rights, duties and powers deemed essential to, and given for the purpose of forming a more perfect union, establishing justice, securing domestic tranquillity, providing for the common defense, promoting the general welfare, and securing to themselves and their posterity the blessings of civil liberty.

§ 91. The body of this government is distinct from the body of the nation. It was instituted for the sole purpose of being intrusted with the exercise of national power and authority in all matters committed to its jurisdiction. Hence, the existence of the nation is independent of any particular *form* of government instituted by it, or of any degree of authority intrusted to its execution.

and reported the same to Congress. On the 28th of September, 1787, Congress unanimously resolved to transmit the report, &c., to the several legislatures, to be submitted to a convention of delegates to be chosen in each State by the people thereof, in conformity to the resolves of the convention. (See *Appendix.*) The several States proceeded to provide for the calling of these conventions of delegates, to be chosen by the people for the purposes expressed in the resolutions accompanying the draft (see *Appendix*); and such proceedings were had, that conventions to ratify the Constitution were held in all the several States, and the Constitution was ratified, and ordained, by each of these conventions, or deputies of the people, in the name, and by the authority of, the people themselves. (See *Appendix.*)

The citizens of the nation were also citizens of the several States, and were as directly connected with, and interested in, the general government, as in their respective State governments. The proposition was to institute a general government for national purposes only; leaving the State governments to administer only in local and domestic matters. And the people were alike citizens of both governments, and had the like authority over each. Citizen A, of the State, asked citizen A, of the nation, being the same individual, whether, in his opinion, the general welfare required that the interests of the people, as a nation, should be provided for and secured by a *general government* of the people, or whether it should be committed to the diverse wills and interests of *thirteen independent local governments.* After an experience of about thirteen years, trusting to these local governments to provide for the common defense, and to promote the general welfare, the unanimous opinion of the people was given in favor of the establishment of a general, or national government, and they ordained and established the national Constitution for that purpose.

See also the opinion of the Supreme Court of the United States, in *Hunter* v. *Martin,* 1 Wheat. Rep., 305-324; also *McCulloch* v. *Maryland,* 4 Wheat. Rep., 316, 404, &c.; also *Cohens* v. *Virginia,* 6 Wheat. Rep., 263, 413, 414; also *Story, Const.,* § 463; (see appendix.) Extracts from Webster, in reply to Hayne, in United States Senate, Jan. 27, 1830; also in reply to Calhoun, in United States Senate, Feb. 16, 1833.

The people of the United States, as a nation, declared and achieved their common independence, and were recognized as a nation, before they established their government. They attempted to make use of the governments of the States as an instrument by which to administer in matters pertaining to the general welfare, and articles of confederation were entered into for that purpose. (See Articles of Confederation, in Appendix.) These articles were drawn up and agreed to during the progress of the revolution (Nov. 15, 1777), and though declared to be perpetual, they were evidently only suited to the then existing revolutionary state of things. The principal powers had respect to the operations of war, and would be dormant in times of peace. Says Judge STORY, in his Commentaries on the Constitution, § 245, "They, the Congress, were indeed clothed with authority of sending and receiving embassadors; 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;

§ 92. This civil government was instituted by the people for no other purposes, and it is intrusted with the exercise of no other rights, duties or powers, than are enumerated or implied in the Constitution of the United States. Hence, as a government, or body corporate, it has no original or inherent sovereignty *per se*.[1] It is a mere instrument or agency of the nation, by means of which the people are enabled to exercise their authority and powers over matters within the jurisdiction of the general government.[2]

§ 93. As the authority of this government is derived from the people, and is held by it in trust for the particular purposes specified in the constitution, should it assume to exercise authority over subjects not within its expressed or implied jurisdiction, or in a manner other than that directed or recognized by the constitution, such proceedings would be without authority, and void.[3]

of establishing Post-offices; of borrowing money, and emitting bills on 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 the means of discharging them. They could pledge the public faith, but they were incapable of redeeming it. They could enter into treaties, but every State in the Union might disobey them with impunity. They could contract alliances, but they could not command men or money to give them vigor. 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."

Says a writer in the American Museum (1786, p. 270): "By this political compact—the articles of confederation—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 embassadors, but cannot defray even the expenses of their tables. They may borrow money in their own name, on the faith of the Union, but cannot pay a dollar. They may coin money, but they cannot purchase an ounce of bullion. They may make war, and determine what number of troops are necessary, but cannot raise a single soldier. In short, they may declare everything, but do nothing." See also Mr. Jay's Letter, addressed to the people of New York, 1787. 3 *Am. Mus.*, pp. 554, 556.

During all this time the people of the United States were a nation; and as a nation, had authority to institute a government, and clothe it with plenary powers; but, until the adoption of the national constitution, they had failed to do so.

[1] This branch of the proposition cannot be made more apparent by discussion. When a corporate body is created for a particular purpose, and is clothed with powers only to enable it to accomplish the purpose of its creation, it can have no original authority of its own underived from the authority creating and endowing it.

[2] In democratic countries, governments are instituted for their use to the people, and not for their benefit to the corporation, called government. They are intrusted with the exercise of the public authority, for the benefit of society and the members thereof; not for the glory and advantage of those intrusted with the administration of the public authority. The general government was instituted by the people to administer in respect to matters pertaining to their welfare as a whole, or nation; because, without such an agency, the general welfare could not be promoted. (See *Appendix.*)

[3] It is universally admitted that the government of the United States is one of delegated powers only, and that it can exercise no power not expressly granted, or necessarily implied. That the Constitution is the fundamental law of its institution, and that in it we are to look for the grant of any authority or power it can exercise.

§ 94. This government has no other authority than the authority of the nation, as expressed or implied in the constitution. Hence, having no authority of its own, distinct from that of the people, when it acts within the sphere of its constitutional powers, it exercises the supreme and sovereign authority of the nation.[1]

§ 95. When the people of the United States, as a nation, ordained this constitution, they thereby instituted the general government, and endowed it with the rights, enjoined upon it the duties, and intrusted it with the exercise of the powers specified in the constitution. Hence, in the exercise of the rights, duties and powers thus conferred and enjoined, the government acts, in the name and by the authority of the nation, and not otherwise.

§ 96. It was the manifest intention of the people of the United States, when they instituted the general government, to make it *national* in character, and *permanent* in duration.[2] Hence, the duties enjoined upon,

[1] When the authority of the government is spoken of, it should be remembered that the authority is that of the people instituting the government, and intrusting it with the exercise thereof in the manner prescribed, for their common benefit. A common error prevails in this respect, confounding the government instituted with the people or nation instituting it. In speaking of the government, some use the term in the sense of the nation; others use it in the true sense, and speak of its authority as being limited by the terms of the grant, and held in trust for the common benefit of those instituting the government. By this indiscriminate use of the term, "*the government*," some ascribe to it too much authority, by confounding it with the nation; others ascribe to the nation too little authority, by confounding it with the government. If, in the discussion of these questions, all are agreed as to the fundamental principles, and as to the meaning of terms to be used, and then use understandingly the same terms in making the application of those principles, there will be little opportunity for differing in their conclusions. Thus, suppose all agree to the principle that the people as a whole, are the sovereigns; and that the authority to govern must come from them. That they institute a government for the purpose of intrusting it with the execution of such public authority as they deem necessary for accomplishing certain specified purposes. Hence, the government, in such case, is an institution of the people, deriving its authority from them, to be exercised for their common welfare, over the subjects, and in the manner prescribed. Agreeing upon these principles, and making use of terms which are understood alike, there will be little opportunity of arriving at different conclusions.

[2] "If it had been the design of the framers of the Constitution, or of the people who ratified it, to consider it a mere compact, 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. * * * The only places where the term *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 10th section of the 1st article, it is declared: 'No State shall enter into any treaty, alliance, or *confederation*.' 'No State shall, without the consent of Congress, 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." *Story on the Constitution*, § 353.

"But that which would seem conclusive on the subject 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

and the powers intrusted to, the general government, are adapted to, and sufficient for, that purpose.[1]

§ 97. When the people of the nation ordained and established the Constitution of the United States, they thereby instituted a national government, amenable only to themselves as a nation; and they clothed it with authority and power sufficient for national purposes.[2] And by the same ordinance they denied to the State governments the right to exercise authority over national subjects, or over any other, except within their own State limits.[3]

§ 98. The people of the United States, in whom, as a nation, sovereignty inheres, when they instituted the national government, and conferred upon it jurisdiction and authority over matters pertaining to the nation as

which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, *shall be* the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' If it is the supreme law, how can the people of any State, either by any form of its own Constitution or laws, or other proceedings, repeal, or abrogate, or suspend it?" *Idem*, § 354.

"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 their posterity. The avowed intention was to supersede the old Confederation, and substitute in its place a new form of government." *Idem*, § 355.

In the several conventions of delegates chosen by the people of the several States to ratify or reject this Constitution, it was the understanding of all parties, that it was not a *confederation* of the States, but a *government of individuals*, that was to be instituted by the nation if the Constitution was ratified. The opponents, on many occasions, pressed the objection, that it was a consolidated government; and contrasted it with the Confederation. The advocates did not deny that its design was to establish a national government, as contradistinguished from a mere league, or treaty, or confederation. *Story on Const.*, §§ 356 *to* 360, *and notes*. 3 Ell. Deb., 22, 27, 28.

[1] See chapter on the Constitution of the United States, *post*.

[2] In *Gibbons* v. *Ogden* (9 Wheat. Rep., 187), the Supreme Court of the United States held this language: "As preliminary to the very able discussion of the Constitution which we have had from the bar, and as having some influence on its Constitution, reference has been made to the political situation of those 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 embassadors*, 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 construction of the instrument by which the change was effected."

[3] Art. 1, § 10, of the Constitution of the United States provides as follows: "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or impairing the obligation of contracts, or grant any title of nobility."

"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 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." (See *post*—chapter on State Governments.)

such, ordained that the residue of governmental authority and power should be exercised by the people of the several States, through the agency of State governments; which residue of authority had respect only to matters local and domestic, and was to be exercised within the limits of the State, and in such a manner as not to interfere with the jurisdiction of the national government, or to trench upon the rights of national citizens as such.[1]

§ 99. The authority which instituted the national government was sovereign to determine what subjects should be committed to the jurisdiction of the general government, and what should remain under State jurisdiction. Hence, whatever of authority remains with the citizens of the States to be exercised by the State governments, remains by the will of the nation; and is still subject to national control.[2]

CHAPTER III.

OF THE GOVERNMENT OF THE UNITED STATES.

§ 100. THE government of the United States is a body corporate and politic, created by the people of the nation to be intrusted with the exercise of their authority over matters committed by them to its jurisdiction. It consists of offices to which are attached rights, duties and powers to be possessed and exercised by the respective

[1] "State legislatures, as political bodies, however sovereign, are yet not sovereign over the people. So far as the people have given power to the general government, so far the grant is unquestionably good; and the government holds of the people, and not of the State governments. We are all agents of the same supreme power — the people. The general government and the State governments derive their authority from the same source. Neither can, in relation to the other, be called primary, though one is definite and restricted, and the other general and residuary. The national government possesses those powers which it can be shown the people have conferred on it, and no more. All the rest belongs to the State governments or to the people themselves." Daniel Webster in United States Senate, Jan. 27, 1830, in reply to Hayne on Foot's resolutions.

[2] When the people said, "we ordain and establish this Constitution for the United States of America," it was the voice of absolute sovereignty asserting its authority to ordain and establish government over all subjects pertaining to the general welfare, whether of a national or local character. It was the assertion of that sovereignty which is indivisible in its existence, and which presides over every authorized jurisdiction, whether State or national. "It is a gross error to confound the exercise of sovereign powers, with sovereignty itself; or the delegation of such powers, with the surrender of them. A sovereign may delegate his powers to be exercised by as many agents as he may think proper, under such conditions and with such limitations as he may impose; but to surrender any portion of his sovereignty to another is to annihilate the whole. Sovereignty is in its nature indivisible." Calhoun on the Force Bill in the United States Senate, Feb. 15, 1833. Gales & Seaton's Cong. Debates, vol. 9, pt. 1, p. 537.
See also § 81 and note, *ante*,

incumbents, in the manner and for the purposes ordained by the people.

§ 101. The rights possessed, the duties enjoined, and the powers conferred, pertain to the office, and not to the individual incumbent. They are the same, whether the office be filled with good or bad men; wise or weak ones. They continue whether the incumbent continues or not. Like the king or state, *they never die.* They were created for the good of the state; and the benefits resulting from a proper administration of them, are secured to all alike.

§ 102. Since the rights, duties and powers conferred and enjoined upon an incumbent of a governmental office belong to the office, and not to the incumbent, they are to be possessed and exercised, as a trust for the benefit of the people; and an officer who has been intrusted with these rights and powers, if he exercise or employ them for any other purpose, is guilty of a breach of trust, and unworthy to be continued as an officer of the government.

§ 103. The rights and powers conferred as an incident of office, being in the strictest sense a trust, created for the benefit of the people, it becomes the duty of those charged with the administration of government to see to it, that the trust be faithfully executed in the manner and for the purposes prescribed in the grant. And the trust being conferred for the benefit of the people, maladministration in office is, consequently, a crime against the people, and should be punished accordingly.

§ 104. The national government having been instituted for the purpose of defending all, and promoting the general welfare of the nation, must be supreme within the sphere of its jurisdiction; that is, in the exercise of the authority and power of the nation for national purposes, so far as the same has been expressly or impliedly committed to its jurisdiction.[1]

§ 105. The duties, rights and powers to be observed, possessed and exercised by those charged with the administration of government, must correspond with those necessary requirements of society which make government a necessity as a means for providing for the

[1] It is to be remembered that the government is intrusted with the exercise of supreme authority over such matters only as have been committed to its jurisdiction by the people. These are specified in the constitution of the United States; and the purposes for which they are given are also specified. In respect to other subjects and powers, essential to the government of the people, those which have not been intrusted to the states as local governments, yet remain with the people.

common defense, and promoting the general welfare. Therefore, the national constitution made provision for the exercise of rights, offices and powers, essential for maintaining and defending the rights of the people as a nation, both externally and internally; that is, for international and for police purposes.

§ 106. There necessarily exists as incident to a sovereign and independent nation, an *internal sovereignty*, inherent in the people of the nation, and, which is, to a limited extent, vested in the government instituted by them.[1] This *internal sovereignty* in its exercise has respect to the rights, duties and welfare of the individual members of the society or nation, and is represented by what is called the *police power, police rights and police duties* of the state or nation.[2]

§ 107. As a like incident of nationality, there must also exist an *external sovereignty* which has its basis in the natural and necessary independence of nations. This external sovereignty is accorded to the nation by its recognition as a nation. Intercourse between the nations is regulated and maintained by the exercise of this branch of national authority. National rights and duties in peace and in war, are asserted and vindicated in virtue of this *external sovereignty*. The laws by which this kind of sovereignty governs, and is known, are denominated INTERNATIONAL, or THE LAWS OF NATIONS.[3]

[1] Sovereignty ever inheres in the people; and they never part with it. Therefore, it is never strictly correct to say that the government *per se*, is invested with sovereignty or sovereign authority. The people remain sovereign whether they institute a government or not; sovereign at all times to create, to amend, to annul, or to destroy what they have created. Sovereignty, as an essential attribute of nationality, can employ as many agents to execute its authority as it deems proper, and can appoint to them the limits of their respective jurisdictions and powers. But like other agents, or agents for other purposes, they can only *exercise* the authority of their principal; they cannot *possess* it as their own; and if they attempt to do so, their acts are void. Hence, whenevever we speak of granting authority, granting power, &c., let it be understood, that the grant extends only to the right to exercise the authority and power in the manner and for the purpose prescribed.

[2] The authority of the people is absolute over all matters pertaining to internal administration. That is, there is no other authority to call in question what they ordain or establish for the government of themselves as individual members of the nation. "A nation is mistress of her own actions so long as they do not affect the *proper* and *perfect* rights of any other nation; so long as she is only *internally* bound, and does not lie under any *external* and *perfect* obligations. If she makes a wrongful use of her liberty, she is guilty of a breach of duty; but other nations are bound to acquiesce in her conduct, since they have no right to dictate to her." (Vattel, § 20.)

[3] "*Internal sovereignty* is that which is inherent in the people of any state, or vested in its ruler by its municipal constitution or fundamental laws. This is the object of what has been called internal public law, *droit public interne*, but which may more properly be termed constitutional law. *External sovereignty* consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained in peace and war, with all other political societies. The law by which it is regulated, has, therefore, been called *external public law, droit public externe*, but may more properly be termed international law." *Lawrence Wheaton*, pt. 1, ch. 2, § 5.

§ 108. In respect to subjects of INTERNAL ADMINISTRATION, there are naturally three departments of government, each of which is necessarily supreme in the exercise of its duties and powers. And as national authority extends over every part of the national domain, and is binding upon each and every individual inhabitant thereof, it follows, that the government, in the exercise of the authority of each of these departments, extends over all the territory, and embraces all the inhabitants of the United States, unless specially excepted therefrom in the constitution.

§ 109. To be sovereign in the exercise of the authority of the nation for national purposes, the government must be intrusted with the exercise of supreme authority in each and every department. It must have sovereign authority to enact all laws necessary for the government of the society composing the nation. It must have supreme authority to interpret and apply those laws to every individual and subject within its jurisdiction. It must have absolute authority to execute the final judgments and decrees rendered by its authority. That is, the government must have a supreme legislative, judicial and executive department, representing the sovereignty of the nation in whatever it ENACTS, ADJUDGES, DECREES AND EXECUTES.

§ 110. To be sovereign in its legislative authority, it must be authorized to prescribe the laws by which society is to be governed in respect to matters committed to it; and there must exist within its jurisdiction no other authority to enact to the contrary, or repeal the laws it has enacted.[1]

§ 111. To be sovereign in its judicial department, there must exist no other or higher tribunal to which appeal can be taken, to review its final judgments or decrees. A sovereign judiciary must possess the right of final interpretation and decision in applying the law. Its

1 The legislature is an office of government created and endowed by the constitution. The department of legislation continues independent of the continuance of any particular set of incumbents. A person elected to the office of legislator, on taking the oath of office to discharge the proposed trust faithfully, according to the terms, and for the purposes prescribed in the constitution, becomes invested with rights, duties and powers incident as a trust of that office. If, therefore, after having been selected by the people for that office, and having, upon oath of fidelity, assumed its duties and trusts, to be used only for the good of society, the legislator abuse the trust, and become guilty of malfeasance, he commits a crime against society, deserving punishment, commensurate with the crime committed—which is little less than treason, combined with moral perjury.

judgments or decrees must stand, unless the same authority suspend or reverse them.[1]

§ 112. To be sovereign in its executive department, there must exist no other authority to stay the execution of its judgments and decrees. The authority by which a judgment or decree of the court can be stayed in its execution, must be such as can vacate or reopen the same for further consideration and adjudication; or such as is authorized to reprieve or pardon the offender.

§ 113. By the constitution of the United States a supreme legislative, judicial and executive department of the government are created, each distinct from, and independent of the other; and each intrusted with the exercise of sovereign authority within the sphere of its prescribed duties and powers.[2]

1 "The people 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 to the people. But 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 government? They have settled all this in the fullest manner. They have left it with the government itself in its appropriate branch. The very chief end, the design for which the whole constitution was formed and adopted, was to establish a government that should not be obliged to act through state agency, or depend on state opinion, or state discretion. 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 power to congress, and restrictions of these powers. There are, also, prohibitions on the states. Some authority must, therefore, exist having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions and prohibitions. The constitution has itself pointed out, ordained and established that authority. How has it accomplished this great and essential end? By declaring that 'the constitution, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.'"

"This 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. But who shall decide this question of interference? To whom lies the last appeal? This 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 cover the whole ground. They are in truth the key-stone 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 became a government. It then had the means of self-protection, and, but for this, it would, in all probability, have been among things which are past." *Webster in U. S. Senate, Jan.* 27, 1830, *in reply to Mr. Hayne on Foote's resolution.* Cong. Deb., vol. 6, pt. 1, pp. 77, 78. See also opinion of Chief Justice Marshall in Cohens *v.* Virginia (6 Wheat. Rep., 264, pp. 376, 377); Story on the Constitution, §§ 373, 396, inclusive, and notes.

2 By the constitution, all legislative authority therein granted is to be exercised by the Congress. Thus, Art. 1, Sec. 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:" and the constitution proceeds to institute the corporate Congress by prescribing its construction, duties and powers.

By Art. 2, it commits the executive power to the President of the United States, prescribing his office, with its duties and powers, and the mode by which a person shall be selected to assume the exercise thereof. It says: "The executive power shall be vested in a President of the United States," &c.

§ 114. The legislative, executive and judicial departments of the government thus created by the constitution of the United States, each act by the same supreme and sovereign authority, whether enacting, adjudging, or executing the laws of the nation: to wit, the authority of the government and nation.

§ 115. Each department of the government, though distinct and independent of the others in its offices, duties and powers, in the exercise of its constitutional functions, represents the entire authority of the government as derived from the nation, and not the authority of that particular department alone.[1]

§ 116. In the administration of the general government, each department is limited to its peculiar sphere of duties and powers, as enjoined and conferred by the constitution of the United States. Thus, Congress, as the legislative department, is limited to the act of legislation; the courts are limited to the sphere of adjudication; and the executive to that of executing the laws as applied by the order, judgment or decree of the courts. But in the discharge of their various duties, and in the exercise of their respective powers, each department acts by the authority of the government and people, and hence, it acts by supreme and sovereign authority.

§ 117. The sphere of legislation is distinct both from the sphere of adjudication and execution. Congress can enact any constitutional law and make it binding upon the people individually. But it has no authority to interpret, construe or apply the law enacted. It cannot judicially determine that there has been an infraction of the law by one upon whom it was obligatory. That power can only be exercised by the judiciary.

§ 118. The sphere of adjudication is limited to the ascertainment of the law, and to its application to the facts judicially ascertained; to the end that the

The constitution also creates the judicial department. Thus: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish." (Art. 3, § 1.)

1 Thus, the government can only legislate through Congress; but the laws enacted by Congress, if constitutional, express the authority of the government and nation. Only the judiciary department can interpret and apply those laws; yet their interpretation and adjudication is final, and expresses the judgment of the government and nation. So the executive has the sole right to execute the adjudicated will of the nation, as interpreted and applied by the national judiciary; but in doing so, he represents both the government and nation, and acts by all the authority the nation could confer in that respect. Sovereignty is not divided between the several departments of the government; on the contrary, it is exercised by the government through the several departments thereof.

proper remedies may be applied by the appropriate judgment, order or decree of the court. But this department can only interpret and apply the law as it exists. It can enact nothing to supply the deficiency of legislation. And when it has pronounced its final judgment or decree, its authority over the subject is at an end. What remains to be done then passes into the hands of the executive.

§ 119. It is the duty of the executive department as such, to see that the law as ascertained and applied by the final order, decree or judgment of the court, is executed in accordance with such order, judgment, or decree. By the constitution of the United States it is made the duty of the President, as the executive head of the nation, to take care that the laws are faithfully executed. (Art. 2, § 3.)

§ 120. There are other duties and powers necessarily incident to a national government which arise out of the external relations sustained by it to other nations. These duties and powers are international in character; and may be imposed or conferred on such departments as the people in their sovereignty ordain. By the national constitution, the President, by and with the advice and consent of the senate, has power to make treaties, to nominate, and by the like advice and consent, to appoint embassadors and other public ministers and consuls. He is also made the commander-in-chief of the army and navy of the United States, &c. (Art. 2, § 2.)

§ 121. There are also other duties and powers pertaining to administration, which may be enjoined and conferred on either of the several departments, as shall seem most appropriate. By the constitution the President may nominate, and by and with the advice and consent of the senate, appoint judges of the supreme court, and all other officers not otherwise provided for by the constitution. He has power to fill vacancies which occur during the recess of the senate, by granting commissions which are to expire at the end of their next session. The constitution requires him to give to the Congress information of the state of the Union, and to recommend to their consideration such measures as he judges to be necessary and expedient, &c. These may be denominated *presidential duties and powers, &c.*[1]

[1] These are denominated *presidential duties and powers*, because they pertain to the office of president, not as a part of the executive duties of that office, but because they are specifically attached to it by the terms of the constitution.

§ 122. The government of the United States, as instituted by the people in the adoption of the national constitution, is a NATIONAL GOVERNMENT; having supreme authority to legislate in respect to all matters pertaining to the permanence, security and prosperity of the nation; having supreme authority to determine the limits of its own jurisdictions and powers under the constitution and laws of the United States; and having supreme authority to carry into effect its own final judgments and decrees, anything in state constitutions and laws to the contrary notwithstanding.

§ 123. To this government of the United States is committed not only all the authority and power to be exercised in the administration of a supreme national government over the people composing the nation, but also the exercise of all national authority essential or necessary to the preservation of the sovereignty and independence of the nation among the nations of the earth; the constitution having clothed the government with ample powers to adjust and maintain international relations and rights.[1]

CHAPTER IV.

OF THE CONSTITUTION OF THE UNITED STATES.

PRINCIPLES OF INTERPRETATION.

§ 124. The government of the United States is a constitutional government, deriving its existence and authority from the people. It is intrusted with the exercise of those powers which are expressly or impliedly granted in the constitution, and with no other. Hence it is a limited government; limited by the terms of the grant. Therefore, the powers of the national government are to be determined by ascertaining the meaning of the several provisions of the constitution, and their application to the subjects intended by the people.

§ 125. The meaning of the constitution, and its application to the subjects intended, must be ascertained by the application of such rules of interpretation as were

1 (*See as to powers conferred upon congress, section eight, article one, of the constitution of the U. S.; as to the treaty making power,* see art. 2, § 2; *also as to the appointment of embassadors. Idem.*)

understood and recognized as just and valid, at the time the constitution was framed and adopted. Therefore, in construing the constitution for the purpose of ascertaining the powers and duties of the national government, it becomes necessary first, to consider the rules by which its true meaning and application are to be ascertained and determined.[1]

§ 126. Construction and interpretation imply uncertainty, ambiguity. Therefore one of the first maxims in respect to interpretation is, that it is not allowable where there is no uncertainty as to the meaning of the language used. That no one shall interpret where interpretation is not needed. "When the deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning which such deed naturally presents."[2]

§ 127. In construing the constitution the end sought is, to ascertain the intention of the people, as expressed in the various provisions of that instrument. But that intention is presumed to be expressed in language appropriate for the purpose; therefore the natural and ordinary meaning of the language used, should control, unless a different meaning is inferable by comparing the provision with other parts of the instrument, or with what was the apparent intention of the people in that respect.[3]

§ 128. It is a fundamental rule in the interpretation

1 As a principle to be observed in the construction of treaties, or any other deed, Vattel says, (§ 263), "the question is to discover what the contracting parties have agreed upon — to determine precisely, on any particular occasion, what has been promised and accepted: that is to say, not only what one of the parties intended to promise, but also what the other must reasonably and candidly have supposed to be promised to him, what has been sufficiently declared to him, and what must have influenced him in his acceptance. Every deed, therefore, and every treaty, must be interpreted by certain fixed rules, calculated to determine its meaning as naturally understood by the parties concerned at the time when the deed was drawn up and accepted."

2 (Vattel, § 263.) "Where a law is plain and unambiguous, whether expressed in general or limited terms, there is no room left for construction." (*Bartlet* v. *Morris*, 9 Port., 260.) (See also 1 Bl. Com., p. 60, and Sharswood's note.)
"Words are the common signs that mankind make use of to declare their intention to one another, and when the words of a man express his meaning, plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation." Rutherford's Inst., B. 2, ch. 7, § 2.

3 The construction or interpretation of a law consists in ascertaining the meaning or intention of the legislator as expressed therein, either from his words or from other conjecture, or both. Hence, interpretation is literal, rational, or mixed. It is literal when his meaning or intention is gathered from the words only, requiring reference to no other parts or subjects. It is rational when his words do not express perfectly his intention, and it becomes necessary to collect it from probable or rational conjectures only. It is mixed when the words, if rightly understood, would express the intention, but being themselves of doubtful meaning, it becomes necessary to have recourse to probable or rational conjecture to ascertain in what sense they were used. (Ruth. Inst., B. 2, ch. 7, § 3.)

of instruments to construe them according to the natural meaning of the terms, and the intention of the parties. The intention of a law is to be gathered from the words, the context, the subject matter, the effects and consequences, and the reason and spirit of the law.[1]

§ 129. While it is a fundamental rule in the interpretation of instruments to construe them according to the natural meaning of the words used, and the intention of the parties, this can be done only when such intention is expressed in language, which, both in words and construction, "is agreeable to common use, without atttending to etymological fancies or grammatical refinements."[2]

§ 130. Where a literal interpretation leaves the intention of the party or legislator obscure or doubtful, recourse must be had to construction, or rational interpretation; by which is meant, other signs of intention must be sought after, by referring to the context; or the subject matter; or the effects and consequences; or the reason and spirit of the instrument or law.[3]

1 1 Bl. Com., 59, 60; Story on Const., § 400.
Says Blackstone, (1 Com., p. 59.") "The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effect and consequences, or the spirit and reason of the law." 1. Words are generally understood in their usual and most known signification. * * Terms of art or technical terms, must be taken according to the acceptation of the learned in each art, trade and science." 2. "If words happen to be still dubious, we may establish their meaning from the context, with which it may be of singular use to compare a word or a sentence whenever they are ambiguous, equivocal or intricate;" as calling in the preamble to help construe the act; or a comparison of the act with other laws made by the same legislator, having some affinity with the subject, or that expressly relate to the same point; as statutes in *pari materia* must be construed with reference to each other. (See Sharswood's Blackstone, 1 Vol. p. 60 and notes.) 3. Words are always to be understood as having regard to the subject matter; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. 4. As to the effect and consequences, the rule is, if the words bear either none, or a very absurd signification when literally understood, we must deviate a little from the received sense. 5. But the most effectual way of discovering the true meaning of a law when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislator to enact it. For when the reason of the law ceases, the law itself ought likewise to cease. (See 1 Bl. Com., p. 60, 61; 3 Maule & Selwyn, 510; *Wilkinson* v. *Leland*, 2 Peters, 661; The Emily & Caroline, 9 Wheat., 388; (see also Sharswood's note, 1 Bl. Com., p. 60.)

2 Ruth. Inst., B. 2, ch. 7, § 4. "If the words and the construction of a writing are clear and precise, we scarce call it interpretation to collect the intention of the writer from them. But the definition of interpretation will best inform us whether it is to be called by this name or not. Interpretation consists in collecting the intention of a man from the outward signs that he makes use of to declare his intention; it must therefore certainly be one branch of interpretation to collect his intention from his clear and precise words, as they lie before us." * * "The principal rule to be observed in literal interpretation, is to follow that sense in respect both of the words and of the construction, which is agreeable to common use, without attending to etymological fancies, or grammatical refinements." *Idem.*

3 Bl. Com., p. 59, and notes.
The construction of a law or instrument, implies the exercise of the rational faculties in exploring the intention of the maker through an examination of signs and indications so connected with the instrument construed, as to make

§ 131. When construction or rational interpretation is required, all doubtful words or expressions are to be taken in such a sense as will make them produce some effect, which is reasonable, and consistent with the general intention of the law-maker as expressed or necessarily implied in the law which is being construed.[1]

§ 132. In the construction or rational interpretation of words or expressions of doubtful meaning in a law, such an interpretation must be given to them as will be consistent with the spirit and reason thereof: that is, with the end which the law-maker had in view. For since the reason of a law consists in the end sought to be obtained by the law-maker, or the effect intended to be produced, such meaning should be given to doubtful words, if possible, as would tend to produce such result.[2]

§ 133. There are numerous circumstances attending a law which may help to ascertain the meaning of ambiguous words or expressions used by the legislator. But these circumstances by which to explain doubtful writings, laws, &c., must be shown to have immediate connection with the writing or law to be interpreted thereby.[3]

it clear that the same or a similar intention pervaded the whole. If it be a contract that requires construction, we must ascertain as far as possible the common intention of the parties; as well the understanding of him who accepts, as of him who made the instrument; for it was their common understanding and assent that made the agreement.

[1] (Rutherford's Institutes, B. 2, ch. 7, § 8. Grot., B. 2. ch. 16, § 6.) "All doubtful words or expressions are to be taken in such a sense as will make them produce some effect; that is, they are to be so construed as to give them some meaning, for to take them in any sense that will make them produce no meaning is in reality to give them no meaning at all."

"Ambiguous words or expressions are sometimes capable of two senses, and will produce some effect in either of the two. The rule then goes further, and says, that the effect must be a reasonable one. No other effect can be supposed to have been in the speaker's or writer's intention, because no man can be supposed to intend what is absurd or unreasonable." (Ruth. Inst., *supra.*)

"All civil laws * * are to be so construed where the words are of doubtful meaning, as to make them produce no other effect but what is consistent with reason, or with the law of nature. And when men live in a state of civil society, all doubtful words in any of their contracts with one another, are to be construed in that sense which will produce an effect consistent with the civil laws of the society to which they belong." *Idem.*

[2] "It may be laid down that the intention of the makers of a statute is to govern, even though the construction grounded upon such intention may appear to be contrary to the literal import of the words. Every technical rule as to the construction or form of particular terms, must yield to the clear expression of the paramount will of the legislature. *Wilkinson* v. *Leland*, 2 Peters Rep., 661. In construing statutes, penal as well as others, an interpretation must never be adopted which will defeat the evident purpose of the law, if it will admit of any other reasonable construction." (The Emily and Caroline, 9 Wheat. 388. Sharswood's note, 1 Bl. Com., p. 60.)

[3] "Grotius divided these circumstances into two sorts, such as are connected with the writing in origin only, and such as are connected with it in place as well as origin. To these two we may add a third; for there are some circumstances which seem to be connected with a law or contract, &c., rather in time than either in origin or place." Ruth. Inst., B. 2 ch. 7, § 9.

§ 134. Contemporary practice, contemporary interpretation, and contemporary history are circumstances to which reference may be had to aid in the interpretation of ambiguous words and expressions in the grants of rights, duties and powers. But contemporary history, practice and interpretation must be resorted to for such purpose, " with much qualification and reserve."[1]

§ 135. The construction to be given to instruments may be *strict* or *large*, *close* or *literal*. Common usage has given two senses to the same word, one of which is more confined by including fewer particulars; this is denominated its *strict sense;* the other is more comprehensive, or includes more particulars; and this is called its *large sense.* If the word is taken in its confined sense, the interpretation is *strict;* if in its enlarged one, the interpretation is *large*. By the same usage, *strict* and *large* interpretation may be opposed to each other; as sometimes the meaning of the language used is to be restrained so as to take in less than the words express; sometimes the meaning is to be enlarged so as to take in more. In the former use it is called *close interpretation;* in the latter it is denominated *liberal* or *free*.[2]

[1] A circumstance of origin occurs where the same lawgiver has previously or subsequently enacted on the same or a similar subject. It is a circumstance of origin because both had the same origin, and were connected with each other by coming from the same person.

A circumstance of origin and place together, occurs when interpretation is sought by the help of some other clause or part of the same instrument, which is connected with the clause to be explained in place as well as origin.

Contemporary practice is a circumstance which is connected with a law in time. See Ruth. Inst., *supra.*

"In examining the constitution, the antecedent situation of the country, and its institutions, the existence and operation 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 careful attention. Much also may be gathered from contemporary history and contemporary interpretation, to aid us in just conclusions." Story on Const., § 404. See also *Stuart* v. *Laird*, 2 Cranch., 299, 309; *Martin* v. *Hunter*, 1 Wheat. Rep., 304; *Cohen* v. *Virginia*, 6 Wheat. R., 264, 418, 421. But see *Chisholm* v. *Georgia*, 2 Doll., 419; The Federalist No. 77.

[2] Story, Com. Const., § 406.

"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. 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 win local favor. And there can be no certainty that the different State conventions in ratifying the constitution gave the same uniform interpretation to its language, or that even in a single State convention, the same reasoning prevailed with a majority, much less with the whole of the supporters of it." Story Com. Const., § 406.

Ruth. Inst., B. 2, Ch. 7, § 10.

"In order to extend the meaning of a writer beyond the precise or common sense of his words, we may argue from the reason or motive upon which he proceeded; from the end which he had in view, or the purpose which he designed to obtain. When we thus argue from the reason of a law, and would

§ 136. When the people institute and establish a constitutional government, and enjoin upon it duties, secure to it rights, and confer on it powers to enable it to provide for the common defense, to promote the general welfare, and to secure to all the blessings of liberty, all grants of power and endowments of rights essential for such purposes, are to receive a *large, liberal* and *free* interpretation.[1]

§ 137. The people of the nation, in whom alone absolute sovereignty within the territorial limits of the United States is vested, in the institution of the national government, with its rights, duties and powers, exercised no authority in derogation of any existing legitimate authority, right or power; either of individuals or States. And, for this reason, a *strict* or *close* interpretation of the grants of powers and rights to the national government, is not required.[2]

§ 138. The powers given to the general government, belonged to the people and not to the State governments. If any of them had been exercised by the State governments prior to the institution of the national

extend the meaning to any case which is not included in its words, Grotius observes that the case must be shown to come within the *same* reason upon which the law-maker proceeded. If it only comes within the like reason this will be no evidence that it is included in his meaning. * * It must be agreeably to the same reason upon which he proceeded." (Ruth. Inst., B. 2, Ch. 7, § 11; also Grot. B. 2. Ch. 16, § 20.) "But every writing, and every clause in a writing, whether it is a law or a contract, or a will, though it is not to be construed agreeably to the reason upon which the writer might have proceeded, is certainly to be construed agreeably to the reason upon which he did proceed. When we know what was the reason or final cause which the writer had in view, what end he proposed, or what effect he designed to produce, and the meaning of the law, or contract, or will, if we were to adhere closely to the words of it, would not come up to this reason, or would not produce this effect, we may then conclude that his words express his meaning imperfectly; and that his meaning is to be extended beyond his words, so as to come up to this reason, or so as to produce this effect. For it is much more probable that the writer should fail in expressing his meaning, than that his meaning should fall short of the purpose he designed to obtain." Ruth. Inst., *Idem.*

1 (Observe the language of the supreme court of the United States in *Gibbons* v. *Ogden*, 9 Wheat., 1 *et seq.*; also in *Martin* v. *Hunter*, 1 Wheat., 304; *S. C.* 3 Pet. Cond. R. 575; *Ogden* v, *Saunders*, 12 Wheat., 332.)

"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 and the other more enlarged, that should be adopted which is most consistent with the apparent objects and intent of the constitution; that which will give efficacy and force as a government, rather than that which will impair its operation and reduce it to a state of imbecility." Story's Com. Const., § 419.

2 It is to be remembered that the people of the nation and the people of the States are the same. That the necessities for national and State governments are the same. That the authority by which they are instituted is the same. They are but different agents of the same principal—the people—intrusted with the several talents committed to their use. The national government is charged with the defense of the whole people as a nation, and with promoting their general welfare; while the State is charged with the exercise of such duties and powers as pertain to domestic matters, and to the local welfare of those residing within her limits. Both governments have the same end to accomplish—to wit, the enjoyment by all citizens of life, liberty, security and happiness, and the protection of all in such enjoyment.

government, they had been so used by the authority of the people who had authority to withdraw such powers at pleasure, and to confer them upon the national government.

§ 139. In construing the constitution of the United States, it is important to keep in mind that it is a fundamental law, ordained and established by the people of the nation for the purpose of instituting a national government, to be invested with supreme authority and power to defend and maintain the rights and interests of the nation, against invasions from without, and insubordination from within; and to do all things necessary to provide for the common defense, and to promote the general welfare of the nation.

§ 140. It is also to be kept in mind that the people in instituting the government of the United States by the establishment of this constitution, intended to commit their rights and interests as national citizens to the absolute protection of the government thus instituted; and to give to it supreme power and authority to afford them that protection whenever and wherever it should be needed.

§ 141. It is also important to remember that it proposed to institute a national government complete in all its parts, and dependent for its rights of administration only upon the authority committed to it, to be exercised upon all national subjects within its jurisdiction. That it proposed to invest this government with supreme authority to legislate, and to interpret, apply, adjudge and execute the laws enacted by it, independent of all other legislative, judicial or executive authority.[1]

[1] The people erected this government. They gave it a constitution; and in that constitution they enumerated the powers which they bestowed on it. They made it a limited government. They restrained it to the exercise of such powers as are granted, and all others, they declare, are reserved to the states or to the people. But * * 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? * * * They have left it with the government itself, in its appropriate branches. 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 or state discretion. The people had had quite enough of that kind of government under the confederacy. * * * The people have wisely provided in the constitution itself a 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 jurisdiction to fix and ascertain the interpretation of these grants, restrictions and prohibitions. The constitution has itself pointed out, ordained and established that authority * * by declaring that "the constitution and the laws of the United States, made in pursuance thereof, shall be the supreme law of the land, anything in the constitution and laws of any state to the contrary notwithstanding." By this the supremacy of the constitution and laws of the United States are declared. No state law is to be valid which comes into conflict with the constitution or any law of the United

§ 142. The powers granted by the people to the national government to be exercised in providing for their common defense, promoting their general welfare, and securing to them and their posterity the blessings of civil liberty, were granted that they might inure to the sole benefit of the grantors — the people — and are to be exercised only for their benefit; therefore, such grants should receive a *free, liberal* and *large* construction, so far as the powers granted are essential to securing such end.[1]

§ 143. In construing the grants of power in the constitution, the power should be deemed coextensive with the terms of the grant; unless from something which appears in the context, a plain restriction is intended. The mere possibility of abuse will not justify restricting the power to a particular case.[2]

§ 144. As, in the construction of doubtful words or expressions in a law, such an interpretation must be given as will not defeat the end the law-maker had in view, so in respect to a given power, such an interpretation must not be given as will plainly defeat or impair its avowed object. Therefore, where the words of the grant are fairly susceptible of two interpretations accord-

States. But who is to decide this question of interference? This 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 cover the whole ground; they are the key-stone of the arch." (Webster's reply to Hayne in U. S. Senate Jan. 27, 1830. G. & S. Cong. Deb., V. 6, pt. 1, pp. 77, 78.)

[1] "In regard to municipal charters or public grants, similar considerations usually apply. They are generally deemed restrictive of the royal or public prerogative, or of the common rights secured by the actual organization of the government, to other individuals or communities. They are supposed to be procured, not so much for public good as for private or local convenience. They are supposed to arise from personal solicitation, upon general suggestions, and not *ex certa causa*, or *ex mero motu*, of the king or government. 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." (Story's Com. Const., § 421.)

"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." *Idem*, § 422.

Laws and acts which tend to public utility should receive the most liberal and benign interpretation to effect the object intended or declared, (1 Bl. Com., 89), so as to make the private yield to the public interest, and in favor of public institutions, and all establishments of piety, charity, education and public improvement. (11 Co., 70-78; Hob. 97, 122, 157; 1 Serg. 55; Dy. 255; 5 Co., 14; 9 Cranch, 331; 3 Pet., 140, 481; 6 id., 436.)

[2] Every government, to be effective, must necessarily be intrusted with the exercise of some discretionary powers; as it is impossible to foresee what contingencies may arise in its administration, and to expressly provide for them. The means by which the administration is to discharge its trusts, under the ever changing conditions and relations of society, must be subject to perpetual modification. Therefore, confidence must be reposed in those charged with the administration of government, after providing the proper remedies in cases of an abuse of the trust reposed in them.

ing to their common use, the one of which will defeat, and the other preserve and promote the object intended, the latter should be adopted, according to the maxim, *ut magis valeat, quam pereat.*[1]

§ 145. Upon a principle similar in spirit, it follows, that in the interpretation of a power granted to government, to be exercised for the benefit of the people alone, such grant of power carries with it the necessary means to execute it.[2]

§ 146. The general and State governments as institutions of the people intrusted with the exercise of governmental authority, have jurisdiction over the same persons and territory, each possessing powers in exclusion of the other in matters committed to their respective jurisdictions. In the institution and endowment of these governments, it is the intention that the general government shall administer in respect to the needs and interest of a national character, and the State governments in respect to those of a local and domestic character. But as the State and national citizen have certain rights and necessities in common, it follows that some of the duties and powers of the general and State governments may be concurrent.

§ 147. As the general and State governments are distinct from each other in their institution and administration, it follows from necessity, that in respect to concurrent powers, they must be of such a nature that they can be possessed and exercised by the general and State governments without conflict, or the possession and exercise by the one must exclude the like possession and exercise by the other.

1 "Courts will look to the provisions of a law to discover its objects; to meet its intention at the time it was made, which they will not suffer to be defeated. It will be sought in the cause and necessity of making the law; the meaning thus extracted will be taken to be the law intended, as fully as if expressed in its letter; and a thing which is within the letter but not within the intention of the law-maker, is not within the statute. (1 Bl. Com., 60; 15 Johns. R., 380; 14 Mass., 92; 5 Wheat., 94; 12 id., 151; 6 Pet., 644.) When the whole context demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to effect it. (6 Cranch, 314; 1 Bl. Com., 60, 92.) The whole statute, and those on similar subjects, as the context will be taken in aid, according to the apparent meaning of their provisions. (1 Bl. Com., 60; 1 Pick., 154.) The history and situation of the country will be referred to to ascertain the reason and meaning of a provision, so as to enable a court to apply the rule of construction. (1 Wheat., 121; 4 Pet., 432) In doubtful cases the title and preamble will be resorted to to explain the law. (3 Wheat., 631; 4 Serg. & R., 166.)" *Judge Baldwin's Constitutional Views, pp.* 8, 9.

2 It must be obvious that the means of carrying into effect the objects of a power must be varied, in order to adapt themselves to the exigencies of the nation at different times. A mode efficacious and useful in one age, or under one posture of circumstances, may be wholly vain or even mischievous at another. Government presupposes the existence of perpetual mutability in its own operations on those who are its subjects; and a perpetual flexibility in adapting itself to their wants, interests, habits, occupations and infirmities. (See Story Const., § 430.)

§ 148. Inasmuch as the constitution of the United States, and the laws made in pursuance thereof, are the supreme law, it follows that the possession and exercise of a constitutional power by the general government, must necessarily exclude the possession and exercise of the same power by the State governments, in all cases where, in the exercise of such power, there is likely to arise an incompatability or repugnancy in the administration of the two governments.

§ 149. Where the power given to the general government, to be effective and adequate to the purpose for which it was granted, must be exclusive in that government, it is to be implied that it is exclusive. This implication arises from the reason and spirit of the grant itself.[1]

§ 150. Where the power granted to the general government is not, either in its nature or in the exercise thereof, incompatible with a concurrent power in the States, then, such power may be deemed to be possessed by both the general and State governments, until exercised by the general government in such a manner as to render its concurrency incompatible.[2]

§ 151. Where the incompatibility and repugnancy which would result from the concurrence of the power in the general and State governments, arises from the character of the power itself, as applied to subjects peculiarly within the jurisdiction of the general government, such power is to be deemed exclusive in the general government, whether exercised by it or not. In such case the incompatibility being in the character of the power itself, it is no answer to say, that each party, in its exercise, might avoid interference with the other.[3]

§ 152. Where the repugnancy or incompatibility does not pertain to the character of the power, but only to its exercise or operation, in such case the State governments are restrained only to the extent of actual interference.

1 Story Com. Const., § 447.

2 Story Com. Const., § 447.
In such a case the concurrency of the power may be incompatible in its nature or general character, by being applied to objects which could control, defeat or destroy the powers of the general government, if permitted to be thus exercised by the States. The concurrency of the power may become incompatible in its exercise, when there arises a conflict in the actual laws and regulations made in pursuance of the power by the general and State governments. In the former case there is a qualification ingrafted upon the generality of the power, excluding its application to such objects and purposes as might interfere with the power of the general government. In the latter case, there is a qualification only upon its exercise to the extent of actual conflict in the operations of each. Story Com. Const., § 447.

3 See Story Com. Const., § 447.

§ 153. In the construction of the constitution of the United States, it is not a universal rule of interpretation, that a specification of particular powers granted necessarily excludes others not specified. But in order to ascertain how far an affirmative or negative provision excludes or implies others, the nature of the provision, the subject matter, the objects, and the reason and spirit thereof, must be examined, remembering that the instrument is a constitution of government ordained and established by the people for their own security and welfare; and that, by special provision, all powers necessary to carry into effect those expressly granted, are given by implication.

§ 154. It is a fundamental principle of public law, that nations are equal in respect to each other, and entitled to claim equal consideration for their rights, however much they may differ in numbers, strength, government, manners or religion.[1] Hence when the people of the United States instituted the general government, as the sole means of maintaining a national existence, and providing for their common defense and promoting their general welfare as a nation, they must have intended to have conferred on the government every power essential for that purpose, as possessed and exercised by other nations.

§ 155. If, then, the people of the nation by ordaining and establishing the constitution of the United States, instituted a national government, and clothed it with authority and powers to enable it to execute the trusts committed to it, that instrument should confer by express grant or by necessary implication, all the authority and powers essential to a complete and perfect administration of such government, to the end that the existence, security and welfare of the nation might be provided for in the most perfect manner.

§ 156. The constitution of the United States contains a grant to the general government, of all powers necessary to the external and internal administration of national authority; and it prohibits to the several state governments, the exercise of any of those powers; thereby showing that the people intended to commit the safety and welfare of the nation to the exercise, management and control of the general government.

[1] 1 Kent Com., 21.

CHAPTER V.

OF THE CONSTITUTIONAL STRUCTURE OF THE NATIONAL OR GENERAL GOVERNMENT.

§ 157. In the construction of a national government, it becomes necessary to provide both for an *external* and an *internal administration* of the authority and powers of the nation. There must be a department of EXTERNAL ADMINISTRATION clothed with the authority and power essential to preserve the sovereignty and independence of the nation from whatever dangers may threaten it. To this end, the department of external administration must have authority and power to contract alliances; to make treaties; to enter into and discharge obligations, and to do everything essential to the perfect exercise of these powers; it must have authority to declare war, and to provide for carrying it on; to make peace and adjust the rights and duties of the nation in respect thereto; and to do everything fully which a free and independent nation must necessarily do.

§ 158. As the authority and powers above enumerated are essential to the existence and administration of a nation, it is to be presumed that every people who attempt to institute and establish a national government to secure to themselves and their posterity the blessings of liberty, will fully provide for the EXTERNAL ADMINISTRATION of such government, by bestowing on it the authority to exercise such powers as are necessary to maintain its independence and sovereignty at home and abroad.

§ 159. In the institution of the general government, the people of the United States intended to provide for their existence as a sovereign and independent nation, until, at least, in their own pleasure they should ordain to the contrary. And they further intended to intrust the government instituted by them, with the exercise of such authority and powers as would make it safe for them to commit the defense and welfare of the nation to its keeping.[1]

[1] It is manifest that the people intended to make the general government their only one for national purposes; as they made no other provision for their national existence, security and welfare. The conclusion is, therefore, irresistible, that if the people intended to remain a sovereign and independent nation, and had any just ideas of what authority and powers were essential to

§ 160. In pursuance of the intention of the people of the United States, the constitution confers on the general government plenary powers to provide for the EXTERNAL ADMINISTRATION of their authority over all subjects international between themselves and other nations; and it denies to the states the exercise of such authority.[1]

§ 161. The people of the United States taking their station as a sovereign and independent nation, among the nations of the earth, took also all the incidents of such station. They necessarily began to figure in the grand society of the human race as independent of all earthly power. The prerogatives and rights of sovereignty are inseparable from sovereignty itself; therefore, they also attached to the people as a nation. As a nation it became their duty to maintain their dignity, and to cause themselves to be respected; for in no other way could they preserve their tranquillity and safety. To this end the establishment of a government, to be clothed with authority to exercise in their behalf, all needed powers, became indispensable. Hence, in the institution of the general government, the constitution provides, in the most general terms, for maintaining intercourse with nations. It gives to Congress the power to regulate commerce; to the President and Senate, the authority to make treaties; to appoint embassadors and other public ministers. It also gives authority to coin money and to regulate its value; to emit bills of credit; to borrow money. It also authorizes the government to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling

enable a government to provide for, and administer to, their needs as a nation, they intended to clothe the general government with such authority and powers. For when we know the end they had in view, we have a right to suppose they purposed to accomplish that end by what they did; and, in the language of Rutherford, it is much more probable that they should fail in expressing their meaning, than that their meaning should fall short of the purpose they designed to obtain.

[1] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; &c. * * No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. Nor shall they, without the like consent, 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. (Art. 1, § 10, Const. U. S.)

forth the militia, and for its organization, arming and discipline, for its government and employment while in the national service; and also to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the constitution in the government of the United States, or in any department thereof.[1]

§ 162. The people of the United States provided for maintaining intercourse with other nations, through the sole agency of the general government; and for that cause they granted to it the powers essential to the maintenance of such intercourse. The power to make treaties, to enter into and discharge obligations in respect to other nations, is given in unlimited terms. This is necessary, because the constitution denies the exercise of such authority to all other governments; and yet the exercise of this power in a practical manner, is essential to the existence and proper administration of national authority. The power to make treaties being unqualified, it necessarily includes the authority to enter into treaty obligations of every character and description, essential to the peaceful and prosperous existence of the nation.[2]

§ 163. The power to bind the nation by treaty stipulations must come from the national sovereignty. Those who are intrusted with the exercise of governmental authority, are limited to the exercise of the powers conferred. Therefore, the treaty making power, by the exercise of which, obligations are to be assumed or discharged by the nation, must be granted to the government by the fundamental law, or it cannot exercise the power. And the people in the grant of the power to make treaties, usually designate the particular manner in which it is to be exercised.[3]

[1] See Const. U. S., art. 1, § 8; art. 2, § 2.

[2] "Treaties or the contracts of nations are recognized and enforced by international law; but they no more form a part of it than the contracts of private persons form any part of the municipal law by which they are enforced. Care must be taken not to confound those rules, which properly belong to the law of nations, with those founded upon treaties. Treaties are declaratory of international law, so far as they imply or set forth its principles; but they are in derogation of it between the contracting parties, so far as their legal rights are varied by their mutual stipulations. Usage as a part of the law is derived from the perpetual current of decisions and treaties. Treaties which depart from the custom do not alter the law of nations. By a confusion of terms they have been styled conventional law, which is but another term for the law of nations. They are, in truth, conventional obligations recognized by the law of nations." (See 1 Wildman's Inst., p. 2.)

[3] "Public treaties can only be made by the superior powers, by sovereigns who contract in the name of the state—nation. * * The sovereign who possesses the full and absolute authority, has, doubtless, a right to treat in the name of the state he represents; and his engagements are binding on the

§ 164. The general government having authority to make treaties of every character and nature essential to the well-being and harmony of the nation in its intercourse with other nations; having power to bind the nation by its compacts and agreements in that respect; to borrow money, if necessary to fulfill its engagements; to regulate commercial intercourse with them; to send to, and receive from them, ministers plenipotentiary; to appoint consuls, etc., and also having authority to declare war, and to make all necessary provisions for carrying it on; to conclude peace, and to adjust the rights of the parties by requiring or granting such conditions as are essential to that end; has all the powers and authority essential to external national administration; all, in that respect, that any national government can have, or exercise.[1]

§ 165. In the institution of the national government it was necessary to provide for an INTERNAL NATIONAL administration. The national citizens had rights and interests common to them as members of the nation, which required the favor and protection of a common government. Within the territorial limits of the nation were existing thirteen state governments. They had been instituted by their respective inhabitants for purposes of local administration. But while the state government was intrusted with the exercise of the authority of the people within its limits, it could exercise no authority beyond. As a state merely, the people had no authority outside its limits. For as state citizens only, they had no *national status.*

§ 166. The government of Massachusetts was never a national government. A mere citizen of Massachusetts had no nationality. It was only when state lines disappeared, and the citizens of all the states stood shoulder to shoulder as members of one society, with a common interest and a common country, that nation-

whole nation. But all rulers of states have not power to make public treaties on their own authority alone; some are obliged to take the advice of a senate, or of the representatives of the nation. It is from the fundamental laws of each state — nation — that we must learn where resides the authority that is capable of contracting with validity in the name of the state." (Vattel, § 154.)

1 It is difficult to conceive of any authority or power essential to the *external administration* between sovereign and independent nations, which is not granted in the constitution, to be exercised by the general government. Every sort of compact or agreement necessary to adjust their rights and interests in time of peace, can be entered into by the general government, and made binding upon the nation; and when war threatens, the government can invoke and command the power of the nation; can command and apply the means necessary for raising and equipping the land and naval forces; can marshal and lead them against the enemy; in short, can do everything necessary to be done in war and peace.

ality attached to them. As such, they declared their common independence. As such, they unitedly achieved that independence, and were unitedly recognized as ONE NATION.[1]

§ 167. As soon as the people of the states had united as one people, to achieve their common independence, and to establish themselves as a sovereign and independent nation, they became members of the new nation; and having established a common or national government, they became the citizens of that government; and hence, had a double citizenship: to wit, a national, and a state citizenship. As members of the nation, their rights, interests and authority extended over the national domain, and throughout the entire territorial limits of the nation. Their representatives and senators were to legislate for the whole nation. As members of the state, their rights, interests and powers were limited to their respective states. Their laws had no binding authority outside their respective limits.

§ 168. Inasmuch as the citizens of the general government about to be instituted, were likewise citizens of the several states, in providing for the *internal administration* of the national government, it became necessary, either to absorb the governmental powers of the states, and institute but one consolidated government for them all, or to continue the state governments in the exercise of their authority and powers over local and domestic matters; and to confer upon the general government jurisdiction and authority over matters pertaining to them as members of the nation, and citizens of its government.

§ 169. The interests of the citizen of the state government, and of the citizen of the national government, were not adverse, but were in harmony. The citizen of the state was likewise a citizen of the nation; having national rights and interests superadded to his local rights and interests; and he sought favor and protection in the exercise and enjoyment of both classes of rights and interests. The state, as such, could administer only in local matters; could provide only for local or state interests. Therefore the general government

1 "But Georgia cannot be viewed as a single, unconnected sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire. She is a member of the American union, and the union has a constitution, the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states which none claim a right to pass." (*Fletcher* v. *Peck*, 6 Cranch, 136; see also 9 Wheat., 187; 5 id., 514; 6 id., 414; 12 id., 334; 2 Pet., 590.)

become a necessity, notwithstanding the existence and authority of the state governments.[1]

§ 170. Therefore in providing for the *internal administration* of the general government, and yet permitting the state governments to continue in the exercise of governmental authority over matters of a local and domestic character, it became necessary that the powers committed to the general government to be exercised by it, and those which were to remain to be exercised by the state governments, should be distinguished the one from the other, to avoid conflict of jurisdiction and authority, in the practical administration of the same, over the same people and within the same territorial limits.

§ 171. The authority and powers to be exercised by the two governments could be generally distinguished, by giving to the general government authority over matters and subjects of a national character; and to the state governments, authority over matters purely local and domestic.[2] But such definition standing alone, would not be sufficiently certain to avoid constant conflict of jurisdiction. For there are a large class of interests common to the state and national citizen. It therefore became necessary in the institution of the general government, to define very clearly the powers intrusted to its exercise, leaving the unenumerated powers essential to the government of the state, to be exercised by the state governments.

§ 172. The people, in the institution of the general government, and in the endowment of it with authority to exercise the powers specified and implied in the grant, did not make it residuary in character, as they did the state governments; for the plain reason, that it was comparatively easy to enumerate the powers essential to a purely *national administration;* while there

1 "The political character of the several states of this union in relation to each other is this: For all national purposes the states and citizens thereof are one, united under the same sovereign authority and governed by the same laws. In all other respects, the states are necessarily foreign to, and independent of, each other." (2 Pet., 590; 10 id., 579; 12 Wheat., 334.) "The national and state system are to be regarded as one whole." (6 Wheat., 419.) "In America, the powers of sovereignty are divided between the government of the union, and those of the states. They are each sovereign with respect to the objects committed to it; and neither sovereign with respect to the objects committed to the other." (4 Wheat., 410.)

2 "For all national purposes, the states and the citizens thereof, are one; united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign to, and independent of, each other." * * The states retain their individual sovereignties, and with respect to their municipal regulations, are to each other sovereign." (2 Pet., 590; 10 id., 579.)

would be no limits to the detail of powers essential to a proper administration in respect to subjects of a local and domestic character.

§ 173. The national and state governments, then, are neither of them primary, in respect to each other. They are each corporate institutions created by the authority of the people, for specific purposes only. Each are intrusted with the exercise of such authority and powers as the people have ordained; and each are prohibited from the exercise of certain other powers. Hence, in the tenth amendment of the constitution of the United States, the people are recognized as possessing powers not intrusted to the exercise of either the general or state governments.[1]

§ 174. The general and state governments are each intrusted with the exercise of governmental authority properly belonging to the department of *internal administration*. That is, in a nation where there are no other governments than the general or national one, to administer in local matters, or in matters pertaining to the intercourse of one citizen or inhabitant with the other, and in respect to the rights and duties arising out of that intercourse, the *internal administration* of the nation embraces these subjects, here committed to the jurisdiction of the states. And the difference between such a nation and the United States as a nation, consists mainly in the division or distribution of the subjects of *internal national administration* between the general and state governments; giving to the general government jurisdiction over a certain enumerated class of these subjects; and giving to the state governments jurisdiction over what remains of them.

§ 175. Such, then, is the structure of the government of the United States, including both the general and state governments. As institutions, neither of them possess any original or inherent authority. They are merely the corporate agents of the people, authorized to exercise the powers committed to their trust in the manner and for the purposes ordained by the people. The general government holds its powers in trust for the people of the nation, and it is administered by the will of the nation, without respect to state lines. The national citizen of New York, by his representatives

[1] "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." (10th Amendment of the Const. U. S.)

and senators in congress, legislates for every part of the nation; and so in respect to the national citizens of the other states. But the people of each state, as state citizens, administer only within the limits of their respective states, in matters pertaining to local and domestic interests alone.

CHAPTER VI.

THE CONSTITUTION OF THE UNITED STATES— ITS PREAMBLE.

§ 176. The constitution of the United States was ordained and established by the people, for the purpose of instituting a national government to be intrusted with the exercise of national authority over all subjects committed to its jurisdiction, to the end that the defense of the nation might be provided for, and its welfare secured.[1]

§ 177. "This leads to an inquiry into the origin of this government, and the sources of its power. Whose agent is it? Is it the creature of the state legislatures, or the creature of the people? If the government of the United States be the agent of the state governments, then they may control it, provided they can agree in the manner of controlling it; if it be the agent of the people, then the people alone can control it, restrain it, modify or reform it. * * * Is it the servant of four-and-twenty masters of different wills, and different purposes, and yet bound to obey all? This absurdity arises from a misconception as to the origin of this government in its true character. It is the people's constitution, the people's government; made for the people, and answerable to the people."[2]

1 "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." (Preamble to Const. U. S.)

2 Webster in reply to Hayne, Jan. 27, 1830, in the U. S. Senate. Debates in Congress, vol. 6, pt. 1, p. 74.

"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 the 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." (4 Wheat., 404.)

"The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of

§ 178. This preamble was not adopted as a mere formulary. It was a solemn promulgation of a fundamental fact, vital to the character and operations of the government being instituted.[1] The one nation, sovereign in its authority to ordain and establish a government, was about to exercise that authority, that it might have one government; actuated by one purpose; governed by one mind and will, as expressed by such government; having one interest in the common defense and general welfare of the people as a nation. Hence the language: "*We, the people of the United States, do ordain and establish this constitution for the United States of America;*" not, we the states do enter into a compact or treaty with each other.[2]

§ 179. At the time the constitution was submitted to the people for their ratification, those who feared a consolidated government, objected to the preamble, because it declared that the constitution was to be ordained and established by the people.[3]

the constitution declares, by the people of the United States." (*Hunter* v. *Martin*, 1 Wheat. R., 305, 324; see also *McCulloch* v. *Maryland*, 4 id., 316, 404, 405; *Cohens* v. *Virginia*, 6 id., 264, 413, 414.)

"Finally, how can any man get over the words of the constitution itself? 'We, the people of the United States, do ordain and establish this constitution.' These words must cease to be a part of the constitution, they must be obliterated from the parchment on which they are written, before any human ingenuity or human argument can remove the popular basis on which the constitution rests, and turn the instrument into a mere compact between sovereign states." (Webster in U. S. Senate, Feb. 16, 1833.)

See also Story's Com. on Const., § 463; see also 1 Wilson's Lectures, 417.

1 Story's Com. on Const., § 463.

2 The impossibility of using the state governments as agents for providing for, and administering to, the needs of the American people as a nation either at home or abroad, had been fully demonstrated by an experience of thirteen years. Said Edmund Randolph, in the Virginia convention: "The confederation has done a great deal for us, we all allow. But it was the danger of a powerful enemy and the spirit of America, and not any energy in that system, that carried us through that perilous war. The greatest exertions were made when danger was most imminent. This system was not signed till March, 1781. Maryland had not acceded to it before. Yet the military achievements and other exertions of America previous to that period, were brilliant, effectual and successful as they could have been under the most energetic government. This clearly shows that our perilous situation was the cement of our union. How different the scene when this peril vanished, and peace was restored! The demands of congress were treated with neglect; one state complained that another had not paid its quotas as well as itself; public credit was gone; for, I believe, were it not for the private credit of individuals, we should have been ruined long before that time; commerce languishing; produce falling, and justice trampled under foot. We became contemptible in the eyes of foreign nations. They discarded us as little wanton bees, who had played for liberty, but had not sufficient solidity or wisdom to secure it on a permanent basis, and were therefore unworthy of their regard. It was found that congress could not even enforce the observance of treaties. That treaty under which we enjoy our present tranquillity was disregarded. * * * What was the reply to the demands and requisitions of congress? You are too contemptible; we will despise and disregard you." (3 Elliott's Debates, by Lippincott, p. 27.)

These were among the reasons assigned by Governor Randolph why the confederated system had been abandoned; and why a national government ordained and established by the people had been resorted to, to wit: the necessity for a national government.

3 Patrick Henry, in the Virginia convention, said: "I would make this inquiry of those worthy characters who composed a part of the late federal convention. I am sure they were fully impressed with the necessity of forming a great consolidated government, instead of a confederacy. That this is a

§ 180. The general government thus instituted, derived its existence and authority immediately from the people of the United States as members of the nation, having sovereign authority to ordain and establish for themselves such government as they thought proper; and to intrust to it the exercise of such authority and powers as to them seemed wise and good. By ordaining and establishing the constitution, each citizen of the nation agreed with all, and all with each, in the institution and endowment of the general government, in the manner and for the purposes therein expressed.

§ 181. The general government is neither a consolidated government, dangerous to the liberties of the states on the one hand, nor a confederated government dangerous to the stability of the nation on the other. It is a government of the people of all the states; representing them in their national sovereignty and character; protecting them in their national interests; defending them in the exercise of their national rights; promoting their national welfare, and securing to them the blessings of liberty as national citizens. It was instituted by the people for such purposes, because the state governments could not be employed in that capacity. There was but one nation, and it could be authoritatively represented only by one national government.

§ 182. The words, "we the people of the United States," require no interpretation, and, hence, interpretation is not allowable. The preamble is worded in clear and precise terms; the meaning is evident, and leads to no absurd conclusions; therefore, there is no reason for refusing to admit the meaning which it naturally suggests.[1] The "people of the United States" were the people of all the states who had united in the declaration and achievement of their common independence, taken together as ONE PEOPLE — ONE NATION — acting together for the institution of ONE GOVERNMENT, to which the exercise of national authority was to be committed.[2]

consolidated government is clear; and the danger of such a government is, to my mind, very striking. I have the highest veneration for those gentlemen; but, sir, give me leave to demand, what right had they to say, *we the people*? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, who authorized them to speak the language of '*we the people*' instead of 'we the states?' States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great consolidated government." (3 Elliott's Debates, by Lippincott, p. 22.)

[1] See ante, § 125 and note.

[2] The language used was the only appropriate language which could have been used by the people of all the states, acting as one, for the purpose of insti-

§ 183. The language of the preamble, "we the people, &c., do ordain and establish this constitution for the United States of America," is the language of a people speaking and acting from their original sovereignty. It is not the language of sovereign states entering into a compact, agreement or confederation with each other. The people, in virtue of their inherent sovereignty as a nation, were covenanting each with all, and all with each; exercising their authority to provide for themselves and their posterity an institution, by which they could will and act as ONE PEOPLE, HAVING ONE MIND AND PURPOSE, on all subjects pertaining to national existence, security and happiness.[1]

§ 184. "The people of the United States" included the people of all the states, without state discrimination. "We the people," &c., was the only form of expression appropriate to define those who constituted the nation, without including in the definition something of the limitation of state organization. This form of expression included as well the people inhabiting the territories as those residing in the organized states; while the expression, the people of the several states, would literally have excluded them. We, the people of the United States, is a national expression, descriptive of the constituents of the nation, and cannot be made more plain in its significance by any interpretation. Its natural meaning is evident, and leads to no absurd conclusion.

§ 185. The purposes for which the people ordained and established the constitution were also national in character. The first purpose named was, "in order to form a more perfect union." A more perfect union was not needed for purposes of state administration. Their several state governments were fully competent to administer in respect to persons and subjects over which they had jurisdiction. In respect to matters local and domestic, the state government could act promptly and efficiently, because it was a unit, and it possessed the necessary authority. It was only in respect to sub-

tuting a national government. The instrument being a constitution of government, it was necessary and proper that it should show upon its face who were the parties that ordained and established it, and the purposes for which they established it. By its language, in presenting the authors of the instrument and the grantors of the powers delegated, it abolished state lines and state jurisdiction. State individuality was purposely lost sight of. The language is, "we the people of the UNITED STATES"—not, we the people of the SEVERAL STATES—"do ordain and establish this constitution," &c.

See remarks of Webster on this subject in U. S. S., Feb. 16, 1833, G. & S. Cong. Deb., vol. 9, pt. 1, p. 555. See appendix, p. —

jects over which the state had no jurisdiction, and yet in respect to which governmental authority and power were demanded for the safety and welfare of the people. It was, in respect to those subjects of interest, common to the people of all the states, as members of one great community; interest connecting the citizens of New York with the citizens of South Carolina, and with the citizens and governments of foreign lands, that made a more perfect union of the people of the United States necessary. Hence, the union called for was a national union of the people; that they might institute a government which would be, in respect to national interests, a unit; having but one mind, one will, one purpose and one power, in pursuing the necessary end.

§ 186. The more perfect union sought by the people was not a more perfect union of the several states as political institutions, intrusted with the exercise of the governmental authority of their people. A union of that character already existed. But it was a union in which there were diverse minds, purposes and determinations; each dictating, none obeying; each proposing, none performing; each sovereign, no one subject.[1] If each of the thirteen state governments were sovereign in their governmental authority over all subjects within their respective limits, there could have been no union so perfect as to fuse their thirteen minds and wills into one national mind and will, without dissolving their state individualism, and thus destroying their state sovereignty. The union established under the articles of confederation was fundamentally and radically defective, in this, that it permitted the institution called government, to be subject to the diverse minds and wills of thirteen states. That was the weakness which threatened the life of the nation, and which required for a remedy a more perfect union of the sovereign people — not of the political states.

§ 187. The governments of the states were mere local institutions of the people, intrusted with the exercise of their authority within their respective limits. Having been instituted by the people of the local territory embraced within their respective limits, the states had no jurisdiction beyond those limits. Therefore, as political institutions, they had no national authority; and, consequently, as political institutions, they could confer

[1] See ante, § 91 and note.

none. The people of the several states had become national citizens — not through their respective state governments, but in virtue of the union of the good people of all the colonies, in proclaiming and establishing themselves as a nation. The "MORE PERFECT UNION" demanded, then, was the more perfect union of the people, to be represented by one general government for national purposes.

§ 188. This more perfect union of the people, demanded, was a union of them, not as citizens or inhabitants of particular states, but as people of all the states having rights and interests in common. To become a nation, the sovereignty of nationality must attach, which is independent of, and above all other earthly authority. This kind of sovereignty could not attach to a state with its limited jurisdiction and authority, nor could it attach to the people of a state as state citizens merely, because the state was not a nation and had no claim to nationality. The advantages to be secured by the more perfect union of the people as a nation, were, among other things, to extend, by administration, the national rights, powers and authority of each citizen over all the states, and make all subjects of one government.

§ 189. The union of the people of the United States as a nation, and the institution of the general government to represent them as such, necessarily involved the denial of sovereignty to the states. The absolute sovereignty of the nation necessarily excludes the like sovereignty in any other body than its own within its limits. The nation as a society, is a unit; as a body, it is one; as a power, it has no superior; as a sovereign, it is absolute, and answerable to no earthly tribunal. This national personality occupies and possesses every inch of territory, and every iota of authority and power within the limits of the United States. What the people as a nation legislatively will, is the supreme law; what they determine, is final, and from it there is no appeal.

§ 190. When the people ordained and established the constitution of the United States, and thus instituted the general government with its powers, they asserted this sovereign authority over all. The convention which drafted the constitution for the PEOPLE OF THE UNITED STATES proposed, among other things, that the constitution might be amended in the manner prescribed.

The people, in ratifying the constitution, sanctioned the proposed mode of making amendments. By it, any of the states, as people or government, may be deprived of the exercise of such powers as three-fourths of the others may ordain by way of amendment to the constitution, whether they assent to it or not. The assertion of this authority by the nation, necessitates the obedience of the states. They are amenable to other and higher authority. There is an earthly power above them, to which, by their own oaths, they are bound to submit. There is that authority which can make laws that are supremely obligatory upon them, notwithstanding the authority of their state constitution and laws to the contrary.[1]

§ 191. The authority by which the general government was instituted, and is sustained, is absolute over all state authority, whenever the people see fit to exercise it. The authority which can withdraw *one* subject from the jurisdiction of the states, and can confer on the general government additional power to regulate and control it, can withdraw *all* subjects from state jurisdiction, and intrust the general government with plenary powers over all matters of internal administration. It is no answer to say, the people will never consent to such amendments. They have the authority to assent to them; and that involves the absolute authority of the nation over the states.

§ 192. The amendments made to the constitution in the manner prescribed, become a part of the constitution, and, consequently, of the supreme law of the nation; and the one-third of the states not assenting to such amendment, are nevertheless bound thereby, notwithstanding the constitutional encroachment made upon their state constitution and laws. A state or people thus situated are not sovereign in the absolute sense. There is a higher authority to which they, as people and states, are subject. Their constitution and laws may be abrogated, in whole or in part, without their consent; and they are without remedy, except in revolution.

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 a 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," &c. (Art. 5 of the Const. of the U. S.)

§ 193. Such was the "more perfect union" sought by the people of the United States when they ordained and established the national constitution. It was to weld the people of all the states, for national purposes, into one grand society as a nation, having one interest, one purpose, one aim, and one destiny; to institute for such people one government, clothed with authority and power to command respect and honor from abroad, and obedience and support at home; and thus to secure to all its citizens the full enjoyment of their civil rights.

§ 194. Another purpose for which the constitution was ordained was "TO ESTABLISH JUSTICE." The state governments, if they would, had full power to establish justice between the citizens thereof, in respect to subjects of a local and domestic character. But they could exert no authority over subjects international, or which involved the jurisdiction of persons or subjects situated beyond their respective limits. The congress of the United States, under the articles of confederation, had no power to exact obedience, or to punish disobedience, to its ordinances. The great defect in the confederation was this lack of power to give sanction to its laws.[1] There was no express authority to exercise force, and it could not be implied, because the articles of confederation prohibited any implication of power by the congress. The congress could neither impose fines, nor direct imprisonment, nor divest privileges, nor declare forfeitures, nor suspend refractory officers.[2]

§ 195. The source of this weakness under the confederation was, that the states refused to commit to the congress the exercise of the necessary authority to administer as a government of the nation. It was rather an advisory than a legislative body. It could

[1] Kent's Com., 200; Story's Com. Const., § 252.

[2] By this political compact—articles of confederation—the United States, in congress, had exclusive power for the following purposes, without being able to execute one of them: They might make and conclude treaties, but they could only recommend the observance of them; they might appoint embassadors, but could not even defray the expenses of their tables; they could borrow money in their own name on the faith of the union, but could not pay a dollar; they were authorized to coin money, but could not command the means to buy the bullion; they might make war and determine the number of troops necessary, but they could not raise a single soldier; in short, they might declare everything, but they could do nothing. (Story on Const., § 246.)

Governor Randolph, in the Virginia convention, in speaking of this lack of power under the confederation, after stating what had been accomplished during the war, remarks: "How different the scene when this peril vanished, and peace was restored! The demands of congress were treated with neglect. * * We became contemptible in the eyes of foreign nations. They discarded us as little wanton bees, who had played for liberty, but had not sufficient solidity or wisdom to secure it on a permanent basis. * * It was found that congress could not even enforce the observance of treaties. The treaty under which we enjoy our present tranquillity was disregarded." &c. (3 Ell. Deb., p. 27, Lippincott's ed.)

investigate and recommend, but it could not command and enforce. The thirteen states maintaining their separate and independent authority; acting from their supposed separate interests; jealous of the particular burdens imposed upon them; jealous of the tardiness of other states in fulfilling their engagements; complaining that others had not paid its quotas, there was no alternative left but to give up national existence and to go back to a state of colonial dependence, or to change the system, and establish a government of the people, perfect in all its departments, to legislate, adjudge, and executed by the authority of the nation.[1]

§ 196. The nation could not maintain its existence among the nations, without maintaining international relations with them. It, therefore, became indispensable that those relations should be regulated and determined by treaties, compacts and agreements; that some agency should be established by which those necessary treaties and agreements could be made and entered into on the faith of the nation; and, being made, it was also necessary that they should be observed and kept. This involved the binding of the nation by the exercise of its authority, and the command of its resources, by which its faith might be kept and its pledges redeemed. This required the institution of a government clothed with the necessary authority and power to represent the nation as a unit in mind, purpose and power; to undertake, and to perform for, and in behalf of the nation. In no other way could justice be established by being made certain and secure to every one having to do with the nation. But this end could not be secured, so long as the nation was in any degree dependent upon the diverse minds and wills of thirteen independent state governments to determine what justice required, and by what means, if any, it should be enforced. Therefore, the establishment of justice between the people of the United States as a nation, and other nations, as well also as between the citizens of the nation, required the

1 After showing that under the confederation there was no power to enforce the authority of the congress, and that the nation was on the very verge of ruin, Governor Randolph, in reply to the remarks of Patrick Henry, demanding by what authority the framers of the constitution had used the expression of "*we the people*," instead of *we the states*, answers: "The gentleman inquires why we assume the language of 'we the people?' I ask, why not? The government is for the people, and the misfortune was, that the people had no agency in the government before. The congress had power to make peace and war under the old confederation. Granting passports by the law of nations is annexed to this power, yet congress was reduced to the humiliating condition of being obliged to send deputies to Virginia to solicit a passport." (3 Ell. Deb., p. 29.)

institution of a general government by the people, which should hold its authority of the people, and be amenable to them alone.

§ 197. Again, the citizens of the several states were alike national citizens, and equally entitled to protection by the nation in their national rights and interests. There were interests common to the members of the nation which the local governments were not competent to adjust. Those engaged in commercial pursuits were peculiarly liable to the unequal operations of the laws of the different states affecting trade. That whole class of subjects committed to the regulation and control of congress by the constitution could have been justly provided for in no other way. The power to lay and collect taxes for national purposes; also, duties, imposts and excises; the power to regulate commerce; to establish uniform rules of naturalization, and uniform laws on the subject of bankruptcies; to coin money and regulate its value, could not have been exercised justly to the national citizen by the state governments. The national government was therefore necessary and appropriate to *establish justice,* in these respects.

§ 198. But the institution of the general government under the constitution was necessary to establish justice between the nation and its citizens, and foreign nations and their citizens. After the confederacy was formed, and the rights of war as a sovereign belligerent nation had been assumed, authority to make captures and bring in ships and cargoes for adjudication, necessarily flowed from the exercise of these rights, according to the law of nations. The several states retained, or rather assumed, the power of appointing prize tribunals to take cognizance of these matters, so that there were thirteen separate and independent prize tribunals instituted by one party carrying on a war. And although the articles of confederation authorized congress to institute appellate tribunals, which they did, they had no authority to enforce their decisions. Consequently these appellate tribunals were disregarded, and their decisions treated as nullities, and neutral individuals and neutral nations were without any adequate redress for the most inexcusable injustice, and the nation subjected to imminent dangers; and there was no remedy for these evils and the consequent injustice, until the people instituted the general government, and thus placed these ques-

tions where they could be adjudicated and determined by the authority of the nation.[1]

§ 199. Again, the treaties which were entered into by congress with foreign nations were neglected, although they were declared to be absolutely obligatory upon the several states. While these states assumed to exercise their authority in national affairs they did not regard the responsibilities of the nation. They did not, individually, hesitate to violate treaty obligations entered into by the congress, both by legislation and adjudication. The treaty of 1783, by which, as against Great Britain, our independence was legally established, was notoriously violated, and the provisions therein for paying debts, discarded. This could not be otherwise while the national administration was committed to the petty interests, jealousies and diverse wills of thirteen local governments. And because of the existence of such defects in the confederation, it was well said: "We, the people, do ordain and establish this constitution, for the purpose of *establishing justice.*"

§ 200. The states treated the debts of the nation as though they were under no obligation to provide for their payment. The obligations of the nation to those creditors who had advanced money, and to those soldiers who had served in the war, were disregarded by the states. Particularly the officers and soldiers who had achieved the independence of the nation, "were suffered to languish in want, and their just demands evaded or passed by with indifference. No efficient system to pay the public creditors was ever carried into operation until the constitution was adopted."[2]

§ 201. The conduct of the several states, in the local administration of justice among their respective citizens, was, if possible, more reprehensible. Laws were continually enacted by the state legislatures violating the sacredness of contracts; such as laws authorizing the payment of debts by installments at periods differing from the original terms; laws suspending the remedies for the recovery of debts; laws authorizing the delivery of any kind of property in payment of debts, upon an arbitrary or amicable appraisement; laws closing, for a limited time, the courts, under particular circumstances; insolvent laws—some of a permanent, and some of a

[1] Story's Com. Const., § 485 and notes.

[2] Story's Com. on Const., § 486.

temporary character — which operated like a general gaol delivery in several of the states; in short, the principles of justice were habitually subverted under the administration of the local governments, through their unwise and partial legislation. Hence, there was peculiar meaning in this expression, "to establish justice," for which, among other things, the people of the United States ordained and established their constitution for the United States of America.[1]

§ 202. Another purpose for which the people ordained and established the constitution for the United States, was "to insure domestic tranquillity." First, there were dangers quite likely to arise out of the conflicting interests of the several states. Although the people of the United States were a nation, hitherto they had not organized a government to exercise their authority as such; and there was no institution among them authorized to adjust the conflicting claims which were liable to arise between the several states, or between the state and citizens of other states. That the state governments were disposed to maintain state authority, and assert their peculiar interests, even in questionable cases, was quite apparent. Instances were not unfrequent where justice was denied, owing to unjustifiable preferences, fostered in favor of state citizens where the interests of citizens of other states were concerned. Moral obligations were discarded, and feelings of retaliation, sure to arise when the law furnishes no redress,

[1] See Story's Com. on Const., § 487; see also CHASE, J., in *Ware* v. *Hylton*, 3 Dall., 199, 1 Cond. R., 99.)

"Prior to the date 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 institutions and organizations 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 in cases where state considerations were not always favorable to the most exact measure. There was danger that, from this source, animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent states, a common tribunal for the termination of controversies became desirable, from motives both of justice and 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 then the inexpediency of referring all such questions to state courts, and particularly to the courts of delinquent states, became apparent. While all the states were bound to protect each, and the citizens of each, it was highly proper and reasonable that they should be in a capacity not only to cause justice to be done to each, and the citizens of each, but also to cause justice to be done by each, and the citizens of each; and that, not by violence and force, but in a stable, sedate and regular course of judicial procedure." (Remarks of JAY, Ch. J., in *Chisholm* v. *Georgia*, 2 Dall. R., 419, 474; *S. C.*, 2 Pet. Cond. R., 635, 670; see also 2 Graham's Hist. Appendix, 498, 499.)

were enkindled. Laws impairing the obligations of contracts were passed by several of the states, affecting injuriously citizens of other states. Had such states been members of the family of nations, they would have been somewhat under the moral restraints of international law; but being independent governments, created out of separate colonies which had recently thrown off the authority of the mother country, they were, as it were, subject to no code of laws; as improvised governments, they belonged to no system. Hence, they were peculiarly independent, not only of one another, but of all earthly governments; responsible to no one but the people of their respective states. In this condition, it was morally impossible that thirteen such governments should continue to administer in such a manner as to avoid conflict. Being subject to no common code of laws, recognizing no common authority to decide when they disagreed, if this state of things should continue, collisions were certain to arise.[1]

§ 203. Before the revolution, these thirteen states were colonies of Great Britain, and they recognized the supremacy of her authority. But when they proclaimed their independence, and renounced their allegiance to the British crown, each set up for itself. They were no longer political bodies, or societies, revolving around a national center, by means of which they maintained relations to other nations of the earth; nor did they become nations, and thus take upon themselves the incidents of nationality. The *people* of the thirteen states, in their union, became a nation; but they were without a government by which to exercise their authority; and, hence, were a nation unorganized; that is, they were organically powerless. During this period, from 1776 to 1787, the states within their respective limits were supreme in their administration; not because they possessed sovereign authority, or had been intrusted with the exercise of it; but because there was no organized body authorized to supervise them. This was the peculiar political condition of the United States prior to the institution of the general government. One nation with thirteen professed sovereignties; each absolute; each independent; each amenable to no earthly authority — not even the authority of international law.

1 Connecticut once retaliated in an exemplary manner upon enormities committed upon her citizens by a neighboring state, which had passed laws affecting injuriously the citizens of Connecticut. (See Federalist, No. 7.)

The administrators of such governments must have been something more than human, or they would soon have found the necessity of a general government to INSURE DOMESTIC TRANQUILLITY.

§ 204. Situated as these states were with respect to themselves, they were in a condition to invite factions among the people. Those intrusted with the administration of governmental authority would naturally feel the independence of their position; and, hence, would act with a less sense of responsibility than was necessary to secure fidelity in the execution of those trusts. A single state, as such, was independent and sovereign in respect to all other states or governments; was responsible to no one for the manner in which she administered. If the federal congress contracted debts, the creditor must look to congress, or the states collectively, for payment. There was little sense of individual obligation or moral responsibility. This naturally induced recklessness, or at least indifferent morals, in those charged with state administration. Not occupying the position of a sovereign nation in the grand society of the human race, they had neither the self-respect, morality or dignity of such station. Hence, they were naturally arrogant, illiberal, petty and selfish. Their injustice would naturally induce retaliation. Hence, factions would arise, prompted by hatred, revenge, retaliation, self-interest. The states being small, divided in interest, naturally antagonistic, the prospect of success would encourage a few, even, to resist the law with expected impunity. These, and other like considerations, demonstrated the necessity for instituting a government of a higher and more responsible character, *to insure domestic tranquillity.*

§ 205. "To provide for the common defense." The nation was a unit in existence, although it had instituted no government to represent that unity in its will and action. The oppressions of the British government had compelled the people to unite in defending themselves, and, finally, in asserting their common independence. But the bond of this union was their common danger, arising from their weakness when standing separated and alone. Hence, as soon as peace was established, and danger ceased to threaten, the demands of their congress of embassadors were treated with neglect. Jealousies sprang up between the states; complaints were made that burdens had not been

equally distributed; and the tendency was to separate again into their colonial elements. Had they thus separated, and each maintained an independent existence, with no commanding power to regulate their intercourse, the nation would have been dissolved; the elements of discord would have been enkindled in their midst, and an appeal to some foreign power for protection would have been the inevitable result. But had they maintained a separate and peaceful existence among themselves as states, each exercising sovereign authority over all subjects within its territorial limits, from their individual weakness, it would have been impossible for them separately to have maintained an independent existence in respect to foreign powers. They had neither the wealth or strength necessary to have provided and used the means requisite for national existence or safety. As it required a union of all to assert and establish their independence, so also it required the continuance of that union to defend and maintain it.

§ 206. As a nation, it was necessary to exercise national authority throughout its entire limits. The state of Massachusetts and the state of Georgia, as a nation, were one. An invasion of the territory of Georgia by a foreign force, was the same to the citizen of Massachusetts as though Massachusetts territory had been invaded. The safety and dignity of the nation would be as really threatened by an invasion of one part thereof as of another. If there had been a necessity upon the colonies, justifying their revolution and the establishment of their nationality, that same necessity required that it should be maintained and preserved in all its vigor and administrative efficiency. As a nation, an *external* and an *internal* administration of authority was indispensable. Hence, there were common interests both external and internal, to be promoted; common dangers to be repelled, and common rights to be defended.

§ 207. "To PROMOTE THE GENERAL WELFARE." This involves, in general terms, the whole end and scope of government. The general welfare of a people consists in the free exercise and enjoyment of their natural and acquired rights. And when government shall so provide that all men living in society can be protected in such exercise and enjoyment, it has provided for the public welfare in a very high degree; and when, in addition to this protection, it benignly and judiciously extends its

aid to foster and encourage every branch of industry and art tending to the welfare, happiness and perfection of individuals and society, it has provided for the public welfare in the highest degree, and accomplished perfectly the primary and ultimate end of all civil governments.

§ 208. The primary and ultimate end of civil government being to aid and protect the members of society in the exercise and enjoyment of all their natural and acquired rights, its mission proper is AID and PROTECTION. Its aid should be so extended as to be available to all alike, who put themselves in a position to enjoy its benefits, without interfering with the vested rights of any. Thus, it can favor business associations by acts of incorporation and grants of franchises, by means of which many citizens can unite their wealth, talent, and enterprise, for the accomplishment of works of greater magnitude than individual enterprise is competent to perform. But in the exercise of governmental power for such purposes, great care should be observed to guard against the misapplication and abuse of the powers granted, to the detriment of individuals or society. The objects for which such corporations are created, should be the general or public welfare, as well as the individual and associated advantages of the corporators. Such objects may be found in works of internal improvements; in the building of public roads; in developing the resources of the country; in the education of the people; the promotion of the arts and sciences; or in the general advancement of civilization and christianity by the various agencies adapted to such purposes.

§ 209. Government can properly be authorized to aid individual members of society, as well as society at large, by building light-houses, harbors, and by improving the navigation of rivers, making safe and convenient the reception and transportation of all articles of trade, manufacture and commerce. It can and should aid the people individually and collectively by establishing post-offices and post-roads; by providing for the safe and speedy transportation of the public mails to and from all settled parts of its territory, thus aiding every branch of industry, as agriculture, commerce, manufactures, navigation, and every other art or trade at all dependant on the speedy distribution of intelligence of markets, or general or special news, or information

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of any character necessary, agreeable or useful to the people in their laudable and ordinary pursuits. It should be able, also, to aid society and individuals by promoting the progress of science and art; by securing for limited periods, to authors and inventors, the exclusive right to their own writings, inventions and discoveries. It is the proper business of government to aid all departments of industry, by providing a uniform and safe currency as a medium of exchange, carefully guarding against fraud and imposition by counterfeiting or otherwise. These and many other like aids the government could properly be authorized to extend to individuals and society, and thereby really promote its general welfare.

§ 210. As the government is instituted and intrusted with the exercise of the authority of the people for their benefit, as members of society, or, more appropriately, for the benefit of the commonwealth, those intrusted with its administration should take care that benefits, conferred upon one class or portion of society, are not conferred at the expense of another; for government should ever exercise its powers in such a manner that thereby many may be benefited and none injured in the exercise of their just rights. It is not in the province of government to take that which belongs to one man and bestow it upon another, unless the welfare of society demands it; and not even then, without making just compensation therefor.

§ 211. Government not only may promote the general welfare of society by affording aid to individual members thereof as above set forth, but it is also required to promote their general welfare by protecting them in the enjoyment of their just rights. This is to be done by making, and enforcing obedience, to all laws necessary to the maintenance of equal and exact justice. To do this, government must have jurisdiction over the persons and subjects necessary to such an administration of its authority. Hence, the constitution, instituting the general government, clothed it with authority to exercise those powers essential to an efficient administration in respect to subjects beyond the jurisdiction of the states, and yet vital to the welfare of the people as a nation.

§ 212. The final purpose for which the constitution was ordained and established — "to secure the blessings of liberty to ourselves and our posterity" — is the sum of all the others. Liberty, in its true civil sense,

secured to the citizen, is all he can of right demand. Civil liberty consists in the free exercise of all the faculties and powers belonging to the individual, essential to the continuance and perfection of his being and the attainment of a perfect destiny. A government that secures to its citizens and subjects the blessings of such liberty, secures all that is essential on its part to the perfect destiny of every subject.

§ 213. Inasmuch as the ultimate object of the people of the United States in ordaining this constitution for the United States of America, was to secure to themselves and their posterity the blessings of liberty, it follows that it was their design that the government thus instituted should be permanent, and should continue with their posterity. It was to be a general government of the nation, to exercise national authority over all subjects committed to its jurisdiction. It was ordained and established to secure the blessings of liberty in a sense in which the state governments were incompetent to the purpose; in a sense in which the state governments were without jurisdiction, and, therefore, could not be employed.[1]

§ 214. The safety and welfare of the nation required a government with continuing authority to represent the *will* and the *power* of the nation, on every question vital to its interests, whenever and wherever occasion should require. It required a government of one mind, will and purpose, in the exercise of national authority and power; one that could speak with authority to the people of Massachusetts and Georgia, and make itself obeyed; one that had jurdisdiction on the high seas from the northernmost limits of Maine to the utmost limits of Georgia; one which, in the plentitude of its authority, could, for all national purposes, obliterate state lines and rise above state jurisdictions. In short, the nation, from necessity, was instituting a government as the only means of exercising its authority and power to save itself, and secure the blessings of liberty thereby to the people and to their posterity.

§ 215. The state governments had not been instituted by the authority of any nation, nor for the purpose

1 In all monarchical governments, where the state in all its sovereignty and authority is represented by its king, the maxim is "*the king never dies*;" by which is meant, the authority of the nation is the same, whether that authority be administered by one king or another. The king, in a legal sense, is the representative of sovereignty. In democratic governments, the same idea would be expressed by the maxim, "*the people never die*," or, in plainer terms, "*the public never die*," thereby representing the continuity of national sovereignty in the corporate body of the nation.

of administering national authority. They had been improvised during the revolutionary struggle by the people of the respective colonies, who, when they renounced their allegiance to the British government, were, as communities, without national recognition or national relations. These colonies took the name of states, not in the sense of nations. Rhode Island and the Providence plantations were never supposed to be a nation, or to have the incidents of nationality, or the rights, prerogatives and powers of a nation. There never was a time when the United States were supposed to constitute more than one nation, although, since the revolution, there has never been less than thirteen separate and independent states. Prior to the institution of the general government by the people of all the states, acting in virtue of their inherent authority as a nation, there was no organized government to question the authority of the state governments. All agree that the people of Virginia, as a colony or state, were separate from, and independent of, all the other states or colonies as such; and so of all the others. So that, in respect to each other, as local political governments, they were sovereign and independent. But they had not, and from their situation never could have, the absolute sovereignty and independence of a nation, in respect to THE PEOPLE OF THE UNITED STATES, by whose proclamation and action they had been separated from the British crown, and absolved from all allegiance to the British government. The authority of the united people constituting the one nation, *de facto* and *de jure*, including the territory and people of all these governments, is the only absolute sovereign authority ever known or recognized here. Nationality was the achievement of all; and, hence, national sovereignty belonged to all, and could be exercised only by those authorized by all to exercise it. And the people of the thirteen colonies, in conventions called for that purpose, ordained and established this constitution to secure the blessings of liberty to all, as members of the nation.

§ 216. Whenever the sovereignty and independence of the several states are spoken of in this treatise, it is to be understood, that State sovereignty and independence is only *relative*, not *absolute*; that is, they are each sovereign and independent in respect to the other, but not in respect to THE NATION. The nation alone is

absolutely sovereign in its inherent authority; and can speak from that absolute sovereignty, and ordain, in respect to these states, whatever it pleases; and its ordinance, when once recorded as the will of the nation, is the supreme law, anything in the constitutions and laws of these states to the contrary notwithstanding.

§ 217. In the internal administration of the nation, these state governments have been preserved, and the sphere of their administration has been assigned, in which sphere only, they have jurisdiction to act. But they can exercise only such authority as remains to them after the nation has assigned to the general government the sphere of its duties and powers. The nation as such, in virtue of its inherent sovereignty, has authority to transfer to the general government jurisdiction over any subject it thinks proper.

§ 218. The people have intrusted the states with the exercise of those powers essential to that portion of internal administration which remained after their grant of powers to the general government; not because of any authority or right on the part of the state to claim the exercise of such powers, but because, in matters of a local and domestic character purely, the people of the state are supposed to know best what the particular welfare of those interested in such administration demands. Such local jurisdiction is committed exclusively to them, not from any right they have to govern as states, but from the policy and fitness of permitting, as far as possible, those whose interests only are affected, to have the exercise of the authority to govern themselves in that respect.[1]

§ 219. By dividing the internal administration between the general and state governments, giving to each, jurisdiction over such subjects as from the nature of things more properly belong to them respectively, the democratic principle of self-government is most aptly applied, in securing to each and every member of the nation the largest amount of liberty, and the highest possible security for the same. Thus, the general and state governments are each institutions intrusted

[1] It is a principle in democratic governments to realize, as far as possible, the idea of self-government. For this reason, instead of committing the entire internal administration to the general government, it ever has been deemed most fitting and proper to commit to the people of each state the exercise of governmental authority over subjects peculiarly their own, and to the general government jurisdiction over such subjects as primarily affected the welfare of the people of the nation. Upon the same principle, the people of the state, as far as consistent with the general interests, commit the government of cities and towns to the municipality.

with the exercise of the sovereign authority of the nation, so apportioned to each as that those interested in any particular subject of administration control it.

§ 220. The system is most admirable. There is but one sovereignty absolute, existing in the United States, and that is, the sovereignty of the nation. It necessarily excludes all other sovereignty absolute. But there are several institutions within the United States intrusted with the administration of this sovereign authority over certain subjects committed to them. The general government, in administration, is charged with the exercise of sovereign authority over subjects committed to its jurisdiction. The state government is likewise charged, in administration, with the exercise of sovereign authority over what remains. But neither government possesses any sovereignty of its own. The authority to be exercised is that of the people of the United States, and those exercising it are ever responsible to them.

§ 221. The general and state governments, as administrative institutions, are a part of the same national system. There is but one authority to be administered, although there are divers administrations of such authority adapted to the subjects thereof. There is but one nation, and it possesses and occupies every inch of territory, and embraces every subject of government. The *nation* is a unit in being, in mind, in purpose and power, unlimited within the national boundaries. The *agencies* by which it administers are limited to the powers committed to them. There is neither consolidation nor division. There is one power over all, with limited administrations suited to all.

§ 222. By the national constitution the state governments have, in some respects, been ordained as agencies in the practical administration of the general government. Thus, the representatives in congress are to be chosen by the people of the several states, having the qualifications requisite for electors of the most numerous branch of the state legislature.[1] The senate is to be composed of two senators from each state, chosen by the legislature thereof.[2] Each state is to 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.[3]

[1] Const. U. S., art. 1, § 2. [2] Idem, § 3. [3] Idem, art. 2, § 1.

§ 223. But in performing these offices in the practical administration of the general government, the states act in virtue of the authority intrusted to their exercise by the national constitution, and not in virtue of any authority inherent in the states themselves. In these respects, the states have been constituted national agencies, to exercise administrative authority in the selection of representatives and senators in congress; and also in selecting electors for president and vice-president of the United States. But all must agree that in these respects they act in virtue of *delegated*, and not of *original*, authority. All must agree that it was competent for the people to have vested the exercise of such authority in the general government had they thought proper to have done so.

§ 224. The idea of separate original sovereignties in the national and state governments, or in the nation and states, is an erroneous and dangerous one. The anticipated conflict between the two authorities, has ever created visions of state and national ruin. The only dangers which have seriously threatened the destruction of the nation, and the consequent loss of security and liberty to its people, have arisen from this erroneous idea of original sovereignty in the states, and, consequently, of a natural antagonism of rights, interests and authority between two separate original sovereignties, occupying the same territory, and embracing the same people.

§ 225. These anticipated conflicts of authority between the general and state governments, which have created in many minds, serious apprehensions as to the stability of these American institutions, are the natural and instinctive recognitions of the incompatibility of absolute sovereignty in two distinct governments, each occupying the same territory, and embracing the same subjects. It is the judgment of common sense that the hypothesis is in itself an absurdity.

CHAPTER VII.

LEGISLATIVE DEPARTMENT.

§ 226. At its commencement, the convention, which drafted the constitution, while it was in committee of the whole on the state of the American union, resolved that, in the opinion of the committee, a national government ought to be established, consisting of a supreme legislative, judiciary and executive.[1] The convention acted upon this suggestion, and divided the internal administration of the government into three departments; committing to one the authority to legislate, to another the authority to adjudicate, and to a third the authority to execute the laws.[2]

§ 227. These several departments, in the exercise of the special powers committed to them respectively, are independent of each other, and collectively constitute the government; that is, they exercise all the authority of the government for purposes of internal administration through their several departments. The government can exercise legislative authority only through congress, to which the legislative authority of the government is committed. It can ascertain and apply the laws only through the judiciary, to which the judicial powers of the government are committed. It can execute its orders, judgments and decrees, or enforce the observance of the laws generally, only through the executive, to which department the executive powers of the government are committed. It is not to be supposed, because each department is intrusted with the exercise of supreme authority in its appropriate sphere of duty, that, therefore, there are three sovereignties, or that sovereignty is divided between these three departments. The government is intrusted with the exercise of the sovereign authority of the people to legislate through congress; to adjudicate through the supreme court, and such inferior courts as congress shall establish; and to execute the laws through the president of the United States.

1 1 Lipp. Ell. Deb., 151.

2 "All legislative powers herein granted shall vest in a congress of the United States, which shall consist of a senate and a house of representatives." (Art. 1, § 1, Const. U. S.)

"The executive power shall be vested in a president of the United States of America." (Art. 2, § 1, Const. U. S.)

"The judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may from time to time ordain and establish." (Art. 3, § 1.)

§ 228. It is essential to the perfection of administration, that the legislative, judicial and executive departments should be independent of each other. The proper administration of governmental authority requires the exercise of the highest wisdom, the greatest prudence, the strictest virtue, and the loftiest pariotism, to make it what it ought to be, as the educating, developing, protecting, sustaining and governing power of the nation. When it legislates, its laws should be calculated to benefit as many as possible, without injuring any; therefore, it should have the wisdom and the prudence to ascertain what laws are needed, and what will be the probable effect of those laws in their application to the people they are to govern. The judges who interpret and apply the laws to individuals and subjects, should have the wisdom to comprehend them in their true meaning and application; to ascertain with judicial certainty the occasions of their application; and should be possessed of that integrity which would make them blind to every other consideration than the doing of equal and exact justice to individuals and society. And he, who executes these laws as ascertained and applied by judicial determination, or in any other manner required by law, should be possessed of firmness of mind, integrity of heart, and kindness and humanity of spirit, so that he become the fit representative of the dignity, the power, and the good will of the people, who, in their utmost severity, seek the highest good of all.

§ 229. There are many and weighty reasons for separating the authority to be exercised by the government into these independent departments. First, the several departments are each distinct in their nature, and require a distinct class of minds having different qualifications, to administer them. The office of legislation will necessarily be performed by a changing body of men, taken from the various classes of society, to administer for a limited time as members of the legislature. In democratic governments, this is one of the essential features of the system. They must come from the body of the people, that they may know their wants, and be identified with their interests. They must return at short intervals to the people, that they may be responsible to them. They must be taken from the various arts, occupations, trades and professions, that all interests may be represented and cared for, to

the end that laws promotive and protective of each, may be enacted. Such, necessarily, must be the general constitution and character of the legislative assembly in all democratic governments. Farmers understand best the interests of agriculture; mechanics understand best what belongs to their particular trade; merchants know best what provisions are required to facilitate exchange of commodities. Each of the learned professions best comprehend their respective professional interests. But neither farmers, mechanics, tradesmen or artists, know best how to frame a law, promotive or protective of their interests, without interfering or injuriously affecting others. There will be, in the legislative assembly, legal minds accustomed to the forms of legal definition and expression; there will be statesmen who can comprehend the general scope and effect of any particular law proposed, and they will aid in embodying the ideas of the various members representing the various interests, in legal form, with suitable restrictions and limitations, so that the laws enacted may do much good and no harm.

§ 230. But these legislative assemblies are composed of men often influenced by particular interests; subject to be controlled by combinations which unite many separate measures for the purpose of securing a majority for each; and in many ways they are influenced to act hastily, from impulse, interest, popular excitement and the like, which tend to defeat the exercise of that wisdom, prudent foresight and calm judgment, so essential to correct legislation for the welfare of individuals and society. For these and similar causes, laws enacted by legislative assemblies are not always wise and just; do not always tend to the well-being of society. Sometimes they are in violation of the fundamental principles of justice. If laws thus enacted were to be adjudicated and applied by the same body, subject to the same influences and impulses; controlled by the same interests, the well-being of individuals and society would be in great danger; and the government, instituted to foster and protect the best interests of society, would become its most dangerous oppressor.

§ 231. The constitution of the judicial office, and the requisite character and condition of the judges are very different. The judges are selected from a class of men familiar with the principles by which rights are to be determined, and justice to be ascertained and applied.

By a long course of studying the constitution and laws, they acquire a knowledge and discipline suited to accurate determination. In practice, the judge is not allowed to sit in cases where he has even the remotest interest; or is within the ninth degree of consanguinity, or in any manner akin to either party. By his position as a judge, he is removed from all excitement or popular influence, and in the discharge of his duty he has only to ascertain the facts and apply the law thereto; but in all other respects, as the symbol of justice, he is required to be blind.

§ 232. Such being the constitution of the legislative and the judicial departments respectively, and such the characters and qualifications of their respective members, it cannot be doubted, that the interest of all requires them to be thus separated and made independent each of the other. Then should the legislature enact a law obnoxious to the principles of justice as secured by the constitution, it would be powerless for mischief. Before such law could be enforced, it would necessarily be subject to the strictest scrutiny of learned and impartial judges, authorized to examine into its validity and pronounce upon its constitutionality; required to ascertain judicially the existence of facts demanding its application; and the deliberate and impartial judgment of the court in respect thereto.

§ 233. The same considerations calling for the separation and independence of the legislative, judicial and executive departments, also require that the legislature itself should be separated into two distinct branches.[1] One branch comes directly from the people, and represents them in all their various rights and interests. It is emphatically the popular branch of the legislature, in which the people speak from every trade, occupation, profession and interest. It is the most numerous branch, coming from and returning to the people every two years, that it may ever be fresh from their presence. This branch is democratic in an eminent degree; and is characterized by the universality of the interests of society represented by it, rather than by its wisdom and discretion in such representation. It is better fitted for

1 "The house of representatives shall be composed of members 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." (Art. 1, § 2, Const. U. S.)

"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." (Art. 1, § 3, Const. U. S.)

proposing subjects for legislative action than for *maturing* legislation upon those subjects. Experience has demonstrated the utility of adding another body as a branch of the legislature, distinguished more for its wisdom, gravity and prudence, than for its numbers, nearness to, or freshness from, the body of the people. This is considered the aristocratic branch, designed as a check upon the hasty, immature and indiscreet legislation, of the more popular branch. In one sense the senate is figuratively composed of the honored fathers of the nation, while the house consists of the sons thereof.[1]

§ 234. In the legislature thus constituted, it is expected that the assembly or house of representatives will represent the people in their individual and social interests; will propose all necessary measures to secure them in the exercise and enjoyment of their respective rights; and that the respective members will, according to their wisdom and ability, be faithful to their particular constituencies. It is expected that the upper house or senate will more particularly represent the wisdom, prudence, discretion and dignity of the state or nation, in the exercise of its legislative authority. In its constitution it does not profess to be democratic; it was instituted as a check upon the centrifugal tendencies of the extreme democracy of the house of representatives, and it is one of its particular offices to bring to the test of wisdom and prudence, the enactments of the other house.[2] The senate is composed of two from each state, who are elected by the legislatures of their respective states, and hold their office for the term of six years. As a governmental body it never ceases to exist, but the house of representatives is renewed every two years.[3]

[1] "The person appointed" to the senate "must be at least thirty-five years of age, have been a citizen of the United States nine years, and at the time of his election, he must be an inhabitant of the state by which he shall be chosen. The senatorial trust requiring great extent of information and stability of character, a mature age is requisite; participating immediately in some of the transactions with foreign nations, it ought to be exercised by those who are thoroughly weaned from the professions and habits incident to foreign birth and education. The term of nine years is a reasonable medium between total exclusion of naturalized citizens, whose merits and character may claim a share of public confidence, and an hasty admission of them, which might possibly create a channel for foreign influence in the national council." (Rawle on the Constitution, p. 32; Federalist No. 62.)

[2] The senate forms a great check upon undue, hasty and oppressive legislation. Public bodies, like private persons, are occasionally under the dominion of strong passions and excitements; impatient, irritable and impetuous. * * Certain popular leaders often require an extraordinary ascendency over the body, by their talents, their eloquence, their intrigues or their cunning. Measures are often introduced in a hurry, and debated with little care, and examined with less caution." (Story's Com. on Const., § 550.)

[3] "A good government implies two things: fidelity to the objects of the government; secondly, a knowledge of the means by which those objects can be

§ 235. The institution of the senate as a branch of the legislature, composed, as it is, of members removed from the direct influence of the people, representing society at large rather than particular individuals or districts, with their personal and local interests and influences, is an expression of the deliberate judgment of the nation, that it is unwise and unsafe to intrust the exercise of the law making power to the exclusive direction and control of a popular assembly. That there are times when the people, like individuals, require to be protected from their own indiscretions. Although the majority are usually under the control of benevolence and good intentions; yet they are liable to transgress; and there should be provisions suited to such emergencies[1]

§ 236. Both the senate and house of representatives are composed of citizens of the United States, who are themselves subject to obey the laws of their own enacting; and while the office of legislature as a department of government, is permanent, those who administer therein, remain in office only for a limited period, when they are succeeded by others. It is not to be supposed, therefore, that as a legislative body, they will seek to accumulate power in their own hands; for as members of that body, it could inure to their benefit but for a short period; and would operate to their disadvantage

best attained. It was suggested that in the American government too little attention had been paid to the last; and that the establishment of a senate upon a proper basis, would greatly increase the chances of fidelity, and of wise and safe legislation. What, it was asked, are all the repealing, explaining and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding against each preceding session; so many admonitions to the people of the value of those aids which may be expected from a well constituted senate." (Story's Com. on Const., § 561.)

"A senate duly constituted would not only operate as a salutary check upon the representatives, but occasionally upon the people themselves, against their own temporary delusions and errors. The cool, deliberate sense of the community, ought in all governments, and actually will in all free governments, ultimately prevail over the views of their rulers. But there are particular moments in public affairs, when the people, stimulated by some irregular passion or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterward be most ready to lament and condemn. In these critical moments how salutary will be the interference of a body of respectable citizens, chosen without reference to the exciting cause to check the misguided career of public opinion and to suspend the blow until reason, justice and truth, can regain their authority over the public mind." (Idem, § 568; Federalist No. 63.)

1 "John Adams in his defense of the American constitution, letter 6, pp. 215, 216, holds this language: 'If we should extend our candor so far as to own that the majority of mankind are generally under the dominion of benevolence and good intentions; yet it must be confessed that a vast majority frequently transgress; and what is more decidedly in point, not only a majority, but almost all, confine their benevolence to their families, relations, personal friends, parish, village, city, county, province; and that very few indeed extend it impartially to the whole community. Now grant but this truth and the question is decided. If a majority are capable of preferring their own private interests or that of their families, counties and party, to that of the nation collectively, some provision must be made in the constitution in favor of justice, to compel all to respect the common right, the public good, the universal law, in preference to all private and partial considerations."

as citizens both while in office and also after their term had expired.

§ 237. There are many weighty reasons for instituting this independent body as a branch of the national legislature, unnecessary to be considered in this place. It has been, and is claimed that the senate particularly represents the interests of the several states as such, and stands as a shield between the people of the nation, or of the government they have instituted, and the respective state governments. The soundness of this position is not readily perceived. It seems to assume that the state governments are in danger of being invaded by the people of the nation, because of some natural incompatibility between the state and nation; and that the state, being small and weak compared with the nation, needs to be protected by a council of semi-embassadors in the persons of the senators of the United States. This hypothesis has no real foundation in fact. Every national citizen is likewise a state citizen; and national and state interests are so interwoven in each citizen, that he is equally interested in maintaining the just authority of each government. The national government is as much his own as the state government, created in the same manner, by the same authority and for the same general purpose. It differs in the subjects and in the extent of its jurisdiction, in the same degree that the subjects of national welfare differ in their nature and extent from the more local affairs of the state. The powers to be exercised by the general government are particularly specified in the grant, while those to be exercised by the states are merely described as the powers, not granted, &c.

§ 238. The general and state governments are a part of one and the same system, instituted by one and the same people, having one and the same general duty to perform for the people. Every national citizen is necessarily connected with business and interests of a domestic character; and there is but one class of institutions in this country that can administer to his necessities in respect to those subjects. That branch of internal administration is by common consent, as well as by particular regulation, committed to state administration. And the state governments are as absolute in the exercise of their authority within the limits of their respective jurisdictions, as is the general government within its particular sphere; and every national

citizen is as much interested in preserving intact the jurisdiction of the several state governments as he is that of the general government. Therefore, the idea of danger of encroachments of national power upon state authority, is without any foundation in philosophy or fact. If there is any danger of encroachment by one government upon the jurisdiction of the other, that danger is to be found in the local and petty disposition of the states to assert and maintain authority over subjects affecting the nation at large. All real danger to the welfare of the people, hitherto experienced, has come from that source.

§ 239. But it is no part of the constitutional duty of the senators of the United States to represent the political rights and interests of their particular state governments as political institutions; nor can they do so practically, because the state governments have no political interests or rights separate from the people, to be represented in the general government or elsewhere. The senate have no special jurisdiction in respect to the local interests of the several states, and no special duties to perform in respect to them. The senate is a branch of the national legislature, and was so constituted for the greater security of the people of the nation at large, and not of the states in particular.

§ 240. The manner in which the senate is constituted, proves that it is not designed to be strictly a representative body. The number of senators to which the people of a state are entitled under the constitution, has no reference to the population of the state. Delaware, with her three counties and a population of one hundred and twelve thousand, has as potent a voice in the senate of the United States as New York with her four millions. The people of Delaware and the people of New York are represented in the house of representatives in proportion to their respective population; and representation extends only to the house. The senators are elected by the state legislatures, not to represent the people of the state as national constituents, but to represent the wisdom, prudence, foresight and dignity of the state, in a department of the general government where the legislative action of the immediate representatives may be brought under their examination and review before it becomes binding as law.[1]

[1] As legislation may act upon the whole community, and involve interests of vast difficulty and complexity, and require nice adjustments and compre-

§ 241. The house of representatives is composed of members chosen every second year by the people of the several states; and they are elected by those citizens who have the qualifications requisite for electors of the most numerous branch of the state legislature.[1] In the internal administration of government, the general and state governments are a part of the same system; and, consequently, the same reasons for dividing the legislatures into two independent branches, apply as well to the state as to the general government. Thus the states have their senate and house of representatives, making the former aristocratic in structure, and the latter more democratic. Therefore, the representative branches of the legislature in the national and state governments, are composed of men elected by a constituency of their respective states, having the same electoral qualifications.

§ 242. By this provision of the constitution the people have committed to the state governments respectively, the authority to determine the qualifications requisite for a national elector, by first prescribing the qualifications essential for an elector of the most numerous branch of the state legislature. There are substantial reasons why the qualifications of a state and national elector should be the same. But it may well be doubted whether they are sufficient to justify the nation in putting its citizens in that respect, under the exclusive authority of the state governments.

§ 243. Every national government should be intrusted with the exercise of authority to determine what qualifications are essential to entitle any class of its citizens to participate in the administration of its authority. The general government in its jurisdiction and by its authority, embraces every citizen within its territorial limits; its laws are equally binding upon all, and all are required to bear a part of the same general burdens in its support; therefore, it is but just that the same classes of citizens throughout the several states, should enjoy equal rights in the exercise of administrative

hensive enactments, it is of the greatest consequence to secure an independent review of it by different minds, acting under different opinions and feelings, so that it may be as perfect as human wisdom can desire. An appellate jurisdiction, therefore, that acts and is acted upon alternately in the exercise of an independent revisory authority, must have the means, and can scarcely fail to possess the will, to give it a full and satisfactory review. (See Story's Com. Const., § 557.)

[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." (Art. 1, § 2, Const. U. S.)

authority. This can be secured only by uniform laws of enfranchisement and disfranchisement throughout the nation.

§ 244. The right to participate in the institution and administration of civil government, is herein denominated political, as distinguished from the civil rights of members of society.[1] These two classes of rights are essentially different in their origin, and in their application to individuals. Civil rights are incident to the individual, derived with his existence, and essential to his continued well-being and ultimate destiny. These are the rights of the individual referred to in the declaration of independence in these words, "We hold these truths to be self-evident, that all men are created equal, and endowed by their Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness." Political rights are such as pertain to the individual as a member of political society, and have their origin in society, and can be exercised by those only who expressly or impliedly are authorized by society to exercise them. In short, civil or natural rights are inherited, political rights are acquired. The former are the gift of God to man, and are inalienable; the latter are the gifts of society to man, and may be forfeited when their continuance becomes incompatible with the safety and well-being of society. Hence the right of voting is called a franchise—some right conferred by government upon the individual, which he did not before possess; and the individual thus acquiring the right, is said "to be enfranchised."

§ 245. Political rights have their origin in the necessity for a government by which the public authority must be exercised; which necessity is ever present with society. And these rights are to be exercised in the institution and administration of government as a social necessity. They belong to society, and not to the individual; as the individual can neither possess or exercise them except in society and as a member thereof. These political rights, or, more properly speaking,

[1] I prefer to use the term civil rights in such a sense as to embrace the natural rights of the individual as defined. (Ante, §§ 40, 41 and notes.) I denominate the right to participate in the institution and administration of government political, because it has its origin in political necessity. The right to vote is a political right, because voting is a governmental act; and the individual who exercises that right, participates in the government of others as well as of himself. This right to participate in the administration of government, by which the public welfare is to be affected, and the public interests are to be controlled, must, necessarily, come from the public. Hence, the exercise of this right must be confined to such classes as are deemed by the public worthy to be intrusted with its safety and welfare.

powers, to be exercised by the individual as a member of an enfranchised class, are intrusted to him, primarily for the benefit of society; and, secondarily, through the well-ordered state of society, for the benefit of all the members thereof. Hence, government, as the authorized agent of society, confers the exercise of political franchises upon such classes of individuals as is consistent with public safety and welfare.

§ 246. In the organization of government, those members of society by whom it must be instituted and administered to become the government of society, have a natural right to exercise the powers necessary for such purpose; which right has its foundation in natural necessity. Those members of society whose intelligence must frame the governmental structure; whose strength must defend its existence, and whose means must support its administration, by their majority have the natural provisional authority to determine for society by whom political power shall be exercised in the institution and administration of the government. This provisional authority belongs to this class from necessity, because it cannot be possessed and exercised by any other as a class. It belongs to the majority of this class, from the same necessity, because it cannot be exercised by a minority of them, and to require a greater number than a majority would be impracticable. The right to exercise this political authority belonging to society as essential to its existence and well-being, it is a duty which society owes to its individual members to enfranchise those classes only who will be likely to exercise the authority for the good of society, and through it, for the welfare of the members thereof.

§ 247. The question of political enfranchisement must be addressed to the enlightened and honest discretion of those intrusted with the exercise of public authority. Manifestly, the welfare of society will not permit universal enfranchisement. There must be discriminations based upon competency, discretion, common prudence, &c., for it is to be remembered that whoever is enfranchised, is intrusted with the exercise of a power which can be directed to the subversion of society, as well as to its improvement and well-being; and government would be guilty of a wrong, not only to society at large, but to those wrongfully enfranchised, should it intrust the exercise of political power to a class who would use

it so ignorantly or so corruptly as to endanger the well-being of society.

§ 248. The most democratic governments, in their practical operations, are obliged to observe these principles. The law necessarily has determined the period of legal discretion at which legal infancy terminates. Those intrusted with the exercise of legislative authority are obliged to fix the period at some age; not because there is, in fact, an exact period of age at which all become discreet, and before which none become so; but because there is an average age which it is supposed embraces more, and excludes less, discreet persons than any other; it is, therefore, fixed upon as the period of legal majority; and is made one of the necessary qualifications for political enfranchisement. The necessary possession of this discretion on the part of those intrusted with the exercise of governmental authority, demonstrates the position that political rights do not pertain to the individual as being natural and inherent. Thus, every democratic government prescribes the qualifications essential to the exercise of these rights, and its duty to society and to the individual members thereof requires that it should do so. The exercise of the elective franchise requires judgment, prudence, discretion, integrity and loyalty in selecting persons suitable to administer in the several departments of government. Hence, classes characterized as not possessing competency, as idiots and insane persons; as not possessing discretion, as infants; as not being loyal, as traitors; are necessarily excluded from the exercise of the voting franchise. So, also, persons convicted of crimes against society are, in most states, by such conviction and judgment, divested of such right. It is requisite as an act of prudence, and of safety to the public, that those who will exercise this power to the detriment of society or government, should not possess it. Hence, rebels against government, traitors, or those in sympathy with them, are unfit persons, as a class, to be intrusted with the exercise of the political franchise.

§ 249. Political rights belong to society as an incident of its existence; and they are to be exercised only in the manner society, by its fundamental law, or through the agency of its government, shall ordain. It has the absolute discretion to determine to what classes of individuals the exercise of political rights shall be committed; and it can limit its exercise to persons pos-

sessing any particular qualification, and can determine at pleasure what shall amount to disqualification. It has authority to limit its exercise to persons of a certain age, sex, race, color, character — in short, to any qualification it deems discreet, prudent, wise, just and safe to adopt.[1] Disloyalty in sentiment, and particularly in conduct, amounting to treason, are peculiarly natural disqualifications for the exercise of the political franchise; and no society or government which permits disloyal classes to participate in the administration of government is faithful to the commonwealth. As qualification or disqualification extends to class, and not to individuals, except through the class to which they belong, the individual can have no vested rights in the exercise of a political franchise; and, therefore, cannot require judicial determination to invest him with, or to divest him of, the power to exercise such rights. Whether he belongs to the enfranchised or disfranchised class is a question of fact, which belongs to the inspectors of election to decide at the polls, when the individual presents his ballot.[2]

§ 250. Political rights belonging to society as incident to its governmental necessities, they are conferred on classes with sole reference to their qualifications as members of society, for maintaining by their votes, the healthy and just administration of the government. Political rights are not conferred on individuals, except as members of an enfranchised class; nor are they denied to individuals, except as members of an unenfranchised class. The individual convicted of a crime and sentenced to suffer the penalty affixed thereto, according to the law in some of the states, thereby becomes a member of a disfranchised class, and, consequently, becomes himself disfranchised.

§ 251. Government disfranchises only by classes. It is ever in the power of society to determine to what classes the exercise of this power shall be committed,

[1] In no two of the state constitutions will it be found that the qualifications of the voters are settled upon the same uniform basis. There is the most abundant evidence that among a free and enlightened people, convened for the purpose of establishing their own forms of government and the rights of their own voters, the question as to the due regulation of the qualifications, has been deemed a matter of mere state policy, and varied to meet the wants, to suit the prejudices, and to foster the interests of the majority. An absolute, indefeasible right to elect, or to be elected, seems never to have been asserted; but the subject has been freely canvassed as one of mere civil polity, to be arranged upon such a basis as the majority may deem expedient with reference to the moral, physical and intellectual condition of the particular state. (Story's Com. on Const., § 582; also Dr. Lieber's Encyclopedia Americana, Art., Const. U. S.)

[2] The subject of the political rights of individuals and of states will be fully discussed in a subsequent chapter on state governments.

and to what classes it shall be denied. And in determining these questions, the highest good of society is ever to be kept in view; and such classes only should be enfranchised as from their average competency, discretion, prudence, foresight, integrity and virtue, would justify the expectation of benefit to the general welfare, should the exercise of political power be committed to them as a class. And upon the same principle, it becomes the duty of government or society to disfranchise, or leave unenfranchised, classes whose average competency, discretion, prudence, foresight, integrity and virtue would justify the expectation that, to enfranchise or leave enfranchised such class, would tend to subvert society or prove detrimental to public interests and the general welfare. This question necessarily belongs to government to decide; and it rests in its discretion, from which there is no appeal, except to society at large, to determine by its fundamental law the political rights and powers of classes.

§ 252. As government enfranchises only by class, it never becomes a question of individual right to enfranchisement, or of individual merit, but of class right and class merit. The class of legal infants would furnish many individuals endowed with sufficient discretion, judgment and prudent foresight to justify the government in intrusting them with the exercise of political rights; but the government cannot entertain the question of individual qualification or merit in distributing that which belongs to class, because it necessarily becomes impracticable for it to do so.

§ 253. As political rights belong to, and are the necessary incidents of every political society, and are to be exercised only for the political welfare of such society, there are certain classes in society, or may be such, as, from the nature of things, must remain unenfranchised, or must become disfranchised. Thus, society cannot with safety enfranchise any but its own citizens; hence, foreigners, legal aliens necessarily remain unenfranchised. There may be individuals of the class competent, both from intelligence and love of country, to exercise the franchise in such a way as to benefit the public; but the class, notwithstanding, must remain unenfranchised. The individual, to gain enfranchisement, must leave the class and gain admission to one that is enfranchised. So, also, a class of malcontents may rise up in rebellion against the government and attempt its overthrow. In

committing the crime of treason, they become traitors; which class, from the nature of things, must be disfranchised. The public sense revolts from that logic which attempts to prove, upon constitutional grounds, that a class seeking to destroy government are to be intrusted with its administration. Treason, in all countries and under all governments, is political death; and no one belonging in the class traitor, has any political life or power.

§ 254. Political rights, having their origin in the social necessity for maintaining government, they belong only to those classes of society who are faithful to that end. No one can claim enfranchisement on personal grounds. When a member of an unenfranchised class asks for personal enfranchisement, he must be prepared to satisfy the public that not only he is qualified to exercise the franchise, but also that his class is likewise qualified; and he must be prepared to abide the political fate of his class, or leave it.

§ 255. From these considerations, it cannot be doubted that every national government should possess the power requisite to determine the qualifications essential to entitle its citizens to participate in the exercise of its administrative authority. The principles of self-preservation, as well as of a healthy and vigorous administration, require it. No government can secure fidelity in its administration without such power. Therefore, in this respect, the constitution requires amendment; and by such amendment, the question of national enfranchisement would be committed to the general government, where it properly belongs.[1]

§ 256. The legislative authority of the nation, to be exercised by the general government, is committed exclusively to congress, which is to be composed of a senate and a house of representatives. The members of the house are to be elected by the people of the several states, having the qualification of electors of the most numerous branch of the state legislature. The senate is to be composed of two from each state, who are to be elected by the state legislature.[2]

1 See a further discussion of this subject in a subseqent chapter on the duties and powers of the state governments.

2 All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and a house of representatives. (Art. 1, § 1, Const. U. S.) 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. (Art. 1, § 2, id.) The senate of the United States shall be composed of two senators from each state,

§ 257. The primary object of the people of the United States in ordaining and establishing the constitution, was to institute a government, independent and complete in every department thereof, to which the exercise of their authority to govern in certain matters might be committed. As a department of that government, a supreme legislature became indispensable; which body the constitution requires to be composed of two branches, and the members of each branch to have certain specified qualifications, and to be elected by certain prescribed constituencies. But the times, places and manner of holding the elections are, by the constitution, made subject to the regulation and control of congress, except as to the place of choosing the senators.[1]

§ 258. The propriety of making the times, places and manner of holding these elections subject to the regulation and control of congress, rests upon the plain proposition, that every government ought to contain in itself the means of its own preservation. The exclusive power in the state legislature to regulate and control elections of members of congress, would leave the continued existence of the government of the nation at the mercy or pleasure of the states. They could destroy the legislative branch of the government by neglecting to provide for the election of members to administer in that department, and thus effectually subvert the general government. It is no answer, to say that such an abuse of power is not probable. Its possibility is a sufficient reason for providing against the happening of such an event. But the same danger would threaten the legislative department of the government, should the state legislatures refuse or neglect to choose senators according to the requirements of the constitution. It can hardly be doubted that the people of the nation, when they imposed a duty upon a subordinate institution, the exercise of which they made essential to the continuance of the government ordained and established for themselves and their posterity, that they, expressly or impliedly, granted the power to enforce the performance of such duty.

§ 259. The constitution provides that the senate shall be composed of two senators from each state, chosen

chosen by the legislature thereof, for six years, and each senator shall have one vote. (Art. 1, § 3, id.)

[1] Art. 1, § 4, Const. U. S.

by the legislature thereof; that if vacancies happen during the recess of the legislature, the state executive may make temporary appointments until the meeting of the legislature, which shall then fill such vacancies.[1] But, supposing, from a factious spirit in the state legislature, or from other cause, there should be a neglect or refusal on the part of this national agency to do its duty in this respect, seeking thus to subvert the general government by aiming at the destruction of the legislative department thereof, is there not in the general government legislative, judicial and executive authority sufficient to require the performance of a duty so vital to the safety and welfare of the nation? Here is a duty to be performed, imposed by the national constitution upon the incumbents of an office, who have sworn to obey it as the supreme law; and the performance of which duty is vital to the existence of the nation as an organized and potential body. The performance of this duty is enjoined upon this office by the sovereign authority of the nation itself. And that this authority might compel obedience to its requirements, the nation created a supreme legislative office, a supreme judicial office, and a supreme executive office, and made that constitution, and the laws made in pursuance thereof, the supreme law, anything in state constitutions and state laws to the contrary notwithstanding. Here, then, is a constitutional duty to be performed by a body of officers bound by oath to its performance. Here is a supreme judiciary invested with full jurisdiction, which extends to all cases in law and equity, arising under this constitution, and the laws of the United States made in pursuance thereof. Here is a supreme legislature empowered to make all laws necessary and proper for carrying into execution the powers conferred by the constitution upon the government, or upon any department thereof. Therefore, it cannot be doubted that there is sufficient authority vested in the several departments of the general government to compel the performance of any duty enjoined by the constitution of the United States upon any office or officer, state or national.

§ 260. It is no answer to say that the members of the legislatures are not officers of the nation, and are not amenable to national authority. The state government exists and administers by permission of the nation. It

1 Art. 2, § 3, Const. U. S.

has jurisdiction over no subject which may not be taken from it at the pleasure of the nation. It can administer only in respect to those subjects left to it by the people of the nation. The form of its administration is subject to the supervision of the general government; and no one can administer in any of its departments without first taking an oath to support, in his administration as such officer, the constitution of the United States. Every requirement of the national constitution is the supreme law, by which they are to be governed, whether as officers or private citizens. Every duty thereby enjoined upon them is supremely obligatory, and may be enforced by proper authority, independent of the constitutional or legislative authority of the state. Therefore, it is not true, that state officers are not amenable to national authority in respect to duties imposed upon them by the constitution of the United States. In respect to such duties they are charged with the execution of a national trust—one which they can execute only by national authority; and for the faithful performance of such trust they are responsible to the nation.

§ 261. The necessity calling for the institution of the general government to exercise the authority of the nation in respect to matters committed to its jurisdiction, required that the government thus instituted should be independent of all other governments in maintaining its existence and administering the authority committed to it. It would have defeated the end of its institution to have made it, in the administrative authority of any of its departments, subject to an adverse will, which might, at pleasure, disorganize its existence or arrest its constitutional action. It is not, therefore, to be supposed that the people, in the institution of the general government, intended to make its continuance or efficiency dependent upon the will of local governments, by giving to these governments the authority to act as the agents or instruments of the nation in certain departments of governmental administration. It was the purpose of the people to institute a government, having a supreme legislature, a supreme judiciary, and a supreme executive to administer for the nation, externally and internally in respect to all subjects committed to it. Such was the end sought, and such the reason and spirit of its institution.

§ 262. Therefore, while the constitution commits to the states the authority to determine the qualifications requisite for electors of members of the house of representatives, by identifying them with those having the qualifications requisite for electors of the most numerous branch of the state legislature, it has left with congress the authority to prescribe by law the time and place of holding, and the mode of conducting the elections of such members; and has given to the general government authority to enforce the constitutional guaranty of a republican form of government to each of the states; so that the authority of the general government can be used to provide for the election of members to the house, should the state, as a political institution, neglect or refuse to do its duty in that respect. For while the state continues republican in form, there must be a class of its citizens having the qualifications requisite for electors of the most numerous branch of its own legislature; and those electors, or such of them as think proper, can return members to the house of representatives under such regulations as congress may find it necessary to prescribe. And should a state legislature neglect or refuse to elect a senator according to the command of the constitution, which is the supreme law of the state, and which by their oaths they have undertaken to support and obey, it cannot be doubted that, under the constitution of the United States, there is sufficient authority and power in the supreme legislative, judicial and executive departments to compel obedience. The nature of this remedy will be considered when the state governments, together with their source, authority, duty and powers, are considered. When it is remembered that absolute sovereignty belongs to the nation alone; and that this sovereignty includes within its authoritative jurisdiction every individual subject or citizen, and every iota of governmental authority; and that these state governments are but instruments or agencies of this absolute sovereignty to administer the nation's authority in matters of a purely local and domestic character, except so far as by the constitution of the United States they may be appointed to the execution of powers pertaining to the general welfare, it will not be difficult to find authority in the general government to hold these local agencies of the nation to a strict accountability for the manner in which they discharge the trusts committed to them. So

long as there is a supreme law, binding alike upon state legislatures, state judges and governors; and there is a supreme legislature, a supreme judiciary, and a supreme executive, which are authorized to speak and act by the will and power of the nation, the political rebellion of a state is as much the subject of national restraint and control, as the individual rebellion or treason of the citizen.

§ 263. To become a member of the house of representatives, a person must have attained to the age of twenty-five years, and must have been a citizen of the United States seven years, and must be an inhabitant of that state in which he is chosen. These are the only qualifications imposed by the constitution as essential to membership of the house. It is designed that it should be eminently a democratic body, fresh from the presence of the people every two years; consequently, that it should be familiar with the needs of the people of every class, occupation, trade, profession and calling. Among its members are to be found men representing every branch of industry, as farmers, mechanics, traders; and professional men as lawyers, doctors and ministers; so that all classes of society needing the fostering hand and protecting care of the government, will find some one in this body to speak for his calling, and represent his interest. The house is made a branch of the legislature, that the will of the people may enter directly into the composition of the laws; that through this branch they may compel regard to, and a protection of the public welfare, as pertaining to the interests of all classes.

§ 264. It cannot be denied that so numerous and transient a body as the house of representatives in congress, is unfavorable to judicious and wise legislation. That a majority of its members have not the culture, discipline or information necessary to constitute a body of wise and discreet legislators. Nor is it necessary they should have. As a body, they represent the wants and wishes of the people, with a demand that the legislation of congress shall conform thereto; and as a branch of the legislature, they have power to enforce their requirements. They do not represent the discretion or wisdom of the state necessary for wise and judicious legislation. They were not constituted for that purpose. The house is constituted with reference to the wishes, and not the wisdom, of the nation. Hence, the essential feature of the house is, that the

members shall be immediately from the people, with qualifications sufficient to understand and represent their wishes. For such purpose, it is sufficient that the member has attained to the age of twenty-five years; and to prompt him to be faithful, he must go back to the people every two years, and receive their judgment, and learn anew their requirements.

§ 265. It is no disparagement of the farmer, mechanic or tradesman to say of them as a class, that they have not the culture, education and discipline essential for the learned professions, or for discharging the duties devolved upon the legislator or judge. The people of the nation; being themselves farmers, mechanics, tradesmen and professional men, in the structure of the general and state governments, and by their general and local laws, have affirmed the same doctrine. They have deemed it necessary to secure fidelity to their common welfare, by reserving to themselves a place in the department of legislation; but they have never deemed it prudent or safe to intrust to the popular branch of the legislature the sole powers of legislation. To legislate wisely and well for the interests of all, requires the possession of an educated mind, a matured judgment, a prudent foresight, a comprehensive understanding, and calm reflection—possessed by few; and for this reason the people, in the structure of the legislative and judicial departments of government, have sought to secure the aid of this class, in the senate and upon the bench. And wherever they have departed from this policy, they were seduced by the devices and wiles of the demagogue, and not influenced by the wise and prudent counsels of the good, or the dictates of their own plain common sense.

§ 266. This principle is observed in the practical organization of the house into working committees. Each interest asking for legislative aid is at once referred to an appropriate committee, which consists of such members of the house as are supposed to be competent, or, at least, peculiarly fitted from their profession, art, trade or calling, for the discharge of the particular duties required. This organization of the house into committees appropriate to the investigation of every particular question likely to arise in the course of popular legislation, has its basis in the recognition of the principle, that men should be suited by qualifications, for the particular work committed to their execution.

§ 267. The people are more interested in wise, prudent and necessary legislation; in upright, faithful and just administration of the laws, than they are in the questions, by whose wisdom have they been framed, or by whose judgment have they been administered. Hence, the highest interests of the people require that the qualities of wisdom, prudence, foresight, judgment and integrity, should characterize those who administer the government; and any policy which tends to lower the standard, or to exclude this class from a controlling influence in the several departments of government, is adverse to the common welfare of the people, however much they may flatter themselves they have gained in power.

§ 268. The advantages of a democracy over every other form of government, are to be found in the potential presence of the people in the administration of their authority, by which they are enabled to secure the incorporation of their common rights and interests into the laws by which they are to be governed. If this end could be accomplished under a monarchy or an aristocracy, the people would be less liable to the corrupting influence of political demagogues, than they are under a democracy; and their common rights and interests would be equally as well protected. But this cannot be. Popular rights and interests will not be secured by a government which does not feel the potential presence of the people in its administration.

§ 269. But this potential presence of the people in the administration of the government is most effectually secured by making one branch of the legislative department purely a representative body — like the house of representatives, as a branch of congress. The constitution provides for receiving them immediately from the people of the nation. As far as possible, it provides for an equal representation of the people of every part of the nation in the popular branch of the congress. It apportions the representatives among the several states according to their respective numbers; taking care, however, to secure to the people of each state, at least one representative.[1] When, for any cause, vacancies shall happen in the representation from any of the states, the executive authority thereof is required to issue writs of election to fill the same.[2]

[1] Art. 1, § 2, cl. 3.

[2] Art. 1, § 2, clause 4.

§ 270. At the timé the draft of the constitution was proposed, the convention were not prepared to fix upon an exact ratio of representation. But in their draft, which was adopted by the people, they provided for taking an actual enumeration of the people of the United States within three years after the first meeting of the congress; and until that should take place, the representation of the people of the several states was determined by the constitution itself.[1] The constitution also provided for estimating the numbers of the people to be represented, by adding to the 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. For the purpose of future equality of representation, the constitution provided that a new enumeration should be taken within every subsequent term of ten years.

§ 271. Equality of representation in the institution and administration of the government is an essential feature of democracy. Hence, the people of the United States provided in the constitution that representatives, &c., should be apportioned among the several states according to their respective numbers; that is, the people of the several states should have a representation in congress in proportion to their number of inhabitants. Proportion signifies, equality of ratio; for which equality the people intended to make constitutional provision. But it is manifest, that with a limited representation in congress, and an ever-changing population in the several states, an exact equality of ratio can never be obtained. This provision, then, must be interpreted according to the reason and spirit of the same. Since an exact equality cannot be obtained, it intends that a ratio of representation shall be adoped which shall give to the people of the several states a representation in congress as nearly equal as possible; leaving as few and small unrepresented fractions in the several states as possible. But as the number of representatives are limited by the provision that they shall not exceed one for every thirty thousand, unrepresented fractions less in number than thirty thousand are always liable to exist in some of the

1 By the provisions of the constitution, the ratio for the first house of representatives was not to exceed one representative for every thirty thousand inhabitants; and until an actual enumeration should take place, New Hampshire was entitled to choose three representatives; 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—making in all sixty-five representatives. (Art 1, § 2, clause 3, Const. U. S.)

states. But taking a period of years together, they will be found sometimes in one state and sometimes in another, ultimately becoming nearly equal on the principles of average.

§ 272. It is not to be inferred that the people of the United States intended to recognize the authority of the several states as absolutely sovereign, in thus providing for this equality of ratio in their congressional representation. The state governments, according to the American system, are an essential branch of the national administration. While the sovereignty of the nation necessarily includes all other governmental authority to be exercised within its territorial limits, the democratic principle by which that authority is to be exercised, requires that those whose interests are involved in a particular administration shall be intrusted with it. Thus, there are interests common to the people as a nation, requiring the supervision and control of a government having jurisdiction throughout the nation. There are interests of a local and domestic character, affecting only those residing within the limits of a particular state; and there are other interests confined to the municipality, affecting only those who resided in the particular city or town. But the citizen of the city or town has also other interests in common with the citizen of the state or nation. In other words, while he is a citizen of the city or town, he is also a citizen of the state, and of the nation; and has rights and interests peculiar to the city, the state, and the nation. The democratic or American system requires that, as a citizen of the nation, he shall be represented and be permitted to participate in the administration of the general or national government; and shall have equal authority in such administration with other like national citizens. That as a state citizen, it is his right to be represented and to participate in the administration of the state government, and to have equal authority in such administration with all other like state citizens. That as an inhabitant of a municipality, it is his right to participate in the administration of the municipal government, upon equal terms with other like inhabitants of the municipality. And the democratic or American system further requires that, so far as the public interests will permit, none but the inhabitants of the municipality shall participate in the municipal administration; none but the citizens of the state shall

participate in state administration; and that only the citizens of the nation should participate in the national administration. But all these are questions of administrative right—not of governmental authority. The authority to administer, is one thing; the authority which is administered, is quite another.

§ 273. The principles of democracy do not antagonize with the existence of absolute sovereignty in the body of the people or nation; nor do they require that this sovereignty should be parceled out, or divided between different classes of governments. The existence of an absolute and undivided sovereignty is as essential to a democratic government, as it is to a monarchy or despotism. Authority to compel obedience is absolutely essential to all governments. Sovereignty is always one and indivisible; and its authority is always the same, by whomsoever lawfully exercised. The fundamental principle of democracy is, that sovereignty belongs to the people of a nation taken together as a whole. That each individual is sovereign only in respect to his own, when compared with other individuals; but that no one is sovereign when taken in reference to all. That the public authority is the authority of all; and is alone sovereign in respect to all, and over all. With respect to the administration of this authority, the democratic theory asserts the right of those to administer whose sole rights are to be affected by the administration. But in such administration, whether it be of the general, state or municipal government, there is but one source of governmental authority.

§ 274. This clause of the constitution apportioning this congressional representation among the several states, was providing for equality of representation in the administration of national authority, in order that, as far as possible, all citizens of the nation, without regard to the particular states in which they resided, should be equally represented in their interests, and should have an equal voice in the administration of national authority; and the state governments were to be used as national agencies for accomplishing such a result. They were already organized, and were administering in that department of internal administration which embraced subjects of a local and domestic character. They were better adapted to that sphere of administration than the general government possibly could be. Therefore, there was no occasion for super-

seding them, for the purpose of instituting new agencies to accomplish the same objects. For this reason, the people of the nation, in the institution of their general government, carefully preserved to the states the exercise of such authority as was not needed for the general safety and welfare of the nation; and denied to the states the exercise of such authority only as more properly belonged to the general administration.

§ 275. To the house of representatives thus constituted is committed the sole power of impeachment. This is the manner in which one high in office, having been guilty of a breach of his official trust, is arraigned to answer before the people for such delinquency.[1] Since government is essential to the existence and well-being of society, and can be administered only by intrusting individuals with the exercise of the public authority, those who are thus intrusted are under the highest obligations to administer with sole reference to the public good. Consequently, when such an one becomes faithless in the execution of his trust, and uses the public authority to the detriment of society, he commits a crime against the people, deserving the severest punishment; for he not only deprives society of the benefits of a proper administration of his office, but he so uses the power committed to him as to tend to the subversion of the very interests he was placed there to promote. His crime will be in proportion to the magnitude of the public interests betrayed. But whatever it may be, the safety and welfare of the public require that he be speedily removed, and the trust be committed to worthier hands.

§ 276. But to remove such officer, justice requires that he should be tried before some proper tribunal, and have an opportunity of vindicating his official conduct; that he should be found guilty before all the people, and that the solemn judgment of an impartial tribunal should pronounce his guilt. The nature of the crime committed, the official position of the culprit, and the importance of the proceeding to the public, require a

1 "An impeachment, as described in the common law of England, is a presentment by the house of commons, the most solemn and grand inquest of the whole kingdom, to the house of lords the most high and supreme court of criminal jurisdiction of the kingdom. The articles of impeachment are a kind of bill of indictment found by the commons, and tried by the lords, who are, in cases of misdemeanors, considered not only their own peers, but as the peers of the whole nation." "The object of prosecutions of this sort, is to reach high and potent offenders, such as might be presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence, or from the imperfect organization and powers of those tribunals." (Story's Com. on Const. U. S., § 688 and notes.)

tribunal of peculiar construction; one in which the people, whose trusts had been betrayed, may be represented in the arraignment of the offender; but one, nevertheless, whose judgment cannot be biased by popular clamor. The public welfare demands, that official misconduct should be punished; that those guilty of maladministration in office should be removed; that fidelity to the public trust should, at all times and in all places, be maintained; and it, therefore, requires that the authority to impeach and try a public officer should be intrusted only in the hands of a most responsible tribunal; one in which there is to be found the highest wisdom, prudence, integrity and public virtue. It should be a tribunal in which the power, the dignity and welfare of the nation could, by no possibility, be betrayed.

§ 277. Trials by impeachment have reference only to public character and official duty. In general, those offenses against society which can be committed alike by private persons and public officers, are not the subjects of impeachment. The constitution provides, "that the president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.[1] That the house of representatives shall have the sole power of impeachment,"[2] and that "the senate shall have the sole power to try all impeachments."[3] All offenses not immediately connected with office, except the two expressly mentioned, are left to the ordinary course of judicial proceedings; and neither house can regularly inquire into them except for the purpose of censuring or expelling the member. But in respect to impeachment, the ordinary tribunals are not precluded, either before or after conviction, from taking congnizance of the public and official delinquency.[4]

[1] Art. 2, § 4. [2] Art. 1, § 2, cl. 4, idem. [3] Art. 1, § 3, cl. 6, idem. [4] Rawle on the Constitution, 204. See No. 65 Federalist, in appendix, p. —

The term "impeachment" is introduced into the constitution as one of known definition, and, therefore, recourse must be had to the common law of England for the definition thereof. "In England, the practice of impeachment by the house of commons before the house of lords, has existed from very ancient times. Its foundation is, that the subject intrusted with the administration of public affairs, may sometimes infringe the rights of the people, and be guilty of such crimes as the ordinary magistrate either dare not or cannot punish. Of these, the representatives of the people, or house of commons, cannot judge, because they and their constituents are the persons injured, and can, therefore only accuse. But the ordinary tribunals would naturally be swayed by the authority of so powerful an accuser. That branch of the legislature which represents the people, therefore brings the charge before the other branch"—the senate here, the house of lords in England—"who are said not to have the same interests, or the same passions as the popular assembly." (Rawle on the Const., p. 198; 1 Bl. Com., 259.) It is not strictly true, that the senators have not an equal interest with the representa-

§ 278. The house of representatives is properly intrusted with this power of impeachment; not as a legislative body, but as a body of the representatives of the nation, coming, as they do, from every part thereof. As an official body, they are nearer the people than any other. They feel more quickly the effects of maladministration; and they are, therefore, the proper body to complain, and frame an accusation against the alleged delinquent. It is not to be supposed that a body composed like the house, of members from all political parties, immediately representing the various interests of the people, will be likely to accuse a high officer, or present articles of impeachment against him, without probable cause. It is not to be supposed that any political party, from mere party spirit or strife, will corruptly undertake to lay their hands upon a faithful public officer, that they may make place for some partisan favorite. The people would see in such a procedure the sure destruction of all governmental security and protection; and would avail themselves of the earliest opportunity to hurl from power such partisan criminals, and put better men in their places. No party will undertake to impeach a high officer of the government, when the evidence of criminality is not sufficiently clear to warrant a conviction, not only in the minds of the senators, but also in the minds of the people.

§ 279. Experience has proved that, however guilty in the exercise of the trust committed to him the official delinquent may be, it is extremely difficult to procure a conviction on the trial of an impeachment. It proves that the leading men of the political party to which the delinquent belongs, will not be disposed to commence the prosecution. There is a general sentiment that the political party is responsible for the official misconduct of those it elects to office; and, therefore, there is a disposition in the party to apologize for, or conceal the delinquency, rather than to expose or punish the delinquent. For these reasons, impeachments are usually prosecuted by the political opponents of the accused. Consequently, the political friends of the delinquent are liable to be influenced to make common cause against the prosecution, and to defend with the zeal and recklessness of a political party, on trial for its political sins.

tives in the fidelity of public officers; but it is true that the members of the senate are selected from a senior class in society; and the body is composed of men who are supposed to be more eminent in native and acquire ability; men of more refinement and higher culture, than those generally composing the house.

Thus, the party lines may be closely drawn, and the question of guilt or innocence be determined by party discipline, rather than by the evidence submitted. And it is seldom that either party can command the constitutional majority requisite for a conviction. But even when the requisite party majority exists, there often are men of either party who may be subject to influences of divers kinds; and the friends of the accused, whenever it becomes necessary, will be likely to find the means of detaching a sufficient number from the side of the prosecution to prevent conviction.

§ 280. An attempt at impeachment, accompanied with a failure to convict, is disastrous to political and public morals. The evidence may disclose official misconduct; infidelity to the sacred trust committed to the delinquent; the powers committed to him, to be exercised for the public welfare, perverted to corrupt individual or partisan purposes; thus showing recklessness, dishonesty and corruption. Yet the trial will be likely to exhibit a great political party, excusing or conniving at such official misconduct; making light of it; palliating it as not uncommon to political parties, or official incumbents; asserting, in effect, that strict fidelity in official administration is not to be expected. Then comes the acquittal, virtually sanctioning by its judgment, official delinquency and party corruption; licensing those in office to be dishonest and corrupt; encouraging them to be so, by the respectability of those who have committed, or now apologize for and excuse, such delinquency, thus sanctioned by the judgment of the highest and most solemn tribunal of the state or nation. The tendency and result in such case is to make dishonesty and corruption in office respectable, and venality the spirit and rule of official administration; until, finally, the people cease to expect or require fidelity on the part of those intrusted with the exercise of governmental authority.

§ 281. But notwithstanding all these dangers, courts for the impeachment of high officials for crimes committed against society by the abuse of official powers, are necessary. And it should be the constant aim of those intrusted with the exercise of legislative authority to provide certain and just means for bringing official delinquents to a speedy accountability. There is wisdom and power sufficient, and there are means competent to be employed under the sanction of legislative authority,

to hold to a strict accountability every official incumbent. The mass of society are sufficiently capable and honest to know the necessity for fidelity on the part of those intrusted with the administration of the government, and to require of them the exercise of such fidelity. Let honest, earnest, patriotic men take charge of the primary assemblies, in which these corrupt streams of maladministration have their origin, and which are now usually controlled by venal and designing politicians, and the mischief would soon be remedied. The remedy should be applied at the root of the evil, if a vigorous and healthy administration of the public authority is to be hoped for or expected.

§ 282. A member of the house is elected for two years, marking the period of congressional duration. There have hitherto been two sessions, designated as the *first* and *second* sessions of the particular congress; and whenever, for any cause, a special session has been called, then a third session has been held. The organization at the first session continues through the succeeding ones; so that, notwithstanding there may be several sessions of a particular congress, there is but one organization of it. The term of two years was unanimously agreed upon as the proper period of congressional duration. A less period than two years would have been too short for maturing many important measures in respect to which legislation is required; and as each successive congress is composed, to a large extent, of new and inexperienced members, the labors of a prior congress could not readily be continued in the succeeding one, without involving a repetition of their former labors. Besides, whatever may be the ability of a new member, experience is necessary to make him a practical and ready legislator. Two years are scarcely sufficient to make one so familiar with the routine of legislative duties as to constitute him a practical legislator; and it is generally bad policy for the people to exchange a faithful and experienced representative for an inexperienced one.

§ 283. It should be the object of every constitutional government to secure men to administer in its several departments, who possess wisdom to discern, and virtue to pursue, the common good of society. And it should provide every safeguard against a departure from these principles, so that fidelity in the administration of the public authority would be secured. Therefore, great

care should be observed in selecting men of ability, intelligence and integrity to represent the people in the house; and by limiting their term of office to two years, they are held to an immediate responsibility for the manner in which they discharge their duties. But should a representative by his ability and fidelity, serve faithfully his constituents, it would be wise and just on their part, to elect him for a second, or even for many succeeding terms. For while he continues faithful to the trusts committed to him the longer he serves, the more experience and practical ability will he acquire; and, consequently, the more efficient will he be in the service of his constituents. It is bad policy for the people to exchange a faithful and experienced representative for an untried one, whatever may be his pretensions or promise. Prudent men in the administration of their own affairs, are never guilty of such folly. In democratic countries, no man has any personal claims for office; and whoever sets up such claim, evinces an intention to serve himself, rather than to serve the public; and upon every principle of prudent precaution his claims should be discarded.

§ 284. It is better, however, that the term of office of a member of the house should be limited to two years, than to continue longer; and then, if the member proves to be faithful and efficient, to reëlect him for a second term. In this way immediate responsibility is secured, together with the benefits of an experience incident to a longer term. The people would generally adopt this practice, were they not influenced to the contrary by a class of ambitious men, who are constantly setting up claims for office, and insisting that their turn to serve the people is at hand. The cry of rotation in office is often uttered by those who are impatient to plunder the public; and when no other reason can be asigned why an official incumbent should be dismissed than that he has been in office a long time, the presumption is, the common welfare requires that he should be continued. For if his administration has been so faithful that no fault can be found, he is the man of all others to continue; and had it not been so, one anxious to displace him would be likely to discover it, and allege it as a reason why he should be dismissed.

§ 285. Too much attention can scarcely be given by the people to this subject. To secure responsibility on the part of the representative, there should be short

terms of office. To encourage fidelity and secure efficiency in the discharge of its duties, those who have been faithful, and have evinced the proper and necessary ability, should be continued by reëlections; and, as a general principle, it should be understood that the public welfare demands no change while the incumbent is competent and faithful to his official trusts. Nothing tends more directly to drive honest and faithful men from the field of political administration, than to be obliged to come into competition with designing and dishonest demagogues, and to deal with office as though it were a political bone to be seized by hungry dogs starving for official pap. When, to obtain a nomination for an office, or an election, money must be spent by the candidate to buy up the influence of professional wire-workers, or to corrupt the suffrage of the people, men of real virtue and integrity of character will seldom be found to be candidates for office; and, as a result, the tricky, dishonest and corrupt will be likely to bear sway in the political arena; at least, such will be the tendency; the people will be swindled, and the public welfare betrayed.

§ 286. The continuance of the official term of a member of congress should be of longer duration than that of a member of a state assembly. A member of congress is required to become familiar with subjects of international administration in respect to commercial intercourse, etc. He is also to legislate, touching public interests affecting all the states; while a member of the state legislature is only required to be familiar with the habits, manners, institutions, occupations and laws of his own state, to qualify him generally for a state legislator. In a single state, the pursuits and occupations of the people are more homogeneous and uniform; and, consequently, it is less difficult to ascertain and understand the legislation required to foster and protect them; and, beside, the people of a single state are more familiar with the principles of their domestic administration, because more immediately connected with them in their daily application to the common pursuits. From divers considerations of this character, it is apparent that it is necessary to make the official term of a member of the house of congress of longer duration than that of a member of the corresponding branch in the state legislature.

§ 287. A member of the house of representatives is required, at the time of his election, to be an inhabitant of the state from which he is chosen. The constitution does not determine the length of time he must have resided in the state prior to the election, nor in what particular part of the state he should reside. These questions are left to the determination of the people. There can be no doubt that congress may, by law, determine these questions, whenever it shall appear that the general welfare requires them to do so. But as the member is to represent the people of his particular state in the congress, it is more in harmony with democratic principles to permit the people of the several states to adjust these questions according to their best judgment. It would be wise to require that the member should have resided in the state long enough to have become acquainted with the interests and views of his particular constituency; and that he should be so located as to be likely to understand their requirements, and to feel his responsibility to them. But the question of particular location should be left to the good sense of the people of the district selecting a member. It may happen that the man best suited to represent them resides in some other district of the state; in which case they should be permitted to return him as their member. And it not unfrequently happens that good men, whose services are required by the public, reside in districts adverse to them in politics; and, therefore, can be sent to congress only by the suffrages of some other district. In such cases, the people should be permitted to select such, without regard to the particular district in which they reside, because they would thus best represent the popular interests, and promote the general welfare of the nation.

CHAPTER VIII.

THE LEGISLATURE—THE SENATE.

§ 288. THE senate of the United States is composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator is entitled to one vote. The constitution provides for dividing the whole number of senators into three classes, in respect to the time when the official term shall commence, and, consequently, when the same shall expire. It declares that, "immediately after they"—the senators—"shall be assembled, in consequence of the first election, they shall be divided as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year."[1] By this provision the senate is made a continuous body; and is, in this respect, likewise, unlike the house, which continues but for two years, when a new body is required to be organized.

§ 289. In the constitution of the senate as a political body, two features are particularly prominent. First, it is not a representative body. Second, it is a continuing or perpetual body, intrusted with some duties not strictly legislative, although it constitutes one branch of the legislature. By not being a representative body, is meant, the senate does not represent a popular constituency. It is claimed, however, that it represents the states in their political or organic existence; and that thus, through the senate, a *quasi* confederation of the states exist as a part of the general government. And an attempt to sustain this view is made by appealing to the discussions in the convention which framed, and the

[1] At the first session of congress under the constitution, the division of the senators into three classes was made in the manner following: The senators present were divided into three classes by name, the first consisting of six, the second of seven, and the third of six. Three papers of equal size, numbered one, two and three, were by the secretary rolled up and put into a box, and drawn by a committee of three persons chosen for the purpose, in behalf of the respective classes in which each of them was placed; and the classes were to vacate their seats in the senate according to the order of the numbers drawn for them, beginning with number one. It was also provided, that when senators should take their seats from states which had not then appointed senators, they should be placed by lot in the foregoing classes, but in such a manner as should keep the classes as nearly equal as possible. (Journals of Senate, 15th May, 1789, pp. 25, 26.) In arranging the original classes, care was taken that both senators from the same state should not be in the same class, so that there never should be a vacancy at the same time of the seats of both senators. (Story's Com. on Const., § 726.)

several conventions which adopted, the constitution. It is not denied that there were those who advocated this feature in the constitution of the senate, upon the ground that the senators were the representatives of the states, as political bodies; and that the security of the smaller states demanded an equal representation with the larger ones, in the senate; and they insisted upon such representation of the states. But such is not the principle involved in the constitution of the senate, as a branch of the national legislature, or as a representative body of the states.

§ 290. The senators are not the representatives of the states as political institutions; nor are they in any essential particular the especial guardians of the political rights of the states against the possible encroachments of the general government. In that respect they have no duty to perform not common to the members of the house of representatives; and it is no more the duty of the senator to see to it that the general government, in the administration of the powers committed to its exercise, keeps strictly within its constitutional limits, than it is the duty of the representative. Both are sworn to obey the requirements of the constitution in the exercise of their official trusts, and each are equally bound to do so.

§ 291. At the time the general government was instituted, the people of the United States, as represented in their political discussions, felt the need of a national government, to be intrusted with authority to administer in all matters pertaining to the general welfare of the nation. It was the almost universal conviction that the states, as political institutions, could not be intrusted with such administration. But there were serious apprehensions lest a great central government might be formed, and all governmental authority be consolidated in it, by means of which the state institutions might become absorbed, and the people be deprived of control in the administration of their local and domestic affairs. There were, likewise, apprehensions on the part of others lest the people, jealous of power not within their immediate control, and fearing the influence and oppressions of a strong government, like the one from which they had just emancipated themselves, should go to the other extreme, and destroy the national unity by state division and disintegration. Their discussions show the presence of these two classes in the federal and state

conventions. The one party was accused of being in favor of a consolidation of all authority in the general government, to the destruction of the states; the other was accused of adhering to the rights of the several states, to the destruction of the nation.

§ 292. This difference of opinion was natural. The ultimate effect of adopting the one or the other was problematical; for they were unaided by any historical parallel. Here were people — citizens of thirteen independent states, consolidated into one nation by a united and successful effort at establishing their common independence. They were a nation; but to continue such, it was necessary to institute a national government. That necessity was immediate and imperative. And the government to be instituted must be supreme in the exercise of its authority, or it could not secure the existence, maintain the independence, and promote the welfare of the nation. To make it, in its administration, dependent upon the diverse, and perhaps adverse wills of others, was to deprive it of the exercise of that authority which was indispensable to the dignity and authority of a government administering for a sovereign nation. But, on the other hand, the people were already living under state governments, instituted and administered by themselves. These governments were intrusted with the exercise of such authority as was necessary for the administration of their local and domestic affairs, and it was clear that no other government more general in its administration, could possibly administer so well, and secure to each citizen such exact justice. And, while they admitted the necessity for a government to administer in national affairs, and were anxious to devise one that could do so without danger to the states, the great problem to be solved was—how can such a government be instituted? and what must be its constitutional structure?

§ 293. The advocates of a strong national government were not hostile to the continuance of the governments of the several states, within a sphere of authority that would not endanger the necessary efficiency of the government required for the stability, dignity and prosperity of the nation. Nor were the advocates of the continued independence and authority of the state governments hostile to the institution of a national government, upon a basis that would not endanger the liberties of the people, secured by their

own administration of the state governments. They were not only willing, but desirous to ascertain some means of establishing a general government for the nation, which, while it would be most efficient in administering the authority of the nation in all matters pertaining to its security and welfare, would at the same time be so limited, as to have no power to encroach upon the people of the states in the administration of their local and domestic affairs. And in all discussions of these questions it is to be remembered, that with the founders of the American governments the great desideratum was, to ascertain a mode in which the principles of self-government might be successfully applied to the administration of national and state interests.

§ 294. The founders of these governments were embarrassed in attempting to establish a system of national and state administration, by confounding the authority of the government with the authority of the people instituting it. And the difficulties experienced by them in finding a true theory of administration, arose out of the evident incompatibility between two governments over the same territory, embracing the same subjects, being each sovereign and absolute in their authority. The feeling was, that both could not be sovereign; that one must be inferior to the other; or, at least, one must have a check upon the other, so as to be able to prevent encroachments upon its rights. Yet to make the general government supreme, was to endanger the existence of the states; to make the states sovereign, was to cripple and ultimately paralyze the nation. These difficuties were inevitable, upon the hypothesis that there were two sources of authority in the general and state governments. If there were two sovereignties to be administered over the same people and within the same territorial limits, the difficulties were insuperable. They perceived the truth of the doctrine of the revolution, that the authority to be administered by the government is the authority of the people, and that the government has no authority of its own; but they had not carefully applied it in detail, in the institution and administration of government. The minds of American statesmen had been occupied more with vindicating their rights against the encroachments of arbitrary power, than in theorizing upon the best form of actualizing their principles in the structure of a national government. After they had established

their independence, and it had become necessary to institute a government to perpetuate it, their attention was then turned to this subject; and the foregoing views represent their first impressions.

§ 295. But the fear lest the general government would, if supreme and unchecked by the states, encroach upon state authority and state rights, ceased, when it was remembered, that the same people by whose authority the general government was to be instituted and to be administered, were also citizens of the states, and equally interested in maintaining state administration; and the like fear lest the states should usurp national authority, was perceived to be without foundation, when it was remembered that the citizens were, likewise, citizens of the nation, and equally interested in maintaining the authority of the general government. When, after much discussion, it was perceived that the state and national citizens were one and the same; that their general and local interests centered in the same individuals; that the national citizen was likewise a state citizen, and *vice versa*, the fear lest the citizen of the nation should turn upon himself, as the citizen of a state, and rob or destroy himself, seemed absurd; and, therefore, the fear of centralization of power on the one hand, or diffusion of it among the states on the other, ceased; and thus the people were enabled to establish a general government upon the true democratic theory. Such were the compromises of the constitution.

§ 296. The compromises of the constitution, so called, consisted in harmonizing the views of those entertaining these opposite opinions, and in their agreement upon a plan of government in accordance with the democratic theory enunciated by the fathers of the revolution — the theory that the people are the source of governmental authority — that governments are instituted by the people for the administration of their authority — that there is but one source of authority to be administered, either by the general or state governments, although there may be several distinct administrations. In short, by compromises is meant, one party renounced consolidation on the one hand; the other, national disintegration; and both united in providing for the administration of public authority, through the instrumentality of the general and state governments, allotting to each the exact sphere in which it was to administer.

To the general government was committed the administration of the nation's authority in relation to subjects pertaining to its common defense and general welfare. To the state governments was commttted the exercise of whatever authority remained essential to the internal administration in respect to local and domestic interests. And whatever was not committed to either, remained with the people, to be exercised by them whenever occasion might make it necessary.

§ 297. When it is remembered that government as a corporate institution, belongs to the people, and is an instrument of administration merely, and can exercise no authority not intrusted to it, and can exercise the powers delegated only for the purposes prescribed, it does not become a very complex question to assign to it the true sphere of its duties and action. When the sovereign authority to be administered is distinguished from the authority of the administrator; that is, when the authority of the creature is distinguished from the authority of the creator, there will be less liability to err in treating upon the authority and powers of government. The general government of the nation as instituted by the people of the United States, is but an instrument in the hands of the nation for administering its authority in the manner prescribed. For any other purpose, it has no rights, interests, authority or existence. Let not the people be deceived, then, by speaking of the general government as though it were an entity aside from the purposes for which it was instituted. It is the same, also, in respect to the state governments. They are merely corporate institutions, created to be used as instruments in the hands of the people for the administration of the public authority in matters pertaining to their domestic interests. For any other purpose, they have no rights, interests, authority, or even existence. Therefore, let no one be deceived by supposing them to be institutions having an existence and authority, independent of the purposes for which they were created. State rights and state authority can mean nothing other than the rights and authority of the people of the states; or the authority intrusted to the exercise of these local institutions. Therefore, when it is said, the senate of the United States is the representative body of the states as political institutions, it is to be understood that the senate represents the wisdom, discretion, prudence, foresight and dignity of the people

collectively, as a check upon the indiscretion, impulse, haste and want of foresight, in the individual masses; otherwise, it means nothing.

§ 298. When, therefore, it is said that the senate as a branch of the general government, represents the states therein, in a manner different from that in which they are represented by the house of representatives, it should be understood that the senate represents the collective wisdom, virtue, prudence, foresight and dignity of the state, as distinguished from that individual interest, feeling, impulse and indiscretion, which is more immediately represented by the members of the house, coming, as they do, from the immediate presence of a popular constituency. The senator certainly does not represent the state or its interests, as separate from the people and their interests; that is, he does not represent the institution called a state government in respect to interests, rights, authority and existence, separate from the people, because the state has no such interest, rights or existence to be represented in the general government, or elsewhere. [1]

§ 299. It was the manifest design of the people in dividing the legislative department of the government into two distinct branches, and in giving to the senate a constitution distinct and dissimilar from the constitution of the house of representatives, to give to the senate the character and influence in the exercise of governmental authority, which would naturally attach to a body thus selected and constituted. The people were to be equally represented in the house; but they were not to be represented at all in the senate. That body was, so far as legislation is concerned, insti-

1 In speaking upon the subject of the constitution of the senate, Mr. Gerry said, "the evils we experience flow from the excess of democracy." (5 Lipp. Ell. Deb., 136.) Mr. Mason thought the house of representatives ought to be elected by the people, and be made the grand depository of the democratic principle of the government. It was, so to speak, to be our house of commons. It ought to know and sympathize with every part of the community, and ought, therefore, to be taken from the different parts of the republic. (Id.) Mr. Wilson advocated the same doctrine. Mr. Madison considered the popular election of one branch of the national legislature as essential to every plan of free government. He was an advocate for the policy of refining the popular appointments by successive filtrations, but thought it might be pushed too far. He wished the expedient to be resorted to only in the appointment of the second branch of the legislature, &c. (Madison's Papers, 5 Lipp. Ell. Deb., pp. 136, 137.) Mr. Dickinson thought it essential that one branch of the legislature should be drawn immediately from the people, and that the other should be elected by the state legislatures; that in the formation of the senate, it ought to be carried through such a refining process as would assimilate it as nearly as might be to the house of lords in England. Mr. Pierce was for an election by the people as to the first branch, and by the states as to the second branch. Mr. Read thought there was too much attachment betrayed to the state governments. He thought we must look beyond their continuance; that the national government must soon swallow them up. Mr. Wilson saw no incompatibility between the national and state governments, provided the latter were restrained to certain local purposes, &c. (Id., pp. 163, 164.)

tuted to aid the nation by the exercise of a judgment, prudence, foresight and wisdom not supposed to be possessed by a body of men elected by a local popular constituency. It was deemed wise to commit the selection of senators to the legislatures of the several states, because, it was argued, the legislatures will select their candidates from a class of men of higher standing, and better educated, than will the masses, if the selection be committed to them. When the legislature, representing the collected wisdom and dignity of the commonwealth, select men to represent that wisdom and dignity in the senate of the nation, it is not to be supposed that it will select those who are below its estimated standard of ability and dignity suited to represent such body, but on the contrary, that it will take care to select from a class of men the most talented and distinguished in the state, to exercise the powers and discharge the duties pertaining to the highest deliberative body in the nation. And this anticipation of the fathers has hitherto been realized; for it is safe and just to affirm of the United States senate, that, as a deliberative body, it has never been excelled in point of intelligence, ability and dignity, by any other deliberative body in the world.

§ 300. It has been said that the very structure of the general government contemplated one partly federal and partly national. If by federal is meant that the state governments as political institutions, are represented in, or can exercise any authority over, the general government, or that they have any authority of their own to exercise in respect to the general government, the proposition is denied. The argument that the people recognized the existence of the state governments, as sovereign and independent in respect to each other, and that they continued them, proves nothing in favor of the *quasi* federal theory. The people of the United States as a nation had sovereign authority to establish for themselves such government, and to authorize it to exercise such powers as they thought proper, independent of the existence of state governments. And they likewise had authority to take from these state institutions the exercise of any or all powers, and to confer the same upon the general government; and the fact that they did not do so, proves that they did not deem it expedient; not that they did not possess the authority. The same authority which instituted the general government, and conferred upon it the powers enumerated in

the national constitution, could have conferred upon it all other governmental authority to the destruction of state jurisdiction. But the people deemed it best to institute the general government and confer on it the exercise of such public authority as was required to provide for the common defense, security and welfare of the people as a nation; and to commit the exercise of the residue of their authority, so far as the same was necessary for domestic purposes, to the local administration of the states. But in doing this, there was no acknowledgment, either expressly or by implication, that the states, as such, had any original inherent sovereignty, or were in any manner, as political institutions, to have a voice in the administration of the general government; nor did they, in fact, give them away. New York as a state government is unrepresented at Washington, while New York as a people or part of the nation, is fully represented there.[1]

§ 301. The argument entitled to the greatest consideration in favor of giving to state legislatures authority to choose their own senators in the manner prescribed, had reference to the inevitable character of a body thus selected and constituted. There were duties to be devolved upon that body which required that the members thereof should be men of great wisdom, experience, discretion, judgment and dignity. These qualifications were of more importance to the people than that the members should come from any particular district or state. The duties to be performed by that body had respect to no particular locality within the nation. As a branch of the legislature they were to supervise the

[1] Says Story (Com. on Const., § 693): "In the first place the very structure of the general government contemplated one partly federal and partly national. It not only recognized the existence of the state governments, but perpetuated them, leaving them in the enjoyment of a large portion of the rights of sovereignty, and giving to the general government a few powers. The general government was, therefore, upon the acknowledged basis, one of limited and circumscribed powers; the states were to possess the residuary powers." What does all this prove in favor of the federative theory? The people of the nation having sovereign authority, in virtue of their existence as such, to create such institutions for administrative purposes as they deem best, create a national government, and confer on it jurisdiction over all matters pertaining to the external administration of national authority, and also over such matters pertaining to the internal administration, as local institutions were not competent to administer; but in respect to such other matters of internal administration as pertain to the local and domestic interests of the people, the nation leaves them to the administration of the state governments, asserting, however, its authority over the whole subject. Now, where is to be found the recognition of state sovereignty, or state authority even, as independent of the nation? The idea that the states, as independent sovereignties, were entitled to representation in the administration of the general government, leads to constant error. The people of the states in respect to popular rights and interests were represented; what was there in the government, independent of the people, that required to be represented in the general government? and how, practically, are the states politically represented by the United States senators?

action of the house, and bring to the test of superior wisdom, great experience and calm judgment, the proposed enactments of the house of representatives. The senate was to constitute the highest tribunal in the nation for trying impeachments; it was to be associated with the president in making treaties with foreign nations; also in appointing embassadors and other public ministers and consuls; judges of the supreme court, and other officers. For these reasons it was deemed important to secure, as members of that body, the best men the nation could produce. Therefore, the selection of them was committed to the legislatures of the several states, rather than to a popular constituency. And experience has demonstrated that the state legislatures, in selecting men for senators of the United States, have usually sought them among those who, as a class, stood highest in the state for ability, intelligence, culture, refinement, worth and dignity; and the character of the senate thus composed is such, that the bestowal of its office confers the highest honor upon the person receiving it.[1]

§ 302. He only can be deemed an honest and patriotic citizen who seeks the highest good of his country by the employment of every means in his power essential to that end. Observation and reflection teach that there are duties to be performed, essential to the well-being of society, which require, in their performance, the exercise of the highest qualities of the mind; qualities which can be found only in a class of men, fitted by natural endowment, and by the discipline of a liberal education and long practice. The relations of society to the individual members thereof, impose duties of this character upon every government, whether popular, aristocratic, or monarchical. The good of society requires wise legislation to adjust and apply the principles of justice to the numerous transactions of men, in

1 "The scheme of an election by the legislature finally prevailed by a unanimous vote. The reasoning by which this mode of appointment was supported does not appear at large in any contemporary debate. But it may be gathered from the imperfect lights left us, that the main grounds were that it would immediately connect the state governments with the national government, and thus harmonize the whole into one universal system." (Story's Com. on Const., §§ 703, 704.) It is admitted that remarks of that character were made by some of the members, but it seems impossible that any one should have been influenced by them; for it is not true that the state governments are connected with the general government through the senator elected by the state legislature. For example, in what respect is the governor, as the chief executive of the state, connected with the general government through the senator elect? In what respect is the legislature of the state connected with the general government through the senator elected by it? or in what respect is the judiciary of the state thus connected with the general government? If neither the executive, legislative or judicial departments of the state are connected with the general government through the United States senator, then in what respect is the government itself thus connected?

the infinitude of their relations to, and bearings upon, each other. The wisest and best cannot always fore-judge the evil results which measures, apparently innocent and simple, will produce if improperly imposed upon society as law. Therefore, every government approximating to a democracy, has found it necessary to provide, as far as possible, for the presence of this wisdom and discreet judgment, both in a branch of its legislature and on the bench. The principles of popular representation do not apply to either the senate, which is a *quasi* judicial body, nor to the bench. The judge upon the bench is required to know the law as obligatory upon all; and to ascertain the facts requiring its application; and then, honestly to pronounce the judgment of the law upon the facts as ascertained. He is to represent neither plaintiff nor defendant, neither town, county, or state, except in the character of impartial justice; blind to every consideration except the wise and just application of the law to the facts of the case before him. He is not to know whether the subject of his judgment be a wise man or a fool; a saint or a sinner; a rich man or poor; dignified or mean; black or white, constituent or stranger. Be he who or what he may, the duty of the judge to declare the law as applicable to the facts is the same. With what propriety, then, can a judge have a constituency? What can he do for them as their representative? what rights can he recognize in them, and award to them, that a judge not a representative is not bound to recognize and award? As a judge, is he to feel the presence of the people on the bench? Is he to be swerved from the discharge of his judicial duties by their influence or clamor? Is he to remember that he owes his official position to their suffrage? If so, by every principle sacred to justice, he is unfit to be a judge; he deserves to be impeached, and be sent back to the political arena from whence he came. The people are their own worst enemies when they put politicians on the bench. They subvert their own liberties, and deprive themselves of the administration of exact justice, when they adopt a mode of selecting judges which, from its nature, will not secure the wisest and best men the profession can produce; which, from its nature, will put upon the bench men of quick sense to snuff the popular breeze, and to trim their judicial sails to catch its favor.

§ 303. Similar considerations apply to the selection of senators of the United States. The welfare of the nation at large, as well as that of every citizen, requires that the senate of the United States be composed of men, who, from age, experience, ability, culture, discipline, and sound judgment, shall be equal to any emergency that can arise. They are required to be statesmen of the clearest and broadest vision. They must be able to grasp and comprehend the scope of every question that can arise in the administration of the general government, both in respect to external or international rights and duties, and also in respect to those which pertain to the internal administration of national authority. Every member should be thoroughly versed in the science of public and police law. He should be qualified to determine all questions of international law which are to be aided or modified by the treaties he advises and ratifies. He should understand the principles of political economy; for by his judgment and vote the nation is to be prospered or injured in all its fountains of wealth and prosperity. The senator should have no constituency but that of the highest wisdom, the most prudent discretion, the clearest insight and the most comprehensive judgment of the state and nation. Such are the duties the constitution imposes upon him, and consequently such should be his qualifications. The founders of the general government, therefore, manifested great wisdom and foresight when they provided for the election of senators by the legislature of the state. By no other means could they have secured the appropriate men to constitute the highest deliberative body of the nation, qualified to counsel the president, and take part with him in adjusting the relations between the nation and foreign powers.

§ 304. While the principles of popular or democratic governments require that the people should be potentially present in the legislature, and that their voice should be heard, and their rights respected in the making of laws, their own well-being, and the welfare of society requires that no one should have a local constituency, who is selected to administer in departments of the government where the duties of the department will not consistently permit the influence of such constituency. Thus, the duties of the judicial office admit of no popular influence; they are the same, independent of all constituencies. To be in sympathy with

any on the subject of adjudication is a disqualification. The judge on the bench should feel that he belongs to the commonwealth as the dispenser of impartial justice to all. The principles of democracy requiring the potential presence of the people in the legislature to secure the enactment of laws just to all, require the absence of their influence on the bench, that impartial justice may be administered to all. Therefore, it is contrary to the nature of the judicial office, and to the spirit in which its duties are to be performed, that the incumbent should feel himself the representative of a constituency less numerous than the state at large. Public interests, and public and private justice imperatively demand, that such method shall be adopted in the selection of judges, as will secure the ablest, wisest and best men for that office which the state can produce; and experience proves that the larger and wiser the constituency, the more competent and responsible will be the representative. Commit the selection of judges to ward politicians, and ward politicians will be found on the bench. Commit their selection to the state legislature, and no man can be appointed who, in character, ability and intelligence, is not a fair representative of the same qualities in the legislature.

§ 305. Because the duties of the senatorial office required in the senator qualifications of character and ability, rather than those of a representative of a local constituency, the number to be selected from each state was determined with reference to the dignity and character of the senate, and not with respect to the principles of popular representation.[1] Two from each

[1] "Each state, whether more or less populous, appoints two senators—a number which would have been inconvenient if the votes in the senate were taken, as in the former congress, by states, when, if the delegates from a state were equally divided, the vote of the state was lost; and which, of course, rendered an uneven number preferable. But in the senate a numerical vote is taken in all cases, and the division of opinion among those who represent particular states has no influence on the general result. If the senate should be equally divided, the casting vote is given to the vice-president, whose office it is to preside in the senate. The equality of states in this respect is not perhaps defensible on the principle of representing the people, which ought always to be according to numbers; but it was the result of mutual concession and compromise in which the populous states, enjoying the advantages of proportional numbers in the house of representatives, by which they were enabled to control the interests of the smaller states, yielded as a compensation the principle of equality in this branch of the legislature, enjoying in most respects equal, and in some respects greater powers. * * This composition of both houses is peculiar to our country, and has been found in practice neither productive of schism nor deficient in energy. A perfect independence of sentiment has been uniformly manifested by the members, and much superiority to local interests and impressions particularly sought for in the senate have always been found there." (Rawle on the Constitution, pp. 32, 33.) It seems strange that any one should mistake the real object for which the senate of the United States was established. It is in no political or personal sense a representative body. It is representative only in the sense that its members ought to be "representative men," in respect to talent, integrity, intelligence and virtue. (Story's Com. on Const., § 702.)

state gave them a body of twenty-six members, to be presided over by the vice-president of the United States. This secured to the government the services of an able body of counselors, and tended to give to its administration, dignity, and to secure confidence in its wisdom and permanence. "It has not only been demonstrated that the senate, in its actual organization, is well adapted to the exigencies of the nation, but that it is a most important and valuable part of the system, and the real balance-wheel which adjusts and regulates its movements."

§ 306. The number of senators should be sufficiently large to insure that variety of knowledge, talent, experience and practical skill essential to the discharge of its various duties. No human genius or industry is adequate to all the vast concerns of government, if it be not aided by the power and skill of numbers.[1] Numbers are also important to give to the body sufficient firmness to resist the influence which the more popular branch will be solicitous to exert over them. Numbers, in many cases, confer power; and what is of equal importance, they present greater resistance to improper influences. The senate being instituted as the conservative power or balance-wheel in the government, seems admirably adapted to the end for which it was created.

§ 307. The duration of the senatorial term is also favorable to the stability and dignity essential to that body. From the classification of its members, one third of their number retire every two years, and their places are supplied with new members. It follows, therefore, that two-thirds of their number will always have the benefit of an experience, as members of that body, varying from two to four years. This will preserve great uniformity in its rules, familiarity with the routine of its duties, and will secure accuracy and precision in all its movements. Thus, while the senate is made a perpetual body as a branch of the government, there is a continual change in the members composing it. There is a perpetual sameness in all that is essential to the end for which it was created; but there are changes in its members, sufficient to keep them in mind of their responsibilities to the nation, and such, also, as to deprive them of motives to usurp and concentrate authority in their own hands; yet its efficiency is not weakened by the constant influx of new and inexperienced members. The system seems to be perfect in

[1] Story's Com. on Const., § 706,

its adaptation to all the requirements of such a body, connected with a popular government.

§ 308. The qualifications proposed for senators as distinguished from those of the representatives, consist in a more advanced age, and a longer period of citizenship. A senator must be at least thirty years of age, and must have been a citizen of the United States nine years. The propriety of these requirements is explained by the nature of the senatorial trust; which, requiring greater extent of information and stability of character, requires, at the same time, that the senator should have reached a period of life most likely to supply these advantages, and which—participating immediately in transactions with foreign nations—ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education.[1]

§ 309. The vice-president of the United States is *ex officio* president of the senate; but he has no voice in their deliberations, and can vote only in case the members present are equally divided. The senate are authorized to choose their other officers, and, in the absence of the vice-president, or while he shall be engaged in exercising the office of president of the United States, they are required to elect a president *pro tempore*.[1] Each house is made the judge of the elections, returns and qualifications of its own members; and a majority of each house constitutes a quorum for general business; though a less number may adjourn from day to day; and also are authorized to compel the attendance of members, under such penalties as they may severally provide.

§ 310. The senate is a semi-judicial body—not that it can exercise judicial powers over subjects properly belonging to the sphere of judicial administration—but the power to try all impeachments against high officials is, by the constitution, committed to its sole exercise. In the exercise of that power it sits as a high court, having authority to determine all questions of law and fact involved in pronouncing the guilt or innocence of the accused. When the president of the United States is on trial, the chief-justice presides. From the composition of the senate, it is a fit and appropriate tribunal to try and determine all questions of law and fact involved in the guilt of any public officer of the United States; for among its members are

[1] Federalist, 62.

always to be found the ablest lawyers and jurists of the nation. When trying an impeachment they are to be upon oath or affirmation, combining the duties both of the judge and jury, to hear and determine the law and the facts touching the matters in hearing.

§ 311. The congress thus constituted is required to assemble at least once in every year; and until congress by law appoint a different day, that meeting is to take place on the first Monday in December.[1] When thus assembled, they are independent of each other in their organization and the government of their respective bodies; but neither house during the session can adjourn for a period more than three days, without the consent of the other body; nor can they adjourn to any other place than that in which the two houses are setting.[2]

§ 312. Each house is not only a judge of the election returns and qualifications of its members, but it may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. The necessity for the existence and exercise of this power is founded on the principle of self-preservation. The constitution confers the power to punish in express terms, only for offenses committed by its members. But the same necessity requires its exercise in respect to persons not members; and the supreme court of the United States have held that the house have authority to arrest and bring before it for punishment for contempt, other than its members.[3] This power to punish extends only to imprisonment, which can continue no longer than the authority which imprisons. The imprisonment necessarily terminates with the adjournment or dissolution of congress.[4]

[1] Art. 1, § 4, Const. U. S. [2] Id., art. 1, § 5.

[3] In *Anderson* v. *Dunn* (6 Wheat., 204), the supreme court of the United States held that, "To an action of trespass against the sergeant-at-arms of the house of representatives of the United States, for an assault and battery and false imprisonment, it is a legal justification and bar to plead that a congress was held and sitting during the period of the trespass complained of, and that the house of representatives had resolved that the plaintiff had been guilty of a breach of the privileges of the house, and of a high contempt of the dignity and authority of the same, and had ordered that the speaker should issue his warrant to the sergeant-at-arms, commanding him to take the plaintiff into custody wherever found, and to have him before the said house to answer to the said charge; and that the speaker did accordingly issue such a warrant, reciting the said resolution and order, and commanding the sergeant-at-arms to take the plaintiff into custody, &c., and delivered the said warrant to the said defendant. By virtue of which warrant the defendant arrested the plaintiff, and conveyed him to the bar of the house, where he was heard in his defense touching the matter of the said charge, and the examination being adjourned from day to day, and the house having ordered the plaintiff to be detained in custody he was accordingly detained by the defendant until he was finally adjudged to be guilty, and convicted of the charge aforesaid, and ordered to be forthwith brought to the bar and reprimanded by the speaker and discharged from custody, and after being thus reprimanded was actually discharged from the arrest and custody aforesaid."

[4] 1 Kent's Com., 236 and note.

§ 313. The times, places, and manner of holding elections for senators and representatives are to be prescribed in each state by the legislature thereof; but the congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators.[1] This provision of the constitution gives to the general government full power to provide for maintaining itself in both branches of the legislature, should a state be disposed to subvert its constitutional existence. Congress could by law provide for the election of members to the house of representatives, by fixing upon the time and place for holding the election, and by prescribing the manner of holding the same; and could make all laws necessary and proper for such purpose. It could also, if necessary, determine by law the time and manner of electing the senator; and could, by law, require the legislature of a state to come together and elect a senator in accordance therewith; and they could make all laws necessary and proper to compel a compliance with such requirement.[2] The constitution has imposed a duty upon the legislatures of the several states, and made it supremely binding upon them. They are required by the same constitution to take an oath of office to perform that duty; and without taking that oath they cannot qualify as members. Should the members refuse to perform this duty as required by the constitution and the laws of congress in respect thereto, there is a supreme judiciary to apply the law, and a supreme executive to enforce its mandate.

§ 314. Each house is required to keep a journal of its proceedings, and from time to time to publish the same, excepting such parts as may, in their judgment, require secrecy. The object of this requirement, in part, at least, is to give the people an opportunity of examining particularly into the official conduct of the members of the congress, with a view of holding them to a strict accountability, and to enable the constituent and nation to know the position and action of each member upon every important measure. A provision for entering the yeas and nays of the members upon the journal at the desire of one-fifth of the persons present, is also inserted in the constitution.[3]

§ 315. The senators and representatives are to receive a compensation for their services, to be ascertained by

[1] Art. 1, § 4, Const. U. S. [2] Rawle on the Constitution, p. 42.
[3] Art. 1, § 5, Const. U. S.

law, and paid out of the treasury of the United States. Except for treason, felony and a breach of the peace, they are privileged from arrest during their attendance at the session of their respective houses, and also in going to and returning from the same. Nor are they to be called in question in any other place for any speech or debate in either house. During the continuance of the official term of either the senator or representative, they may not be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments of which shall have been increased during such time; and no person holding any office under the United States can be a member of either house during its continuance.[1]

CHAPTER IX.

LEGISLATIVE POWERS AND DUTIES.

§ 316. ALL legislative powers granted to the general government are vested in congress, and it is authorized to make all laws necessary and proper for carrying into execution all the powers vested by the constitution in the government of the United States, or in any department or officer thereof. The constitution has, in the most general terms, instituted the several departments of the government, and given guides to the proper administration thereof. It has vested it with powers to exercise all the functions of government over certain specified subjects. But it requires the legislation of congress to define and determine the mode of its action, and the details of its administration; so that practically every department and officer of the government, in the exercise of the powers committed to either, are under the direction and control of congress. The constitution vests in a president of the United States the executive powers of the government; and points out in general terms the manner of his election, and induction into office. But it is necessary for congress to regulate and determine the mode of executive administration. The constitution vests the judicial power of the United States in one supreme court, and in such inferior courts as congress from time to time may ordain and establish. But the organization of the supreme court in all its

[1] Art. 1, § 6, Const. U. S.

details, is necessarily the subject of legislation, and consequently these details are to be determined by congress. All the several departments of the government are to be administered according to law; and the laws of their administration are to be determined by congress. This necessity imposes upon the legislative department the supervision of all the others; and, although it is the constitutional duty of the president to see that the laws are executed, it is the duty of congress to see that he has the necessary means, and that he performs his constitutional duty.

§ 317. The legislative department of a government, more than any other, eminently represents the sovereignty of the people. It is necessarily required to be present by its laws, in every other department, and to provide for the faithful and just administration of the duties thereof. It stands in the place of the people, and must have their wisdom and unlimited discretion, in respect to all subjects committed to its jurisdiction. It must be a department with Argus eyes, seeing the relations, dependencies, influences, and needs of society in all its parts; it must have wisdom to discover the laws necessary to regulate and harmonize the jarring and discordant elements; and discretion to adapt means to that end. The true mission of the legislator is to discover the natural laws incident to every condition and relation which can exist in society; and to devise means by which such laws can have just sway without interruption. For every individual being, as well as every atom of matter, is the subject of natural law, and can be regulated and controlled harmoniously only in accordance with such laws. The Infinite Father and Divine Architect of the universe is omnipresent in every department of existence by the omnipotence of his power, in the operations of these natural and necessary laws, and the highest good of all requires that these natural laws should be understood and observed. Hence, the wise legislator, if he would regulate by law the commerce and trade of society, will first ascertain the natural laws pertaining to commerce and trade, and then adapt his legislation thereto; and thus it is in respect to every branch of industry and every department of business.

§ 318. The legislative department of government is necessarily intrusted with the exercise of a larger discretion than any other. It is impossible to foresee the

powers which it may become necessary for the government to exercise to preserve itself and the society over whose interests it presides. For these reasons the legislative department should be connected immediately with the people, and should be in constant communication with them. One branch, at least, should take its members from every district in the state or nation, that the observation, information, interest and discretion of the people may be present in the legislature to suggest, urge and act for the particular occasion. There are certain rights of the individual and public which should be so guarded by constitutional bulwarks that even the legislature cannot invade them. There are certain fundamental principles so essential to the welfare of the individual and the well-being of society, that even the people themselves should be deemed incapable of disregarding them. The jurisdiction of each department of the government should be well defined—that of the legislature as well as of the others. But within its assigned sphere or jurisdiction, and in respect to proper subjects of legislative control or direction, it should be permitted to exercise large discretion. Where vested rights are not infringed, where fundamental principles are not endangered, and especially where the common welfare demands legislative action, there the maxim, *salus reipublicæ est suprema lex*, applies, and the legislature will be required to exercise all necessary discretion within the limits of its assigned jurisdiction. Its paramount duty is to see that the commonwealth sustains no detriment, if it be within the reasonable scope of its authority to prevent it by proper legislation. The reason why the legislative department of government should be permitted to exercise such large discretion, is founded in the necessity of the case; and that is, it cannot perform the necessary duties of its office in providing for the common security and general welfare of the people without the exercise of a liberal discretion.

§ 319. The reasons requiring the exercise of a broad discretion by the legislative department of government in administering within the sphere of its jurisdiction, do not apply to other departments. In general, the judiciary department is not called upon to act until the legislature has acted. It is not called upon to interpret and apply the law, until the legislature have enacted the law to be applied. In fact the judiciary

cannot exist or act until created by legislative action and direction. The duty of the judge is limited to ascertaining the law as it exists, and applying it to the facts as ascertained in each particular case; while the duty of the legislator requires him to ascertain what laws are necessary for the welfare of individuals, and the well-being of society, and to enact them in suitable form. The executive department like the judiciary, has less occasion to exercise a large discretion, than the legislative. In general, its duties are all regulated and defined by law, so that there is little left to executive discretion. Its duties begin when the legislature or judiciary have completed theirs. When required to execute an order, judgment or decree of the court, the necessary directions are given by the legislature or the court, or by both. When required to execute the provisions of a statute without the interposition of a court, the manner of its execution is pointed out and determined by law. But the legislature has no power or department to go before and prepare its way, and make its paths straight. Hence, it must always be very near the people, to learn from them and their needs, the interpretation of its duties and powers within the general limits assigned by the constitution.

§ 320. From this ever-present necessity of liberal discretionary powers in the legislative department, has arisen the doctrine of the absolute supremacy of the legislature over all other departments of government, and, indeed, over all other authority. Says Sir EDWARD COKE, "the power and jurisdiction of parliament" — the legislative department — "is so transcendant that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporary, civil, military, maritime or criminal, this being the place where absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischief and grievances, operations and remedies that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the crown, as was done in the reign of Henry VIII and William III. It can alter the established religion of the land, as was

done in a variety of instances in the reign of Henry VIII and his three children. It can change and create afresh the constitution of the kingdom and of parliament themselves, as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible, and, therefore, some have not scrupled to call its power by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo; so that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude and their knowledge." [1]

§ 321. The authority ascribed by Lord COKE to parliament, as the depositary of absolute power for purposes of legislation, according to the American theory, belongs to the people in their original or national sovereignty, to be exercised by them or by those to whom they have delegated the authority to exercise it. The people as a nation being sovereign and independent of all other earthly authority, can, if they will, exercise the absolute authority ascribed to parliament. They are above constitutions, and what they do no other authority on earth can undo, while they continue as a sovereign nation. They can ordain and establish constitutions of government; and they can revoke them at pleasure. They can set up constitutional barriers to the exercise of legislative authority over particular subjects, and they can remove them at pleasure. In the language just cited, they have "sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal."

§ 322. It is not claimed that the general government possesses this absolute and uncontrollable authority concerning matters of all possible denominations. On the contrary, the general government can exercise authority over no subject not expressly or by implication, committed to its jurisdiction. But over subjects, committed to its jurisdiction, it has the absolute authority to legislate ascribed to parliament; that is, it has the authority of the people, and the discretion and

1 Black. Com., pp. 160, 161; 4 Coke Inst., 36.

power of the people to require and do whatever the people themselves could require and do in the premises. The constitution enumerates in general terms, the powers of congress over certain subjects; and leaves to it the most unlimited discretion as to the manner of exercising those powers within the meaning of the terms "necessary" and "proper;" and, lest there should be any doubt as to the right of congress to exercise implied powers wherever and whenever they may be necessary and proper to the discharge of duties imposed, or the execution of express powers given, it provides expressly for their exercise. Congress, then, in the exercise of the duties and powers imposed and conferred by the constitution, is as absolute in its authority and discretion as are the people themselves; subject only to such restrictions and limitations as are contained in the constitution.

§ 323. In the institution of the general government, the people assigned to it the subjects of its particular jurisdiction, and left to it the exercise of their authority and discretion in legislating upon those subjects, restrained, however, by certain important prohibitions contained in the constitution; which are, that in the exercise of legislative authority, congress should 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. That the right of the people to keep and bear arms should not be infringed. That no soldier in time of peace, should be quartered in any house without the consent of the owner, nor in time of war, except in a manner to be prescribed by law. That the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, should not be violated. That no warrants should issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized. That no person should be held to answer for a capital or otherwise infamous crime, unless on 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 should any person be subject for the same offense to be twice put in jeopardy of life or limb, nor 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 should private property be taken for public use without just compensation. That in all criminal prosecutions, the accused should enjoy the right to a speedy and public trial, by an impartial jury of the state or district wherein the crime was committed, which district should have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. That the right of trial by jury should be preserved in suits at common law, when the value in controversy should exceed twenty dollars, and that no fact tried by jury should be reëxamined in any court of the United States, otherwise, than according to the rules of common law. That excessive bail should not be required, nor excessive fines be imposed, or cruel and unusual punishment be inflicted. That the privilege of the writ of *habeas corpus* shall not be suspended, except where in cases of rebellion or invasion the public safety might require it; that no bill of attainder or *ex post facto* law should be passed; no capitation or other direct tax should be laid, unless, in proportion to the census or enumeration therein required; that no tax or duty should be laid on any article exported from any state; that no preference should be given by any regulation of commerce or revenue to the ports of one state over those of another; nor should vessels bound to or from one state be obliged to enter, clear or pay duties in another; that no money should be drawn from the treasury but in consequence of appropriations made by law; that no title of nobility should be granted, &c. Subject to these restrictions and prohibitions, congress has all the authority and discretion of the people to legislate upon subjects committed to its jurisdiction, which in spirit, embraces every subject essential to national existence, safety and welfare.

§ 324. There is no danger to the public welfare to be apprehended from an abuse of this legislative authority committed to the congress—because, virtually, it is the exercise of the authority of the people themselves by their immediate representatives, fresh from their presence, and instructed as to their duty. It is not to be overlooked that the house of representatives is composed

of members coming from every district in the nation, by the expressed suffrage of the people, renewed every two years, and yearly instructed in the wishes and needs of their particular constituency: so that the people are as fully represented in congress, and are as potentially present there to legislate upon the subjects committed to the jurisdisdiction of the general government, as they were in the conventions which framed and adopted the national constitution. To object to the exercise of a liberal discretion by congress, in legislating for the nation, is, virtually, to object to its exercise by the people themselves.

§ 325. In making laws the senate and house of representatives possess equal authority. Each can originate bills, except as to revenue bills. The constitution provides that 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.[1] There can be little question as to the kind of bills to which reference is here made. They are bills to levy taxes upon the people; and not such bills as may result incidentally in creating a revenue. It cannot be supposed that a bill to provide for the sale of the public lands, or to sell public stocks, or to establish a post-office or a post road is included in this prohibition, although as a result, money may thereby come into the public treasury.

§ 326. Such being the meaning of the expression, "all bills for raising revenue," the reason is obvious why they should originate in that branch of the legislature in which the people are fully represented. The constitution is framed upon the hypothesis, that the people are imminently present in the house of representatives. That all occupations, professions and interests have their guardians and advocates there. That the needs, impulses and demands of every district in the nation are fully represented. If a revenue is to be raised by a levy upon the industry of the nation, who can know so well how to equalize the burden as the representatives of the people, coming from every district, and familiar with every interest? Who will feel so immediately the responsibilities to be assumed in levying a tax upon the industry and property of the people, and will be able to indicate so perfectly the effect of any proposed measure upon the branch of industry

1 Art. 1, § 7, cl. 1, Const. U. S.

he represents, as the immediate representative of the people? If the burden is to be imposed upon the people, they are the proper ones to say how much, and how it shall be imposed. For reasons similar to these, the British house of commons had the right and privilege that all grants of subsidies and parliamentary aids should begin in their house. The reason assigned was, that the supplies are raised upon the body of the people, and, therefore, it was proper that they alone should have the right of taxing themselves.[1]

§ 327. Although the senate cannot originate a revenue bill, it can propose and concur in amendments. There are reasons why the senate should participate in maturing these, as well as other bills. They, too, are citizens of the states and nation; and are equally with the people interested in all revenue bills. Being elected by the state legislatures, they have no popular constituency. Holding their office for the term of six years, they are not so familiar with the mass of the people, and do not feel so immediately their responsibilities to them. Therefore, they cannot be supposed to be so intimately and personally connected with every local district, or so well acquainted with local interests as the immediate representatives of these interests and districts. For these reasons, the senators are not as well qualified to suggest all the details of a tax bill which is to bear equally upon all the localities of the nation. They are not so familiar with all the interests to be reached, and the particular burdens to be increased here or lessened there. But while they are not qualified for the details of such a bill, they are eminently qualified to discuss the general principles to be observed in framing it; and, being themselves a part of the people who are to bear the burden to be imposed, it is wisdom to permit, and it is their just right to be permitted, to participate in maturing such bill, by suggesting and concurring in amendments thereto.

§ 328. Although all legislative power, granted to the general government is, by the constitution, vested in congress, yet, before a bill can become a law, after it has passed both houses of congress, it must be presented to the president for his approval and signature. If he approve of it he signs it, and it becomes law. If he do not approve it, he returns it with his objections to the house in which it originated. The objections of the presi-

[1] 1 Black. Com., 169.

dent are then required to be entered at large upon their journal, and they proceed to reconsider the bill. If, after such reconsideration, two-thirds of the house agree to pass the bill notwithstanding the president's veto, it is then sent, together with the objections, to the other house by which it is required to be reconsidered. Then, if approved by two-thirds of that house also, it becomes law, notwithstanding the president's veto. In these cases the votes of both houses are required to be by yeas and nays, and the names of the members voting for or against the bill are required to be entered on the journal of each house respectively. The president has ten days to examine any bill before he is required to return it. If he should not return a bill within ten days, Sundays excepted, after it has been presented for his approval, it becomes a law, the same as if approved and signed by him. But, if congress should adjourn, thereby preventing the return of such bill within ten days, it would not become law.[1]

§ 329. There are two principal reasons assigned why this qualified veto power should be conferred on the president of the United States, requiring after its exercise, a two-third vote of each of the houses of congress before the proposed measure can become law. The first reason assigned is, that there is danger to be apprehended from the encroachments of the legislative department upon the executive; and, therefore, this qualified negative is necessary to enable the president to protect his office in the discharge of its executive duties. The second reason assigned is, that the rights of the people will be more perfectly secured by intrusting the exercise of this power to the president than they would otherwise be, by permitting congress by a majority vote to determine what measures shall become law. The first theory of the existence and exercise of the veto power is taken from the British constitution and government, and has its origin and continuance in the peculiar theory and practice of monarchical governments.

§ 330. The theory and structure of the government of the United States is so peculiarly its own, that it requires reasons peculiarly its own to explain or justify such provisions. The reasons why the king of England should possess an absolute veto power over the proposed laws of parliament, have not even a qualified application to the general government of the United

1 Art. 1, § 7, cl. 2, Const. U. S.

States, ordained, established and administered by the people themselves. In England the king is an essential branch of the legislative department, and is neither elected by, nor responsible to the people. The law ascribes to him the attribute of sovereignty or pre-eminence. He is said to have imperial dignity; and in charters before the conquest he is frequently styled *basileus* and *imperator*, the titles respectively assumed by the emperors of the east and west.[1] His realm is declared to be an empire, and his crown imperial, by many acts of parliament. He is declared to be the supreme head of the realm in matters both civil and ecclesiastical, and, of consequence, inferior to no man upon earth, dependent on no man, accountable to no man. "Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities as inherent in his royal capacity, distinct from, and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand; yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law, therefore, ascribes to the king, in his high political character, not only large powers and emoluments which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect which may enable him with greater ease to carry on the business of government."[2]

§ 331. Beside this attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong; that is, whatever is exceptionable in the conduct of public affairs, is not to be imputed to the king, nor is he answerable for it personally to his people; for this doctrine would totally destroy that constitutional independence of the crown which is necessary for the balance of

[1] "*Rex est vicarius et minister Dei in terra; omnis quidem sub eo est, et ipse sub nullo, nisi tantum sub Deo.* Bracton, L. 1, c. 8.

[2] 1 Bl. Com., 241.

power in the British constitution. It also means that the prerogative of the crown extends not to any injury; it is created for the benefit of the people, and, therefore, cannot be exerted to their prejudice.[1] The inviolability of the king is essentially necessary to the free exercise of those high prerogatives which are vested in him; not for his own private splendor and gratification merely, but for the security and preservation of the real happiness and liberty of his subjects.[2] The king is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness; for the law will not cast an imputation on that magistrate whom it intrusts with the executive power, as if he were capable of intentionally disregarding his trust; but it attributes to mere imposition those little inadvertencies, which if charged on the prince, might lessen him in the eyes of his subjects.

§ 332. Another attribute of the king's majesty is his perpetuity. The king never dies. His personal death is called a demise; which merely signifies the transfer of the royal character, prerogatives and imperial dignity to his regal heir, who is, *eo instanti*, king, to all intents and purposes. These royal prerogatives invest the king, thus considered in his kingly capacity, as all-perfect and immortal, with such authorities and powers as constitute the executive department of the British government. This department is distinct from and independent of the legislative; and is not responsible to the people for its existence or continuance. According to the theory of the British constitution, the executive powers are placed in the single hand of the king, for the sake of unanimity, strength and dispatch. That if these powers were placed in many hands they would be subject to many wills; that many wills being disunited and drawing different ways, would create weakness in a government; and to unite them and reduce them to one, would be a work of more delay than the exigencies of state will afford. That, therefore, the king is not only the chief, but properly the sole magistrate of the nation; all others acting by commission from, and in due subordination to him. These prerogatives and powers, which belong to the king as the political head of the nation, are treated as individually

[1] Bl. Com., 246.

[2] Christian's note to 1 Bl. Com., 247.

and personally his; because the mass are deemed to be incapable af distinguishing between his individual and political character. Thus, according to the theory of the British constitution, the executive powers of the nation are vested in the king alone; who is supreme, who is perfect, and who never dies. And, although theoretically and philosophically, these attributes only pertain to the office, practically, they attach to the person of the king, and become his personal attributes, authority and powers. In theory, he reigns by divine right; *Dei gratia*, not *populi gratia;* and such, also, is the theory of his responsibilities — not to the people, but to God alone. The government is his, the people are his subjects; the regal style is, "my kingdom," "my realm," "my subjects," etc.

§ 333. The king, according to the British constitution, being thus the immortal and perfect head of the nation, and the sole executive of its authority and power, is necessarily constituted a branch of the legislature of the realm. Laws can be made and repealed only by his authority. The powers of parliament are but a limitation of those of the king, imposed as a check to the despotic exercise of the royal will. It is true the king can make no new law without the consent of parliament; but it is equally true that parliament can repeal no existing law without the consent of the king. His royal prerogatives and powers are his own, and he can wrap them around his royal person as a garment, and defy the constitutional powers of the British government to disrobe him. The king is made a branch of the legislature, according to the British theory, for the purpose of preserving the balance between the executive and legislative departments of the government. The total union of the two departments, it is said, would be productive of tyranny; the total disjunction of them would, in the end, produce the same result. The legislative would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus, the long parliament of Charles I, while it acted in a constitutional manner with the royal concurrence, redressed many heavy grievances, and established many salutary laws. But when the two houses assumed the power of legislation in exclusion of the royal authority, they soon after, likewise, assumed the reigns of administration, and in consequence of these united powers

overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder, therefore, any such encroachments, the king is himself a part of parliament; and as this is the reason of his being so, very properly, therefore, the share of legislation, which the British constitution has placed in the crown, consists in the power of *rejecting*, rather than in *resolving*, this being sufficient to answer the end proposed.[1]

§ 334. Here is the principle and the philosophy of the veto power as it exists in the British constitution. But neither the principle or philosophy have any possible application to the American governments. According to the theory of monarchy, the monarch is possessed of all political authority and power in divine right. But practically in the progress of governments, the lords or chief men found it necessary to have some check upon the arbitrary will and power of the monarch; and a parliament of the chief men was instituted for that purpose, which could not make laws, but which could demand a voice *in* the making of them. Ultimately, the people found it necessary to have some check upon both monarch and lords; and the commons were instituted as a part of the legislature. The commons could not make laws, neither could the commons and lords together make them. They were instituted as a check upon the absolute authority of the monarch. They could propose the form and substance of a law as a sort of petition to the king, and he could say, in virtue of his sovereignty, yes or no, and it became a law or not accordingly. The American theory is quite the opposite of this. The people are sovereign, and the president subject. The prerogatives belong to the nation, not to their servants. The commons, aided by their peers in the nation, constitute the law-giving power in America. The legislative department is created by the people, and the members thereof are continually coming from, and returning to the people, taking their authority in virtue of the office conferred, as a public trust, to be exercised for the benefit of, and to be restored back, to them. Thus, the office of legislation here is not exercised by permanent incumbents, like the lords and king of England, and hence there is no temptation on the part of those administering for the time being to usurp the powers of government, and absorb all authority in

[1] 1 Bl. Com., 154.

the legislative department, to be used by their successors to oppress the people of whom they will then be a portion. It is true the executive office is permanent; but the incumbent is elected by the people for four years. Unlike the king, the president can do wrong, and may die. Consequently the executive incumbent is not permanent. The people have the authority to designate, once in four years, who shall administer in that department. The reasons assigned why the king should exercise the veto power in England have no application here. In this country, the executive needs no protection against the encroachments of legislative authority. All are equally interested in having the proper balance preserved, and they have the power to compel its preservation without the veto power of a president.

§ 335. The second reason for intrusting the president of the United States with a qualified veto power is, that the rights of the people are more perfectly secured by the exercise of this power, than they otherwise would be if a mere majority of the two houses of congress were to determine what proposed measures should be law. This second reason has its basis in the assumption that the president may more perfectly comprehend the duties of a legislator upon a given question, or may better understand the rights and interests of the people, than their more immediate representatives; or the combined wisdom of the representative men of the nation, who are placed in the senate to examine and judge of the fitness and propriety of any proposed law; or upon the hypothesis that the president is less liable to improper influences than a majority of each of the two houses. Upon the soundness of these two latter propositions rests the propriety of this constitutional provision, giving a qualified veto power to the president of the United States. It is to be observed that the effect of this provision is merely to require that a measure shall receive the sanction of two-thirds of the members of each house of congress, instead of a mere majority when the objections of the president are not interposed.[1]

[1] This qualified negative of the president upon the formation of laws, is theoretically, at least, some additional security against the passage of improper laws, through prejudice or want of due reflection; but it was principally intended to give to the president a constitutional weapon to defend the executive department against the usurpations of the legislative power. (1 Kent Com., 240). This qualified negative of the president upon the acts and

§ 336. It is to be remembered that the exercise of this power on the part of the president is liable to abuse. Whatever may be the theory of the exalted position and superior character of a president of the United States, the fact practically is, and ever has been, that the legislatures of the several states have uniformly placed in the United States senate learned, talented and patriotic men, who are every way as well qualified to discharge the presidential duties as the incumbent of that office; and it is safe to affirm that every presidential incumbent, from the organization of the general government to the present, might have found in the senate of the United States, senators from whom it would be as appropriate to take advice as to give it, respecting senatorial duties. It is exceedingly improbable that the many learned and patriotic men of congress would be more liable to commit errors in respect to measures of public importance, than the single incumbent of the presidential office. But since there is a possibility of such error on the part of the congress, which may be corrected at the suggestion of the president, the power to require a reconsideration of the subject, and a two-third vote of the two houses respectively, is wisely committed to the president, if he prove worthy of the trust. A wise, discreet and prudent president will very seldom exercise that power. The case must be one where the error of congress is patent, and where the public welfare imperatively demands interposition. But in the hands of a partisan incumbent, or a president

resolutions of the two houses of the legislature, is justified in the Federalist (No. 73), as follows: "The propensity of the legislative department to intrude upon the rights and absorb the powers of the other departments, has been already more than once suggested; the insufficiency of a mere parchment delineation of the boundaries of each has also been remarked upon and the necessity of furnishing each with constitutional arms for its own defense has been inferred and proved. From these clear and indubitable principles, results the propriety of a negative either absolute or qualified in the executive, upon the acts of the legislative branches." See also the remarks of Judge Story to the same effect. (Story on Const., § 884). With proper deference to the opinions of these learned men, I must say there no where appears in any of their arguments the assertion of any principle, or reference to any facts sustaining their positions, when applied to the theory and structure of the American government. The congress is always composed of a changing body of individuals. It seldom happens that in the house a majority of the old members are continued through more than one succeeding term. They are citizens of the states and nation, and are interested in preserving the exact balance of power between the several departments. Their continuance in congress is brief, and they become private citizens again. Now, it is obvious that a legislative body of men thus constituted can have no motive to invade the other departments, and assume executive powers. To do so would be putting weapons into the hands of their successors to injure and oppress themselves after their tenure of office had expired. Reference to the British constitution, and the practical operations of the British government, have no possible application in this country. To apply the British theory of government to our own, the president and senate should propose the laws, giving to the people, as represented in the house, the absolute negative possessed by the king. For according to the monarchical theory, the parliament is a limitation upon the sovereignty of the king. &c. (See *Ante*, §§ 329-333, inclusive).

with an ideal policy of his own, one to which he commits all his power and patronage, this qualified veto is a mischievous and dangerous power, and it may well be questioned if the public interest has not suffered more than has been gained by its exercise.

CHAPTER X.

THE EXPRESS POWERS OF CONGRESS.

§ 337. THE eighth section of the first article of the constitution provides, that "the congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States;" but that "all duties, imposts and excises, shall be uniform throughout the United States." There has been much discussion as to the precise signification of this clause, whether it should be understood that congress had the power to lay and collect taxes, &c., in order that it might pay the debts and provide for the common defense and general welfare of the nation; or, whether there were two distinct and substantial powers given, consisting, first, of the power to create the revenue; and second, of the power to provide for the common defense and general welfare. It is immaterial which construction is given to the clause, so far as the extent of the expressed and implied powers thereby granted is concerned. The general government was instituted expressly for the purpose, among other things, of providing for the common defense, and promoting the general welfare of the nation; and this clause, at least, affirms, that the general government shall have power to raise the means by taxes, duties, imposts and excises, to accomplish that purpose. Here is a specific adaptation of a means to an end. Who, then, can deny that the end sought is within the scope of the powers of the government; and, that it is the will of the people that all power, necessary and proper for the accomplishment of that end, shall be exercised? It is, consequently, immaterial whether the clause be read, that congress shall have power to lay and collect taxes, &c., for the purpose of enabling it to pay the debts and provide for the common defense and general welfare of the nation; or, that congress shall have the power to lay and collect

taxes; and also, to pay debts and provide for the common welfare. The people, in the institution of the general government, made it the duty of the government to secure that end; and charged congress, as the legislative body of the nation, to provide, by law, the means necessary and proper for such purpose. Having the authority, they signified the intention; and hence, the general government has the requisite power.

§ 338. The advocates of the different constructions which have been given to this clause, attached special importance to the one or to the other, as affecting materially the power therein granted.[1] The one, that the power to lay and collect taxes, &c., is limited to the specific objects named, to wit, to pay debts and provide for the common defense and general welfare. That this limitation is secured, if the law be construed as giving but one substantial power; that is, the power to raise a revenue for the purpose specified; but that the power to lay and collect taxes, &c., is unlimited, unless the latter part of the clause be construed as a limitation upon the former, &c. On the other hand, the advocates of the construction, which makes the clause contain grants of two substantial powers, to wit, the power to raise the revenue, and the power to pay debts and provide for the common defense and general welfare, insist that, by such construction, our government is vested with unlimited power to provide for the defense and welfare of the nation, which it would lack but for such grant. But reflection, will satisfy any one that there is little to be gained or lost, to the powers of

1 "Do the words, 'to lay and collect taxes, duties, imposts and excises,' constitute a distinct and substantial power; and the words, 'to pay the debts and provide for the common defense and general welfare of the United States,' constitute another distinct and substantial power? Or, are the latter words connected with the former, so as to constitute a qualification upon them?" This has been a topic of political controversy; and has furnished abundant material for popular declamation and alarm. If the former be the true interpretation, then it is obvious, that under the generality of the words, "to provide for the common defense and general welfare," the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, "to pay the debts and provide for the common defense and general welfare." (Story's Com. on Const. U. S., § 907; see also, note to Story, § 908; see also, 2 U. S. Law Journal, April, 1826, p. 451 *et seq.*) This work contains (p. 207 *et seq.*) a very elaborate exposition of the doctrine. Mr. JEFFERSON has insisted that this was the federal doctrine; that is, the doctrine maintained by the federalists as a party. (4 Jefferson's Correspondence, 306.) The assertion is incorrect, for the latter opinion was maintained by some of the most strenuous federalists at the time of the adoption of the constitution, and has since been maintained by them. (2 Elliot's Debates, 170, 183, 195; 3 id., 262; 2 Am. Museum, 434; 3 id., 338.) It is remarkable, that Mr. GEORGE MASON, one of the most decided opponents of the constitution in the Virginia convention, held the opinion, that the clause to provide for the common defense and general welfare was a substantive power; and that congress should have the power to provide for the general welfare of the union. But he thought, that the constitution should contain a clause in respect to all powers not granted being retained, &c.

the government, or to the security of the people, by the adoption of the one or the other of these constructions. One or the other is manifestly correct, and it matters not which. If the power of taxation is unlimited by the terms of the grant, as contained in this clause, it is only the power of the people to tax themselves; for it is to be remembered, that this government is to be administered by the people, coming from every state, and from every district of each state. If they lay and collect the tax, they alone have to pay it; and there is little to fear from the powers of a government which is never to be separated from the authority of the people in its administration. The people will not be likely to oppress themselves beyond their own endurance. They will never have occasion to overthrow a government of which they have the sole administration. The fears and jealousies expressed, of the aggressions of the government upon the people, presuppose the separation of the government from the people, or its independence of the people. The constitution having secured to the people the administrative authority of the government, the people can trust the government as far as they can trust themselves.

§ 339. On the other hand, adopt the theory of limitation; that the government can only lay and collect taxes, &c. for the purpose of paying debts and providing for the common defense and general welfare of the nation; and that the administrators of their government, being the people of the nation themselves, have the discretion to determine what debts shall be contracted in providing for the defense and welfare thereof, and the limitation is a check of little value. There never will be an occasion to raise a revenue for any other purposes than those specified as such limitation. When the wide range of subjects which may engage the attention of government looking to the common defense, and the general welfare of the nation come under consideration, it will be found that every thing pertaining to the duty of the government is necessarily included. It is the whole duty of every civil government to so exercise the powers committed to it, as to provide for the security and welfare of the people, which is included in the expression, "their common defense and general welfare." The people of the nation were providing for themselves a general government, which was to be intrusted with the exercise of their authority for the

special purpose of providing for the common defense, and promoting the general welfare, and they were securing to themselves the administration of that government, and they intended to clothe it with every power essential to that end. The limitations of the powers committed to the general government had particular reference to the subject of jurisdiction; that the line of administration between it and the several states might be well defined so as to avoid interference with each other. It is not to be supposed that the people had any misgivings as to their own ability to administer their own government, under the general authority to provide for the common defense and welfare of the nation. They were then, and the people ever after would be, the best judges of what measures were necessary for such purpose.

§ 340. It is to be observed that the limitations imposed upon the general government, by the specification of the subjects over which it shall have jurisdiction, extend only to the subjects, and not to the extent of its authority, or the manner of exercising it over those subjects. The people of the nation who were instituting the general government in their national sovereignty, had authority over all subjects of governmental administration; as well over those of a local and domestic character, as over those pertaining to the general or national administration. They had authority to take any and all subjects from state jurisdiction, and to place the same under the jurisdiction of the general government. It was a question of expediency, and not one of authority. The questions discussed in adjusting the powers of the general and state governments, were questions of expediency. What powers are essential to a complete administration of national authority over subjects pertaining to national security and national prosperity? Whatever those subjects were, they were placed under the jurisdiction of the general government. What subjects of a local and domestic character merely, in respect to which the people of a particular state are only interested, and in the administration of which by the states, the security and prosperity of the nation will not be jeopardized? Whatever those subjects were, they were permitted to remain under state jurisdiction; and the people specified the subjects to be committed to the jurisdiction of the national government, because, being of a general character, they were comparatively

few, and easily enumerated. The national or general government is limited in its administration in no other sense, than in the enumeration of the subjects over which it has jurisdiction. But in respect to such subjects, for the purposes for which they were committed to its jurisdiction, that government has plenary authority; that is, it has the unlimited authority of the nation in administering upon them. It has the same authority, and the same latitude of administration in respect thereto, that the states have in respect to subjects left to their local administration.

§ 341. It is said the general government is one of special powers; and the state governments are those of residuary powers; by which it must be intended—because such is the fact—that the subjects of which the general government has jurisdiction are enumerated in the constitution; and the residue of subjects of governmental administration are left to the jurisdiction of the states, except so far as they are prohibited to them by the constitution. The difference, then, in the limitations of the general and state governments is simply this. The general government is limited *to* subjects enumerated in the constitution; and the state governments are limited *by* the subjects enumerated therein; and in this respect, the one is as really a limited government as the other. The difference in the practical administration of the two governments consists in this: the general government finds its jurisdiction in the subjects enumerated; and the state governments find their jurisdiction in the subjects not enumerated. But it is to be remembered, that this difference extends only to *subjects of jurisdiction*, not to *authority* and *modes of administration*. This is the same, whether applied to the general or to the state governments.

§ 342. The general government, then, has the same powers over subjects committed to its jurisdiction as the states have over subjects left under their jurisdiction, to wit: all the governmental power and authority of the nation in respect thereto. To this conclusion there can be no valid objection, because these powers are to be executed by the nation itself. When they instituted the general government, they did not commit their administrative authority to other hands; they reserved to themselves the right to administer, and they provided for the potential and constant presence of the nation in its administration; so that the same authority

which instituted and empowered, administers. The states, likewise, administer in respect to their domestic affairs by the same authority, to wit: by the authority of the nation. The sovereignty of the states is to be found in the authority by which they are constituted their own administrators; and also in the authority by which they administer. In respect to all states instituted under the constitution, it is apparent that they take their authority to administer by the incorporating and enfranchising act of the nation. In respect to the original thirteen, the same in effect will appear in a subsequent chapter.

§ 343. This view is fully sustained by the constitution itself. In the enumeration of subjects committed to the jurisdiction of the general government, those subjects only were specified which necessarily pertained to the general administration; and the powers of the government over those subjects were given in the most general terms, as—"congress shall have power to lay and collect taxes," &c.—"shall have power to regulate commeree"—"shall have power to define and punish piracies and felonies committed on the high seas"—"to raise and support armies"—"to provide and maintain a navy," &c., &c. The constitution proceeds thus to enumerate subjects over which the general government through its congress should have power; and then concludes the section by providing that congress shall have power to make all laws necessary and proper for carrying into execution the powers specified, and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof. The states certainly can have no higher or fuller authority over subjects left to their jurisdiction than is here committed to the general government over subjects pertaining to its administration. What, then, is to be understood by the term, "the limited authority, &c., of the general government," as contradistinguished from the general authority of the states?

§ 344. The proposition is a plain one, that the people of the nation are as imminently present in the administration of their authority through the instrumentality of the general government, as the people of the state are in the administration of the state governments. And being thus present, they have full and perfect power to exercise all governmental authority over subjects committed to the jurisdiction of the general

government, which is the sovereign and absolute authority of the nation. Being charged with the duty, and being specifically authorized to acquire the means for providing for the common defense and the general welfare of the nation, they have ample authority for that purpose, which is as unlimited and general as is the authority by which the state governments administer in local and domestic interest. The proposition, also, is plain, that the expression so common that the general government is one of delegated powers, while the state governments possess and exercise original authority, is true only in the sense, that the subjects of national jurisdiction are enumerated, while those of the states are unenumerated and residuary. And a third proposition is equally plain, that both the general and state governments are mere instruments of administration in the hands of the people, possessing no inherent authority of their own.

§ 345. Says Judge STORY, "the constitution was, from its very origin, contemplated to be the frame of a national government of special and enumerated powers, and not of general and unlimited powers."[1] This is not denied. It was never proposed to commit to the general government as a branch of its internal administration, jurisdiction over subjects pertaining to the local and domestic interests of the states. In that respect it was intended to be, and is, limited to those interests pertaining to the general welfare of the people as a nation. And because it was necessary to enumerate the powers committed to the exercise of the general or the state governments, to avoid all uncertainty as to the boundaries of their respective jurisdictions; and because from the nature of things, it would be impossible to enumerate in an instrument of reasonable length the multitude of subjects pertaining to the administration of government in respect to the local and family or domestic interests of society, the only practical definition of the subjects of state and national jurisdiction which could be given, consisted in enumerating those which were committed to the general government, and thus defining the subjects of state jurisdiction as being residuary. But this mode of defining the subjects of general and local jurisdiction, is not to be construed as giving liberal powers to the states to administer in respect to local matters, and strict powers to the general

[1] Story Com. on Const., § 909.

government to administer in respect to national interests. On the contrary it is to be construed as giving the same general powers to the general government to administer in respect to subjects committed to its jurisdiction, as to the states, over matters of a local and domestic character.

§ 346. Judge STORY continues: "If the clause 'to pay the debts and provide for the common defense and general welfare of the United States,' is construed to be an independent and substantive power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers, but it plainly extends far beyond them, and creates a general authority in congress to pass all laws which they deem for the common defense or general welfare. The enumerated powers would tend to embarrassment and confusion, since they would only give rise to doubts as to the true extent of the general power, or of the enumerated powers."[1] The answer to this view is, that the enumeration of subjects by which to define the jurisdiction of the general and state governments, was as necessary to ascertain the limits of state jurisdiction as to determine the subjects of general jurisdiction. It was a question of administration merely, not of authority to be administered. The general government was to have full authority to administer in all matters pertaining to the common defense and the general welfare, as distinguished from that which was local in its nature and effect. And when it is considered that the people of the nation and the people of the states are the same; that the national and state interests centre in the same individuals; that each are equally present in the state and national administration, by what principle of logic or law, or common sense, are the people of the nation to be denied the same liberal interpretation of powers, in the exercise of their administrative authority, as is accorded to the states in the administration of the same authority?

§ 347. Says Judge STORY: "One of the most common maxims of interpretation is, that, as an exception strengthens the force of the law in cases not excepted, so enumeration weakens it in cases not enumerated."[1] The error committed by the learned author in the application of the maxim above quoted, consists in supposing that the powers of congress are enumerated. The sub-

1 Story's Com. on Const., 909.

jects in respect to which the powers of congress are to be exercised, are enumerated; but the powers which congress is to exercise in legislating upon those subjects are not enumerated, but on the contrary, are committed to their broad discretion. The constitution enumerates subjects of jurisdiction only; giving congress power over them in the most general terms; and then it concludes by declaring that congress shall have power to make all laws necessary and proper for carrying into effect those general powers, and all other powers by the constitution vested in the general government or in any department or officer thereof.

§ 348. The grammatical and the logical reading of the clause would clearly indicate that the authority to lay and collect taxes, &c., was given for the purposes specified, to wit: to pay debts, and to provide for the common defense, and to promote the general welfare of the nation. But the power to create debts is unlimited. The measures to be adopted to provide for the common defense and the general welfare of the United States, are committed to the discretion of congress, so as they keep within the list of subjects enumerated as committed to national jurisdiction; and as all the powers committed to the general government are to be construed with reference to that end, and are to be administered by the people themselves, it is to be expected that they will so administer as to see that the public sustain no detriment; and that the common defense is provided for, and the general welfare promoted; and that such latitude of construction be adopted as will enable them so to administer.

§ 349. If there are no other cases which concern the common defense and general welfare, except those within the scope of the other enumerated powers, the discussion is merely nominal and frivolous. If there are such cases, who is at liberty to say, that, being for the common defense and general welfare the constitution did not intend to embrace them? The preamble of the constitution declares one of the objects to be, to provide for the common defense and to promote the general welfare, and if the power to lay taxes is in express terms, given to provide for the common defense and general welfare, what ground can there be to construe the power short of that object. One of the best established rules of interpretation, one, which common sense and reason forbid to be overlooked, is, that when

the object of a power is clearly defined by its terms, or avowed in the context, it ought to be construed so as to obtain the object and not to defeat it. The circumstance that the power so construed may be abused, is no answer. All powers may be abused; but are they then to be abridged by those who are to administer them, or denied to have any operation? If the people frame a constitution it is to be obeyed. Neither rulers nor judges have a right to cripple it, because, according to their view, it is inconsistent or dangerous, unwise or impolitic.[1]

§ 350. The term "taxes," used in the constitution, is generical, and is thus used to confer plenary authority in all cases of taxation.[2] Taxes are of two kinds, direct and indirect.[3] Direct taxes can only be apportioned among the several states according to the census returns; as, representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers.[4] Direct taxes are properly capitation taxes and taxes upon land. There seem to be no other subjects of taxation upon which taxes can be apportioned among the several states. Indirect taxes are such as affect expense or consumption, and are increased or reduced as the consumption is increased or reduced. Indirect taxes do not admit of apportionment; but they are to be uniform throughout the United States on the subject taxed, as, all duties, imposts and excises shall be uniform throughout the United States.[5]

§ 351. It is fully settled that under the grants of the constitution, congress has plenary power over every species of taxable property within the United States except exports. That there are but two rules prescribed for their government in the exercise of this power; the rule of uniformity in respect to indirect taxes, and of apportionment in respect to direct taxes. Duties,

1 Story's Com. on Const., § 924.
2 Rawle on Constitution, p. 74.
3 1 Kent's Com., 255.
4 Art. 1, § 2, Const.; also § 9, cl. 2.
5 Art. 1, § 8, Const. U. S.

Direct and indirect taxation have been the subjects of judicial investigation and adjudication. In the case of *Hylton* v. *The United States* (3 Dallas, 171,) the power of Congress relative to taxation was fully discussed. By the act of 5th June, 1794, congress laid a duty upon carriages for the conveyance of persons; and the question was whether it was a direct tax, within the meaning of the constitution. If it was not a direct tax it was properly laid within the grant of the constitution, which declares that all duties, imposts and excises shall be uniform; but if it was a *direct* tax, not being capable of apportionment among the several states according to numbers, it would be unconstitutional The court concluded and so held, that it was an indirect tax on expense or consumption, and, therefore, properly laid according to the rule of uniformity. See 1 Kent's Com., p. 255, *et seq.*; see also *Loughborough* v. *Blake*, 5 Wheat. 371.)

imposts and excises, constitute the three kinds of indirect taxes, or taxes upon consumption or expense; and capitation tax, and taxes upon lands constitute the direct taxes which are to be apportioned. And should there be any other species of taxes not included within the words, duties, imposts or excises, they would be laid by the rule of uniformity or not, as congress in its discretion might determine to be reasonable or proper.[1]

§ 352. Thus the constitution invests the general government with plenary authority over the persons and property of the United States, for the purpose of pro viding the means for its administration. No government can be supported without the means of raising an adequate revenue; and it must possess this power within itself, independent of all other authority. Of the amount of revenue to be raised, congress is the sole judge; and well it may be, for in its halls the people of the nation are present by their immediate representatives, to declare what amount they may probably need, and how much they are able to pay. The authority to lay and collect taxes is one of the high prerogatives of sovereignty; and it can proceed from that power only, which has authority to lay its hand upon the title by which individuals hold their property, and transfer it to others upon such conditions as it sees fit to impose. It virtually says, there is so much money laid upon that land, that horse, that carriage, to be paid by the owner thereof by such a time, or the title thereto will be transferred to the person who, according to the forms of law, does pay it. So much money is laid upon the head of each individual in the state or nation to be paid for the support of the government, and if not paid according to requirement, such and such penalties will be imposed. Can more absolute authority be exercised by any sovereign or despot? The difference between a despotism and a democracy is not to be found in the sovereignty to command obedience, but in the will and power which administers. The despot exercises this absolute authority according to the dictates of his own will, without consulting the interests or wishes of others In democratic governments the people administer this authority according to the popular will, having regard to the public welfare.

§ 353. Congress may lay and collect taxes, duties imposts and excises, to pay the debts and to provide for

[1] 1 Kent's Com., p. 255.

the common defense and general welfare of the United States. This implies a broad discretion in congress as to the purposes for which taxes, duties, imposts and excises may be laid and collected. But large as the discretion is, it is no larger than is safe and necessary to commit to the congress, charged as it necessarily is, with providing for the security and welfare of the nation. It is to be remembered that the nation has no other institution intrusted with authority to provide for its common defense, and to promote its general welfare. So far as the state governments are concerned, they were never competent for any other than their own local and domestic administration. The laws of a state were never of any binding force beyond its own limits. It could pass no law, and make no provision which could extend to all national citizens. When, therefore, the people of the United States instituted the general government, and committed the safety and welfare of the nation to its sole keeping, they intended to make it efficient for all purposes for which a national government was demanded. They intended to limit the subjects of national administration to those which, from the nature of things, were general and not local. Thus, in the grant of power to lay and collect taxes, the terms of the grant are broad enough to include every kind and description of tax that can be laid and collected; to subject to this power every species of taxable property, and every individual inhabitant of the nation. In short the people intended to include in the terms of the grant, the whole taxing power of the nation for general or national purposes. As the nation is to administer the government, it is not necessary to limit the discretion committed to congress to lay and collect taxes, &c., either as to the amount, or as to the purposes of its particular application.

§ 354. It has been denied that congress has authority to lay and collect duties, imposts and excises for any other purpose than raising a revenue; that duties laid upon imports as a means of affording protection to domestic industry are not within the letter or spirit of the constitution, and, hence, that a protective tariff is unconstitutional. The force of this objection rests upon the broad assumption that the general welfare of the nation can never require that its agricultural, mechanical or commercial interests should be fostered and protected against the competition of cheaper labor

from abroad. For it cannot be denied that if the general welfare requires such protection to enable the nation to establish its industrial independence of foreign labor, foreign production, and the like, under the powers to regulate commerce, and to lay taxes, duties, imposts and excises, for the purpose of paying the debts and providing for the common defense and general welfare of the nation, congress has ample authority to make such discriminations in laying duties, imposts and excises as will incidentally afford protection to domestic industry. And a nation that neglects thus to provide for its industrial independence of foreign labor, manufacture and commerce, is liable to find itself weakened, crippled, and perhaps ruined, when its peaceful relations to foreign powers are disturbed by war. It is manifestly a duty which the administrators of government owe to the people, to establish as early as possible the industrial and commercial independence of the nation.

§ 355. Capitalists will not invest in any enterprise where there is not a reasonable prospect of remuneration for the capital invested. They will not employ labor unless that labor be sufficiently remunerative to afford a reasonable use for the capital necessarily invested in its employment. It is the nature of capital in making its purchases, to seek a market where it can buy the cheapest — in making its sales, to find the market where it can realize the largest and surest profits. If it can buy railroad iron in England at such a rate that it can transport it to this country and deliver it where it is needed, for a less price than it can employ the labor of this country to produce it, it will be certain to do so; for capital knows no sympathy with the laborer, or patriotism for the country. It is exceeding cunning and supremely selfish. Hence, there is nothing to prevent the pauper labor of the old world from coming into successful competition with remunerative labor in America, except a tax laid upon its products sufficient, at least, to equalize in market, its price with the price of the like articles produced at home, at a remunerative rate for the capital and labor invested.

§ 356. It is sometimes objected that this tax upon imported articles laid with a view to the protection of domestic industry against foreign labor, tends to a monopoly in domestic manufacturers — that by such tax they are enabled to demand, and the people are compelled to pay, a higher price for a given article of

foreign or domestic manufacture than would otherwise be required if the protective duty were not laid. There can be no other monopoly than that which enures to the benefit of the American laborer against the pauper labor of the old world, so long as the domestic production is open to the free competition of domestic capital and domestic labor. The effect of the protective duty is to eqalize foreign and domestic labor, so that remunerative labor in America may successfully compete with pauper labor in Europe, in its application to the development of the natural resources of the country. By this protection, a national industrial independence will be established; American labor will be employed at remunerative prices in every possible department of production; the natural resources of the country will be developed—and individual and public prosperity will be promoted. And as the common defense and general welfare of the people would be provided for and promoted by such means, congress not only have the power, but it is their duty to adopt such measures as will naturally and necessarily secure to the people such a result.

§ 357. An industrial and commercial independence is essential to the welfare of every nation. Political independence can secure little safety or prosperity to a people dependent upon foreign nations for their trade, their commerce, or their manufactures. The proposition scarcely admits of argument, that every nation should have the authority to impose a tax or tonnage duty on foreign vessels, for the benefit of its commerce; on the importation of the raw material, for the aid of its agriculture; on imported fabrics, for the aid of its manufactures. It is the inherent right of every sovereign nation to foster and build up every branch of industry, by such legislation as will enable its citizens and subjects to compete with the subjects of other governments in its own markets. If the subjects of other governments under a home policy, are required to labor for a few sous per day, and the products of their labor are to come into competition with American labor in American markets, certain results must follow. Either congress must impose such duties upon imported fabrics as will make their price equal to the cost of production here; or it must convert capital from its love of gain, to "Christian charity"; or it must, in effect, reduce the price of American labor to the standard of

pauper labor in other countries; or the manufacture of such fabrics must be abandoned, and a condition of industrial dependence be established. When the people instituted for their common defense and general welfare, the government of the United States, and gave it authority to lay and collect taxes, duties, imposts and excises, to pay the debts, and to provide for the common defense and the general welfare of the nation, and gave it authority also to regulate commerce with foreign nations, it cannot be supposed that the commercial and industrial interests of the people as a nation, were overlooked. The authority of the congress to protect the nation in its vital interests by laying discriminating duties upon imported fabrics, can with no propriety be questioned. It is a question of political economy, and not of national authority.

§ 358. Congress has power to borrow money on the credit of the United States.[1] This power is granted in the most general terms; and involves the broadest discretion of the law-making power of the nation. Borrowing money on the credit of the United States involves the contracting of debts against the United States, which may be provided for by the laying of taxes, duties, imposts and excises; so that congress has the power to provide for the payment, as well as the contracting of debts. This discretion is safely committed to the general government, because it is to be exercised by the people themselves who administer it. The power to borrow money is indispensable to the existence of the nation. It is liable to be involved in expenses, for the payment of which the immediate revenues of the government will not be adequate. It may be required to expend more in one year than could be supplied by the revenues of many years. In the civil war in which the government was involved in 1861 by the general rebellion of the slaveholding states, and which required the sacrifice of a quarter million of lives and the expenditure of over three thousand millions of dollars to subdue, this power to borrow money was indispensable to the existence of the government and the salvation of the nation. Giving to congress unqualifiedly this power to borrow money on the credit of the United States and to provide for the payment of the same, places in the hands of the general government

[1] Art. 1, § 8, Const. U. S.

the means of providing for any contingencies in war or peace that may arise, and is another of the many indications of the people to make the government of the nation permanent and complete.

§ 359. "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[1] By this provision the commercial intercourse of the nation, and of every portion thereof, with other powers, is placed under the absolute direction and control of the general government. There has been much discussion as to the meaning and extent of the term commerce, and of the power to regulate it. It is to be remembered, that what have usually been denominated "the enumerated powers of the government," are more properly to be considered the enumerated subjects of general jurisdiction, over which the government has full powers. It is manifest that the people of the United States in the institution of the general government intended to commit to the congress the entire subject of commercial intercourse between the United States and other nations, and to deny to the several states any authority over the same. As a nation, sovereign and independent, it was indispensable that it should have full authority and power over the subject of commercial intercourse, between its subjects or citizens and other nations and their citizens or subjects; and having this authority and power, it was necessary that provision should be made for its exercise. It would be a singular position to assume, that the nation as such, has this sovereign authority to regulate its own commercial intercourse with others; but has made no provision for its exercise. There can be no doubt that the constitution confers upon congress plenary power over the whole subject of commerce, extending to every branch and department of the same. "In the term commerce are included not merely the act of buying and selling or exchanging merchandise, but also the navigation of vessels and commercial intercourse in all its branches. It extends to vessels by whatever force propelled or governed, and to whatever purpose applied."[2] Commerce as used in the constitution is a unit, every part of which is indicated by the term;[3] and the power conferred embraces everything essential to its existence and control.

[1] Art. 1, § 8, cl. 3, Const. United States.
[2] Rawle on Constitution, p. 76.
[3] *Gibbons* v. *Ogden*, 9 Wheat., 1.

§ 360. The term commerce as applied to the nation, must necessarily include all the dealings which the members thereof have with those of a foreign jurisdiction. In its broadest sense, it includes every transaction of those within its jurisdiction which reaches beyond into the jurisdiction of another power; and it includes also the means by which such transactions are carried on. The basis of this right to regulate and control these transactions, rests upon the hypothesis that every interest within the nation is subject to the use of the nation when the public welfare demands it; that society as a whole is the lord and proprietor of all that makes up society; including the right to command and to dispose of persons and things according as the highest good of society requires. "*Salus republicæ est suprema lex.*" This authority is asserted in the right to lay and collect taxes, duties, imposts and excises; in the right of eminent domain; and in the many other assertions of absolute authority on the part of the nation, so essential to provide for the common defense and general welfare of the people. It is as though the nation were the common parent of all, and owner of everything within its jurisdiction; and that individuals were its beneficiaries, individually enjoying the use of everything as far as possible, consistent with the highest liberty and equal rights of all and each. Society being a necessity pertaining to every individual; and government being a necessity pertaining to society; and this absolute authority over all being a necessity pertaining to government, it is true that governments are ordained of God, and have his warrant for the exercise of all needful authority in the discharge of their duties and trusts.

§ 361. From the nature of things, then, the nation must be possessed of this absolute authority to regulate and control all intercourse between its subjects and those belonging beyond its jurisdiction. Its guardian care over the interests of society requires it to provide appropriate measures for the protection and security of its subjects at home and abroad. It is a duty which it owes to every member to protect him in the exercise and enjoyment of every natural and acquired right, against everything which threatens its subversion. If the citizen is required to serve his country with the offering of his property and life, if need be, the country —government—can do no less than to protect the property and life of the citizen by the exercise of all its

authority and power, if need be. If an oppressive gov ernment makes its subjects paupers, and puts pauper labor into the market to compete with free labor, it is as really the duty of government to prevent such competition as to prevent any other species of wrong or robbery. It may not have power to aid or protect the foreign pauper, but it has the authority to protect its own people in its relations and intercourse with pauper communities. It cannot go beyond its own jurisdiction to correct evils unless the public safety imperatively demand it; but it can close its doors to the admission of such evils within its own domain, and throw the mantle of its protection over all its subjects, by regulating the intercourse to be permitted with such communities.

§ 362. In discussing the powers of the general gov ernment in this treatise, it is laid down as a fundamental principle that the people of the nation, in the institution of the general government, intended to provide for the plenary administration of their authority over all subjects, through the instrumentality of the general and state governments; that the constitution ordained and established by them, divided the subjects of jurisdiction between the general and state governments, by defining what subjects should be committed to the jurisdiction of the general government; that in the enumeration of these subjects of general jurisdiction, they were governed by what to them seemed appropriate and necessary to the security, perpetuity and welfare of the nation; that in respect to the subjects of general jurisdiction enumerated, they gave to the general government plenary powers of administration, and then made themselves the administrators of the same, so that, in effect, the power that instituted the general government, and assigned to it the sphere of its administration, provided for its own potential and perpetual presence in the administration of its own authority. Upon this theory, the general government possesses the entire authority of the nation over the subject of commerce; and the power of congress, as charged with the exercise of the legislative authority of the nation over this subject, is plenary, and can of right do what sovereignty itself can do; that is, what the people as a nation can of right do. And why not?—since the people themselves as a nation, administer this authority for their own security and welfare.

§ 363. The regulation of commerce extended not only to the regulations of trade, but of every species of intercourse extending to the emigration and immigration of individuals. This appears to have been the under standing of those framing and adopting the constitution After providing for the power of congress to regulate commerce, it was deemed necessary to restrain for a limited time the exercise of this power over a certain class of subjects. Thus the constitution provides that, the migration or importation of such persons, as any of the states then existing might think proper to admit, should not be prohibited by the congress prior to the year one thousand eight hundred and eight; but that a tax or duty might be imposed on such importation not exceeding ten dollars for each person. If the power to regulate commerce did not extend to the authority to exclude such persons from coming into the country as the congress might prescribe, this prohibition in the constitution was uncalled for; for congress had acquired the authority thus restricted under no other provision than that which gave it authority to regulate commerce, which, in this case, was construed to include the inhibition of the specified subject. This, undoubtedly was a correct construction of the grant. The nation had delegated to congress all its authority upon the subject; and that, as a sovereign nation, it had authority to prohibit entirely the introduction of a particular class of individuals into its jurisdiction, no one will pretend to deny.

§ 364. Congress also has power to regulate commerce among the several states. This power is as plenary in respect to commercial intercourse among the several states as in respect to intercourse with foreign powers; subject, however, to the restrictions contained in the ninth section of the first article, which are, that no tax or duty shall be laid on articles exported from any state; and no preferences 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. In respect to foreign nations, it is universally admitted that the terms of this provision include every species of commercial intercourse; and this being the admitted meaning of the provision as applicable to foreign nations, the same must likewise attach to the term in its application to the states. Commerce among

the several states must be that kind of commerce affecting the interest of two or more states. The states as political institutions are independent of each other, and maintain, in that respect, a *quasi* sovereignty. But being *entirely* local in their respective jurisdictions, they have no other than strictly local authority; and under the constitution, they have no power to extend their authority by treaty, compact, agreement or comity. That is, a state government is merely a local institution, authorized to exercise local and domestic authority over certain subjects within its own state limits; but beyond this it has no duty to perform, and no power to act. It cannot be known to, or represented in, any other government. It can enter into no treaty, alliance or confederation with any other power. It can lay no duties or imposts on any imports or exports, for any other purpose than executing its inspection laws; and even those are required to be for the use of the treasury of the United States; and its regulations in that respect are continually subject to the revision and control of congress. From this condition of the states it became absolutely indispensable that there should be a common authority to which their citizens respectively might appeal to determine inter-state rights. There would naturally and necessarily be commerce among the citizens of the several states, which would require regulation by an authority and power common to, and supreme over all. This power could only exist in the nation, to be exercised by the general government.

§ 365. That commerce among the several states which requires the authority of congress to regulate must be of a character to affect more than one state. The states are respectively competent to regulate the intercourse of their own citizens so long as they continue within their respective jurisdictions. Commerce among the several states is not intended to include such ordinary business transactions as are conducted by citizens in their intercourse with each other under state authority, or within the scope of state administration. But when transactions necessarily require an authority to supervise and enforce their observance, which a state from its local jurisdiction cannot exercise, then the authority of the general government is required to regulate such intercourse. The exclusive internal commerce of a state between its citizens, is to be regulated by the authority of a state itself; for it is the policy of

all truly democratic governments to commit the administration of governmental authority to those who are only to be affected by it. But where there are citizens of thirteen separate states dealing with each other, carrying on trade which brings them within the jurisdiction of several separate and distinct authorities during a single transaction, each of which are liable to have different laws and regulations affecting the same, it becomes necessary that the regulation of such intercourse should be intrusted to a power that can speak and act with authority over all. Such is the character of that commerce among the several states which is committed to the regulation of congress by this provision of the constitution.

§ 366. These several state governments are created, and exist only for the special purpose of administering in those local and domestic matters which pertain strictly to the locality of the particular state. For this reason, they are not allowed to exercise authority over subjects affecting generally citizens of the United States. No state is permitted to regulate the trade between itself and another state. A very material object of this power is to protect the commerce of the people of one state while passing through another with their imports or exports. If each state were at liberty to regulate the trade between state and state, it would be impossible to estimate the embarrassment that would inevitably follow the exercise of such authority. The experience of the states during the confederation, demonstrates the disastrous consequences to inter-state trade and commerce, sure to follow under the stimulating influences of local interests and the desire of petty advantage.

§ 367. The power to regulate commerce among the several states is necessarily exclusive in congress. The reasons for conferring the power upon the general government are sufficient to require the exercise thereof to be exclusive in congress. But aside from these reasons, it has been judicially determined that the full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right to any part thereof in another; that a grant of the power to regulate, necessarily excludes the action of others, who would exercise the same authority.[1]

[1] See *Gibbons* v. *Ogden*, 9 Wheat., 1, 198, 199, 200; also 12 id., 419, 445; see also Story's Com. on Const., § 1072 *a*; 1072 *b*; 1072 *c*; 1072 *d*; 1072 *e*; 1072 *f*; 1072 *g*, 1072 *h*; 1072 *i*.

§ 368. There have been able and learned discussions touching the authority of the states to impose regulations upon masters of vessels, either from foreign ports or from ports within the United States, touching the landing of passengers, etc. But the questions discussed were whether the regulations were matters of *internal police*, belonging to the states, or whether they amounted to a regulation of commerce, the power of which was exclusively in congress. By a certain act of the state of New York, concerning passengers of vessels coming to the port of New York, the master of any ship arriving from a foreign port, or from one of the other states, within twenty-four hours after its arrival, was required to report to the mayor, in writing, on oath or affirmation, the name, place of birth, last legal settlement, age and occupation of every passenger brought in such ship to the city of New York, or permitted to land at any place, or put on board of any other ship with an intention of proceeding to the city, under a penalty of seventy-five dollars for every passenger, to be paid by the master, owner or consignee. And further, each master was required to give bond to the mayor, with two sureties, in a sum not exceeding three hundred dollars for each passenger not a citizen of the United States, to save harmless the mayor, &c., and the overseers of the poor, from all expense and charges which might be incurred in the maintenance and support of such passenger, under a penalty of five hundred dollars. It further provided that the master or owner should, on the order of the mayor, be compelled, under a heavy penalty, to remove to the place of his last settlement, any passenger, being a citizen of the United States, who should be likely to become chargeable on the city.[1]

§ 369. It seemed to be conceded in the adjudication of this case, that if the provision above referred to was, in effect, a regulation of commerce, the act would be unconstitutional. But a majority of the court held that the act was not to be considered as a regulation of commerce; that it was merely a police regulation; that jurisdiction over matters of internal police had not been conferred upon the general government; and that therefore any legislation upon such matters was a constitutional exercise of state powers; that both the end to be attained and the means used were within the powers not surrendered — not conferred — upon the general

[1] See *The City of New York* v. *Miln*, 11 Pet. S. C. Rep., 102.

government; the end being to prevent the state from being burdened with foreign paupers; the means bearing a just, natural and appropriate relation to that end; that while the state is acting within the legitimate scope of its power as to the end to be attained, it may use any means appropriate to that end, although they be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress, acting under a different power; subject only to the limitation that in the event of collision, the law of the state must yield to that of congress; that a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States; that by virtue of this, it is not only the right but the duty of the state to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to those ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained; that all those powers which relate merely to municipal legislation, or what may be termed, *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive; that any law comes within this description which concerns the welfare of the whole people of a state, or any individual within it, whether it relate to their rights or their duties; whether it respect them as men or as citizens of the state; whether in their public or private relation; whether it relate to the rights of persons or of property, of the whole people of the state or of any individual within it, and whose operation is within the territorial limits of the state, and upon the persons and things within its jurisdiction.[1]

§ 370. These propositions of the court, in the case just referred to, seem to contain certain fallacies to which attention is called. First. That whatever measures are necessary for the perfect administration of the domestic interests of the state, called *internal police regulation*, they come within the authority of the state, even though they do operate oppressively upon citizens

[1] *The City of New York* v. *Miln*, *supra*.

of other states, and other persons immigrating to the United States, under the encouragement, and even protection, of the laws of the nation. The principle upon which this authority in the states is claimed, is, that the states have never *surrendered* to the federal government, and the constitution of the United States has not restrained the states from, the exercise of this power; consequently that the states possess and can exercise it, even though in such exercise, the means adopted by them be scarcely distinguishable from those adopted by congress in the exercise of the powers conferred upon the general government. It is to be remembered that the powers to be exercised by the states are those remaining after the enumerated powers or subjects of the general government have been carved out of the plenary powers of the nation; and after those which are prohibited to the states are also deducted; so that each state derives its powers of administration from the same fountain; and so far as they are not restrained by their respective constitutions, they are equal; and what one state can do, all can do; what pertains to the internal police authority of one state, pertains to all states; therefore, in determining the question whether a state, in the exercise of a particular power, has transcended its police authority, it is proper to inquire what would be the effect if all the states should exercise the same powers. Under the constitution of the United States, every citizen of a state is likewise a citizen of the United States; and as a national citizen, he is politically and potentially present in every part of the national domain; and he has the right to be personally present in any state or territory, upon the same general conditions, enjoying the same privileges and immunities as the citizens of the state into which he seeks to come. Now, any state regulation which interferes with his rights as a national citizen, in manner and in effect different from what it does with its own citizens, conflicts with his constitutional rights; whatever may be the pretense for adopting such regulations. If by state regulation, New York can prevent immigration into its state, except upon penal terms, every other state may do the same. If New York can constitutionally make exactions upon the citizens of any particular state, such state can retaliate by exactions upon the citizens of New York; and so every state may adopt its own regulations, and make it impossible for a national citizen to leave the

state in which he was born, and deny to the government of the nation the authority to secure to the citizen of each state the privileges and immunities of the citizens of the several states.[1]

§ 371. The New York law authorized the mayor of New York to compel the master of any vessel under a heavy penalty to remove to the place of his last settlement, any passenger, being a citizen of the United States, who should be likely to become chargeable on the city. It is manifest that New York could not authorize the master, or any other person, to take a citizen of the United States beyond her own limits. She may legislate with respect to her own citizens within her own limits, and may authorize or require paupers to be removed from one town or county to another within her state jurisdiction; but when she legislates in respect to the rights of national citizens beyond her limits, she manifestly transcends her authority as a state. If by legislation she may send citizens of the United States beyond her lines into other states, other states by the same authority may send them back, and others beside them. For a state cannot by its legislation fix responsibilities upon persons and places beyond its jurisdiction. Admit the authority of a state to determine who may come within, or who must depart

[1] To illustrate the consequences of permitting a state to exercise authority extending to interests beyond her jurisdiction, take the following as an illustration: In 1787, New York, by an act (March 19) granted to John Fitch a sole and exclusive right to make and use every kind of boat or vessel impelled by steam, in all creeks, rivers, bays and waters within the territory and jurisdiction of New York, for fourteen years. In 1798, on the suggestion that Fitch was dead, or had withdrawn from the state, without having made any attempt to use his privilege, an act was passed repealing the grant to Fitch, and conferring similar privileges on Robert R. Livingston, for the term of twenty years, on a suggestion made by him, that he was the possessor of a mode of applying the steam engine to propel a boat on new and advantageous principles. On the 5th of April, 1803, another act was passed, declaring that the rights and privileges granted to R. R. Livingston, by the last act, should be extended to him and Robert Fulton, for twenty years from the passage of the act, etc. And by an act of the 9th April, 1811, provisions were made for enforcing the observance of the privileges granted, by the forfeiture of vessels, &c., found navigating these waters. Thus, according to the laws of New York, no one could navigate the bay of New York, the North or Hudson river — the sound — the lakes or any of the waters of the state, without a license from the grantees of New York, under penalty of forfeiture of the vessel. Connecticut retaliated upon this, by providing that no one could enter her waters with a steam vessel *having such license*. New Jersey provided by law that should any citizen of that state be *restrained* under the New York law from using steamboats between the ancient shores of New Jersey and New York, he should be entitled to an action for damages in New Jersey, with treble costs against the party restraining or impeding him under the law of New York. The New Jersey act was called an act of *retortion* against the illegal and oppressive legislation of New York, and was justified on the grounds of public law, justifying reprisals between independent states. Thus, a steam vessel of any description going to New York, is forfeited to the representatives of Livingston and Fulton, unless she have their license. Going from New York or elsewhere, to Connecticut, she is prohibited from entering the waters of that state, if she have such license. If the representatives of Livingston and Fulton, in New York, carry into effect, by judicial process, the provisions of the New York laws, against a citizen of New Jersey, they expose themselves to a statute action in New Jersey, for all damages and treble costs. (See *Gibbons* v. *Ogden*, 9 Wheat., pp. 4-10.)

from, the limits of the state, and the power conferred upon congress to regulate commerce with foreign nations, and among the several states, is dead, so far as immigration and emigration are concerned. If the states have authority to impose conditions upon the immigration of citizens or aliens, the nation has not. But the nation has the express authority to regulate this branch of commerce, and it alone can exercise it; for its jurisdiction extends beyond state lines.

§ 372. The introduction of aliens or citizens of the United States into a state under any sort of regulation, is necessarily a regulation of commerce; and it involves the assertion of powers over persons not within the jurisdiction of the state attempting such regulation. Imposing any conditions of initiation into a state, implies a right of exclusion; and the rights of one state in that respect being the rights of all, there is no authority upon that subject left to the nation. Its power to regulate commerce, upon such theory, is absorbed by the states. Its treaty stipulations with Great Britain, by which the inhabitants of the two countries are to be permitted freely and securely to come with their ships and cargoes to all places, ports and rivers in the territories of each country, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories respectively; to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, to afford complete protection and security to the merchants and traders of each nation respectively, subject to the laws and statutes of the two countries, could not be enforced by the nation, if this power to impose conditions upon the immigrating alien can be exercised by the states. The power to regulate commerce with foreign nations, and among the states, is given to congress in the most unlimited terms; and, therefore, a state cannot make a regulation of commerce to enforce health laws, or any other police regulation, because that power is committed exclusively to congress.

§ 373. In the passenger cases, Mr. Justice WAYNE, in stating the decision of the court, among other things holds the following: The acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those states, either in foreign vessels or vessels of the United States; from foreign nations, or from ports in the

United States, are unconstitutional and void, being in their nature regulations of commerce, contrary to the grant in the constitution to congress, of the power to regulate commerce with foreign nations and among the several states;—that the states within the union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws;—and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise;—also that the acts of Massachusetts and New York are unconstitutional and void, being in conflict with treaty stipulations between the United States and Great Britain;—and that such laws are in conflict with sundry acts passed by congress at different times, admitting foreigners with their personal luggage, and tools of trade, free of duty or imposts, into the United States;—that the law of a state imposing any tax upon foreigners or immigrants, for any purpose whatever, whilst the vessel is *in transitu* to her port of destination, though such vessels may have arrived within the jurisdictional limits of such state, before the passengers had landed, is in violation of such acts of congress, and therefore void;—that those acts so far as they imposed any obligation upon the owners or consignees of vessels, or upon the captains of vessels, or upon freighters of the same, arriving in the ports of the United States within the said states—New York and Massachusetts—to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States, or coming from a port within the union, are unconstitutional and void; being contrary to the constitutional grant to congress of the power to regulate commerce with foreign nations and among the several states, and also to the legislation of congress under the said power by which the United States had been laid off into collection districts and ports of entry, established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers are to be admitted into the ports of the United States, as well from abroad as from other ports within the union;—that the ninth section of the first article of the constitution includes within it the migration of other persons, as well as the importation of slaves, and in terms recognizes that other persons as well as slaves may be the subject of importation and commerce;—that

the fifth clause of this ninth section, which declares that "no preference should be given by any regulation of commerce or revenue, to the ports of one state over those of another state, nor should vessels bound to or from one state be obliged to enter, clear or pay duties in another," is a limitation upon the power of congress to regulate commerce for the purpose of producing entire commercial equality within the United States; and also a prohibition upon the states to destroy such equality by any legislation prescribing a condition upon which vessels bound from one state should enter the ports of another;—that those acts of state legislation imposing a tax upon passengers, are unconstitutional and void, because each of them contravene the provisions of the first clause of the eighth section of the first article of the constitution, which declares that all duties, imposts and excises shall be uniform throughout the United States;—that such injunction of uniformity is as obligatory upon the states in the absence of legislation on the part of congress, as if the uniformity had been made and established by congressional legislation;—that such constitutional uniformity is interfered with and destroyed by any state imposing any tax upon the intercourse of persons from state to state, or from foreign countries to the United States;—that the power of congress to regulate commerce with foreign nations and among the several states, includes navigation upon the high seas, and in the bays, harbors, lakes and navigable waters within the United States; and that any tax by a state in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to such grant to congress.[1]

§ 374. In the case of *The City of New York* v. *Miln* before cited, the court remarked: "We think it as competent and as necessary for a state to provide precautionary measures against a moral pestilence of paupers and vagabonds, and possibly convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship the crew of which may be laboring under an infectious disease." It certainly is competent for a state to exercise all needful power to protect its citizens from moral and physical evils, provided she does not adopt measures involving the rights of persons other

[1] See *Smith* v. *Turner*, and *Norris* v. *The City of Boston*, 7 How. S. C., 283.

than those over which she has jurisdiction, in matters purposely committed to the jurisdiction of the general government. The states of the union may, in the exercise of their police powers, pass quarantine and health laws interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods; prescribe the places and times for vessels to quarantine, and impose penalties upon persons violating the same. But such laws, though temporarily affecting commerce in its transit, are not *regulations of commerce*, prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States. They are necessary precautionary measures to prevent the introduction of disease into the ports to which vessels are bound. And states may, in the exercise of such police power, without any violation of the power in congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from passengers on board, such fees as are necessary to pay the costs and expenses of their detention, and of the purification of the vessel, cargo and apparel of the persons on board.[1]

§ 375. How far a state possesses the authority to obstruct by its legislation a navigable stream in which the tide ebbs and flows, has been the subject of much discussion. The principle involved would seem to be this: If the stream be navigable in fact, and the quality of navigability continues between two or more states, the power to regulate commerce upon such stream should be exclusive in congress; because the states are not competent, by any authority they possess respectively, to regulate the commerce between themselves; and congress has plenary authority to do so. According to technical definition, a stream is said to be navigable to the extent that the tides ebb and flow therein; though, in fact, such streams are not always navigable. A stream lying entirely within a state, which in fact is not navigable, even though the tide ebbs and flows therein, is in no way connected with the commerce of the nation, and there is no reason why the authority of congress to regulate commerce with foreign nations and among the several states, should give to the gen-

[1] Although the court was divided in opinion in these passenger cases (*Smith* v. *Turner*, *Norris* v. *The City of Boston*, 7 How. S. C., 283), five of the judges—McLEAN, WAYNE, CATRON, McKINLEY and GRIER—concurred in the doctrines herein stated. Four of the judges—TANEY, Ch. J., DANIEL, NELSON and WOODBURY—dissenting therefrom. (See Story's Com. on Const., § 1072 *g*, and note.)

eral government commercial jurisdiction upon the banks or over the bed of such non-navigable stream. In respect to all such streams, or even navigable streams in fact, beyond the point where navigation is possible as a channel of commerce, there is no apparent reason why the general government should exercise exclusive or even any jurisdiction over them, or over that part of them. Where a stream cannot be used in fact for commercial purposes, there is probably no reason why the rights of riparian owners along its channel should not be left to the administration of the local or state government. To give congress authority over a particular stream of water, it would seem that its navigable character should be continuous beyond the jurisdiction of the state; that is, it should be navigably connected with navigable waters extending beyond the limits of the state. For where there are navigable waters entirely within the territorial limits of a particular state, which are disconnected with navigable waters beyond such limits, such waters are not the subject of either inter-state or international use; and consequently the power of congress to regulate commerce with foreign nations and among the states would not reach to the navigation of such isolated waters.[1]

§ 376. A stream that is in fact navigable, and is used as a channel of inter-state and international communication cannot be lawfully obstructed by the authority of a state through which it passes, even though congress has made no especial regulations in respect thereto. By the constitution of the United States its navigable qualities are placed under the exclusive regulation of congress, and consequently the states have no power to authorize the interruption of the full and perfect enjoyment of the public easement therein. It has been argued that the state might authorize an obstruction, as the building of a bridge over a navigable stream, where congress had passed no law expressly prohibiting the same; but the supreme court of the United States held to the contrary. They held, that if the law of the state of Virginia authorized the erection of a bridge over the Ohio river in such a manner as to obstruct the navigation, such law would be no defense to the bridge company, although congress had passed no act prohibiting the obstruction of that river; for

[1] See *Veazie* v. *Moore*, 14 How., 568; *United States* v. *Coombs*, 12 Pet. S. C., 78. Per STORY, Justice.

they had exercised control over it by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers, &c.[1]

§ 377. The power of congress to regulate commerce extends to the regulation of navigation, and to the coasting trade and fisheries, within, as well as without any state, wherever such navigation is connected with the commerce or intercourse with any other state or nation. The form of the grant is, congress shall have power to regulate commerce with foreign nations and among the several states. The power of regulating this branch of commerce was committed to the general government, because, from the nature of things, it was a power which could not be left with the several states. No subject could be committed to state jurisdiction which required the exercise of authority beyond its limits. To regulate the commerce with foreign nations or between the several states involved the exercise of such extra-territorial authority, and for that reason that subject was necessarily committed to the exclusive control of congress. But such reason would not extend to the navigation of a stream lying wholly within a particular state, and disconnected with any other navigable waters extending beyond state limits.[2] The power to regulate commerce extends to the regulation and government of seamen on board of American ships; to conferring privileges upon ships built and owned in the United States, in domestic as well as foreign trade.[3] It extends to quarantine laws, pilotage laws, and wrecks of the sea.[4] It extends as well to the navigation of vessels engaged in carrying passengers, steam vessels or others, as to the navigation of vessels engaged in traffic and general coasting business.[5] It extends to the laying of embargoes both on domestic and foreign voyages.[6] It extends to the construction of light-houses; the placing of buoys and beacons; to the removal of obstructions to navigation in creeks, rivers, sounds, bays, &c.;[7] in short, everything essential to the exercise of commercial intercourse and intercommunication between the people of the United States and foreign nations, and also between the several states,

[1] *State of Pennsylvania* v. *The Wheeling and Belmont Bridge Co.*, 13 How., 518. Read the dissenting opinion of Judge TANEY in this case for the views of those holding a contrary doctrine. It may be found in a note by Judge STORY in his third edition of Com. on the Const., § 1073.

[2] *Veazie* v. *Moore*, 14 How., 568. [3] 1 Tuck. Black. Com., app., 252. [4] 9 Wheat., 208-208. [5] Id., 214-221. [6] Id., 191, 192. [7] Story's Com. on Const., § 1075.

seems to be included in the power given to congress to regulate commerce. The people of the United States in the institution of their general or national government undoubtedly intended to make it an instrument, by means of which they, as a nation, could exercise authority over the whole subject of commercial intercourse as fully and completely as any other sovereign and independent nation could of right do. They committed the regulation of commerce with foreign nations and among the several states to the exclusive control of congress, and gave to it the plenary authority of the nation, always to be exercised and administered by themselves.

§ 378. The power to regulate commerce with the Indian tribes is exclusively in congress. Prior to the revolution, this power was exercised by the British government. During the confederation it belonged to congress, except as to those tribes which resided within the limits, or were considered as members, of any of the states. At the formation of the constitution no objections were made to conferring this power upon the general government through congress. In their tribal condition the Indians have ever been dealt with as separate nations, although dependent. Their territorial rights and property have been respected by the government. Their property in the soil, however, has not been deemed such as to entitle them to the right to dispose of it to foreign nations, or to any but the general government. Their mode of occupation is such as only to require the use of it for purposes of hunting and fishing. As individuals, generally, they attach no improvements, and hence, make no individual appropriations of the land to their respective uses. Therefore the government cannot deal with them as individually having any property in the soil, or as having any other rights thereto, except its use for the purposes to which they have applied it. Their use does not differ essentially from the use made of it by the wolf, the bear, the deer, and other denizens of the forest. It has long been a problem demanding solution, what is to become of the red man at last? There can be but two answers to the question: he must become a civilized being individually and socially; or he must cease to live upon the earth. If, as a race, the Indians are incapable of becoming civilized, and of entering upon that higher plane of civilization and enlightenment awaiting humanity, as active, coöperat

ing members, they must disappear. If the Author of all good in his wisdom, has ordained progress in the birth, development and decay of races in the human, as in the animal kingdom, then the saurians of the races must pass away, by the advancement of those conditions of life essential to the ushering in of that "GOOD TIME COMING," believed in by many, and hoped for by all.

§ 379. From the character and constitution of that society of Indians known as a tribe, it is impossible to accord to them the attributes of an independent sovereign nation; nor can they in all respects be treated as such. An Indian tribe, leading a nomadic life, may have its king or chief, and its counselors; but it is in no condition to maintain that relation and intercourse with other nations essential to true nationality. As a society, they may be recognized and treated with as having a corporate existence, and possessing certain rights as incident to their nomadic condition. Since the organization of the national government, the United States have always treated with them as possessing a dependent sovereignty—if such a condition be definable—as having rights original and inherent in themselves, by which they can acquire and possess property and dispose of the same under such supervision and restrictions as the general government feels in duty bound to exercise. For this reason all trade or commercial intercourse with them must be in accordance with the rules and regulations imposed by congress. It has been decided upon solemn argument by the supreme court of the United States that, an Indian tribe is to be deemed politically a state, so far as to be considered a distinct political society capable of self-government; but that it cannot be deemed a foreign state in the sense of the constitution. Its stateship is one of pupilage, and in the United States each tribe is the ward of the nation.[1]

[1] See *The Cherokee Nation* v. *Georgia*, 5 Pet., 1-17.

CHAPTER XI.

POWERS OF CONGRESS—NATURALIZATION.

§ 380. "CONGRESS shall have power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States."[1] As the United States were to be one nation, it was necessary that there should be one uniform rule of citizenship. Under the confederation the states each for themselves exercised this authority, and the inevitable consequence was, that there were many and dissimilar rules of naturalization in the several states; and as the citizens or free inhabitants of each state were entitled to all the privileges and immunities of citizens in all the other states,[2] it followed that a single state had the power of determining the conditions of naturalization affecting all the other states. For an alien might become naturalized in a state requiring but a short residence, and then he was, in effect, a citizen of the nation, and he could claim in the other states the privileges and immunities of their own citizens. By this provision, the laws on the subject of naturalization of a single state were rendered paramount to those of the other states. But as the citizens of the state are likewise national citizens, it is the right of the nation alone to determine who shall politically and potentially become members of the national society. The propriety of committing the exercise of this power to the general government was not questioned in the convention, and has never since been questioned. Congress has the exclusive power of determining upon what conditions an alien may become a citizen of the United States.

§ 381. In the United States there are two classes of citizens; that is, two classes in reference to the manner in which they became citizens. At the time of originating the American nation, the citizens of each state became likewise citizens of the nation, and the rights of citizenship attached to them. Therefore, after the establishment of American nationality every person born within the territorial limits of the United States, whether his parents were citizens or aliens, became a citizen by birth, called a native born citizen. Under the constitution, all such are entitled to all the rights

[1] Art. 1, § 8, cl. 4, Const. U. S. [2] Articles of Confederation, art. 4.

and privileges pertaining to membership of the national family. The constitution in some respects distinguishes between native born citizens and others; thus, no person is eligible to the office of president of the United States unless he is a natural born citizen. So also to be qualified as a member of the house of representatives, or of the senate, he must have been a citizen of the United States a certain number of years.

§ 382. Under a democratic government the sovereignty resides essentially and entirely with the people. Those only who comprise the people and partake of this sovereignty, are citizens, and are capable of exercising political rights and powers. Therefore they have the authority to determine upon what terms and conditions those who are alien to their society shall be admitted to become constituent members thereof, and become politically enfranchised. In a country where the people are the administrators of their own governmental authority, and where every one who is admitted to the rights and privileges of citizenship becomes an equal participator in such administration, it becomes a question of prime importance to fix upon a safe and just rule of naturalization, suited to the growth and development of the nation, and at the same time prudent and safe to a faithful and just administration of governmental authority. For by the act of naturalization a foreigner, whatever his moral and intellectual condition, is made a citizen and clothed with all the authority and powers of the most enlightened, moral and patriotic citizen of the nation. If the conditions of conferring citizenship are not reasonably stringent there will be great danger of weakening the just administrative power of the nation. For it should be remembered that commercial intercourse exists between this and the most unenlightened nations; and the uniform rules of naturalization apply as well to the ignorant, immoral and vicious, as to the better classes of immigrants; and that, practically, every ignorant and vicious alien who is made a citizen becomes a political tool in the hands of the like class of native born citizens, and by his vote he neutralizes the power at the polls of the most enlightened and patriotic, so that virtually every ignorant and vicious citizen which is added to the national society, sinks the power of the like number of those upon whose shoulders the pillars of the republic rest.

§ 383. There have been two classes of opinions respecting the essential features of naturalization laws, which may be denominated the liberal and the stringent. One class have advocated the early admission of all foreigners who desired it, to a full participation in the political administration of the government; affirming that, generally, they were as well qualified to exercise the right of suffrage immediately after becoming located in the country, as a very large class of natural born citizens are, or ever will be;—that by being permitted to participate in the administration of the government they will feel themselves identified with the interests and general prosperity of the country, and will become attached to its institutions;—that, having the rights of citizenship, they are subject to its duties and obligations; and that the nation will be enriched and strengthened by an increase of its citizens. On the other hand, it is claimed, that the character of any government depends upon the character of those who administer it;—that, whatever its form, it becomes free or oppressive according to the character of those who exercise its powers;—that a republican and democratic government can be maintained only by the presence of intelligence and virtue among the people;—that the mass of foreigners are necessarily ignorant of the essential principles of a free government; are peculiarly liable to fall into the hands of unprincipled men and demagogues, who will not hesitate to approach them by the use of corrupting and demoralizing influences; who will mislead them as to the real issues, and avail themselves of their support for selfish and dishonest purposes;—that while it may be true that the mass of foreigners are as intelligent and virtuous as a certain class of native born citizens, that the class of ignorant and vicious native born citizens, who are entitled to the elective franchise, are naturally as large as it is safe for any republican government to attempt to hold in check, without being largely increased by the addition of an uneducated and undisciplined foreign element; and that, therefore, it is the more prudent and safe policy to require a long residence in the country, in order that the foreigner may become familiar with the practical operations of the government; with the character and habits of those concerned in its administration; in short, that he may become politically acclimated before he attempts to declare who shall administer the public authority, and

to prescribe for the political welfare of the nation. Practically it has been found, that that class of immigrants who come to this country to benefit their physical and social condition by habits of industry and honest living; who immediately seek some honest and honorable occupation, are abundantly qualified to participate in the administration of the public authority after the brief residence of five years. But that other class who come hither because it was impossible, or, at least impolitic, for them to remain at home; who had no honest or honorable occupation in the old world, and who proposed to find none in the new; whose highest ambition it is to eat and to drink and to indulge in their animal propensities; who settle mostly in cities and the larger towns, because of the facilities for dishonest and dishonorable gains, have proved themselves dangerous to the security and welfare of society, and, so far as they have obtained political power, it has been used for the lowest and basest purposes. They are ever ready instruments in the hands of dishonest and gambling politicians to place the political power of the country in the possession of those who use it for purposes of private emolument, regardless of what the public welfare demands. Experience has already taught, that the greatest danger to the future of the commonwealth is to come from this class, as aids to the demagogue and trading politicians of the nation; — that measures must be taken to elevate this class to that standard of intelligence and morality which will make it safe to intrust them with political power, or they must be deprived of its exercise.

§ 384. The mode by which an alien may become a citizen, and be invested with the privileges and immunities of citizenship, is denominated his naturalization. By its operation the political status of the alien is changed in the eye of the law, and he is in a condition to enjoy all the advantages conferred by birth upon the other class of citizens. The rights and privileges of aliens, as mere residents of the states, differ in different states. In general the United States leave to the state administrations those regulations which affect their rights of property, and also the manner in which they are to be exercised and enforced. But it cannot be doubted that the alien is subject to the supervision and control of the general government, should it become necessary for it to exercise its authority. Thus, if a war

should break out between the United States and the country of which the alien is a citizen or subject, on general principles, he would thereby become an alien enemy, and would be liable to be sent out of the country at the pleasure of the general government; or to be laid under such restraints, while remaining within it, as congress might deem to be reasonable and proper. While the alien is the legal subject of the nation with which the United States is at war, the presumption is that he will be true to the interests of his nation; and will avail himself of every means to advantage her; therefore the right of self-defense justifies the government in taking necessary measures to guard against any injury he might be disposed to inflict in behalf of his liege sovereign and country.

§ 385. The duration of the character or quality of citizenship, that is, of defeasible or indefeasible allegiance, has been the subject of much discussion, and has not been so definitely settled hitherto as to be beyond even further discussion. The doctrine of indefeasible allegiance has, perhaps, deeper root in England than in any other European country; and, in discussing the grounds upon which the doctrine of perpetual allegiance is based, it becomes necessary to find their theory of the source of governmental authority, or the subject of this indefeasible allegiance.

§ 386. Almost the entire real property of England is, by the policy of its laws, supposed to be granted by, dependent upon, and holden of some superior lord, in consideration of certain services to be rendered to the lord by the tenant or holder of the land. Thus all the lands of the kingdom are supposed to be holden, mediately or immediately, of the king, who is styled the lord paramount. In this manner are all the lands of the kingdom holden, which are in the hands of subjects. All tenures being thus derived from the king, those that held immediately of him, in right of his crown and dignity, were denominated his tenants *in capite*, or in chief. There were several species of tenures, each characterized by the species of services or renders due the lord from the tenants. Bracton divided them into *frank-tenement and villenage;* and of frank-tenements he says, some are held in consideration of homage and *knight service;* others in *free-socage*, with the service of fealty only. And of villenages, some are pure and others are privileged. He that holds in pure

villenage shall do whatever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called *villein-socage*, and these villein-socmen do villein service, but such as are certain and determined. So, according to Bracton, the subjects of England holding the lands were, first, those where the service was free but uncertain, as military service with homage; that tenure was *per servitium militare*, or by knight service. Second, where the service was both free and certain, as by fealty only, or by rent and fealty; that tenure was called *liberum socagium*, or free-socage. Third, where the service was in its nature *servile* and *base*, and uncertain as to time and quantity; this tenure was *purum villenagium*, absolute or pure villenage. Lastly, where the service was *base* in its nature; but certain in quantity, this tenure was *villenagium privilegiatum*. But whatever the tenure by which he held, he was bound by oath of service to his superior lord, from which obligation he had no right or authority to absolve himself.

§ 387. The constitution of feuds had its origin from the military policy of the Northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals and the Lombards,[1] who poured themselves into Europe at the declension of the Roman Empire. The feudal policy was not established in England until the reign of William the Conqueror. The exact period of its establishment cannot be ascertained; but, it was probably after the threatened invasion from Denmark, in the nineteenth year of King William's reign. The defenseless condition of the country at the time, was the occasion of the calling of a grand council to enquire into the state of the nation; the immediate consequence of which was the compiling of the great survey called domesday-book, which was finished the next year, and in the latter end of the same year, the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person. The law and the form of the oath, made every man taking it, a tenant or vassal, the tenants obliging themselves to defend their lord's territories and titles against all enemies, foreign and domestic.[2] This

[1] 2 Bl. Com., 45.

[2] "Statuimus, ut omnes liberi homines foedere et Sacramento affirment, quod intra et extra universum regnum Angliae, Wilhelmo regi domine suo fidelis esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigena defendere." (See 2 Bl. Com., 50.)

new policy was imposed by the conqueror, says BLACKSTONE, but was nationally and freely adopted by the general assembly of the whole realm.[1] Here will be found the basis of that indefeasible allegiance so strenuously contended for in England, as inseparable from the British constitution.

§ 388. Therefore, whatever repugnance may be felt to the assertion of the fact, the present government of England, in theory, is founded on conquest, the property having been transferred to the king by his subjects, to be held by them afterward as tenants, and on conditions of services and fealty. Afterward the oaths of fealty and homage accompanied grants of land, and the oath of allegiance necessarily accompanied that of fealty. Certain consequences were understood to flow therefrom. The allegiance thus pledged could not be withdrawn by the subject. It was a matter of contract between him and the king, and was perpetually binding, unless the protection of his sovereign, which was the consideration of his allegiance, became impracticable or impossible. Hence, if the monarch was driven out by a successful competitor, who took possession of the throne, the allegiance of the subject was transferred, and it became his duty to obey the reigning sovereign. So also, when the king by treaty with a foreign power, alienated an entire territory, and its inhabitants, the allegiance was transferred to the new sovereign. From this allegiance, original or transferred, the subject could not withdraw himself: he was the subject of the king; one in whom the king had a species of property, transferable at his sovereign pleasure, but not at the pleasure of the subject. Such is the basis of the doctrine of indefeasible allegiance in England, and such the theory. But it has no application to a country where the people are sovereign, and where the allegiance arises from the necessity of government and the rights incident to such necessity.

§ 389. In a democratic republican government, the sovereignty of the nation consists in the authority of the members of the national society taken together as a whole. The government instituted by them is a mere instrument for the administration of their authority for purposes of individual protection, and for the common defense and general welfare of the whole society. The allegiance which a member of that society owes

[1] 2 Bl. Com., 50.

to the government, arises from the fact of membership of the society, and the necessary condition of obedience to all its requirements. The government is instituted to protect each member in the enjoyment of his civil liberty to the fullest extent, consistent with the like rights and liberties in others. Naturally, every one has the right, and is at liberty, to visit all parts of the earth as the common heritage of man; and to select such place for his home in any zone which pleases him. He is not responsible to any one for his parentage, or for the place of his birth. Naturally, he is at liberty, as soon as able to provide for himself, to seek such social and political associations as he feels to be for his good. He can be under no possible obligations to live under the particular form of government, under which he chanced to be born. He may seek the highest and best his nature and destiny demand; and, therefore, no society or government has any just authority to restrain him of such natural liberty, nor can it impose upon him obligations inconsistent with such liberty. He is obliged to obey the requirements of the authority under which he lives, or where he chooses to make his home; and if he sees fit to become an integral member of such society, that he may claim its fullest protection, and enjoy its largest privileges, he is bound to serve it in common with the other members thereof, if need be, with his property and life. But if he deems it best for himself to withdraw therefrom, and seek political and social associations elsewhere, he releases society and government from all further responsibilities on his account; and he should be freed from responsibilities to them. The basis of allegiance to government and society, is gone, when the relation between the citizen and it, is dissolved and ended.

§ 390. The theory of indefeasible allegiance is inconsistent with that natural liberty belonging to man, as essential to enable him to seek his highest good and ultimate destiny. Not being responsible to any authority for his parentage and birth, and being liable to be born under a government under which he cannot possess the rights essential to the unfoldment and perfection of his true manhood, it is his natural and inherent right to migrate therefrom in search of those associations he needs for his true development, and to make his home under the fostering care of such a government as will protect him in the enjoyment of that liberty which

belongs to him, and which he must possess or fail of his birthright. But to enjoy the full advantages of citizenship he must become a citizen. He must be at liberty to pledge full and undivided allegiance to the adopted government, free from the claims of any other; and thus to stand before the world, an equal citizen of such government, entitled to equal protection and to equal rights. Indefeasible allegiance is not consistent with the doctrine that governments are instituted for the benefit of the governed, and belong to the people. When a republican nation opens wide its political arms to receive and adopt as her own, the oppressed of other countries, she must necessarily repudiate the doctrine of indefeasible allegiance, or be unfaithful to her adopted citizens.

§ 391. RAWLE, in his commentaries upon the constitution, speaking of the indefeasible allegiance of the native and adopted citizens, remarks that, "in the native, his allegiance is coeval with his life; in him who migrates hither from another country, it commences as a permanent duty, with his naturalization; in both it lasts till death, unless it is released by some procedure mutual on the part of both the state and the individual." But, he adds, "whether the individual alone can relinquish it, is a question which in this, as well as other countries, has been often discussed, and on which an opinion cannot be given without diffidence, since it has not yet received a decision in the highest tribunals of our country." He continues: "in the first place we may dispose with little comparative difficulty, of the case of the naturalized citizen. His accession is voluntary, and his engagement is, neither in terms nor its nature, limited to any time. He, therefore, binds himself by contract for his life; and the state, which, differently from the doctrine of the English and other monarchies, cannot afterward deprive him of the quality thus acquired, which cannot again, by its own act, convert him into an alien, is equally bound for the same term," and he quotes LOCKE as an authority upon this subject.[1] With due deference to the learned commentator, the argument is not satisfactory. Unless the obligations of the adopted citizen are more permanent and binding than those of the native born, the reasoning cannot be sound. If the native born citizen cannot

[1] See Rawle on the Constitution, p. 85; see Locke on Civil Government, ch. 8.

renounce his allegiance to his government, he cannot assume the obligations of allegiance to a new nation or sovereign; for it is quite clear that he cannot be under obligations of allegiance to two independent sovereigns at the same time. He can no more serve two masters politically, than he can religiously; for politically he is quite liable to be required to defend the one, and to defeat the other. Therefore, the hypothesis that an adopted citizen can be bound by an oath of allegiance to be loyal and true as a citizen of his adopted country implies that he can lawfully put off his native allegiance. And if one can lawfully put off his native allegiance there is little ground for arguing that an adopted citizen may not, in the same manner, put off his adopted allegiance when he renounces the society and protection of his adopted country to enter into, and become the loyal subject of another. To deny this right of changing allegiance by changing countries and adopting a new home, implies that the sovereign or government has a kind of property in the subject or citizen; which doctrine is not recognized in America.

§ 392. Whatever may be the theory as to the foundation of a subject's obligation to be loyal and true to his government, the real basis of this obligation is to be found in that necessity which God has imposed as the only condition of social existence, security, order and public welfare. It matters not whether man undertakes to obey the requirements of law, and to be loyal to the authority by which the society in which he resides is governed; it is indispensably necessary that he should be obedient and loyal, while he continues a member of such society; and it matters little whether his obedience be compelled upon the theory of a contract, or upon the fact of an imperative necessity. But if he withdraws from such society, and goes beyond the jurisdiction of its laws, and becomes a member of another and an independent community, the same necessity is upon him in relation to his new association. He must be loyal to the government of which he becomes a citizen or subject, and must obey its laws. Says Mr. RAWLE: "The compact created among the citizens by the declaration of independence, was well understood by themselves at the moment not to be of a temporary nature, and in the power of the individual at pleasure to dissolve. It was essential, not only to the permanence, but to the formation of the new government,

that every one, either taking an active part in its establishment, or giving evidence of his consent by remaining within it, should be considered as bound to it so long as it continued."[1] It will not be contended that the inhabitants of the United States by their declaration of independence, intended, individually to bind themselves to forever surrender their right to emigrate to another country, if health, business or inclination should, in after life, prompt them to do so; and that should they find in another climate, and under another government, a congenial home, that they would not be permitted to accept and enjoy it because they had in early life united in achieving the independence of the American nation. The argument in favor of indefeasible allegiance drawn from the implied compact of the people in declaring and achieving their independence, is neither forcible nor satisfactory. That they bound themselves together to maintain and defend their common independence, may be admitted; but it is not thence to be inferred that they deprived themselves of the liberty of seeking other homes in other climes and under other governments.

§ 393. Congress has power to establish uniform laws on the subject of bankruptcies throughout the United States. This power was given to congress as a means of carrying out the declared objects of the people in instituting the general government, to wit: to establish justice, insure domestic tranquillity, and promote the general welfare. Commerce, credit and confidence were the particular things which did not exist under the old confederation, and which it was a principal object of the framers of the constitution to create and establish. A vicious system of legislation, a system of paper money and tender laws, had completely paralyzed industry, threatened to beggar every man of property, and ultimately to ruin the country. The relation between debtor and creditor, always delicate and always dangerous whenever it divides society, and draws out the respective parties into different ranks and classes, was in such a condition in the years 1787, 1788 and 1789, as to threaten the overthrow of all government; and a revolution was menaced more critical and alarming than that through which the country had then recently passed. The object of the new constitution was to arrest these evils; to awaken industry, by giving security to property; to establish confidence, credit and

1 Rawle on the Const., pp. 86, 87.

commerce, by salutary laws, to be enforced by the power of the whole community. The revolutionary war was over; the country had peace, but little domestic tranquillity; it had liberty, but few of its enjoyments and none of its security. The states had struggled together, but their union was imperfect; they had freedom, but not an established course of justice. The constitution was therefore framed to form a more perfect union; to establish justice; to secure the blessings of liberty, and to insure domestic tranquillity.[1] With respect to the internal administration of the general government, the objects of the constitution were, among other things, commerce, credit, mutual confidence in matters of property, and these required, among other means, a uniform standard of value, or medium of payment. Therefore, one of the first powers given to congress, is that of coining money, and regulating its value; and fixing the value of foreign coins. And among the first prohibitions to the states, is that of coining money; emitting bills of credit; making anything but gold and silver a legal tender in payment of debts, or making any law impairing the obligation of contracts. Thus the powers conferred on congress, and the restrictions imposed upon the states, clearly indicate the purpose of the people, when they committed to congress the power to make uniform laws on the subject of bankruptcies throughout the United States.

§ 394. The general object of all bankrupt and insolvent laws is, on the one hand, to secure to creditors an appropriation of the property of their debtor, to the discharge of their debts *pro tanto*, whenever the debtor is unable to discharge the full amount of the same; and, on the other hand, to relieve unfortunate and honest debtors from perpetual bondage to their creditors, either by unlimited imprisonment to coerce payment, or by a right to appropriate the subsequent property of the debtor for that purpose. One of the first duties of legislation, while providing for the obligation of contracts, is, to relieve the unfortunate and meritorious debtor from a slavery of mind and body, which deprives him in a great measure of the enjoyment of the comforts of life and the common benefits of society. But the power of affording this relief should be intrusted to the administration of those who are liable to be affected by it either as the debtor or creditor

1 See Webster's remarks in *Ogden* v. *Saunders*, 12 Wheat., 247, 248.

class. A local government should not possess the authority to absolve a debtor from the legal obligations to pay his debts contracted in another jurisdiction, for the reason that the laws of a state can have no force beyond its local jurisdiction. Thus, if New York by its laws, can relieve a citizen of his legal obligation to pay his debts or fulfill his contracts, entered into in other states, and made legally binding by the law of the place where the debt was contracted or the contract was entered into—then, indeed, the obligations of contracts are left to the legislation of the several states; and the question of validity and of enforcement depends upon the place where the debtor is to be found when the fulfillment of his obligations is demanded. Then a valid contract entered into in New York may become invalid by the act of the party removing into another state, where such a contract is condemned, or deemed to be against the public policy of the state. It is consistent with the principles of republicanism to permit a state to impose the conditions of legal obligation arising out of the transactions of individuals within its territorial limits; it may prescribe what shall be essential to the legal validity of any contract made within its jurisdiction touching any subject; as, that contracts of a certain description shall be in writing; or shall be sealed; or shall be witnessed; or shall be executed with certain solemnities; for these conditions are prescribed by those who are to be affected by, and who are also to administer the law. But a state has no authority to prescribe these conditions of validity to contracts made in other states, and valid by the laws of the state where made. Thus, New York cannot say that a contract made in New Jersey and valid there by the laws of New Jersey, shall not be valid against the parties wherever they may be found; because the contract when made in New Jersey was not only morally but it was legally obligatory upon the parties; and it is not in the province of any other state to say that such obligation shall be destroyed or impaired by her local laws.

§ 395. There is a wide distinction between a legal obligation and a moral duty to fulfill a contract entered into between two parties. The moral obligations of a contract do not depend upon the law of the place where the contract is made; while the validity or legal obligations imposed thereby, do. The duty of performing a contract entered into between parties where the subject

thereof is moral and just, rests on principles of universal law; the obligation to perform it, rests upon the law of the place where the contract is made. Thus, two individuals may make a contract in a locality over which no law of society extends. If the contract be in accordance with the principles of natural justice and universal law, it may be enforced in the courts of law in any civilized country; because being valid and obligatory according to the principles of natural law, and there being no local law to prohibit the making of it in the manner and form in which the parties bound themselves, the legal obligation is perfect, and may be enforced in any court of law where perfect obligations are recognized. The prohibition of the constitution, that no state should make a law impairing the obligation of contracts had undoubted reference to the legal obligation of contracts depending upon the law of the place where such contracts were made. The spirit of the provision is this: A contract which is legally binding upon the parties at the time and place it is entered into by them, shall remain so, any law of the states to the contrary notwithstanding.

§ 396. In accordance with these principles, the power to make uniform laws on the subject of bankruptcies is committed to the legislative department of the general government, without any restriction of its authority in that respect. The intention of the people is well expressed by reading the constitution in this manner, No state shall pass any bill or law impairing the obligation of contracts; but congress may establish uniform laws on the subject of bankruptcies, throughout the United States. The general government has jurisdiction over all persons and property within the United States, to execute the plenary power and authority of the nation in respect to all subjects committed to its jurisdiction. It can determine upon what conditions and in what degree individuals may be released from the complete fulfillment of their contracts. That is, as the supreme authority upon that subject, congress can by law determine the limit of legal obligations arising out of every species of indebtedness, and can prescribe the manner by which a party should proceed to obtain legal absolution of his debts. This principle recognizes the authority in the government to determine what shall constitute a legal obligation, and what shall cancel it. It recognizes the principle that legal obliga-

tions as distinguished from moral, have their basis in the will of society or government, and can only be enforced by its laws; that society may determine by law what shall be essential to the validity of any contract upon any subject, and the manner in which legal obliga tion shall be enforced. Thus sovereignty has authority to prescribe the *lex loci* and the *lex fori* of the state; and every government intrusted with the exercise of sover eign authority may exercise this power within the limits of its jurisdiction. Upon this theory, the several state governments, so far as they are not restrained by the constitution of the United States, may exercise this authority. This follows from the doctrine that there is but one authority to be administered by the general and state governments; and that is, the authority of the people as a nation. Each has the subject of its jurisdiction assigned to it; the general government finding its jurisdiction in the subjects enumerated in the constitution of the United States; and the state governments finding the subjects of their jurisdiction in what remains, or in what are not enumerated or prohibited to them in the constitution.

§ 397. From the foregoing, it would seem that the states may prescribe everything pertaining to the validity of contracts to be made within their respective jurisdictions, so long as they do not interfere with any law of congress upon that subject, or with the prohibitions of the constitution, and do not attempt to extend the operation of their laws into other jurisdictions. That is, a state may make any law which affects the validity, the construction, the duration, the mode of discharge, or the evidence, of any subsequent contract to be made within its jurisdiction, and thus may impair the contract. Thus, the law which declares that no action shall be brought whereby to charge a person upon his agreement to pay the debt of another, or upon an agreement relating to lands, unless the same be reduced to writing and signed by the parties, impairs a contract for that purpose, made by parol. But when the state has by law prescribed the manner in which contracts shall be executed and evidenced, in order to be binding, the legal obligation of the contract upon the parties depends upon their compliance with these statutory requirements. If such essential requirements are not complied with by the parties, the contract does not become obligatory upon them; and, consequently, such law does not come

within the inhibitions of the constitution, prohibiting the states from making laws impairing the *obligations* of contracts. Thus, the state may, by law, determine what shall be essential to the validity of a contract made within its jurisdiction; how the same shall be proved; by what rules it shall be construed; how long it shall continue to bind the parties thereto; and in what manner its obligations shall cease or be discharged; but such laws are applicable only to contracts made within the same jurisdiction, and subsequent thereto. For a contract which has once become obligatory upon the parties under the law of the time, and of the place of its execution or performance, cannot be modified, limited or restrained in its legal effect or operation by any state law.[1]

§ 398. The power to make uniform laws on the subject of bankruptcies throughout the United States, committed to congress by the constitution, is not limited in its application to contracts made subsequent to the enactment of such laws. The restrictions of the constitution apply only to the states, leaving to congress the unlimited authority of the nation, over such subject. Congress, therefore, has plenary authority to pass a bankrupt law which shall be binding throughout the United States, affecting civil contracts of every character within the department of commercial intercourse, and determining upon what conditions, and in what manner they may be discharged. Twice congress has passed a bankrupt law; and permitted the same to remain in force long enough to allow the most unworthy class of debtors, who were ever ready to evade the obligations of their contracts, to avail themselves of their provisions; but they repealed those laws, before the more meritorious class of debtors had concluded to seek their aid. In general, honest men are averse to the avoidance of their contracts; and will struggle long to comply with their obligations, before they will avail themselves of either an insolvent or bankrupt discharge. Consequently, they are usually the last to apply for the benefit of such laws, while on the other hand, men less scrupulous, are eager to avail themselves of every advantage, and are usually the first to appropriate to themselves the benefits of insolvent and bankrupt laws. The brief duration of the bankrupt laws hitherto enacted by congress, has, in general, had the effect to do all the

[1] See *Ogden* v. *Saunders*, 12 Wheat., 213.

mischief bankrupt laws are liable to do, without much of their accompanying benefits; for by the time the large mass of those who were justly entitled to its aid had concluded to ask for relief, the laws were repealed. There can be no doubt that an efficient and just system of bankrupt laws is demanded by the people of the United States, and that it is the duty of congress to provide such a system. They should make it as perfect as possible, and then amend its provisions from time to time as experience demonstrates the necessity. In this way, a wise and just system would eventually be adopted, which would establish justice and promote the general welfare of the nation.

CHAPTER XII.

POWER OF CONGRESS TO COIN MONEY, &C.

§ 399. THE congress shall have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.[1] This power is plenary and exclusive in congress. They have all the power over the subject of the currency possessed by the nation; and whatever they do in that respect is done by the authority of the nation; because the constitution has given them unlimited authority to coin money, regulate its value, and the value of foreign coin. Money is the universal medium by which all commercial and exchange values are determined; and it represents the respective values of all commodities. It is the measure by which the equivalents of commodities are ascertained. This power is one of the prerogatives of sovereignty, and implies authority over the property interests of the nation. The power to coin money and affix a value at which it shall be taken in exchanges, or in satisfaction of debts, or of damages to persons and property, belongs to that absolute sovereignty which can be found only in the nation, and which is responsible to no other earthly power. "As money is the medium of commerce, it is the king's prerogative as the arbiter of domestic commerce, to give it authority and make it current. The coining of money is, in all states, the act of sovereign power. The denomination or value for which the coin is to pass current, is also in the breast of the king."[2]

1 Art. 1, § 8, cl. 5, Const. U. S. 2 1 Bl. Com., 276.

§ 400. To coin money and regulate its value as an act of sovereignty, involves the right to determine what shall be taken and received as money; at what measure or price it shall be taken; and what shall be its effect when passed or tendered in payment or satisfaction of all legal obligations. The act of coining money consists in affixing to that which is to constitute money, the stamp or seal of sovereign authority, by which it may be recognized and known in market as being authoritatively entitled to be received at the price or value marked thereon. The authority which coins or stamps itself upon the article, can select what substance it deems suitable to receive the stamp, and pass as money; and it can affix what value it deems proper, independent of the intrinsic value of the substance upon which it is affixed. The usual substances which have been selected for the purpose of being used as money, are the various metals, as silver, gold, copper, brass and such alloys as the sovereignty in its pleasure adopts. The currency value is in the stamp when used as money, and not in the use of the metal, independent of the stamp. In other words, the money quality is the authority which makes it current, and gives it power to accomplish the purpose for which it was created. To coin or stamp money, and regulate its value, includes the whole power of sovereignty in respect to currency. It includes the authority to select the substance to receive the impression; to determine what impression shall be enstamped thereon; what shall be its office as a medium of exchange; at what price it shall be received; and what shall be the penalty to be inflicted for discrediting, counterfeiting, or in any manner interfering with its legal and authoritative value. Because gold and silver have usually been selected as the basis of currency, the popular idea of value attaches to the metal rather than to the royal or sovereign authority stamped upon it; and while they recognize the authority of the government to change the relations between the intrinsic value of the metal and the current value of the coin, they are slow to understand that such relation is arbitrary, and depends solely upon the will of the sovereign.

§ 401. By keeping constantly in mind that the quality of money or legal currency, consists in the enstamped authority of the government upon that which is used as such; and that the authority to coin money and affix

its value, involves the whole power of sovereignty over the subject of legal currency — to select what substance, affix what stamp, and ordain what value, it pleases—the whole law upon the subject of money, as a currency, and money as a commodity, becomes comprehensible. But to confound the legal quality of money, with the commercial value of that which is used to receive the royal impression, begets infinite difficulty, because there is no necessary relation between the two. Government, like the Spartan law-giver, may put its stamp upon leather, and make that currency; and so long as it can provide against the counterfeiting of the same, and thus can regulate the quantity in use, it can give to its stamp upon leather the same money value, as if put upon gold, or silver or any other substance. Thus government may put its royal or sovereign stamp upon paper, affixing its money value, and if it limit the quantity and provide fully against the counterfeiting of it, it will have the same currency value as gold or silver, or any other substance. It must be remembered that, legally speaking, money is not a commodity; and commerce can make it such only by dealing with that upon which the money quality is impressed.

§ 402. Much has been said about paper money, and gold, silver and copper money; but all such language is deceptive. There is no such thing legally as gold and silver money and paper money. Money, as the measure of price or value, is the sovereign authority impressed upon, and attached to, that which is capable of taking and retaining the impress of that authority. It is the recognized presence of sovereignty in the market, and in the court, applying the measure, and determining the equality of exchanges of commodities between subject and subject; between peasant and prince; between crown and people. As a medium of exchange, as a means to an end, it has no value but the sovereign will recorded upon its face; and in respect to its use its value is as unchangeable as the authority that created it. It measures all values by its own; and can know no other measure of value. Its value being fixed by the will of the sovereign, and not by the intrinsic qualities of that upon which it is impressed, legally, it cannot vary. Its relative proportion to other things may disturb their relative values, but its legal value stands fixed and immutable, while the price of commodities measured

by it, rise and fall. The philosopher can explain the reason, but he cannot change the law.

§ 403. The act of coining money consists in imparting to any substance this legal currency quality, by which it can legally be used as a medium of exchange, without permitting its value or authority to be questioned in the domestic market. That upon which the stamp is placed is called coin; the act of stamping is called coining; and as the practice of all governments using currency, has been, generally, to place its money stamp upon metals of some kind, the common idea of coin is, that it must be a metal, as a substance distinguished from other substances. But this rests solely in the discretion of the sovereign or sovereignty; whether the coin shall be metal, leather, parchment, paper, or any other substance, is a question of expediency — of political economy — and not of authority. The authority selecting the substance to coin, if wise, will consider the fitness, the adaptation, the economy, the necessity for the public use. There is a need in every society for a medium of exchange — for money. Hitherto no nation or state has discovered the means of dispensing with it. It is a public necessity as well as private; and should be provided in such a way as to subserve the public as well as private use. There are times when large expenditures are required to be made, beyond the ordinary capacity of the currency to represent them. There must necessarily exist the authority to adapt the currency or money to these public exigencies. The necessity which requires that it should be used at all, requires that it should be made adequate to any public emergency. The sovereignty or sovereign is then authorized by sovereign necessity, to coin the necessary amount of money to answer as a means of making the purchases or exchanges demanded. If that be neglected, the responsibilities of a state or nation ruined, will attach. The necessity which requires money as a medium of exchange at all, requires that the public authority should make the supply at least equal to the imperative demand of the public welfare; and the government would be as derelict in omitting this, as any other duty to the public.

§ 404. The United States, as a nation, has the same authority to coin money and regulate its value, as other sovereign nations. It is subject to the same necessities, and can adopt the same facilities for adapting the currency to the needs of the nation; and there is no earthly

authority to call it to an account for so doing. In instituting the general government for administering its authority in respect to all subjects enumerated in the constitution, and for the purposes therein named, it conferred upon congress the unlimited authority to coin money and regulate its value; that is, it committed the whole subject of creating and regulating the legal currency to congress; so that congress, as the national legislature, is invested with plenary powers upon this subject. It was the intention of the people that this power should be exercised in such a manner as to make the currency of the nation adequate for any emergency that could arise. The government was instituted, and the powers were conferred, that they might be used in such a manner as to make every department of administration contribute to the declared end the people had in view, to wit, to the establishment of justice, to providing for the common defense, and promoting the general welfare. For these, among other purposes, congress was empowered to coin money and regulate its value, and was further authorized to make all laws necessary and proper for carrying into execution this power. The pretense for attempting to restrict the powers of congress over subjects committed to its jurisdiction, based upon the assumption that congress is a body separate from the people, is without foundation. The people are as eminently and potentially present in congress, to administer their own authority by legislation, as they were in the conventions that framed their government, and established the mode of its administration. Therefore they may be as safely intrusted with the exercise of their authority to coin money and regulate its value, as they were to institute the government, and ordain by whom that power to coin money, &c., should be exercised.

§ 405. As the people of the United States conferred upon congress plenary authority to coin money and regulate its value, and denied to the states the exercise of such powers, they thereby made it the duty of congress to make all necessary legal provisions for supplying the nation with money as a medium of exchange. This proposition admits of no denial. As a sovereign nation, the people had authority to provide for the creation of a legal currency, which should be of equal value as money, throughout the United States. It was necessary that this authority should be exercised

by some one, to provide such currency. It could be exercised by no authority not sovereign, and not coextensive with the United States. It could therefore be exercised by no other than the government of the United States. In the distribution of subjects of jurisdiction between the general and state governments, that of coining money and fixing its value, that is, that of providing a legal measure of value or currency, was committed to congress, not by limited or restricted terms, but in the most liberal and unqualified; so that congress is vested with all the authority of the nation in that respect. Congress is the only body authorized to provide for this individual, state and national necessity. The whole duty and responsibility rests upon it, to supply, under all circumstances, so much money or currency, or to provide for the same, as the exigencies of the public or nation may require. It is no excuse that there is not gold enough, or silver enough in the country to furnish or supply the amount. The authority of the nation to supply itself with the amount of money necessary for any emergency, is not confined to the use of any particular metal, or to any metal at all. The quality of money is neither gold nor silver nor any precious metal. It is simply the sovereign authority of the nation so impressed upon any substance as by its presence to represent such authority in determining at what price or value it shall be received in discharge of legal obligations.[1]

§ 406. The object of the grant of this power to congress is to give uniformity of value as a standard of price throughout the union. The power of coining money is uniformly exercised by the sovereign authority, for the purpose of supplying a uniform currency to the home market. The necessity for such a currency, denominated money, is imperative; and, therefore, the duty of the government intrusted with the exercise of this authority is imperative. This duty requires it to supply a currency of such quality and in such an

[1] As congress alone has the power to coin money and fix its legal value, that is, has the power to determine what shall be received as money, and at what price it shall be received, it must adopt such means in the exercise of such power, as will enable it to accomplish the end for which such power was given. During the recent civil war in the United States, the current expenses of the government were much larger than could be met by the use of all the gold, silver and copper coin in the country. Thus, for four years the average expenditures of the government were about $800,000,000 per annum; yet the whole amount of gold and silver coin in the country, north and south, was less than $250,000,000. Under these circumstances, the continuance of the government, required the exercise of the plenary powers of congress to supply the nation with the means of defending its existence, by a resort to a legalized paper currency.

amount as to answer the imperative demands of the public exigencies. It should also provide against the discrediting, debasing, or the counterfeiting of the currency, or with interfering in any manner with its authoritative value. Every civilized government has found it necessary to provide itself with such currency, and to guard against its debasement, and the counterfeiting thereof. The money thus created by the government, and having its authority as to the price at which it shall pass, stamped upon it, becomes a legal tender in discharge of all legal demands for value, under such regulations as the law-making power prescribes. What shall be permitted to be offered or tendered in discharge of such obligations, depends upon the authority of positive law.[1]

§ 407. Legal obligations are such as are created by law; and can only arise in accordance with the requirements of law. When the law declares that contracts made for the loan of money reserving for its use an amount greater than seven per centum per annum, are usurious and void; no legal obligation arises from the making of such contracts. When it declares that all contracts by which one man undertakes to answer for the debt, default or miscarriage of another, to be valid and obligatory, shall be in writing and be signed by the parties; a contract of that character by parol merely, raises no legal obligation. And thus with every condition which the law-making power sees fit to impose. Inasmuch as the obligation is created by law, it can also be discharged by law; that is, it can be discharged in any manner prescribed by law. For it is a principle of general application, that the power which can create an obligation can likewise discharge it. An obligation which can be enforced by law is called a perfect obligation. Therefore, all perfect obligations are such as the government undertakes to enforce. But it is in the pleasure of the sovereignty to determine what shall be essential to a perfect obligation, and upon what conditions that obligation may continue, and by what

1 "But on the great question, whether the government can make this money — treasury notes — legal tender, the court will not fail to observe that the very term, '*legal tender*,' imports that the subject is one, by the common understanding of mankind, belonging in every sovereignty, to the law-making power. It has been recognized as such in every civilized nation. Gold and silver have been a legal tender with us. Not so in Great Britain. There, except for small sums, it is *gold, or the notes of the Bank of England.* Not so in France. There it is *silver coin and government paper.*" (Remarks of Hon. JOHN K. PORTER in the case of *The Metropolitan Bank et al.*, v. *Van Dyke, Superintendent of the Bank Department of the State of New York*, before the Court of Appeals June, 1863.)

means is may be discharged. Hence arises the authority of government to provide by law that a certain class of contracts shall not be deemed legally obligatory; to provide how contracts shall be executed to become obligatory; to provide how they shall be established in court to be entitled to judicial recognition; to determine by what rules they shall be construed, and their purpose be ascertained; and to provide by bankrupt and insolvent laws, or by limitations, or otherwise, how they may be discharged. It is said, that men may make in respect to their own, what contracts they please, so long as they do not interfere with the rights of other parties. That may be true; and they may do as they please about fulfilling them, unless they comply with the requirements of the law in the making of them. It is to be remembered that individuals do not make the law, and cannot create the terms of legal obligation. The public authority—the law-making power—creates the conditions, and leaves each member to act his own pleasure in assuming contract obligations. But it will undertake to enforce no obligations not created by law. The authority to determine what shall amount to a legal obligation, involves the power to determine by what means that obligation may be discharged. Every government exercising the powers of sovereignty, unless restrained in that particular respect, has authority to provide for a legal tender of performance which, if rejected, discharges the obligation. That tender may be money, labor, chattels, or anything the sovereignty sees fit to prescribe.

§ 408. The power to coin money, and to establish the value thereof, being exclusive in congress, as the national legislature, it has been doubted by eminent statesmen whether the states can authorize the issuing of bank paper to be circulated and used as currency. Mr. WEBSTER, in his speech on the Bank of the United States May 25 and 28, 1832, reasoned thus: "The states cannot coin money. Can they, then, coin that which becomes the *actual* and the almost universal substitute for money? Is not the right of issuing paper intended for circulation in the place, and as the representative of metallic currency, derived merely from the power of coining and regulating the metallic currency? Could congress, if it did not possess the power of coining money and regulating the value of foreign coins, create a bank with power to circulate bills? It would be diffi-

cult to make it out. Where, then, do the states, to whom all control over the metallic currency is altogether prohibited, obtain this power? It is true that, in other countries, private bankers having no authority over the coin, issue notes for circulation. But this they do always with the consent of government, expressed or implied; and government restrains and regulates all their operations at its pleasure. It would be a startling proposition in any other part of the world, that the prerogative of coining money held by the government was liable to be defeated, counteracted or impeded by another prerogative, held in other hands, of authorizing a paper circulation," &c. It is to be remembered that bank notes authorized by the states to be circulated by banking associations or companies, are not, and cannot be made, a legal tender for the discharge of legal obligations; for the states are prohibited by the constitution from making anything but gold and silver coin a tender in payment of debts. Bank paper, therefore, is receivable, or not, at the pleasure of each member of society. But if he do consent to receive it as money, it shall have the effect of money to bind him; or to discharge legal obligations to him, so far as they are created and enforced by the state. This seems to be the extent of the authority required to permit private banking, and the issuing of bank notes to circulate as currency. Where the general government does not interfere to prevent the circulation of such paper as currency, it would seem that the states are transcending no authority on their part in authorizing such circulation, leaving each citizen to exercise his own pleasure in receiving and using the same. It may be a question of expediency—of economy; but it would seem not to be a question of authority.

§ 409. Besides the power to coin money and regulate its value, congress has also the power to fix the standard of weights and measures. The whole clause together, gives to congress the power to determine the measure of all values, and of all quantities. This power is given to the general government for the sake of uniformity so essential to the convenience of commerce. The attention of congress has frequently been called to this subject, but owing to the many difficulties attendant upon it, they have never fully exercised the power. JOHN QUINCY ADAMS, as secretary of state, made an able report upon the subject on the 22d of February,

1821, which was referred to a select committee. Among the recommendations of that committee were the following: that the president should cause application to be made to the English government to allow models of the yard, the Winchester bushel, wine gallon and pound—avoirdupois—to be procured from its offices;—that the yard should be traced upon the rod of platina in the possession of the department of state, on which the French metre is traced;—that the models should be made with the utmost accuracy that the art and science of England can give, and if satisfactory to congress, should be declared the standard yard, bushel, liquid gallon and pound of the United States. The committee were of the opinion that the standard of length and weight should be of platina; because of its very extraordinary properties; its unequaled specific gravity; its infusibility, its durability, its power of resistance against all the ordinary agents of destruction and change.[1] The committee concluded their report by recommending that the president of the United States be requested—if the consent of the government of Great Britain should be given—to cause to be traced on a rod of platina the yard of the year 1601, which is kept in the British exchequer;—that he cause to be made of platina a pound of the weight in value of the English avoirdupois pound;—that he cause to be made of whatever material he shall deem best for standards of those measures, a vessel of the same capacity as the standard Winchester bushel; and also a vessel of the same capacity as the standard wine gallon of England. They also recommended that the president be requested to cause to be made models of these weights and measures, for distribution among the several states,[2] but these recommendations seem never to have been carried into effect, and as yet each state exercises the authority of fixing its own standard of weights and measures.

§ 410. Congress shall have power to provide for the punishment of counterfeiting the securities and current coin of the United States. Under this provision, congress has power to punish the act of counterfeiting and also the bringing of counterfeited coin into the country from foreign countries, and the passing and uttering of the same.[3] The authority to punish for the

[1] Annals of Congress—First session XVIIth congress, vol. 2, p. 1251.
[2] Id., 1253.
[3] *United States* v. *Marigold*, 9 How., 560.

act of counterfeiting the coin of the United States is exclusively in congress; but the states may provide against the circulation of such coin within their respective jurisdictions, by penal enactments.[1] The right of the local government to punish for cheats and frauds practiced within their respective limits is unquestionable, irrespective of the instrumentality by which it is done. The authority to punish the act of counterfeiting the coin of the United States, would seem to be incident to the power of coining money and regulating its value. There would be little practical value in the exercise of the power to coin money and regulate its value, if the authority to protect the public against the frauds incident to counterfeiting such coin or money, was not also to attend the power. In truth, its value could not be regulated to any practical purpose, while counterfeiting thereof should be permitted. But as the whole subject of currency is virtually committed to congress, to them properly belongs the power to provide, by penalties, for the preservation of its character.

§ 411. The principle underlying the distribution of powers between the general and state governments, determining what authority should be exercised by the one or by the other, or concurrently, is this: Those interests which were common to the whole people as a nation, and in the provisions for which, all parts of the country were alike interested, were committed to the supervision and control of congress, as the representative body of the nation, to be administered upon by all the people. Those which were local in their character, affecting only the local and domestic interests of each particular state, depending upon local circumstances and interests for the proper character of governmental administration, were left to be exercised by those whose interests were especially to be affected, and who knew best what should be the special adaptations of administration to those circumstances and interests. Those powers which might be exercised concurrently with safety to the local and general welfare, and without conflict, were left to be concurrently exercised, until congress, as the representative body of the nation, should especially assume the exercise of such powers, when they would then be deemed to be exclusive in congress. Such are the general principles underlying the distribution of powers to be exercised by the general

[1] *Fox* v. *State of Ohio*, 5 How., 433; see also 14 id., 13.

and state governments. In accordance with this rule, the common currency of the country, and the uniformity and stability of its value, are subjects in which all parts of the country are alike interested; also the punishments by which the counterfeiting of the coin and the discrediting of the currency thereby are to be prevented, are alike matters of importance to all sections of the country. But the possessing of counterfeited coin or currency with intent to pass the same; or the uttering and passing the same upon citizens or inhabitants of the state, with intent to defraud them; is also an offense against the local and domestic welfare of the people; and is properly the subject of local inhibition and punishment. Keeping this rule in view, it is easy to determine what powers ought to be deemed exclusive in congress, and what may be safely treated as concurrent with the states.

§ 412. As illustrative of this rule, the remarks of Justice DANIELS in the case of the *United States* v. *Marigold*[1] are pertinent. He said the stress of the argument in the case of *Fox* v. *The State of Ohio*[2] was to show, that the right of the state to punish the cheat had not been taken away from her by the express terms, nor by any necessary implication, of the constitution. It claimed for the state neither the power to coin money, nor to regulate the value of coin, as established and regulated under the authority of congress. In illustration of this right in the state, and in order merely to show that it had not been taken from her, it was said that the punishment of such cheat did not fall within the express language of those clauses of the constitution which gave to congress the right to coin money and regulate its value, or to provide for the punishment of counterfeiting the current coin. It was also said by this court, that the fact of passing or putting off a base coin did not fall within the language of those clauses of the constitution, for this fact fabricated, altered or changed nothing, but left the coins, whether genuine or spurious, precisely as before. But this court have nowhere said that an offense cannot be committed against the coin or currency of the United States, or against that constitutional power which is exclusively authorized for public uses to create that currency, and which, for the same public uses and necessities, is authorized and bound to preserve it; nor have they said

[1] 9 How., 560. [2] 5 id., 433.

that the debasement of the coin would not be as effectually accomplished, by introducing and throwing into circulation a currency which was spurious and simulated, as it would be by the actually making counterfeits—fabricating coin of inferior metal. On the contrary, we think that either of these proceedings would be equally in contravention of the right, and of the obligation pertaining to the government to coin money, and to protect and preserve it at the regulated or standard rate of value. With a view to avoiding conflict, this court, in the case of *Fox* v. *The State of Ohio*, have taken care to point out, that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We think this distinction sound, as we hold to be the entire doctrines laid down in the case above mentioned, and urged them as being in no wise in conflict with the conclusion adopted in the present case.[1]

§ 413. "Congress shall have power to establish post-offices and post-roads."[2] There has been much controversy as to the extent of the powers granted by this clause of the constitution. One party contends that the power to establish post-offices and post-roads includes only the power to direct where post-offices shall be kept, and on what roads the mails shall be carried;—that the power to establish post-roads is simply the power to designate what roads shall be mail roads, and to establish the right of passage or way along them when so designated. President MONROE, in his message to congress of the 4th May, 1822, discussed this question at length. He contended for the strict construction of this power. His argument was, that the sense in which words are commonly used is that in which they are to be understood in all transactions between public bodies and individuals;—that the intention of the parties is to prevail; and that the way to ascertain that intention is to give to the terms used their ordinary import; that the import of the word establish, and the extent of the grant which it controls, as understood by enlightened citizens, is satisfied by giving to congress the power to fix on the towns, court houses, and other places throughout our union, at which there should be post-offices;

[1] 9 How., 560. [2] Art. 1, § 8, ch. 7, Const. U. S.

the routes by which the mails should be carried from one post-office to another, so as to diffuse intelligence as extensively, and make the institution as useful as possible; — to fix the postage to be paid on every letter and packet thus carried, to support the establishment; and to protect the post-offices and mails from robbery, by punishing those who should commit the offense; — that the use of an existing road by the stage, mail carrier or post boy in passing over it as others do, is all that would be thought of, the jurisdiction and the soil remaining to the state, with a right in the state, or those authorized by its legislature, to change the road at pleasure. The president further contended that the intention of the parties was also to be inferred from their action under the confederate government; — that there was a grant of power for the same purpose, in these words: "The United States in congress assembled, shall have the sole and exclusive right and power of establishing and regulating post-offices from one state to another throughout the United States, and of exacting such postage on the papers passing through the same, as may be requisite to defray the expenses of the said post-office;" — that the word establish, was the ruling one in that instrument, and was there intended and understood to give the power simply and solely to fix where there should be post-offices; — that post-offices were made for the country, not the country for post-offices; — that they are the offspring of improvement, and never go before it; — that no example could be given of a post-office being established without a view to existing roads; — and that in no case prior to the adoption of the constitution, had a single road been made for the sole purpose of accommodating a post-office; — that in the grant of this power it was the intention to limit it to the same extent as had before been practiced; — that these conclusions are further confirmed by the object of the grant, and the manner of its execution; — the object was the transportation of the mails throughout the United States — the manner of executing it admitted of their being carried on horseback as had often been done; — that the object of the grant, and the means of executing it were so simple that it would excite surprise if it should be thought proper to appoint commissioners to lay off the country on a great scheme of improvement, with the power to shorten distances, reduce heights, level mountains, and

pave surfaces;—that if the United States possessed the power contended for in the grant, they might, in adopting the roads of the several states for the carriage of the mail, assume jurisdiction over them, and preclude a right to interfere with or alter them;—they might establish turnpikes and exercise acts of sovereignty necessary to protect them from injury and defray the expense of repairing them;—that in this way a large portion of the territory of the state might be taken from it.

§ 414. President MONROE, like others of that class, who contend for a strict construction of the powers granted to congress, argues upon the hypothesis that the people were parting with authority, by conferring power upon the general government; that they were nominating in the bond the precise amount of power they were willing to surrender to the general government, in consideration of the benefits the government was required to render in return;—that the nominations of the bond carried only "the pound of flesh," but not one drop of blood. But such hypothesis is untrue. The people were proposing to surrender nothing; they were instituting a government by which to administer their own authority in matters pertaining to the security and welfare of the nation. The government they were instituting was their own; the congress they were empowering to act was their own. It was to be a congress of their own chosen men; selected from among themselves to administer for their benefit. The institution of the general government was simply an act of the nation providing the instrumentality by which they, as a nation, could realize the benefits of nationality; and what is termed the "enumerated powers," in the constitution, is rather an enumeration of subjects over which the government is to exercise jurisdiction with the plenary powers of the nation in respect thereto. Thus congress—the national legislature—has power to establish post-offices and post-roads—by which is plainly meant, the subject of post-offices and post-roads, is committed to the jurisdiction of the general government; to be administered upon by the nation; and congress has power to make all laws necessary and proper for such purpose. The terms, congress shall have power to regulate commerce with foreign nations; and among the several states;—to establish an uniform rule of naturalization—and uniform laws on the subject of bank-

ruptcies — to coin money, regulate its value, and the value of foreign coin — to establish post-offices and post-roads, &c., simply mean, in effect, that these subjects are committed to the jurisdiction of the general government to be administered upon by the nation. There is, then, no foundation for claiming a strict construction of these powers; on the contrary, the spirit and reason of the instrument demand that the general government shall exercise, to the fullest extent, the authority of the nation, over these subjects, whenever the safety and welfare of the nation demand it. There is also the further idea, of antagonism between state and national interests. "In this way," says President MONROE, "a large portion of the territory of every state may be taken from it." He seems to have overlooked the fact that the citizens of the states and of the nation are identical. That the establishment of these post-offices and post-roads is for the benefit of these citizens, and are to be established by themselves, for their own convenience. That the congress thus empowered is composed of their own chosen representatives, renewed every two years; — that the nation instituting the government and committing to its jurisdiction these subjects, was thereby providing for the administration of this government, and the exercise of these powers by themselves; — that they are as potentially present *in the administration*, as they were *in the institution* of the general government. That the idea of delegating powers in the sense of parting with power is deceptive, and has arisen from the dangerous theory of absolute sovereignty in the states, as essential elements of national existence and authority.

§ 415. When it is considered that, by the terms of the grant, the whole subject of establishing post-offices and post-roads is committed to the general government to be provided for by the legislation of congress, it will be perceived that the questions discussed are questions of *express* powers, not of *implied* ones. The express provisions on this subject read thus: Congress shall have power to establish post-offices and post-roads; and to make all laws necessary and proper for carrying into execution such power. Everything legitimately connected with the subject of establishing post-offices and post-roads, and extending the benefits thereof to the people of the United States, are subjects within the control of congress under the *express* powers of the grant.

Says President MONROE in his message above quoted, "whatever is absolutely necessary to the accomplishment of the object of the grant, though not specified, may fairly be considered as included. What, then, is the true meaning of the words, "to *establish* post-offices and post-roads"? The generally received meaning of the word "to establish" is, to settle firmly, to confirm, to fix, to found, to build firmly, to erect permanently. Thus, treaties speak of establishing regulations of trade laws speak of establishing navy hospitals, where land is to be purchased, work to be done, and buildings to be erected; of establishing trading houses with the Indians, where houses are to be erected; congress is to establish uniform rules of naturalization, and uniform laws on the subject of bankruptcies. The constitution always uses the word "to establish" in its general sense; thus the constitution was ordained and *established* by the people of the United States, for the purpose, among other things, of *establishing* justice: Congress is authorized to establish courts of inferior jurisdiction. It is plain that the term is used in the sense of forming, creating and regulating that to which it is applied. Thus in establishing a uniform rule of bankruptcies, and laws of naturalization, it is expected that congress will form, enact, make and construct laws on these subjects; and as the judicial power of the United States is to be vested in one supreme court and such inferior courts as congress may from time to time *establish*, it is expected that congress will exercise this power in creating and organizing such courts.

§ 416. The only questions to be discussed are, had the people, as a sovereign and independent nation, authority to establish post-offices and post-roads? Had they the same absolute and unqualified sovereignty over all matters of internal administration, as other sovereign and independent nations? Had they, as a nation, authority to institute a general or national government, and to assign to its jurisdiction such subjects of general administration as they saw fit; and to confer upon the several departments thereof, authority to exercise all their powers as a nation, in administering upon those subjects? Did the nation, in the institution of the general government, provide for their own continual and potential presence in the administration of the same? Did the people, in the institution of the general government, provide for surrendering to any one, their author-

ity? or did they not rather provide for the means, and establish the manner in which they could administer their own authority? Did the nation intend to deprive themselves of the power to administer fully in respect to every subject assigned to their general jurisdiction; and thus tie the hands of the nation lest they should abuse their own authority? Or did they not rather intend to provide for the full administration of all powers through the instrumentality of the general and state governments, giving to each plenary powers over every subject falling within its jurisdiction? The doctrine of derivative authority as applied to the American nation, is an inversion of the truth; and can result in nothing but constant error and antagonism. It is the Cyclopean monster of modern times: — the "*monstrum horrendum, informe, ingens, cui lumen ademptum.*"

§ 417. Congress has power "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."[1] This power is confined to authors and inventors, and cannot be extended to those who merely introduce a new improvement from abroad. This power is necessarily exclusive in congress, because the objects sought to be secured, cannot be obtained, if the several states are allowed to exercise authority upon the subject. The writings, inventions and discoveries belong naturally to the authors and inventors thereof, as being the products of their labor and skill; and it is but just that they should be secured in the beneficial enjoyment of the commercial value of such labor for a limited period.

§ 418. The authority of congress to constitute tribunals inferior to the supreme court, will more properly come under consideration in a subsequent chapter, when the subject of the national judiciary, as provided for by the first section of the third article of the constitution is considered. The judicial power of the general government is vested by the constitution in one supreme court, and in such inferior courts as congress from time to time shall ordain and establish. This subject will be fully considered in its order.

§ 419. Congress also has power to define and punish piracies, and felonies committed on the high seas; and offenses against the law of nations.[2] By this provision

[1] Constitution U. S., Art. 1, § 8, cl. 8.
[2] Art. 1, § 8, cl. 10, Const. U. S.

of the constitution, the subject of defining and punishing piracies, is committed to congress, without any limitation. It has the entire power of the nation in that respect, inasmuch as it can declare by law, what shall constitute piracy, and how the same shall be punished. Under the confederacy the congress had the exclusive power to appoint courts for the trial of piracies and felonies committed upon the high seas,[1] but they were not expressly authorized to define what constituted piracy, or to declare what should be its punishment; although congress did denounce the punishment of death as the penalty for the common law offense, known as piracy.[2] But every nation has authority to define what shall constitute a crime against society, and how such crime shall be punished. Piracy is a crime against the universal law of nations, as well as against the law of any particular society or nation, for a pirate is deemed an enemy of the human race. At common law, piracy consisted in committing robbery on the high seas. By the act of May 15, 1820, congress provided that any person who shall be guilty of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, upon the high seas, or in any open roadstead, or in any haven or harbor, basin or bay, or in any river where the tide ebbs and flows, shall be guilty of piracy, and upon conviction be punished with death. It also provides that any persons engaged in a piratical cruise or enterprise, or being of the crew or ship's company of any such enterprise, who shall land therefrom upon shore and commit robbery, shall be adjudged a pirate. It further provides that any citizen of the United States who shall, upon any foreign shore, decoy or seize negroes with intent to make them slaves, shall be deemed guilty of piracy.[3]

§ 420. According to the law of nations, piracy is incurred by depredations upon the high seas, or near the sea, without authority from any prince or state. "It is piracy not only when a man robs without any commission at all, but when, having a commission, he despoils those whom he is not warranted to fight or meddle with; such as are *de ligeantia vel amicitia* of that

[1] Art. Confed., Art. 9.
[2] Ordinance of April 5, 1781, 7 Jour. Congress, p. 76.
[3] See also Ing. Digest, pp. 155, 156, 170, 171; 11 Wheat. 39; *United States* v. *Palmer*, 3 id., 310, 326; also *United States* v. *Klintock*, 5 id., 144, 149; *Same* v. *Furlong*, id., 152, 184, 192; *Same* v. *Holmes*, id., 412, 416.

prince or state which hath given him his commission."[1] Thus, if a man having the commission of letters of reprisal against the Spaniards, commits, intentionally, depredations against the French or any other people, the guilt of piracy is incurred.[2] But if these violations of property be perpetrated by any national authority, they are the commencement of a public war; if without that sanction, they are piracy. Such were the sentiments and practice of antiquity, and the same distinctions are observed in modern Europe. Of this type or character were deemed the people of Algiers, Tunis, and the other maritime states of Africa. They have a fixed domain, public revenue, and form of government, and are treated with as nations by the European states. The Europeans, therefore, do not treat them as pirates; but sometimes carry on war, sometimes treat for peace, with them as with other nations. For these reasons, when a Bristol merchant ship, in the reign of Charles II, was taken by the Algerines, and was afterward driven on the coast of Ireland, with some Turks and renegades on board, Sir Leoline Jenkins, judge of the admiralty, certified to the king that in his opinion, the native born Moors and Turks found on board were to have the privileges of enemies in open war, because the government of Algiers had been acknowledged by several treaties; by the establishment of trade, and by the residence of consuls, by England and other states.[3]

§ 421. By the law of nations, as understood in England and some other European countries, it is held that piracy cannot be committed by the subjects of states at enmity;—that the subjects of either state may seize and capture the enemy's ships and goods in time of open hostilities without the sanction of special commission;—that when there is a public demonstration of war, that may be taken not only to authorize but even to enjoin seizures of the enemy's vessels and goods;—that the solemnity of a commission may be omitted as unnecessary, as the intention of the supreme power is manifested as plainly by actions as it could be by words, provided such actions be unequivocal, and there be no doubts as to a subsisting war.[4] But VATTEL is of a different opinion. He thinks that those who, without

[1] Sir Leoline Jenkins, vol. 1, xciv; 2 Wooddeson's Law of Eng., § 34, p. 422.
[2] Wooddeson, *supra*.
[3] Letter 11th Feb., 1679, 1680; 2 Sir L. Jenk., 791; 2 Wooddeson, § 34, p. 423, 424.
[4] See 2 Wooddeson, § 34, p. 432.

commission even in a time of open war, commit violence or depredation on the adverse state, are to be treated as robbers and banditti. There are reasons why the doctrine as stated by VATTEL should be maintained; otherwise the prey upon the commerce of the adverse state, may be carried on by the worst class of subjects, with a piratical and felonious intention, demoralizing those who engage in it, and ultimately converting them to pirates and felons. Although England does not denounce such uncommissioned acts as piracy, nevertheless she does not encourage them. Prizes taken by such non-commissioned privateers, do not inure to their benefit, but go to the admiralty through the crown.[1]

§ 422. As pirates are reputed to be out of the protection of all law and all privilege—as being enemies of the race, they may be tried in any country or jurisdiction where they are taken; "*eum, qui sine legitimo principis mandato hostile quid moliretur, punire posse a quocunque principe, in cujus potestatem fuisset redactus.*" Thus the captain of a French merchant ship having put into port in Ireland was accused by his crew of robberies on the seas. He fled, and his ship and goods were confiscated as having belonged to pirates. The French embassador presented memorials requiring the cause to be remanded to the appropriate judge, as he claimed, in France. But the king and his council adjudged that he was sufficiently founded in point of jurisdiction to confiscate the ship and goods, and also to try the captain capitally had he been taken, the matter of *renvoy* being a thing quite disused among princes.[1] Such are some of the general principles of the law of nations on the subject of piracies. But the particular law of each sovereignty may change or modify these general principles as applicable to their own citizens or subjects within their own particular jurisdiction; and all the authority which any nation possesses on this subject is committed to the exercise of congress by the provisions of the constitution of the United States.[2]

§ 423. If congress had not attempted to define what acts would constitute piracy, but had simply provided for the punishment of the same, the common law definition of the crime would have been sufficient for determining what constituted it. The term piracy, as

[1] 2 Wooddeson, § 34, p. 432.
[2] 2 Sir L. Jenkins, 714; 2 Wooddeson, *supra*. [2] Art. 1, § 8, cl. 10.

the technical name of a crime, was well understood by those who framed and adopted the constitution; and the definition of the crime would have been found in the term used. Thus, "the offense of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there."[1] But it was deemed best to commit to congress the power to determine what other acts or depredations committed upon the high seas should be considered piracies, so that the nation, through congress, could exercise the sovereign authority of other nations upon that subject.

§ 424. But congress has power also to define and punish felonies, and offenses against the law of nations. At common law, that crime was deemed a felony which occasioned a total forfeiture of either lands or goods, or both; and to which, capital or other punishment might be superadded, according to the degree of guilt.[2] Capital punishment does not necessarily enter into the definition of felony, although the idea of felony is so generally connected with that of capital punishment that it is difficult to separate them. Hence, where the English statute made a new offense felony, the law implied that it was to be punished with death, as well as with forfeiture, unless the offender was entitled, on prayer therefor, to benefit of clergy.[3] But whatever may be the common law definition of a felony, or whatever may be the punishment annexed to the offense, the whole subject is committed to the discretion of congress, which can both define the crime, and affix the penalty thereto. This provision of the constitution clearly commits to the jurisdiction of the general government the subject of offenses committed on the high seas. The term high seas embraces not only the waters of the ocean at large, but also the waters along the coast below low-water mark; and also the waters within the local jurisdictions of the several states lying along the coast between high and low-water mark, as well as below. The question of high and low-water mark as affecting the jurisdiction of the general government, is applicable only to that part of the ocean which washes the shores of foreign countries.[4]

[1] 2 East P. C., 796; 1 Russell on Crimes, p. 100 and notes; 1 Hawk. P. C., ch. 37, § 4; 4 Bl. Com., 72.
[2] 4 Bl. Com., 95; see also 1 Hawk., ch. 25; 1 Russell on Crimes, 42.
[3] 4 Bl. Com., 93; 1 Russell on Crimes, 42.
[4] Rawle on Const., ch. 9, p. 107; 1 Kent's Com., 342; 5 Mason R., 290.

§ 425. Congress has power also to define and punish offenses against the law of nations. Nations are independent sovereignties, having absolute jurisdiction in all matters over the individual members thereof; therefore one nation cannot lawfully exercise its powers within the jurisdiction of another, to punish those who offend against it or its subjects. But justice, which is the basis of all society, and the sure bond of all intercourse between nations, requires that the rights of society, and of the individual members thereof, should be respected; and that every one should be secure in the enjoyment of that which is his own, against the encroachments of the subjects of other jurisdictions, as well as against those of his fellow subjects. The obligation imposed upon all men to be just, has its basis in the law of nature; and may be taken as true, without argument. All nations are therefore under obligations to cultivate justice toward each other, and carefully to abstain from anything which may violate it. From this obligation which nature imposes on nations, as well as from the obligation which each nation owes to herself, results the authority of every state to defend her rights and the rights of each and all of her subjects; for in opposing the infliction of wrong either upon herself or upon her subjects or citizens, she only acts according to her imperative duty; *and therein consists her right.* For it would be in vain for nature to prescribe to nations, as well as to individuals, the care of self-preservation, and of advancing their own perfection and happiness, unless she also gave them the right to preserve themselves from everything which might render this care ineffectual. Man has a natural right to everything which nature has made essential to his perfection, and necessary to the discharge of his duties.[1] Therefore every nation, as well as every individual, has a right to prevent others from obstructing its own self-preservation, perfection and happiness; that is, every nation has a perfect right to protect itself from all injuries. From hence it follows, that private persons who are members of national societies, are under the same natural obligations to respect and observe the rights of other national societies, and of all the members thereof, which obligation is perfect and should be enforced. Therefore, whoever offends a state, injures its rights, disturbs its tranquillity, or does anything wrongfully to

[1] See Vattel, pp. 154, 155, 160, being §§ 49, 50, 63, 64.

its prejudice, exposes himself to just punishment; and there should be no authority to interpose any barrier between such offense and the punishment it deserves. A nation should not permit one of its members to commit such a wrong upon a neighboring nation, or upon any of its members, with impunity. Its duty to itself, to its subjects, and to the family of nations, requires that it should provide by law for punishing all such offenders according to the nature of the offense committed. And a nation which neglects to keep its citizens or subjects within the rules of justice and peace, but suffers them to injure other nations, either in body or in its members, is guilty of a wrong for which she may justly be held responsible, as though the wrong were committed by herself. Therefore, it was proper and just that the power to define and punish offenses against the law of nations should be conferred upon congress; and that thus the duty of maintaining good neighborhood with other nations should be imposed upon the general government. Under this grant, congress has all the authority of the nation upon that subject; and can pass any laws necessary and proper to secure, on the part of citizens, fidelity to the rights of mankind.

§ 426. This duty of nations in respect to each other, arises out of the obligations imposed by the law of necessity. If one nation permit its subjects to prey upon the subjects of a neighboring nation, then the subjects of the neighboring nation will be led to retaliate by inflicting the like or worse injuries upon the subjects of the offending nation; and in this way the friendly intercourse which nature has established between all men as a necessity and duty, would be interrupted; and discord, strife and plunder would take its place. Where the offenders are arrested within the jurisdiction of the government whose subjects have been injured, they may be made to atone for their crimes; but if they have escaped again within the jurisdiction of their own nation, they can be reached only through their own government. In such case the offended nation should apply to such government to have justice done in the premises; and the government so applied to, is in duty bound to compel the transgressor to make reparation; or to inflict upon him such punishment as the nature of his offense requires; or to deliver him into the hands of the offended authority to be dealt with according

to the laws of the country which he has offended. If the nation thus applied to refuse either to punish the offender, or to deliver him into the hands of the offended nation, she adopts and ratifies the offense, and it then becomes a matter of public concern; and it may become a just cause of war between the two nations. It is the imperative duty of every nation to demand and require, by all its power, the doing of exact justice in such case, at whatever cost; for it should be the settled law of nations that no public authority shall screen an offender from the punishment due to his crimes, without being held to answer for such an offense.

CHAPTER XIII.

WAR POWERS OF THE GENERAL GOVERNMENT.

§ 427. CONGRESS shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the union; to suppress insurrection and repel invasion; to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be in the service of the United States; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. By these provisions of the constitution congress is intrusted with the exercise of all the authority and powers in this respect of the nation. The war powers necessarily embrace all the powers of the nation, over the persons and property of every citizen or subject thereof; and congress can by law hold the citizens to the strictest obedience. So great is the exigency of a public war, that the body intrusted with the defense of the nation and the vindication of its rights, has unlimited discretion in the exercise of the war powers. A public war is that which takes place between nations or sovereigns, and is carried on in the name of the public power, and by its authority. Such wars are either *offensive* or *defensive*. That power which is foremost in taking up arms, and attacking a nation which before lived in peace with it, wages an offensive war;

the one who takes up arms to repel the attack merely, carries on a defensive war. An offensive war is carried on to enforce some claim; to vindicate some right; to punish for some injury inflicted; or to prevent some threatened danger. The authority to involve the nation in war must proceed from the sovereignty;—from that authority which holds in its keeping, the lives, the liberty and the property of every member of the national family. Therefore, the right to declare war should be intrusted to that department of the government in which the nation is immediately and potentially present; and can, by its presence, exercise that unlimited discretion so necessary to be exercised in the midst of a great public war, involving the safety, and perhaps existence of the nation. In democratic or republican governments, this sovereignty is in the people. The authority to declare war, and provide all necessary means for prosecuting it, should then be confided to the law-making power; because in that department the nation is fully represented. For this reason the full power of the nation upon the subject of declaring and prosecuting war, is by the constitution committed to congress, to be exercised by the nation itself, according to its own discretion, and for its own safety and welfare.

§ 428. The authority to be exercised by congress in declaring war between the United States and any other power, is as unlimited as the authority of any sovereign or sovereignty; and, therefore, it can be exercised in the same manner, for the same causes, and subject to the same responsibilities, as when exercised by any sovereign or sovereignty. The American nation being sovereign in its national authority, has committed that authority to be exercised by the general government through congress, in which it is to be immediately present through its chosen representatives, to exercise such powers as it deems necessary, both to declare war and to provide the means for conducting it to a successful issue. Congress, then, has the sole discretion to determine for what causes war shall be declared. The moral right to make war belongs to the nation as the only remedy against injustice; and should never be exercised except in cases of imperative necessity. Says VATTEL:[1] This remedy is so dreadful in its effects, so destructive to mankind, so grievous even to the party who has recourse to it, that unquestionably the law of

[1] B. iii, ch. 4, § 51.

nature allows of it only in the last extremity;—that is to say, when every other expedient proves ineffectual for the maintenance of justice. The declaration of war usually precedes, by a limited time, the commencement of actual hostilities. It is due to justice and humanity, that notice of a belligerent determination should be given, that the private subjects of each sovereignty may adjust their business relations and prepare for the condition of war which is about to be thrust upon them. The declaration of war being necessary to terminate the differences between nations without the effusion of blood by an appeal to the grave considerations incident to a state of war, it should, at the time of its announcement set forth the reasons which impel to such an alternative. And such is the present practice of all civilized nations. And if the offending party offers equitable conditions of peace, which are made available by proper security, then the right of making war would, by the law of nations, cease.[1]

§ 429. The power to declare war may be exercised by authorizing general hostilities; or by authorizing only partial hostilities. When, by an act of congress, war between the United States and a foreign power is declared to exist, then general hostilities are authorized; as by the act of 1812,[2] congress enacted, "that war be and hereby is declared to exist between the united kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories." But in 1798 there was a qualified but public war, carried on by the United States against France, upon the high seas only. It was qualified, because it was confined to the high seas; but public, nevertheless, because the whole nation was engaged in it. It was founded on hostile measures authorized by congress against France, because of her unjust aggressions upon the commerce of the United States. It was carried on without any other declaration of war.[3]

§ 430. As a war cannot be carried on without soldiers, it follows that the authority to declare and make war, involves the power of levying the necessary troops. This power is expressly provided for in the constitution, so as to leave no question as to the plenary authority of congress over the whole subject of declaring, making

1 Vattel, b. iii, ch. 4, § 54.
2 Ch. 102.
3 See Rawle on Constitution, ch. 9, pp. 105, 106; 4 Dall., 37; Story's Com. on Const., § 1174.

and carrying forward war. The authority to levy troops belongs to sovereignty, and cannot be intrusted to subordinate authority. But the authority to levy troops places every citizen under the direction of congress, or of those to whom congress shall intrust the exercise of this authority. Congress can say how many troops shall be raised; for how long a time; who shall be subject to be drafted; what shall be their compensation; in what branch of the service they shall be placed; where they shall serve; by what regulations they shall be governed; to what authority they shall be amenable;—in short, in this respect the authority of congress over the persons of citizens is absolute to command, requiring implicit obedience. In former times in the smaller states, immediately on the declaration of war, every man became a soldier; all took up arms and engaged in war. But in modern times, armies are composed of picked men, leaving the remainder to pursue their usual avocations. In monarchical countries, standing armies—regular troops—are relied upon as constituting the necessary force.[1] But in the United States, able-bodied male citizens between certain ages, constitute the class from which the great bulk of the national army is to be taken. But congress has unlimited authority to enlarge the class indefinitely, and cause it to embrace as large a proportion of the citizens as it deems proper.

§ 431. The power to declare and make war and to levy troops, also implies the power to command the means by which to arm, equip and sustain them in the service of the nation. This places at the disposal of the government so much of the property of the nation or of the members thereof as is deemed necessary for that purpose. Congress can provide those means by borrowing money on the credit of the United States; or by laying and collecting taxes, duties, imposts and excises; or it can create a currency on the credit of the nation, and provide for its solvency; or for its circulation by making it to possess the authority of money in payment of debts, and the discharge of legal obligations. These powers are incident to that sovereignty which can declare and make war, and impose its authority upon the persons and property of the individual members of the nation. The authority that can create the emergency of war;—that can put

[1] Vattel, b. iii, §§ 7, 8, 9.

its hand upon the citizen and make him a soldier;— that can take him from the civil, and put him under martial jurisdiction;— that can take his property by taxation, by duties, by imposts, and by excises, or by force if need be, and apply it to the use of the nation, must, in such respect, be sovereign to command whatever is required by the exigencies of war.

§ 432. The authority of congress to issue treasury notes, and to make them a legal tender in payment of debts, for the purpose of supplying the means for carrying on war, has been gravely called in question. That all the war powers of a sovereign nation are committed to the discretion of congress, to be exercised as the exigencies of war shall require, is not debatable. The constitution has expressly provided that congress shall exercise all powers necessary and proper for carrying into execution the war powers of the nation; and has thereby conferred upon congress the full discretion of sovereignty itself. What powers are necessary and proper, congress alone can decide. Everything involved in the issue of treasury notes, and in the authority to make them a legal tender, is committed to the discretion of congress. Under the exigencies of war, congress can take the private property of every citizen and appropriate it to the defense of the nation. It can levy its exactions, if need be, to the last dollar, and can legally require the levy to be paid. There is no species of property within the limits of the nation which it cannot reach. In the exercise of the sovereign authority of the nation, it can convert every citizen to a soldier, and compel him to be obedient to military authority. It can create, and it can discharge, legal obligations when necessary and proper to the execution of its powers. It can borrow money on the credit of the United States; it can coin money by stamping the authority of the nation upon what substance it pleases, and can determine the value or price at which it shall be taken; it can exercise all the authority of the nation, in this respect, for it is the nation itself exercising its own authority in the only way possible. The act of issuing the promises of the government, and requiring them to be received and treated as money by those whose persons and property are subject to the authority issuing them, seems to be no very great stretch of authority on the part of congress; no very violent exercise of the discretion committed to it. In the midst of

a war requiring the expenditure of $800,000,000 a year to save the life of the nation; with a gold and silver currency not adequate to one-fourth of such expenditure; with no alternative left but to create a currency upon the credit of the nation adequate to the emergency; it would seem to be trifling with the subject to deny to congress the authority to make that currency legally current, by requiring it to be received as payment or in discharge of legal obligations. It was the nation's currency; created and issued as a necessary and proper means to save the nation's life; why, then, should it not be received by the nation upon its own credit, in discharge of its own obligations?

§ 433. The United States as a nation is sovereign and independent; and as such, has all the authority incident to such sovereignty. As a nation, she is liable to be involved in war with other nations; and to be required to exercise all her authority and power in conducting such war to a successful issue. By the constitution, the people provide that the war powers of the nation shall be exercised by the general government alone; — that the several states shall have no authority to enter into any treaty or alliance, or to grant letters of marque or reprisal; — that they shall keep no troops or ships of war in time of peace; and shall not engage in war unless actually invaded, or in such imminent danger as to admit of no delay.[1] Thus, the people of the United States have provided for the exercise of the war powers of the nation, only through the general government. But it will not be denied that the people as a nation, contemplated the possible exigency of war; and, consequently, the possible occasion for using all the powers of a sovereign nation in prosecuting the same. In assuming its position among the nations as free and independent, the United States, with a full knowledge of what was essential to maintain and defend nationality, instituted the general government as the sole and only means of asserting its authority and maintaining its rights, under all circumstances. They, therefore, provided for themselves a general government, as a means by which the public authority could be exercised over those subjects which were enumerated in the constitution; and as the nation was to administer the government, no other restriction or definition was necessary than that which pointed out clearly the subjects of

[1] Art. 1, § 10, Const. U. S.

national jurisdiction, that the officers of the national and state governments might not interfere in their respective administrations.

§ 434. Inasmuch as the general government is invested with all the powers of the nation to declare war and make peace; to raise and equip armies, and support them in the field; to provide and maintain a navy; and to make all laws necessary or proper for carrying into execution these powers, the extent of the war powers of the general government can be ascertained by an inquiry into the sovereign authority of the nation in such respect; and, as the American nation has the same authority as other independent nations, the inquiry becomes simple and easy to be answered. Congress has authority to declare war for any of the causes known to the law of nations. Thus, a nation may be attacked with a view to obtain that which is due, but is unjustly withheld; or to punish her for some injury committed to another nation or its subjects; or to avert threatened dangers. The sovereignty, or those intrusted with its exercise in any country, are the sole judges of what are sufficient causes for war. War being declared, all powers essential to its vigorous prosecution and successful termination can legitimately be exercised; and when the authority of the nation is vindicated, the power to bring the war to a close by treaty stipulations is as plenary as it was to declare and carry it on.

§ 435. According to the peculiar doctrines of the strict constructionists, serious questions have been raised whether the nation had authority to acquire territory from a foreign power. The authority of sovereignty to acquire and dispose of territory admits of no question. There can be no such authority in any one which does not come from the sovereignty. But the question was, whether the nation had authorized the general government to acquire such territory. Soon after the American nation had organized a government, this question was thrust upon them. Spain had ceded Florida and Louisiana to France; and France proposed to take possession of the same. THOMAS JEFFERSON was then President of the United States. Mr. LIVINGSTON was the American minister in France. On the 18th of April, 1802, Mr. JEFFERSON wrote Mr. LIVINGSTON upon the subject. He informed him that this proceeding on the part of France had reversed all political relations of the United States, and had formed a new epoch in her political

course;—that of all nations, France hitherto had offered the fewest points on which any conflict of right could arise, and the most points for communion of interest;—that for these causes, France had been considered the natural friend of the United States;—but that there was one point on the globe—one single spot—the possessor of which was the *natural and habitual enemy of the United States; and that point was New Orleans,* through which the products of three-eighths of the territory of the American Union must pass to market; and which, from its fertility, would soon yield full one-half of the products, and contain one-half of the population of the United States;—that France, placing herself in the door, assumed an attitude of defiance;—that the impetuosity of the French temper, the energy and restlessness of the French character, would there be placed in a point of eternal friction with the United States;—that, in short, the day that France should attempt to take possession of New Orleans, would fix the sentence which would restrain her forever within her low-water mark;—that the position of the United States would permit no foreign power to occupy that outlet to the Gulf of Mexico;—that persistence on the part of France, would be a cause, and an occasion, of war between the two nations. Here was a singular dilemma. According to the doctrine of Mr. JEFFERSON himself, the United States had no constitutional authority to acquire territory, because the states had not expressly delegated it to them. Yet here was territory which the existence and safety of the nation would not permit any other nation to occupy; and, if necessary, the United States would take possession of it by force, and hold it at the risk and expense of a war with its old friend and ally. Yet, according to Mr. JEFFERSON'S doctrine, had France offered to cede the whole Louisiana country to the United States for the expense of fixing its boundaries, they had no authority to accept of it, even though they might be compelled to go to war to acquire it. But notwithstanding the constitutional scruples of Mr. JEFFERSON and his class of strict constructionists, negotiations took place by which the Louisiana territory was ceded to the United States, and the supposed unauthorized act of the government was made legal and constitutional by the higher laws of necessity and acquiescence. This exigency should have taught the true doctrine of the sovereign powers of the

nation over all subjects of general jurisdiction, as administered by themselves through the instrumentality of the general government.

§ 436. The advocates for derivative sovereignty in the nation, and original sovereignty in the states, have questioned the authority of the nation to move the national forces through the states, without the consent of the government of the particular state through which they are required to pass. It is a singular position that the general government is required to protect every part of the national domain from invasion, and is authorized and required to raise and provision armies; or to call the militia into service for such purpose, and yet it has no authority to enter upon the territory invaded or threatened, without the consent of the local government. At the time of the inauguration of the great rebellion in 1861, certain of the border states were much concerned for the inviolability of state sovereignty; and remonstrated against the passing of the national armies through their borders on their way to the field to put down the rebellion. Kentucky not only had no soldiers for the defense of the nation, but she proposed to become neutral ground between the nation and her rebellious citizens; and to exclude the armies of both parties from her territory. The advocates of original and inherent sovereignty in the states, overlooked the fact that the authority of the nation extends over every inch of the national domain; and for the purpose of national security, and welfare, is supreme over all; that Kentucky, as a local government, exists only by the incorporating and enfranchising act of the nation; that every national citizen, for national purposes, has as much authority within the territorial limits of Kentucky, as those born therein. The exigencies of civil war soon revealed the essential fallacy of the doctrine of inherent sovereignty in the states; and settled the question of national authority to occupy any territory within the several states, required for the purpose of securing obedience to the laws of the nation.

§ 437. There are those who claim large war powers for the president, because he is made, by the constitution of the United States, *ex officio* commander-in-chief of the army and navy—that is, the supreme command of the army and navy is vested in the president. The duties and powers of the president as the executive head of the nation, and the duties and powers incident to his

command of the army and navy, are distinct and dissimilar. As the executive head of the nation, charged with the execution of the laws thereof, his duties are prescribed by law, and are of a civil character. In the exercise of those powers he acts according to the eirection of, and in obedience to civil authority. If resisted in the performance of his executive duties, he can call to his aid such assistance as the law authorizes; and in the manner in which he is authorized by law to do so. Beyond this he cannot go. Whenever the resistance becomes such as to call for the intervention of the army of the United States, and it is legally employed to put down resistance to the law, then the president's authority as a military commander begins, and may continue like the authority of any other supreme commander of the army of a nation. But the powers of the president as a civil officer, and his powers as a military officer are very distinct. As a civil officer the president has no power not conferred and regulated by the laws of the United States. In the discharge of his executive duties merely, he is as strictly accountable to the law as the humblest officer. He has no authority to interpose the military power of the nation in the execution of his civil duties except as provided by law. Therefore it is clear, that as a civil officer he has no war powers; nor has he any authority to involve the nation in war that he may exercise war powers. It will be time enough for the president to commence the exercise of war powers, after the exigencies of war shall make it necessary.

§ 438. As the executive head of the nation, it is made his especial duty to see that the laws of the nation are properly enforced; and congress not unfrequently provide especially for the manner in which certain requirements shall be enforced; and by such provisions give to the president large powers to be exercised under a large discretion. The statute books of the United States are full of examples of this character; and the president, in executing these laws, at times seems to be possessed of unlimited authority. But careful attention to the subject will show that he is acting in obedience to the particular authority conferred upon his office by the law-making power. It cannot be too strongly impressed upon the public mind, that the President of the United States is a mere officer of the law, intrusted with the exercise of certain duties and powers attached to

the office, and not to the incumbent; that as a civil officer he has no authority except that which is prescribed by law. As a military officer his duties are as strictly confined to military operations, conducted according to principles of martial law, enlarged and restricted according to the exigencies of the situation, the same as other military officers in supreme command.

§ 439. The duties and powers of the President of the United States, as the commander-in-chief of the army and navy, do not extend beyond the well established rules or laws necessarily peculiar to the organization, discipline and command of military bodies; except so far as by the laws of the United States, other duties may have been imposed, or other powers may have been conferred upon that office. As commander-in-chief, the president has no occasion to exercise martial authority except in connection with the operations of the army. That which pertains to the country at large, and which is not connected with the immediate presence of the army, or with that which has to do with the organization, discipline or efficiency of the army, does not properly come within the scope of the president's powers as its commander-in-chief. There have been grave questions as to the authority of the president as commander-in-chief, to proclaim martial law; to suspend for the time being the functions or powers of civil government over any particular territory. The principle by which these questions are to be answered would seem to be plain, affording an easy solution of the problem. The reason for the authority given to military commanders in the exigencies that may be upon them, is found in the *necessity* of the case. In the presence of an enemy which is threatening not only the destruction of the army, but likewise the destruction of the government, which has intrusted its defense to the keeping of the army, the commander may find it necessary to disregard civil processes and civil authority altogether. The very continuance of civil authority in the future may require for the time being, that it be suspended in the present. Under such circumstances, it would be the duty of the commander-in-chief to disregard, if need be, all civil authority until the emergency had passed, and both the army and government were safe from impending danger. This military power is accorded to the military commander, because the civil authorities have neither the time nor ability to act in the premises. Aside from these

military reasons based upon the necessity of the case, the commander-in-chief has no rightful authority to disregard the civil authority. If there are general reasons affecting the whole country why martial law should be proclaimed and the powers of civil government should be suspended for the time being; reasons applicable as well to places not connected with the army as to those in its immediate presence, it furnishes no occasion for the exercise of the exigency powers of the commander-in-chief. Where there is time for the people to act through the legislative department of the government without danger to the commonwealth incident to the delay necessary, it is more in accordance with the principles of republicanism, that civil authority should be suspended by the action of the legislature than by the authority of the commander-in-chief. It is only in respect to the presence of war with its impending dangers that the maxim, *et silent inter leges arma*, applies.

§ 440. It has been asserted that because the constitution declares the president to be the commander-in-chief of the army and navy of the United States—that is, because the army and navy are subject to him as their constitutional commander, therefore he is invested with the war-making power, and can wield the army and navy as he pleases, until resistance to the authority of the nation ceases; that he can be restrained only by the power of congress, to be exercised in refusing to appropriate the means to pay the expenses, or to provide for his levying troops.[1] This view is based upon the hypothesis, that the president, being *ex officio* commander-in-chief, possesses authority that a commander-in-chief would not have were he not also President of the United States. But examination and reflection will show that the authority of commander-in-chief of the army and navy of the United States is not at all augmented by the fact, that civilly the same person is also president of the nation, and has civil and presidential duties to perform in other departments of administration. His duties and powers as commander-in-chief are the same they would be were he otherwise nothing but a common citizen. So that the question of the powers of the president as *ex officio* at the head of the army and navy, is to be determined by the simple definition of the powers pertaining to the office of commander-in-chief. Suppose, then, that the lieutenant-general could

[1] Congressional Globe 1861-2, March 4, 1862.

become the captain-general or commander-in-chief, instead of the presidential incumbent, could it be said of him, that he was invested with the war-making power? that he could direct and control the army and navy of the United States as he pleased? that he was not subject to the direction or control of congress? that the only power they could exercise over him would be in withholding supplies, or making no provisions for levying troops? The people of the United States have invested no commander-in-chief with such powers, to override their will as expressed through congress, in the laws by them enacted. The President of the United States, as commander-in-chief of the army and navy, is as limited in his authority as would be any other commander-in-chief; he is as much subject to legislative direction and control, as any other person occupying that position would be. It is to be remembered that the powers and duties pertain to the office of commander-in-chief; not to the person holding the office; not to any other office he may possess; or to any other duties and powers incident to such other office. The authority of the president to proclaim martial law, or to suspend the writ of *habeas corpus*, or any other civil process, depends upon the same exigencies as would authorize any other person holding the office of commander-in-chief to do so. For be it remembered that when the president assumes the authority to proclaim martial, and suspend civil law, he acts in virtue of the authority of his military, and not of his civil office. Therefore, the power of the president to suspend the writ of *habeas corpus* would be justified, when, and to the extent, that the *exigency duties* of his military office require that it should be suspended. To attempt to go beyond this necessity as a military commander, is to usurp power; and, consequently, to act without authority.

§ 441. The power to proclaim martial law is one of the war powers, and is to be resorted to only when the safety and welfare of the public require it. The language of the constitution is, "the privilege of the writ of *habeas corpus* shall not be suspended unless, when in case of rebellion or invasion, the public saftey may require it." This supposes the presence of a force which can be resisted only by military power. It supposes a danger, to the removal of which civil authority is not adequate; and, therefore, it should not be permitted to defeat the end of government by the assertion of

authority it could not execute. Now this danger may be present, and yet be of such a character, that congress can both ascertain the fact of its existence, and provide for the remedy by its ordinary course of legislation. It may be a danger that pervades the entire country, both in the presence and in the absence of the military arm of the government. The very danger may be in the disloyalty of those intrusted with the administration of civil authority. The courts armed with judicial powers, may be composed of persons unfriendly to the government: and this condition of things may pervade a large extent of country, so that the authority which should aid in the enforcement of civil law, may be used to overthrow the government. In cases of this character, the authority to suspend the writ of *habeas corpus*, would be more properly exercised by congress, as expressing the will of the nation, looking to its prospective dangers, and the means of providing against them. But where the danger is local, is in the presence of the army, and threatens to interfere with its efficiency; where it is immediate and cannot be averted except by prompt and decisive action; when there is no time to consult the legislature, in short, where from the necessity of the case, it must be left to the discretion of the commander, then he not only has the authority, but it is his duty, if need be, to suspend the writ of *habeas corpus*, and all other civil processes, that the military power may be used to save the army and government from defeat and overthrow.

§ 442. Mr. SUMNER of Massachusetts, in the United States Senate held the true doctrine. Said he, "there are senators who claim these vast war powers for the president and deny them to congress. The president, it is said, as commander-in-chief, may seize, confiscate, and liberate, under the rights of war; but congress cannot direct these things to be done. Where is the limitation upon congress? Read the text of the constitution, and you will find its powers as vast as all the requirements of war. There is nothing which may be done anywhere under the rights of war which may not be done by congress. I do not mean to question the powers of the president in his sphere, or of any military commander in his department. But I claim for congress all that belongs to any government, in the exercise of the rights of war; I mean for an act of congress passed according to the requirements of the constitution, by both houses, and

approved by the president. The government of the United States appears most completely in an act of congress. Therefore war is declared, armies are raised, rules concerning captures are made, and all articles of war regulating the conduct of war are established by act of congress. It is by the act of congress that the war powers are at all put in motion; when once put in motion, the president must execute them. But he is only the instrument of congress under the constitution. It is true the president is commander-in-chief: but it is for congress to make all laws necessary and proper for carrying into execution his powers, so that according to the very words of the constitution, his powers depend upon congress which may limit or enlarge them at pleasure." [1]

§ 443. During the discussions respecting the war powers of the president and of congress, some spoke of the constitution as being suspended; that is, of its authority as being in abeyance during the continuance of the war, and the maintenance of martial authority over certain sections of the country. This language tended to beget erroneous ideas respecting the authority of the constitution. The constitution is as really the supreme law of the nation during the prevalence of war, as in the time of peace. It is in itself an ordinance of government; that is, an ordinance instituting a government for the nation in times of war as well as in times of peace. It contemplates war and peace. It provides for the exercise of war powers in times of war, as fully as for the exercise of peace powers in times of peace. It is as explicit in defining the duties and powers of the government to be exercised and administered at the one time as at the other. Congress is acting as constitutionally in declaring war, and in making all necessary provisions for carrying it on, as when it is laying and collecting taxes, coining money, or establishing post-offices and post-roads, or exercising any other of the peace powers of the constitution. The president, in exercising the duties and powers of commander-in-chief, at the head of the army and navy, is as really a constitutional officer of the government, engaged in the discharge of his constitutional duties, and in the exercise of his constitutional powers, as when he is sending his message to congress, approving of the laws passed by it, or discharging any other civil duty

[1] In U. S. Senate, June 27, 1862.

imposed upon him. The constitution contemplates the possible existence of war with all its stern realities; and provides for an administration of authority under its provisions suited to such exigencies. In times of peace, congress is expected to exercise only the peace powers; except, perhaps, so far as it may be necessary to provide against the accident of war, by making ready for it whenever it may come. In times of peace, the president is the simple executive and presidential head of the nation; having little occasion to exercise his military powers as commander-in-chief. In times of peace, the citizen is to be secure in the enjoyment of his civil liberty and rights, according to the established forms and usages of law. But the constitution contemplates the possibility of a state of public danger arising from the presence of a foreign or domestic foe, which may render it expedient to suspend the writ of *habeas corpus*, and hold in custody those who are deemed to be dangerous to the public peace and security, without the presence of an authority to inquire into the legality of their detention. It contemplates the necessary suspension, for the time being and in particular localities, of the civil functions of the government, that the martial powers of the same may be efficiently exercised, for the security and welfare of the nation. But that the martial powers may be exercised, when, in the judgment of the proper authorities it becomes necessary for the safety of the nation, is as really in accordance with the provisions of the constitution, as is the exercise of the civil powers in times of peace. But the proper authority to determine when and where any portion of the nation shall be under martial rule, is to be found in congress, in which the nation itself is ever present to exercise its judgment and declare the law. It is proper, however, that the commander of the army should suspend the operations of the civil, by substituting the martial, powers of the constitution whenever, for the time being, the safety of the army and of the state requires that the operations of the army should not be interfered with by the obtrusion of civil process. These occasions may be denominated the exigencies of war; and the powers thus exercised, "*the exigency powers.*"

§ 444. The power of the president to suspend the writ of *habeas corpus* was called in question by Chief Justice TANEY, during the progress of the civil war in the United States. Orders had been issued by the presi-

dent to military commanders in various sections of the country to suspend, if necessary, the writ of *habeas corpus* within the limits of their respective commands. The military commander of the district of Pennsylvania and Maryland had caused to be arrested, as dangerous to the peace and security of the nation, one Merryman. A writ of *habeas corpus* was issued to bring him before the chief justice. The officer refused to obey the writ. In concluding his remarks upon the subject, Chief Justice TANEY says: "The documents before me show that the military authority in this case has gone far beyond the suspension of the privilege of the writ of *habeas corpus.* It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, substituted military government in its place, to be administered and executed by military officers. There was no danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. And yet, under these circumstances, a military officer stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland, undertakes to decide what constitutes the crime of treason or rebellion, what evidence is sufficient to support the accusation and justify the commitment; and commits the party without even a hearing before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem during the pleasure of those who committed him. I have exercised all the power, which the constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer, who has incurred this grave responsibility, may have misunderstood his instructions, and exceeded the authority intended to be given him. I shall therefore order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy under seal, to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation, to take care that the laws be faithfully executed, to determine what measures he will take to cause the civil process of the United States to be respected and

enforced."[1] The chief justice seems to have overlooked the fact, that at the time the order of the president was issued to these military commanders, a civil war had been inaugurated, pervading the territory where this arrest was made, and involving the existence of a civil government loyal to the nation; when the rebel hosts were marching upon the capital of the nation to capture it, and to overthrow the government; and when, in obedience to the call of the president, while loyal forces marching to its defense, in passing through the city of Baltimore were met by the citizens of Maryland, attacked in the streets, their progress obstructed, their blood shed; and when the civil authorities of Maryland either could not or would not interpose to prevent such interruption; and for days after, the loyal men of the north and east were not permitted to pass through the city on their way to defend the national capital from the insurgent army; and the only direct route to Washington through Maryland remained closed to the transportation of troops loyal to the government, until it was opened by the martial authority of the nation. The chief justice overlooked the fact that Maryland as a state was saved from going bodily into secession by the arrest of the members of its legislature;—that had it not been for the loyalty of her governor, Maryland would have early placed herself, in company with the gulf states, in open rebellion against the authority of the nation;—that treason was popular in Maryland, and loyalty was contemned and despised;—that the civil authorities of Maryland were plotting with rebels, and with the rebel authorities south, to take the state out of the union. In rebel parlance, she was called "my Maryland." The exigencies of war were upon the nation at the time the president issued his order to the military commanders to proclaim martial law, if deemed necessary, in their several departments. The time of danger contemplated by the constitution, when the civil should yield to the martial administration of authority, was in the midst of the nation; and nothing but the firm, loyal, prompt and effectual action of the president as commander-in-chief, saved the nation from utter overthrow. The authority given by the constitution to suspend the privileges of the writ of *habeas corpus*, was designed to be exercised on just such occasions as those which called for the military order of the

[1] Law Reporter, June, 1861.

president; and its exercise was as constitutional as the exercise of civil authority in times of peace. The thrusting aside of the judicial and civil authorities of Maryland, in the emergency then upon the nation, was a constitutional act, exercised in the sound discretion of the officer in whom, by the constitution, the authority was reposed.

§ 445. Upon principle, it would seem that the commander of a military district would be justified in the interruption of the course of civil administration only in cases of necessity; and then only to the *extent* necessary. If the emergency be such only as that the course of civil administration is adequate to its demands, there is no reason for the interference of military authority. But if the danger be so pressing that it will not admit of the delay incident to civil proceedings; or if the civil authorities are disloyal, and will aid the enemies of the government rather than the government, then the commander-in-chief will be justified in resorting to the martial powers of the nation. Thus, at New Orleans, when the civil authorities attempted to obtrude civil process to the embarrassment of military operations in the face of the public enemy, the proclamation of martial law by General JACKSON, for the time being, had its justification in the necessity of the case. Martial law and success, or civil rule and ruin, seemed to be the alternatives. "When martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of existing facts, and not as the creation of the facts; as in a beleaguered city, the state of siege lawfully exists because the city is beleaguered; and the proclamation of martial law in such case is only notice and authentication of the fact, that civil authority has been suspended of itself by force of circumstances, and that by the same force of circumstances the military power has devolved upon it."[1] In the states of continental Europe, the *état de siège*, which corresponds with the suspension of the *habeas corpus*, or with martial law, is regulated by permanent law. In France it is defined to be "a measure of public security, which temporarily suspends the empire of the ordinary laws in one or more cities in a province, or in an entire country; and then considers them subject to the laws of war."[2] So by the constitu-

[1] Opinions of Attorneys General, vol. 8, p. 373.
[2] Bouillet Dictionaire des Sciences, &c., p. 622.

tion of the 14th of January, 1852, as modified by the *senatus consultus*, reëstablishing the imperial dignity, "the emperor has the right to declare a state of siege—*état de siège*—in one or more departments, subject to a reference to the senate with the least possible delay." [1] It provides that the state of siege can only be declared in cases of *imminent peril*, for the internal or external security; and that the national assembly can alone declare it, except that the president of the republic may declare it during the prorogation of the assembly, subject, in grave cases, to immediately convening the assembly. [2]

§ 446. The power to declare war would of itself have carried with it, by necessary implication, all the other powers necessary and proper for carrying it on, without the particular enumeration of subjects which immediately follows this clause. Especially is this the case when it is considered, that the enumerations of the eighth section are rather enumerations of subjects than of particular powers. The subject of war with foreign powers is, by the constitution, committed to the jurisdiction of the general government; and, consequently, all powers necessarily connected therewith. But to place beyond question the authority of the general government over the whole subject, the further enumeration of subjects was made. The power to grant letters of marque and reprisal, although incident to the power to declare and make war may, nevertheless, be exercised as a measure of peace, to prevent the necessity of resorting to war. The law of nations authorizes the sovereign or government whose subject has been injured by the depredations of a foreign potentate or state, or the subjects thereof, to grant to the injured party this mode of redress, where justice has been denied him by the state to which the party doing the injury belongs. Letters of marque signify the passing, or the authority to pass, the boundaries of the offending state, in order to make reprisal by seizing the persons or goods of the subjects of such offending state, wherever they may be found, until satisfaction for the injury is made. This right is granted, because the delay of making war may sometimes be detrimental to individuals who have suffered by such depredations; and this method is resorted to to enable them to obtain speedy justice.[3] The prin-

[1] Tripier, Code Politique, p. 389.
[2] Tripier, *supra*; see Lawrence, Wheat., p. 521 and notes.
[3] See 1 Bl. Com., 258-260.

ciple involved is that of authorizing the injured party to take the remedy into his own hands, and that the government will be responsible for the consequences.

§ 447. The whole subject of exercising war power is committed to the exclusive jurisdiction of congress. Thus, it is authorized to make rules concerning captures on land and water, committing the admiralty jurisdiction of the nation to the general government exclusively. The power to raise and support armies is unlimited, except as to the duration of the appropriations. That is, the house of representatives is renewed every two years, by members fresh from the people, and newly instructed in their wishes, therefore they are not to be bound by appropriations made for the support of the army for a period longer than the official term of the members making the appropriations. Thus, if one congress had unnecessarily increased the army, and had made provision for its support and maintenance, the next congress can continue the appropriations, or not, as they think proper. By this means the unlimited power to raise and support armies is sufficientiy within the control of the people; and their maintenance depends upon new appropriations to be made every two years. Congress is also to provide and maintain a navy; that is, the subject of providing and continuing a sufficient naval force for national exigencies belongs exclusively to congress, and its authority over the whole subject is as unlimited as sovereignty can grant. Congress has the power of prescribing the rules by which the land and naval forces are to be governed; and also to make such provisions as they please for calling forth the militia for any purpose for which the military may become necessary; that is, either to execute the laws, to suppress rebellion, or to repel invasion. It is also authorized to provide for organizing, arming and disciplining the militia; and also for governing such portion of them as are employed in the service of the United States.

§ 448. Congress shall have power 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 government of the United States; and shall have power 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 shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. By the operations of this clause, congress becomes the legislature of the District of Columbia, for all purposes of internal police administration, and the authority of the general and state government are united in the general government. This was deemed necessary to avoid conflicts which might arise between the local authorities of any state, and the authorities of the nation. In the exercise of the powers requisite for the protection of local and domestic interests, and for the administration of law to local and domestic relations, congress has hitherto found it impracticable to enter into the details of such legislation; and has generally supplied this local necessity by adopting the local laws of the state from which the particular territory was taken, as the law of such territory, by reënacting it for such territory. In doing this it has made such alterations or modifications of the state laws as it thought proper, and then provided for the administration thereof by national authority.

§ 449. Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers—meaning the powers pertaining to the subjects enumerated in the eighth section—and all other powers vested by this constitution in the government of the United States, or in any department thereof. By the provisions of this clause, congress is vested with sovereign legislative authority over the enumerated subjects, committed by the constitution, to the jurisdiction of the general government, or to any department thereof; so that whatever legislation may be necessary to the exercise of plenary authority over any enumerated subject committed to the jurisdiction of the general government, congress has the express authority of the constitution to supply. Thus, congress shall have power to regulate commerce with foreign nations, &c., and to make all laws which shall be necessary and proper for carrying into execution such power. Congress shall have power to provide and maintain a navy; and to make all laws which shall be necessary and proper for carrying into execution such power. The president shall be commander-in-chief of the army and navy of the United States; and congress shall have power to make all laws which shall be neces-

sary and proper to carry into execution such power. 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; and congress shall have power to make all laws necessary and proper for carrying to execution such power. Thus this eighteenth clause of the eighth section of the first article of the constitution gives to congress express authority to legislate to any extent that legislation may be necessary in administering the sovereign authority of the nation in respect to all subjects committed to the jurisdiction of the general government. Under this clause, much that has been classed as belonging to the implied power of the constitution is expressly granted. In truth, under its just operation, there is little left to implication.

CHAPTER XIV.

PROHIBITIONS AND RESTRICTIONS.

§ 450. SECTIONS nine and ten of the first article are made up of prohibitions and restrictions imposed upon the general government, and also upon the state governments. These prohibitions and restrictions of power become important as manifesting the understanding of those who framed and adopted the constitution, as to the extent of powers otherwise supposed to be granted. For it is a plain proposition, that there existed no occasion to limit or restrict the exercise of powers not granted; and the form of prohibition implies that those making it, deemed it to be necessary. Thus, the first clause of the ninth section of the first article of the constitution provides, that 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. Unless the authority to prohibit the migration or importation of persons into the country had been conferred upon congress by the constitution, there was no occasion for inserting such prohibition. The only authority conferred upon congress touching the subject of the migration and of the importation of persons, is to be

found in the third clause of the eighth section of the first article, taken in connection with the eighteenth clause of the same section. Thus, congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; and shall have power to make all laws which shall be necessary and proper for carrying into execution such power. The construction put upon this provision of the constitution by the inhibitions of the first clause of the ninth section, imports that, according to the understanding of those who framed and adopted the constitution, congress had full authority over the subject of intercourse between the United States and foreign nations; and also between the several states, extending to the migration from state to state; and also to the importation of persons from abroad, into the United States. The migration of persons has reference to the right to pass from state to state within the union; while the importation of persons has reference to bringing them in from abroad. This prohibition extended only for the term of twenty years; so that after the year eighteen hundred and eight, congress had plenary authority over the whole subject, and still has. In short, the prohibitions of the ninth section imply, that in the opinion of the authors of the constitution, the whole authority upon those subjects was conferred upon congress. It is not to be denied that the persons mentioned in this first clause of the ninth section, were supposed to be slaves; and that the effect of this prohibition was to permit the continuance of the slave trade in the United States for the term of twenty years. That is, the general government had no authority to prohibit the importation of slaves into the United States prior to eighteen hundred and eight; nor had it authority over the coastwise and interstate trade in slaves prior to that time. But as soon as that limitation of the power of the general government ceased, the subject of the foreign and domestic slave trade was entirely within the legal control of congress, and the traffic in slaves carried on between the slave-breeding and the planting states, could have been prohibited at any time thereafter.

§ 451. This prohibition was a compromise between the friends of the union, and the people of certain states, who refused to become members of the proposed union unless the right to bring in slaves from abroad

for a limited time, was conceded to the states. The public sentiment of the nation was against this. But this concession seemed the only alternative to the formation of a national government, which would ultimately have authority over the whole subject. The accusation sometimes made against the United States, that by this provision they legalized for twenty years an act which they afterward declared piracy, is not strictly just. It is to be remembered that at the time of the institution of the government, each state exercised authority independent of the other, because there was no organizd authority to supervise its political action;—that the people of the several states, though a nation in fact, had no organized government to represent them in their national character as sovereign. Therefore, in the institution of the general government, it became necessary to exercise a spirit of concession and compromise in order to come to some basis of union; and while the general sentiment of the nation was in favor of the immediate suppression of the traffic in slaves, there were certain states which would not agree to it, and place themselves under an authority with power to enforce such regulation. To insist upon such condition was to defeat the whole. Therefore, patriotic citizens concluded to concede to the states the right to import slaves into the country for the period of twenty years, when they would get control of such power; that such would be a wiser policy than not to get control of it at all. They acted upon the hypothesis, that it was better to begin with little even, than to reject all, because everything could not be obtained at the commencement. But after the government was instituted, congress lost no time in interdicting the traffic in slaves as far as its power extended, by prohibiting American citizens from carrying it on between foreign countries; and by prospective legislation it abolished the whole traffic as soon as the limitation of its authority, in that respect, was at an end. Mild and moderate penalties were found to be ineffectual, and finally the slave trade was declared piracy, and made punishable with death.[1]

§ 452. The terms "migration" and "importation" are of peculiar significance in this ninth section of the constitution. Slaves were an article of commerce between the several states; and they were also brought in from abroad. The clause conferring upon congress the power

[1] Act 1820, ch. 113.

to regulate commerce with foreign nations and among the several states, necessarily included the power to control this commerce in slaves, not only from abroad, but also among the states. Hence, the prohibition. The migration—that is, the passing from place to place within the United States—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. Nor shall the importation—that is, the bringing in from abroad—of such persons as any of the states now existing shall think proper to admit, be prohibited by the congress prior to the year one thousand eight hundred and eight. The purpose of this provision being to extend to the original thirteen states the right to supply themselves with slaves either from abroad or from the neighboring states, congress always had the power over this subject except as to the original thirteen states. That is, any of the states then existing, had a right to be permitted, under this restriction, to bring into their jurisdiction slaves from any quarter. But it may be seriously questioned, whether Florida, Alabama, Louisiana, Mississippi, Tennessee, Arkansas, Missouri or Kentucky had any such right. They were not then existing states. But since slavery has ceased as a legal condition in all of the states, it is no longer a question of any importance to be considered.

§ 453. "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."[1] The constitution contemplates a state of peace and general security, when the ordinary functions of civil government will be adequate to every requirement. But it also contemplates a condition of public danger when the ordinary functions of civil government will not be adequate to the exigencies of the times; when the civil administration will be obliged to give place to the martial administration of authority. But whether the civil or military authorities administer, the authority administered is the same; the end sought is the same; and the government administering is the same. It is only a different mode of administration, suited to different circumstances. In times of peace, all presumptions are in favor of peace. It is presumed that every man will obey the law; and that every man has obeyed the law;

[1] Art. 1, § 9, Const. U. S.

and, although the law be disregarded, every man is presumed innocent until his guilt is established. Every subject is to be protected in the enjoyment of his natural liberty until he is accused of some delinquency; and then, his personal liberty can be interfered with only by due process of law. When arrested, he can require to be informed of the cause of his arrest, the nature of the accusation, and demand a speedy and impartial trial. If this be denied to him, the great writ of liberty — the *habeas corpus* — will come to his aid, and if illegally or unjustly detained, restore him to liberty. The civil administration of government is designed for peace. It is cautious, deliberate, formal, exact, and governs generally by silent, unostentatious authority. It orders and is obeyed without strife. Its power is the voice of authority evidenced by the peaceful seal, silent, but potential. In the institution of the general government, the civil department was intrusted with the exercise of the civil powers in time of peace. When no danger threatened by invasion from without or rebellion from within, all the presumptions in favor of peace, security and innocence were to continue. The silent authority of the law was to govern; and no person was to be interfered with except in due form of law. The constitution contemplates this condition of peace as the natural and ordinary condition of the nation, especially in the internal administration of its authority. All its civil provisions are designed to apply as the supreme authority in the civil administration of its powers. Then it is that all its forms of administration must be observed; that courts of justice must be open to all to hear their complaints; to give them its process; to determine their rights, and to execute the judgments of the law. Then it is that the privilege of the writ of *habeas corpus* cannot be suspended; — that no soldier can be quartered in any house without the consent of the owner; — that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, cannot be violated; — that warrants must be issued only upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized; — that no person can be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury, &c. All these, and many other provisions of the constitution, refer to the

civil administration of authority in time of peace, and are supremely binding upon government and people. But the civil administration of authority is limited to times of peace and public security incident thereto; and is not suited or designed to apply to, the condition of war; when it is said, *et silent inter leges arma;* when civil courts are shut, and the voice of the law is silent;—then the privileges of the writ of *habeas corpus* may be suspended, because the public safety requires it;—then a soldier may be quartered in any house in a manner prescribed by law, though the owner thereof does not consent thereto;—then persons may be seized, their houses and papers may be searched, without formal warrants supported by oath, &c.;—then persons may be held to answer for capital and other offenses without presentment or indictment by grand jury, &c.

§ 454. In general, it is a principle of civil administration, that the law can only take notice of delinquencies which have already occurred; can only punish offenses committed; and although it can, in certain cases, interfere to prevent injuries, yet such is not the general character of its administration. But it is otherwise in a time of public danger, occasioned by the presence of a rebellion or an invasion by an armed force; when the forms of law are discarded; when its authority is despised, and force bears sway;—then all the civil presumptions applicable to a time of peace and quiet submission to the authority of the law cease, because the condition upon which the presumptions were based have ceased. Then men were presumed to be obedient; now they are openly in rebellion;—then they were presumed to be loyal; now they are known to be traitorous;—then they were presumed to be supporters of the public authority; now they are known to seek its overthrow. President LINCOLN, in answer to a letter of May 19, 1863, from the Hon. ERASTUS CORNING and others, inclosing the resolutions of a public meeting held at Albany, N. Y., on the 16th of the same month, presents the subject in forcible language: "Ours," says he, "is a case of rebellion—so called in the resolutions before me—in fact, a clear, flagrant and gigantic case of rebellion; and the provision of the constitution that '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,' is *the* provision which

specially applies to our present case. This provision plainly attests the understanding of those who made the constitution, that ordinary courts of justice are inadequate to cases of rebellion — attests their purpose, that in such cases men may be held in custody, whom the courts, acting on ordinary rules, would discharge. *Habeas corpus* does not discharge men who are proved guilty of defined crime; and its suspension is allowed by the constitution on purpose that men may be arrested and held who cannot be proved to be guilty of defined crime, 'when, in cases of rebellion or invasion, the public safety may require it.' This is precisely our present case — a case of rebellion, wherein the public safety does require the suspension. Indeed, arrests by process of courts, and arrests in cases of rebellion, do not proceed altogether upon the same basis. The former is directed at the small percentage of ordinary and continuous perpetration of crime; while the latter is directed at sudden and extensive uprisings against the government, which, at most, will succeed or fail in no great length of time. In the latter case, arrests are made, not so much for what has been done, as for what probably would be done. * * Of how little value the constitutional provision I have quoted, will be rendered, if arrests shall never be made until defined crimes shall have been committed, may be illustrated by a few notable examples: Gen. JOHN C. BRECKINRIDGE, Gen. ROBERT E. LEE, Gen. JOSEPH E. JOHNSTON, Gen. JOHN B. MAGRUDER, Gen. WM. B. PRESTON, Gen. SIMON B. BUCKNER and Commodore FRANKLIN BUCHANAN, now occupying the very highest places in the rebel war service, were all within the power of the government since the rebellion began, and were nearly as well known to be traitors then as now. Unquestionably, had we seized and held them, the insurgent cause would have been much weaker. But no one of them had then committed any crime defined in the law."

§ 455. During the early part of the civil war — February, 14, 1862 — the subject of making military arrests was transferred to the war department, representing the authority of the president as commander-in-chief, which department in issuing an executive order in relation to state prisoners, recited, in substance, that the breaking out of a formidable insurrection based on a conflict of political ideas, being an event without precedent in

the United States, was necessarily attended by great confusion and perplexity of the public mind. Disloyalty, before unsuspected, suddenly became bold, and treason astonished the world by bringing at once into the field military forces superior in numbers to the standing army of the United States; — that every department of government was paralyzed by treason; defection appeared in the senate — in the house of representatives — in the cabinet — in the federal courts; ministers and consuls returned from foreign countries to enter the insurrectionary councils, or land or naval forces; commanding and other officers of the army and in the navy betrayed the counsels, or deserted their posts for commands in the insurgent forces. Treason was flagrant in the revenue, and in the post-office, as well as in the territorial governments and in the Indian reserves. Not only governors, judges, legislators and ministerial officers in the states, but even whole states rushed one after another with apparent unanimity, into rebellion. The capital was besieged, and its connection with all the states cut off. Even in portions of country the most loyal, political combinations and secret societies were formed furthering the work of disunion; while from motives of disloyalty or cupidity, or from excited passions or perverted sympathies, individuals were found furnishing men, money and materials of war and supplies to the insurgent military and naval forces. Armies, ships, fortifications, navy-yards, arsenals, military posts and garrisons, one after another were betrayed or abandoned to the insurgents. Congress had not anticipated, and so had not provided for the emergency. The municipal authorities were powerless and inactive. The judicial machinery seemed as if it had been designed not to sustain the government, but to embarrass and betray it. Foreign intervention, openly invited by the insurgents and industriously instigated by the abettors of the insurrection, became imminent, and was only prevented by the practice of strict and impartial justice, with the most perfect moderation in our intercourse with nations. The public mind was alarmed and apprehensive, though fortunately not distracted or disheartened. In this emergency the president felt it his duty to employ with energy the extraordinary powers which the constitution confided to him in cases of insurrection. To the extent it seemed necessary, he substituted the martial for the

civil powers of the government, that he might avert the public danger.[1]

§ 456. In time of war or rebellion, when the danger is present in the midst of the people, and when the forms and rules of law as applicable to a time of peace, can be made an instrument of danger, rather than of security; when force must repel force, and the machinations of the enemy must be thwarted by the seizure of all instruments of mischief, of whatever character, and wherever found, then the martial administration of authority is demanded, and the obtrusion of civil authority to arrest or hinder the efficiency of the military arm must not be permitted. The suspension of the privilege of the writ of *habeas corpus* implies, that in time of rebellion or invasion, when the public safety requires it, the civil functions of government are to cease to any extent necessary; and that those charged with the exercise of this power are to determine when that necessity occurs.[2] It is to be remembered that, under the constitution, the same congress which exercises supreme legislative authority in time of peace, also remains supreme in time of rebellion or war. The same executive head of the nation in time of peace, remains the head of the nation in time of war. In time of peace he executes the authority of the nation by due process of law, subject to the supervision of those civil tribunals authorized to supervise his civil administration. But in time of rebellion or war he executes the same authority of the nation; not civilly, as the executive head of the nation, but by martial power, as the commander-in-chief and military head of

[1] See executive order in relation to state prisoners, dated War Department, February 14, 1862.

[2] Opinion of Judge STEWART, on the application of Senator Pugh to the Circuit Court of the United States at Cincinnati, May 5, 1863, for a writ of *habeas corpus*, to bring before said Circuit Court Clement L. Vallandigham, who had been arrested by order of Gen. Burnside, and ordered for trial before a court-martial. Said Judge STEWART: "Men should know and lay the truth to heart, that there is a course of conduct not involving overt treason, and not subject, therefore, to punishment as such, which nevertheless implies moral guilt and a gross offense against the country. Those who live under the protection, and enjoy the blessing of our benignant government must learn that they cannot stab its vitals with impunity. If they cherish hatred and hostility to it, and desire its subversion, let them withdraw from its jurisdiction, and seek the fellowship and protection of those with whom they are in sympathy. If they remain with us, while they are not of us, they must be subject to such course of dealing as the great law of self-preservation prescribes and will enforce. And let them not complain if the stringent doctrine of military necessity should find them to be the legitimate subjects of its action. I have no fear that the recognition of this doctrine will lead to any invasion of the personal security, or personal liberty of the citizen. It is rare indeed that the charge of disloyalty will be made on insufficient grounds. But if there should be an occasional mistake, such an occurrence is not to be put in competition with the preservation of the nation; and I confess I am but little moved by the eloquent appeals of those who, while they indignantly denounce violation of personal liberty, look with no horror upon a despotism as unmitigated as the world has ever witnessed."

the nation in actual war. But whether the president administer the authority and power of the nation, either as chief executive, or as commander-in-chief, he administers in virtue of the authority of the constitution, as regulated and controlled by the supreme legislative authority of the nation. And whether he employ the civil agencies of administration in times of peace, or the martial agencies in times of rebellion or war, it is the same government, administering the same authority, according to the forms, and in the manner, prescribed by the people themselves. The president proclaiming martial law, and putting on the robes of power as commander-in-chief, when the presence of rebellion or war requires it, is performing as much a constitutional duty as when administering civilly according to established legal forms in times of peace. It is his duty to see that the laws are faithfully executed — as well the martial, in times of public danger arising from the presence of rebellion or war, as the civil, in times of public security and peace. It is his duty to change the civil to the martial functions of power, whenever and wherever, in his judgment, the public safety demands it.

§ 457. In the midst of a civil war, the commander-in-chief of the loyal forces can, undoubtedly, whenever the public safety demands it, suspend the administration of civil authority, and substitute martial law in its place; and this may be done whenever and wherever it is necessary. But it is more in accordance with the genius of the American government, to provide by law for the substitution of martial for civil authority, when it is likely to be necessary to extend the operation of martial law over a large extent of territory, and to continue it for any considerable time. Accordingly, congress in the winter of 1863, during the great rebellion, gave to the president authority, during the continuance of the war, "to declare the suspension of the writ of *habeas corpus*, at such times, and in such places, and with regard to such persons as in his judgment the public safety may require." Under this authority the president caused many evil disposed persons to be arrested in the loyal states, and to be confined in forts and military prisons. For exercising this necessary power, he was denounced as a tyrant, and his authority to make such arrests in places remote from the army, and from the insurgent states, was warmly contested. Under the guise of devotion to the "union and the

constitution," public meetings were called, and resolutions were passed, denouncing the president for causing disloyal persons in the loyal states to be arrested. In reply to resolutions of this character sent to him by the chairman of a democratic meeting held in the city of Albany on the 16th day of May, 1863, he remarks: "By the third resolution the meeting indicate their opinion, that military arrests may be constitutional in localities where rebellion actually exists; but that such arrests are unconstitutional in localities where rebellion or insurrection does not actually exist. They insist that such arrests shall not be made 'outside of the lines of necessary military occupation, and the scenes of insurrection.' Inasmuch, however, as the constitution itself makes no such distinction, I am unable to believe there is any such constitutional distinction. I concede that the class of arrests complained of can be constitutional only when, in cases of rebellion or invasion, the public safety may require them; and I insist that in such cases they are constitutional *wherever* the public safety does require them, as well in places to which they may prevent the rebellion extending, as in those where it may be already prevailing; as well where they may restrain mischievous interference with the raising and supplying of armies to suppress the rebellion, as where the rebellion may actually be; as well where they may restrain the enticing of men out of the army, as where they would prevent mutiny in the army; equally constitutional at all places where they will conduce to the public safety, as against the dangers of rebellion or invasion." [1]

[1] Letter of President LINCOLN to Erastus Corning and others, June 13, 1863. In this letter the president continues: "Take the particular case mentioned by the meeting. It is asserted, in substance, that Mr. Vallandigham was, by a military commander, seized, tried, and for no other reason than words addressed to a public meeting, in criticism of the course of the administration, and in condemnation of the military orders of the general. Now if there be no mistake about this; if this assertion is the truth, and the whole truth; if there was no other reason for the arrest, then I concede that the arrest was wrong. But the arrest, as I understand, was made for a very different reason. Mr. Vallandigham avows his hostility to the war, on the part of the union, and his arrest was made because he was laboring with some effect to prevent the raising of troops; to encourage desertions from the army; and to leave the rebellion without an adequate military force to suppress it. He was not arrested because he was damaging the political prospects of the administration, or the personal interests of the commanding general; but because he was damaging the army, upon the existence and vigor of which the life of the nation depends. He was warring upon the military, and this gave the military constitutional jurisdiction to lay hands upon him. If Mr. Vallandigham was not damaging the military power of the country, then this arrest was made on mistake of facts, which I would be glad to correct on reasonably satisfactory evidence. I understand the meeting whose resolutions I am considering, to be in favor of suppressing the rebellion, by military force—by armies. Long experience has shown that armies cannot be maintained unless desertions shall be punished by the severe penalty of death. The case requires, and the law and the constitution sanction this punishment. Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? * * If I am wrong on this question of constitutional power, my error lies in believing that certain proceedings

§ 458. It is a great error to suppose that the constitution has provided for the same mode of administration in times of public danger, occasioned by the presence of rebellion, general insubordination, or invasion, and in times of peace and public security. It is not that the constitution itself is different in the time of insurrection or invasion, from what it is in times of peace; but it has provided for modes of administration, different under the dangers of war, and the security of peace. When there is nothing to interfere with the silent, yet potent authority of the law, then the civil mode of administration is constitutional; but when, by reason of rebellion or invasion, the civil administration becomes ineffectual to public security, then the martial mode of administration is constitutional; and whether the one mode or the other shall be adopted is left to the determination of either the president or congress, according to the nature of the exigency calling for their determination. When the danger is not imminent, and it is safe to await the action of congress, then it would be better to leave the question to the action of that body. But if, by any sudden invasion or rebellion the public safety should demand more speedy action, then there can be no doubt it is the constitutional duty of the president to proclaim martial law, and apply that mode of administration contemplated by the constitution during the existence and presence of rebellion or invasion. The fears lest civil liberty should be overthrown by the suspension of the privileges of the writ of *habeas corpus* during the great rebellion, had no just foundation; nor were they sustained by facts or logic; and the history of the times as interpreted and understood in the future, will reveal the opposition to the measures of the administration, in this respect, as having its foundation in the craft of the mere politician, and not in the judgment of the statesman or patriot.[1]

are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in the absence of rebellion and invasion, the constitution does not require them; in other words, that the constitution is not, in its application, in all respects the same in cases of rebellion or invasion involving the public safety, as it is in times of profound peace and public security."

[1] To the meeting held at Albany, May 16, 1863, Governor SEYMOUR writes as follows: "If this proceeding"—speaking of the arrest of Vallandigham—"is approved by the government, and sanctioned by the people, it is not merely a step toward revolution—it is revolution. It will not only lead to military despotism—it establishes military despotism. In this aspect it must be accepted, or in this aspect rejected. * * The peope of this country now wait with the deepest anxiety the decision of the administration upon these acts. Having given it a generous support in the conduct of the war, we pause to see what kind of a government it is for which we are asked to pour out our blood and our treasure. The action of the administration will determine in the minds

§ 459. No bill of attainder or *ex post facto* law shall be passed. *Bills of attainder* are defined to be signal exertions of penal justice, and adapted to exigencies unprovided for in the penal code. They are such special acts of the legislature as inflict punishment upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. In England, if the special act inflicted capital punishment, as in cases of treason or felony, it was denominated a *bill of attainder;* but if it inflicted a milder punishment, it was more properly, a *bill of pains and penalties.* In *bills of attainder* the legislature assume the judicial magistracy, weighing the enormity of the charge, and the evidence adduced in support of it; then they decide the political necessity and moral fitness of the penal judgment. These legislative sentences of condemnation have the force of law, but are applicable only to the particular delinquent, and expire as to their chief or positive effects, with the occasion of their enactment.[1] Thus, persons were, by act of parliament, attainted of treason after death; and Lord COKE says many such acts have been made.[2] These attainders were such as affected either *the crime, the evidence, or the punishment.* As affecting the crime, it was usual in England in times of domestic rebellion to pass acts of parliament inflicting penalties of attainder on persons by name, who had levied war against the king, and had fled from justice, provided they should not surrender by a day prefixed. The neglecting to surrender by the appointed day, constituted, or rather, consummated, the new treason against which the attainder was directed. Until that time, it was inchoate and unripe for the operation of

of more than one-half of the people of the loyal states, whether this war is waged to put down rebellion at the south, or destroy free institutions at the north." The meeting for which this letter was written, and at which it was read, was denominated a meeting of the democratic party, and it pledged the party to its views. Similar meetings of the same party were held throughout the north, breathing forth the same spirit. And particularly were such meetings held in New York city and Philadelphia. On the 11th of June, a state convention of the democratic party was held at Columbus, Ohio, and Vallandigham was their nominee for governor. It was well known to these men — that is, to the leading ones — that at the very time they were holding these political meetings, and denouncing the administration for making these arrests, that a secret conspiracy existed throughout the western, middle and eastern states, against the government of the United States, and in the interest of the rebellion; — that they boasted of an efficient, organized band of over three hundred thousand strong, scattered throughout the north, ready to rise at a preconcerted signal, and involve the north in bloodshed and civil strife; — that the boldness of many of those who were arrested was owing to the fact, that they believed the Lincoln government, as they called it, was about to be overthrown.

[1] 2 Wooddeson, pp. 621, 622.

[2] 4 Inst., 36, 37.

the particular statute.[1] The acts of attainder passed against domestic rebels were enforced in a summary manner. No indictment was preferred to a grand jury; but the statute was certified into chancery by the clerk of the parliament, in pursuance of writ directed to him for that purpose; it was then removed into the king's bench, where the whole proceeding was entered upon the record, and the prisoner was asked what he had to allege why execution should not be awarded against him. These bills of attainder in their operation in respect to crime, sometimes determined things to be treason which by no prior law had been so declared.[2] It is probably for this reason, that *ex post facto* laws are prohibited in this connection. Thus, "No bill of attainder or *ex post facto* law shall be passed." A bill of attainder as affecting the evidence, was passed in the case of Sir John Fenwick, changing the law as to the evidence in his case. The statute requiring two witnesses in the more atrocious kinds of high treason,[3] the bill in Fenwick's case was sustained upon the testimony of a single witness, not upon oath, by allowing written evidence not competent in ordinary trials; and by hearing proof of what had been sworn when Sir John Fenwick was not a party, nor present; and of things transacted by his wife, which could not legally exculpate or convict her husband.[4] Such are the nature of bills of attainder which are prohibited by the constitution. By *ex post facto* law, in the constitution, is meant only those acts which are of a criminal or penal character. The supreme court define an *ex post facto* law thus: "It is one which renders an act punishable in a manner in which it was not punishable when committed."[5] The supreme court have also decided that the term *ex post facto law* does not apply to civil laws, or civil proceedings.[6]

§ 460. It is a rule of constitutional government, that the legislative and judicial office shall be separate, and one body shall not exercise the functions of both. The constitution of the United States, which provides that the judicial powers of the nation shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish, in

[1] 2 Wooddeson, pp. 625, 626.
[2] Statute 16 Chas. I, ch. 1; 9 Parl. Hist., p. 288; 2 Wooddeson, p. 631.
[3] 7 W. III, c. 3, § 2.
[4] 2 Wooddeson, 635.
[5] 6 Cranch, 138.
[6] 8 Peters, 110.

spirit makes it impossible for congress to pass bills of attainder without this special prohibition. Nevertheless, the special prohibition was properly inserted, showing in express terms, that the founders of the American government repudiated that species of judicial legislation tending to a subversion of that liberty, and of those rights of the subject, which the government was instituted to protect and preserve. Says Dr. PALEY: "This fundamental rule of civil jurisprudence is violated in the case of acts of attainder or confiscation, in bills of pains and penalties, and in all *ex post facto* laws whatever, in which parliament exercises the double office of legislature and judge. And whoever either understands the value of the rule, or collects the history of those instances in which it has been invaded, will be induced to acknowledge that it had been wiser and safer never to have departed from it. He will confess, at least, that nothing but the most manifest and immediate peril of the commonwealth will justify a repetition of these dangerous examples. If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the law, provide against the commission of future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule upon which the purity of public justice and the existence of civil liberty essentially depend."

§ 461. While considering the subject of *bills of attainder*, and *ex post facto law*, another provision of the constitution comes appropriately under consideration. Section three of the third article provides, that "treason against the United States shall consist in levying war against them, or in adhering to their enemies, giving them aid and comfort. That no person shall be convicted of treason unless upon the testimony of two witnesses to the same overt act; or on confession in open court. That 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." These restrictions upon the constituents of treason, the evidence requisite to a conviction, and the punishment to be denounced against it, had reference to certain legal abuses or enormities practiced under the constitution of the English government, In England treason consisted

in any act which the government saw fit to denounce as such. The term treason imported betrayal, treachery, or breach of faith. It was a general appellation made use of by the law to denote not only offenses against the king and government, but also that accumulation of guilt which arises whenever a superior reposes confidence in a subject or inferior, between whom and himself there subsists a natural, civil or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection and allegiance, as to destroy the life of any superior or lord. This was looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbors it, to have conspired in public against his liege lord and sovereign: and, therefore, for a wife to kill her lord or husband, a servant his lord or master, an ecclesiastic, his lord or ordinary, these being breaches of the lower allegiance of private and domestic faith, are denominated *petit* treason. But when disloyalty so rears its crest, as to attack majesty itself, it is called by way of distinction, *high* treason.[1] By the ancient common law there was great latitude left in the breast of the judge to determine what constituted treason, whereby the creatures of tyrannical princes had opportunity to create abundant constructive treasons: that is, to raise by forced and arbitrary construction, offenses into the crime and punishment of treason which never were suspected to be such, But to prevent these inconveniences arising from the multitude of constructive treasons, the statute of 25 Edward III, ch. 2, was made, which defined what offenses only should, for the future, be held to be treason. This statute comprehended all kinds of treason under seven distinct branches.

1. Where a man should compass or imagine the death of the king, his queen, or their eldest son and heir.

2. Where a man violates the king's companion, or eldest daughter unmarried, or the wife of his eldest son, and heir.

3. Where a man levied war against the king in his realms.

4. Where a man is adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere.

5. Where a man counterfeits the king's great or privy seal.

1 4 Bl. Com., 75.

6. Where a man counterfeits the king's money, or brings false money into the realm, counterfeit to the money of England, knowing the money to be false to merchandise and to make payment withal.

7. If a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justice of the assize, and all other justices assigned to hear and determine, being in their places doing their offices.[1]

But this method of defining what should constitute treason was not sufficient, to satisfy; so the act proceeded, "Because other like cases of treason may happen in time to come which can not be thought of or declared at present, it is accorded that if any other cause, supposed to be treason which is not above specified, doth happen before any judge, the judge shall tarry without going to judgment of the treason till the cause be shown and declared before the king and his parliament, whether it ought to be judged treason or other felony. In consequence of this power, constitutionally inherent in every subsequent parliament, new treasons could be declared at any time, and persons could be made subject to the punishment of treason by bills of attainder, and *ex post facto* laws, at the pleasure of the parliament. This omnipotent power of parliament to define an act as treason, and to denounce the penalties of treason after the act had been committed, is an abuse of legislative power which the constitution seeks to avoid: and therefore provides, that *no bills of attainder or ex post facto law*, shall be passed; and goes further, and declares what acts alone shall be necessary to constitute treason, to wit, "treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort."[2]

§ 462. Under the British constitution the transcendent powers of the legislature or parliament are such, that no act can bind a subsequent parliament to its definition of treason; as for example; under the reign of Richard II, the legislature was exceedingly liberal in declaring new treasons, so much so that in the first year of his successor's reign an act was passed reciting "that no man knew how he ought to behave himself, to do, speak or say, for doubt of such pains of treason; and therefore

1 Const. II., s. art. 3, § 1.
2 4 Bl. Com., pp. 76—85.

it was accorded that in no time to come any treason be judged otherwise than was ordained by the statute of King Edward the Third.[1] This, says Blackstone, swept away at once the whole load of extravagant treasons introduced in the time of Richard II.[2] But again between the reigns of Henry IV, and Mary, the spirit of inventing new treasons was revived, such as offenses of clipping money, breaking prison or rescue, when the prisoner was committed for treason; burning houses to extort money; stealing cattle by Welshmen; execrations against the king; calling him opprobrious names by public writing, &c.[3] The principle to be noticed is, that this power to abuse legislative authority creating new treasons *ad libitum*, as it exists under the British constitution, is taken away by the American constitution. The constitution of the general government has defined what acts shall be necessary to constitute treason, and congress has no power to extend the definition. The Supreme Court of the United States has placed its construction upon it.[4] Said the court, to constitute that specific crime, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert, by force, the government of our country, such conspiracy is not treason. To conspire to levy war, and to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot be committed. * * * It is not the intention of the court to say that no individual can be guilty of this crime, who has not appeared in arms against his country. On the contrary if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute the levying of war." There is considerable latitude left to the court in determining the treasonable purpose, as well also as what constitutes adhering to the enemies and giving them aid and comfort. During the civil war in the United States, the Governor of Virginia

1 Hen. IV, ch. 10.
2 Bl. Com., 86.
3 4 Bl. Com., 76–85.
4 Ex parte Bollman, 4 Cranch, 126. See also *U. S.* v. *Burr*, 4 Cranch, 469.

proposed to Mr. Hinckman, of New York, agent of the New York and Virginia Steamship Company, payment for two steamers of that line which had been seized for the rebel service. Mr. Hinckman was informed that an acceptance of that offer by him would be treated as an act of treason against the United States. Mr. Seward stated the point thus: "An insurrection has broken out in several of the states of this Union, including Virginia, designed to overthrow the government of the United States. The executive authorities of that state are parties to that insurrection, and so are public enemies. Their action in seizing or buying vessels to be employed in executing that design is not merely without authority of law, but is treason. It is treason for any person to give aid and comfort to public enemies. To sell vessels to them which it is their purpose to use as ships of war, is to give them aid and comfort. To receive money from them in payment for vessels which they have seized for those purposes, would be to attempt to convert the unlawful seizure into a sale, and would subject the party so offending to the pains and penalties of treason, and the government would not hesitate to bring the offender to punishment." Although the constitution thus defines the constituents of treason, there is great latitude of construction to determine what acts shall amount to levying war; and what to giving aid and comfort to the enemy.

§ 463. Another evil incident to the power of parliament to define or create new treasons was their power to receive what species of evidence they pleased, and to determine upon what amount to convict of treason. Thus, in the reign of William III., Sir John Fenwick was indicted for treason upon the oaths of two witnesses. Sir John obtained a delay of his trial, and in the mean time one of the witnesses departed from the realm; and, as the statutes[1] then required two witnesses to convict of high treason, it became necessary for parliament to provide for his case. For this cause a bill of attainder was introduced, which brought into the house of commons a formal trial. Upon this trial, the rules of evidence and the requirements of the statute were departed from. A single witness was examined, not upon oath, because such was the custom in the house of commons; written evidence not admissible in common trials was introduced; what had been sworn

1 Edw. VI., ch. 12; 5 and 6 do., ch. 11; 1 and 2 Ph. & M., ch. 10; 4 Bl. Com., 356.

to in a case in which Sir John was not a party, and when he was not present, was given in evidence; and testimony of things transacted by his wife, which could neither exculpate nor convict the husband, were admitted. In this manner he was convicted, and suffered the penalties of treason, except the king remitted all the corporal severities which form a part of the ordinary judgment, except decapitation.[2] Abuses of this character instructed the American people to make it a part of the fundamental law of the nation that no person should be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

§ 464. The next abuse incident to the English system of creating new treasons *ad libitum*, which the people sought to provide against, was the effect and consequences of an attainder of the crime. According to the English theory, there were certain results following the judgment upon conviction of treason, as being necessarily incident thereto. The penalty of the law to be executed upon the person of one convicted of treason was rigorous in the extreme. He was required to be put to death with circumstances of unusual cruelty. His bowels were to be taken out while he was yet alive, and burned in his presence. He was to be quartered, decapitated, etc. But in addition to the penalty to be inflicted upon the person of the convict, certain incidents also attended the judgment upon conviction of high treason.[1] Forfeiture to the king of all his lands and tenements of inheritance, whether fee-simple or fee-tail, with all his rights of entry on lands or tenements which he had at the time of committing the treason, or at any time afterwards, to be forever vested in the crown. This forfeiture related back to the time the act of treason was committed, so as to avoid all intermediate sales and incumbrances. The natural justice of this forfeiture, says Blackstone, is founded on this consideration; that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connection with society, and hath no longer any right to those advantages which before belonged to him purely as a member of community; among which social advantages the right of transferring or

22 Wooddeson, pp. 634, 638; 7 W. III., ch. 3, § 2; Com. Jour., 25 Nov. 1696: Lord's Jour., 23 Dec., 1696.

transmitting property to others is the chief; and further he adds, "Such forfeiture, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by his sense of duty and dread of personal punishment, but also by his passions and natural affections, and will interest every dependent and relation he has, to keep him from offending in such manner.[1] These forfeitures, consequent upon the attainder of treason, differ from those pronounced, or rather created, by the statutes of *præmunire* and others in this:—the latter forfeitures are made a *part of the judgment and penalty* inflicted by the respective statutes; and they do not follow *as mere consequences of the attainder.* Besides the forfeiture of all estate in lands, the convict also forfeits all goods and chattels, with this distinction:—Lands are forfeited upon attainder, and not before; goods and chattels are forfeited by conviction; because in many cases, where goods are forfeited, there never is any attainder, which happens only where judgment of death or outlawry are given. The distinction between *conviction* and *attainder* is this:—The *conviction* may happen without judgment of death or outlawry; but judgment of death or outlawry cannot take place until after conviction. When the judgment of the law is pronounced, and final action had, then *attainder* takes place. The *forfeiture*, relating back to the commission of the act of treason, instantaneously takes place; inheritable blood ceases to connect the attainted with the past or future, and nothing remains for him in this world but the fearful execution of the death sentence, with its attendant horrors. 2. The remaining incident of attainder of treason, is that of the corruption of blood. It is the immediate consequence of the judgment of attainder; and this corruption of the blood proceeds both upward and downward, so that the attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those already in possession of, nor transmit them by descent to, any heir; but the same escheat to the lord of the fee, subject to the King's superior right of forfeiture; and he also obstructs all descents to posterity wherever they are obliged to derive title through him to a remote ancestor.

§ 465. When sentence of death, the most terrible and highest judgment known to the laws of England, is pronounced, the immediate, inseparable consequences

[1] 4 Bl. Com., 381.

from the common law is *attainder*. For when it is now clear beyond all dispute that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him, than barely to see him executed. He is then called attaint; *attinctus*, stained and blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man, for by an anticipation of his punishment, he is already dead in law. This is *after judgment*: for there is a great difference between a man *convicted*, and *attainted*, though they are frequently, through inaccuracy, confounded together. After conviction only, a man is liable to none of these disabilities, for there is still, in contemplation of law, a possibility of innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, or be allowed the benefit of clergy, both of which suppose some latent sparks of merit which plead in extenuation of his fault. But when judgment is once pronounced, both law and fate conspire to prove him completely guilty, and there is not the remotest probability left of anything to be said in his favor. Upon judgment, therefore, of death, and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime pronounced for absconding or fleeing from justice which tacitly confesses the guilt. For these reasons, either upon judgment of outlawry, or of death for treason or felony, a man is said to be attainted.[1]

§ 466. It was in view of the law on the subject of treason, as it then existed in England, that these provisions of the constitution were framed. The constitution not only confined the subject of treason to the act of levying war against the nation, and in adhering to its enemies, giving them aid and comfort; and fixed upon the nature and quantity of evidence which should be indispensible to conviction; but it went further, to abolish or make impossible those incidents of attainder of treason already described. It gives to congress, in the broadest terms, the power to declare the punishment

1 4 Bl. Com. 380, 381.

of treason; that is, congress may impose what penalty it thinks proper to be inflicted upon the person of the criminal, or upon his property; but whatever is inflicted upon him or his, must be a part of the penalty prescribed by law; and shall not follow as the inevitable consequence of the judgment by which he becomes attaint. It is to be remembered, that the consequences of the attainder are no part of the penalty denounced against the criminal. They follow inevitably, the condition in which the criminal is placed in the eye of the law, as soon as by the judgment of the court all possible hope is extinguished, and the guilty one becomes attainted. Then the blood is corrupted, connecting with neither the past or the future. Then forfeiture takes place, because there is in him nothing of manhood left to which it can attach. He is without ancestor or heir; and what he possessed at the time to which the attainder relates, goes to the king by forfeiture. In this view the language of the constitution is simple and appropriate; congress shall have power to declare the punishment—affix the penalty—of treason; but no attainder of treason—that is, no tainted condition of the criminal resulting from the judgment of condemnation—shall work corruption of blood or forfeiture, except during the life of the person attainted.

§ 467. There have been two classes of construction placed upon the last clause of this provision, which cause their advocates to arrive at very different results as to the effect to be given to it. One party insists that it is a limitation upon the penalty which congress is empowered to denounce as the punishment for treason; that owing to this provision congress can not make an absolute forfeiture of real estate to the government a part of the penalty of the crime; but can extend its effect only during the life of the traitor.[1] The other party insist that it has no reference to the penalty which congress is authorized to declare as the punishment for treason; that it refers only to the period during which the party shall be liable to be attainted; that is, the attainder shall take place during the life of the person attainted. There is a third view which seems to be more in accordance with the legal meaning of the language used, and the purpose the people had in view at the time than either of the foregoing constructions, and it excludes both of the others; that is, it affirms that the latter clause of this provision is neither a limitation upon

the power of congress to declare the punishment of treason, nor upon the time during which the person shall be attainted; but that it means, as its language imports, that there can be a condition in the criminal known as attainted; produced, as in law, it only can be produced, by pronouncing the judgment of the law upon the convicted felon; and that the incidents of that attainder, corruption of blood and forfeiture can follow as in England, but only during the life of the person attainted. After death the attainder shall cease; that is, the corruption of blood and forfeiture shall be at an end, and as to all that come after him as heirs they may take through him as though his blood had never been corrupted. Each of these constructions will be considered in their order, premising first, that no light is to be obtained from the debates in the convention framing, or the conventions adopting the constitution; nor has the Supreme Court of the United States yet put its construction upon that clause.

§ 468. The theory that the clause under consideration is a limitation upon the power of congress to declare the punishment of treason is objectionable for at least two reasons. First, the language of the clause forbids such construction. To suppose it to be a limitation upon the power of congress to affix by law, the penalty for treason, is to give to the word "attainder" a meaning and an office which has no warrant in any former use. Attainder, as used in law, implies the imparting of a state or condition to the person by the pronunciation of the sentence which the law denounces upon the convicted felon or traitor. Attainted, implies the state of the felon produced by the judgment, bereft of civil life, of human sympathy and connections; without the protection of law, awaiting only to be executed. Corruption of blood, and forfeiture are the immediate and inseparable consequences of this attainted condition, wrought out by the condition itself. Hence the expression, "no attainder of treason *shall work* corruption of blood or forfeiture except" for a limited time. The penalty of the law enters in to make the judgment. The judgment of the law produces the attainted condition; and corruption of blood and forfeiture result from that condition as an inseparable consequence. It would therefore be a most unwarrantable interpretation of the language used to make this clause a limitation upon the power of Congress to declare the punishment for trea-

son. Second, if the language used would admit of such interpretation consistently with any former use of the same, the provision would so limit the power of Congress in denouncing the penalty, as to virtually protect the property of the traitor from confiscation or even use for any considerable length of time, unless the government should preserve the life of the traitor for the sake of keeping the use of his property. In all governments the penalty of treason, that is, of that species of treason which aims at the life of the state or government, is death. And after conviction and sentence, it is not usual to defer for a long time, the period of execution. If, then, the extent to which Congress can subject the property of the traitor to forfeiture, is limited to the period between sentence and execution, the life estate, *per autre vie*—during the life of the felon —would be of little value. Ordinarily, if justice should be done by the speedy execution of the law, upon the guilty, the tenant would have little time to raise and gather his crops. The estate would commence at the moment of judgment, and end on the day of execution. Such cannot be the true construction of that clause.

§ 469, The theory that the clause under consideration is a limitation upon the period during which it shall be lawful to convict, adjudge and attaint a traitor, is objectionable for two reasons. First, because the structure of the sentence must be distorted to adapt it to the expression of such idea or limitation. Had the authors of that instrument intended to express such a limitation they would probably have said, "but there shall be no attainder of treason except during the life of the person attainted, which shall work a corruption of blood, or forfeiture." But even under this form of sentence, or any other form which can be given to it, except as it stands in the constitution, the word attainder cannot be used in its strictly legal sense, and sustain the hypothesis that it is either a limitation upon the penalty for treason or upon the time for trying the accused. A second objection to this interpretation or construction is, that the constitution had before provided against the exercise of any such authority to attaint a person after his death, so that if such be its real meaning, this clause is without value. Under the greatest latitude practiced in England, creating new treasons, passing bills of attainder, and *ex post faeto laws*, it never happened that the courts of England went through the formality of trying, convicting and

denouncing the penalty of the law upon a dead person. When the party denounced for treason or other felony was dead, it required the omnipotent power of parliament to attaint him by bill: and therein is one of the advantages, that they could deal with the dead as though they were still living. But the constitution of the United States had provided against proceedings after the death of the accused, by the provision that "No bill of attainder or *ex post facto law* shall be passed." Therefore it was unnecessary to insert the clause under consideration, if the end sought was to make impossible the attainting of a person after his death.

The remaining theory, and the one which seems most free from objection, is that which interprets this clause to be a limitation upon the duration of the corruption of blood and forfeiture incident to the condition of attainder. The language implies that there is such a condition as that of *attainder of treason*, and that such condition has the power to *work a corruption of blood and forfeiture.* In legal parlance, attainder is the immediate, inseparable consequence of the judgment denouncing the penalty of the law upon the convicted felon, whether by parliament or court. In like parlance, corruption of blood and forfeiture are the work or result of attainder, and form no part of the penalty. Thus, again, the penalty of the law enters into, and becomes the judgment of the court, whether it extends to life, limb, liberty, or property. The attainder resulted from this judgment, and the corruption of blood and forfeiture, from the attainder. This clause of the constitution, then, is to be construed as meaning that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted, that is, except for a limited period, measured by the life of the felon. Such being the interpretation, congress has full power to denounce what penalty it sees proper, as the punishment for treason, extending to life, limb, liberty, or property. It can do every thing except extend the period of corruption of blood and forfeiture incident to the attainted condition of the criminal. It can limit the forfeiture, or take it away entirely; it can limit the effects of the corruption of blood, or remove it entirely. Under the English system, the attainted felon is forever a broken link, and can never be the means of connecting heir with ancestor. Under the American constitution, this broken link continues but a few days. It reaches only

from judgment to execution, when the corruption ceases, by the termination of the attainted condition, and, therefore, the forfeitures cease. It is not to be objected, that the forfeiture amounts to nothing, if it continue no longer than from judgment to execution. Congress has authority to provide by penalty what shall constitute the judgment against the traitor, and it need leave nothing to be operated upon by forfeiture. According to this construction, the full force and effect is given to the language used; the harshness and injustice of the English law on the subject of treason is removed. Congress has full power to declare, without limitation, the punishment of treason, and most clearly the end intended by this clause is fully secured. By this construction, the traitor, convicted and sentenced to death, becomes attainted, and his attainder works corruption of blood and forfeiture, not forever, but for a limited period, during the life of the felon. That is, while living, the traitor, under sentence of death, is a broken link; he is stained and blackened by his ascertained crime, and is disconnected with ancestor or heir, cut off from human sympathy, from human aid, from credit, reputation, capacity, and, in anticipation of punishment, in law, already dead.

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration, hereinbefore directed to be taken." The part of the constitution here referred to is the third clause of the second section of the fifth article, which provides that representatives and direct taxes shall be apportioned among the several States in the Union, according to their respective numbers. It also provides the means and manner in which such numbers shall be ascertained. This subject was considered in the tenth chapter[1] of this treatise, to which reference is made.

§ 472. 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. The object of this prohibition is to avoid as far as possible, in equality of burdens imposed by the general government upon the people of the different states. It was the purpose of those instituting the general government to treat with impartiality the

1 *Ante*, p. 171, § 337 *et seq.*

people of the nation without respect to the particular states in which they chanced to reside. The constitution commits the subject of regulating commerce to congress; under which general power they have the sovereign authority of the nation, to be exercised according to their discretion. Without some restrictions imposed upon the exercise of this power, they can do what sovereignty itself could do, in its exercise: for the terms of the grant are absolute and unqualified, giving the regulation and control of commercial intercourse to congress. To guard against such an exercise of this power as would operate oppressively upon particular states, this provision was inserted, prohibiting the levying of an export duty upon articles exported from any state. This prohibition has been understood generally as excluding from congress, authority to levy export duties; in-as-much as all exports are from the several states. If congress were allowed to lay an export duty from any one state, it might unreasonably injure or perhaps destroy the staple productions or common articles of that state. Thus, some of the states have nothing but agricultural products for exportation; others have manufacturing products; others still, derive their resources mainly from the fisheries. Now a duty laid on any of these classes of exports would operate unequally upon the people of the different states living by such diverse pursuits. Such is the character and extent of the constitutional objection to the authority of congress to levy export duties. It rests upon the hypothesis that the state, as a political institution, has a corporate and vested interest in the products of the industry of the people residing within its territorial limits, and that, therefore it should be provided for, by guarding against all possible encroachments by the nation upon its corporate and vested rights and interests. The language of this prohibition does not necessarily extend beyond denying to congress authority to levy export duties upon the products of a particular state: that is, forbidding congress in the levying of duties, to regard state lives. But if the prohibition is to be extended to the exclusion of all power in congress to levy export duties by reason of the inequality of the operation of any law which could be made, then the same reason would be applicable to the levying of *import* duties: for while it would be true that the inhabitants of the several states are generally engaged in different pursuits, and produce for market

different articles; it is also true, that the inhabitants of the several states generally *import* different articles for home consumption; and investigation will show nearly as great a diversity in the local character of *imports*, as there is in the local character of *exports*. But beside this, the local character of exports or imports is not at all determined by state lines. Whether a locality shall engage in any particular enterprise as that of agriculture, manufactures, mining, fishing or commerce, does not depend upon state lines; and there exists no reason why the particular prohibition under consideration should be construed as intended to avoid inequality of burden by prohibiting duties upon exports, in any other sense than that the exports from a particular state should not be made the subject of a local export duty. In other words, the spirit of the entire clause is, that in the regulation of commerce, congress shall pay no heed to state lines; but shall so exercise its powers that they shall operate equally upon all citizens, in the same manner as though the political division known as states, did not exist.

§ 473. As a historical fact the convention which prepared the draft of the constitution, intended by this clause to deny to congress the power to lay export duties. This is very clearly manifested in their discussions upon that subject. This prohibition was insisted upon as a protection to the staple states, as they were called. Thus, General Pinckney was alarmed at the remarks of Gouverneur Morris, who had spoken of laying taxes on *exports*, because South Carolina had, in a single year, exported to the amount of £600,000 sterling, all of which were the fruits of the labor of her blacks.[1] Again Mr. Pinckney reminded the convention that if the committee should fail to insert some security to the Southern States against an emancipation of slaves, and *taxes on exports*, he should be bound in duty to vote against their report.[2] Again Mr. Mason urged the necessity of connecting with the power of laying taxes, the prohibition, that no tax should be laid on exports. He hoped the Northern States did not intend to deny to the Southern, this security.[3] Mr. Elsworth claimed there were solid reasons against congress laying taxes on exports. First, it would discourage industry, as taxes on imports would discourage luxury. Second, the produce of different

[1] Madison's Debates in Congress, 302; 5 Elliott's Debates by Lippencott, 1866.
[2] Id., p. 357.
[3] Id., p. 432.

states is such as to prevent uniformity in such taxes Third, the taxing of exports would engender incurable jealousies.[1] On the other hand, Mr. King objected to the position in which the general government would be placed by not allowing it to prohibit the importation of slaves, or to tax exports. He inquired, "is this reasonable? what are the great objects of the general system?" First, defense against foreign invasion; secondly, against internal sedition. Shall all the states then be bound to defend each, and shall each be at liberty to introduce a weakness which will render defense more difficult? Shall one part of the United States be bound to defend another part, and that other part be at liberty, not only to increase its own danger, but to withhold the compensation for the burden? If slaves are to be imported shall not the effects produced by their labor supply a revenue the better to enable the general government to defend their masters? There was no such inequality and unreasonableness in all this — that the people of the northern states could never be reconciled to it; — no candid man could undertake to justify it to them.[2] The clause as it now stands in the constitution, was the result of the discussion and compromises of the convention; and it cannot well be questioned that they intended so to frame the draft of this prohibition, as to deprive congress of the power to tax exports. But here arises a more serious question. The intention of the *framers* of the constitution has nothing to do with the legal interpretation of the instrument itself. It cannot give a meaning to it differing from the natural import of the language used. It is not a question, what were the views of those who made the *draft* of the instrument but what were the views of those who ordained it. If the language used by them be such as to render it necessary to resort to interpretation, then resort may be had to such principles of interpretation as well established rules will permit; but in no case can the motives and purposes of those who prepared the draft of the instrument be inquired into, with the view of ascertaining the intention of another body who adopted it. If the expression, "no tax or duty shall be laid on articles exported from any state," require an interpretation other than that which the natural import of the language used implies, then a resort to the established rules of interpretation is required; and no one is authorized to

[1] Madison's Debates in Congress, p. 454. [2] Id., p. 391.

depart from such rules; because all instruments are constructed with the view of disclosing the intention of the parties to the same, as it shall appear when interpreted according to such rules. The first principle of construction requires that the words used shall be understood according to their usual and most known signification. If the meaning is still dubious, then resort to the context shall next be had, by which is included an examination of the preamble; or of other acts passed by the same legislature; as statutes in *pari materia* are to be construed in reference to each other. If the meaning is still uncertain, then reference to the subject matter is next in order; and the meaning still remaining doubtful, the last resort is to the reason and spirit of the law; or the motive which led the legislature to enact it.[1] Tried by any or all of these modes of ascertaining the legal meaning of the above clause, and there is but one conclusion; and that is, that in the exercise of its power over commerce, and in the regulation thereof, congress should pay no heed to state lines, but should so exercise its powers, that they should operate equally upon all citizens, in the same manner as they would if the political division known as states, did not exist. If congress cannot levy export duties without violating this principle, then it is prohibited from doing so.

§ 474. The remaining portion of the fifth clause of the ninth section has the same end in view, to wit: that congress, in the exercise of its power to regulate commerce, should act upon the hypothesis that all are members of one government, and that there is but one authority in that respect to be obeyed. Thus, "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." The effect of this prohibition is, that congress, as the national legislature, shall make no law touching the subject of regulating commerce, which shall not apply with equal force to all parts of the nation; that is, its laws regulating commerce shall be general, and not local. That when a ship has entered, cleared, or paid duties in any port of the United States, it has discharged its duty, in that respect, to the government, and shall not be required to do it again, because it may be bound to or from any other state.

[1] 1 Bl. Com., 59, 60; ante p. 128 and notes.

§ 475. "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." The object of this provision is to bring under the inspection and authority of congress all expenditures of money by the nation, or for and on its behalf. The provision requiring an exhibit of the receipts and expenditures of all public money from time to time, is designed as a sure means of enlightening the public; that they may, through their representatives, know what appropriations are required; and the means on hand by which such requirements are to be met. That is, this provision is based upon the hypothesis that the law-making power is in the hands of the people; and that all payments of money shall be by their authority; and that they shall have the means of correct information, that they may act understandingly upon that subject.

§ 476. "No title of nobility shall be granted by the United States." That is, the general government has no authority to create classes or class distinctions among the people;—that all its laws shall be enacted upon the hypothesis that all men are created equal, and are equally entitled at the hands of their government;—that government is an institution of the people, created for the sole and only purpose of administering their authority, to the end that each and all may be secure in the enjoyment of civil liberty; and that equal and exact justice may be administered to all; and that those who are intrusted with the administration of the public authority, may not be influenced to betray their trust, or to administer under a foreign influence, all persons holding an office of profit or trust under the general government, are prohibited from accepting any present, emolument, office or title of any kind whatever from any king, prince, or foreign state, without the consent of congress.[1]

[1] Const. U. S., art. 1, § 9, cl. 7.

CHAPTER XV.

OF THE STATES AS POLITICAL ORGANIZATIONS—THEIR OFFICE, DUTIES AND POWERS.

§ 477. ACCORDING to the American theory, government has no original authority. It is an institution of the people, designed only as an instrument of administration; and all the power it possesses and can properly exercise, is a mere trust for the common good. Government is imposed upon society by the law of necessity. Thus, the public authority must be applied to the regulation and control of the public acts of the individual members of society; and also to the regulation and control of their private conduct, so far as it affects the legal rights of others. But this can be done only through the instrumentality of a political organization, created for the purpose of exercising such public authority, and duly authorized to exercise it. Such political body becomes a corporation, or an artificial person, having the qualities and attributes, in law, of a person, with an understanding, will and power, to be exercised within the limits of the authority conferred, called its jurisdiction; and for the purposes for which it was created and endowed, called its administration. Thus, government proper is a creature of the public authority. It is an instrument of administration, by which alone the public authority is to be made known; or by means of which, during its continuance, the public authority is to be represented. In treating of government, it is necessary to remember that it possesses powers to be exercised; but that all such powers are trusts, and can be exercised only in accordance with the authority given, and for the purposes for which the powers were given. Thus, the general and state governments are mere instruments of administration, each intrusted with the exercise of certain powers, over certain subjects or classes of subjects, for specific purposes. In either case, the authority by which they administer, as well as the authority administered, by them or either of them, is the authority of the public or nation, and not the authority of the government or institution.

§ 478. The government, whether of the state or of the nation, is a body corporate and politic, created by the people, to be intrusted with the exercise of their

authority over matters committed by them to its jurisdiction. Its corporate governmental character consists of offices, to which certain powers and duties are incident; authorizing the incumbent to exercise those powers, and requiring him to perform those duties, in the manner prescribed, and for the purposes for which the offices were created. And it is to be remembered that the rights possessed, the duties enjoined, and the powers conferred, pertain to the office alone; and the incumbent is the instrument designated to administer the office, and for the purpose for which it was created. It is also to be remembered that there is but one source of authority, and hence but one authority, to be administered by the government. All governmental authority must be rooted and grounded in sovereignty; that is, it must have its basis in prerogative, whether that be found in the monarch or in the people. In all forms of government the absolute right to command obedience must be found somewhere; and wherever that is found, there is *prerogative*—there is *sovereignty*. Therefore, under all forms of government, and in all gradations of authority, that power only which comes from sovereignty expressly or by implication, has the right to command obedience—has authority to govern. Sovereignty may delegate powers of administration, and distribute administrative rights through many gradations of office, from the national to the municipal government, or even to the family; and it may map out the subjects of jurisdiction, and the limitations of authority to each particular gradation, but it does not by so doing, divide itself, or create diverse sovereignties. There is present in every subordinate jurisdiction the same authority to administer, and the same authority to be administered; and that is the sovereignty which created the jurisdiction and authorized administration therein. The authority of the humblest magistrate in the discharge of his official duties, is as absolute as the authority of the king. Belonging to an inferior jurisdiction, his action may be subject to review by a superior jurisdiction. But until reviewed and reversed, it has all the authority committed by sovereignty to that jurisdiction; that is, it has the authority of sovereignty itself in what is officially done within the assigned jurisdiction.

§ 479. Sovereignty is essential to the establishment and maintenance of government, whatever may be the

form of its administration. It is as essential to a democratic as to a monarchical government. There must be an ultimate authority; an authority from which there is no appeal; an authority to command in the last resort; subject to no legal restriction—to no authoritive stay. This sovereignty, as the fountain from which all governmental authority proceeds, can have no superior—can have no equals within its sphere of authority. It must be prerogative and alone. Every independent nation must, from necessity, possess this sovereignty—this prerogative power—as an essential attribute of its existence. As a nation, it cannot be inferior in authority to any other; and within its limits, it can have no equals. The people of the United States as a nation possess this absolute sovereignty; and there is no political power on earth to question the nation's sovereign authority to govern itself in such a manner as pleases it. But this sovereignty pertains to the people as constituent elements of the nation, in their original character as members of the national society; and it necessarily includes all governmental authority within the limits of the nation. For there cannot be two independent sovereignties within the same limits, having jurisdiction over the same territory and people. The right of commanding in the last resort can come from but one source, and be exercised by but one authority, within the nation. The people of the United States constituting but one nation, possess this absolute sovereignty to be exercised in such a manner, and in respect to such subjects as they, in their pleasure, ordain and determine; and no other governmental authority can exist or be administered within the nation, except that which comes, expressly or by implication, from the national fountain. The principles of democracy are seen in the *source*, and in the *administration*, of governmental authority. In the *source*, by ascribing to the people in their largest civil association, sovereignty. In the *administration* of this authority, by committing to those only who are to be affected by it, the rights of administration. Thus, in respect to all matters pertaining to the common defense and the general welfare of the nation, the administration of the public authority is committed to the nation. In respect to all matters pertaining to local and domestic interests alone, the administration of the public authority is committed to the people of the state. In respect to all matters pertaining to the interests

of the municipality, the administration of the public authority is committed to the municipality. The principle to be noticed is this: there is but one source of this governmental authority, by whomsoever and in whatsoever department administered. And the right to administer this authority, like all other political rights, is conferred by the same sovereignty. The rights of administration, in their origin, must have the same source as sovereignty itself. That is, the authority to govern may determine by whom its authority shall be administered; at least, it has the rightful authority to determine by whom it shall be administered. Thus, if any particular class of people are disqualified from the exercise of that patriotism, that judgment and discretion which is essential to the character of one qualified to administer the public authority, such class may be excluded from the exercise of such powers. The very necessity which calls for the existence and maintenance of government, demands the exercise of proper authority to determine by whom the public authority shall be administered. The right to determine by whom governmental authority shall be exercised, pertains to sovereignty alone.

§ 480. The administration of governmental authority through the instrumentality of the general and state governments, furnishes ample illustration of the ONE SOURCE of authority in the sovereignty of the nation; and of the DIVERS MODES of administering that authority, through the instrumentality of these several corporate institutions, called the general, and the state governments. In the institution of the national government, the people of the United States, as members of the civil society constituting the one nation, exercised their inherent authority to establish for themselves such an agency or government for executing their authority as they thought proper. In the exercise of this authority, *they acted in virtue of their powers as men and not as members of any organized government or society.* They occupied a plane above political constitutions, and exercised the authority which makes constitutions and founds governments. They exercised the prerogative authority to say, that a national or general government should be instituted for certain purposes; and should have authority to exercise full powers over a certain class of subjects. They determined that for certain purposes, the existing state governments should be

continued; and should be intrusted with the exercise of the public authority over such local and domestic matters as pertained to their local and domestic interests; and as were not, by them, committed to the jurisdiction of the general government. But in determining the limits of the general and of the local jurisdiction of these governments, the people consulted their own pleasure and judgment, and exercised their inherent authority; and they defined the several jurisdictions of these governments in virtue of their sovereignty alone. They took from the states, and conferred upon the general government, the right to exercise authority over such classes of subjects as, in their opinion, the safety and welfare of the people required them to do. And in the constitution which they then ordained and established, they provided for amendments thereof, to be made in such a manner as to assert in the most unqualified form the sovereign authority of the nation to take from the states, whenever it should be the pleasure of the nation to do so, all administrative authority whatever. Thus, congress, whenever two-thirds shall concur in the measure, can propose amendments to the constitution, which become valid to all intents and purposes as parts of the same whenever ratified by the legislatures of three-fourths of the states; or by conventions therein, as congress shall determine. In this way, any state may be deprived by national authority of all administrative rights without the consent of its people; because the authority to do so is in the nation, and there is no authority in its particular government or people to forbid it. This illustration is sufficient of itself to demonstrate the subordination of state administration to the authority of the nation. It is no answer to this view to affirm that the people of the several states would never consent to such amendments of the national constitution as would deprive them of state administration. The people of the several states are citizens of the United States, and, as such members of the nation, they have authority to assent to such amendments; and that sustains the position that the authority is in the nation, and may be exercised whenever they think proper.

§ 481. The questions of *governmental administration* belong to the sovereignty. The authority to institute a government, can determine by whom that government shall be administered, and those who are intrusted with

the powers of such administration, exercise them in virtue of the authority conferred upon them by the sovereignty, and not in virtue of any inherent right in themselves. Thus, the questions pertaining to the administration of the general government were determined by the sovereignty which instituted that government. All questions as to what powers should be committed to the general government; what should be the structure of that government; in what manner and by whom it should be administered; how the officers thereof should be selected; who should be authorized to participate in the selection of the same; what should be their duties, powers and responsibilities, were determined by the authority which instituted the general government; and the same authority can revise, modify or abolish the whole or any part thereof at pleasure. The authority which took from the states, both as political institutions and as people, any part of the subjects of their jurisdiction, and placed the same under the jurisdiction of the general government, could, had it so pleased, have taken every subject from state jurisdiction and have abolished state administration entirely. That they did not do it, was a question of expediency, and not of authority. The absolute authority of the inherent sovereignty of the nation underlies all other civil authority in the United States, both as to the powers to be administered, and the authority by which they are to be administered. If the states, as political organizations, are allowed to participate in any degree in the administration of the general government, it is in virtue of the authority conferred by the constitution of the United States, and not in virtue of any authority inherent in them. Thus, the state legislatures may apportion among the citizens of their respective jurisdictions, the districts from which their members to to the house of representatives in congress shall be elected; but they can do it only in virtue of the authority conferred by the constitution, and that privilege is liable to be taken from them, at the pleasure of congress. The state legislatures can elect, each two senators to represent them in the United States senate; but they do so because authorized by the national constitution. The same authority which authorized the legislature to select these senators, could have given the authority to the people at large; or could have withheld it altogether. The same is true of all power conferred upon

the states to participate in the national administration. That power has its authority in *national*, not *state* sovereignty, and is to be exercised as a right or privilege *conferred*, not as a right or privilege *inherent* in the state; and it is to be exercised as a *trust*, and not as possessed in the *right of him or it* which administers.

§ 482. The people, in the exercise of their inherent sovereignty in the institution and endowment of the general government, recognized the continued existence and use of state governments as *instruments* of internal administration; but they recognized them as subordinated to the authority of the nation; and they used them only as thus subordinated. They parceled out the subjects of administration between the general and state governments, by enumerating what should belong to the general, and declaring that the rest should remain with the state administrations. Thus, the states then existing virtually took their future or continued existence and authority at the hands of the nation; and they became instruments of internal administration of such powers as were assigned to them by national sovereignty; and they now hold such powers in trust merely at the pleasure of the nation; for whenever it shall be the pleasure of the people so to amend their national constitution as to withdraw from the states any portion of their present powers, they will be obliged to submit to such determination. This subordination of state institutions to the sovereignty of the nation is more clearly apparent in the institution of new states. Since the assertion of national sovereignty in the United States over the subjects of civil administration, by the institution of the national government, some twenty-three new states have been created within the national limits. These states have been erected within territories of the United States, portions of which have been acquired by the nation since its civil organization as a government, but all of which was subject to the absolute and unrestricted jurisdiction of the United States in all matters pertaining to civil administration prior to the erection of these states. While remaining territories, no civil or criminal jurisdiction could be exercised therein except by the authority of congress, as the national legislature. This authority of congress over the territories is usually based upon the second clause of the third section of the fourth article of the constitution, which provides that 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. But, aside from the authority contained in this clause, the power to exercise jurisdiction over, and provide for the government of, any territories which the nation might acquire, would necessarily inhere in congress, as being the body to which the exercise of all legislative authority over national subjects is committed. If, as an incident of sovereignty, the nation has authority to acquire such contiguous territory as its safety and welfare demands; and if such authority is committed to the proper departments of the general government, to be exercised in its sound discretion—as it undoubtedly is under the war powers—then the acquisition of such territory draws with it, not only the property therein and the right of possession thereof, but likewise the *sovereignty over* the same; that is, the authority to extend its jurisdiction both civil and criminal, over such territory. To hold the converse of this would be an absurdity. For if the nation, through the agency of the general government, can acquire territory from any foreign power, it must either acquire the right of exercising the sovereignty of the nation over the same, or that right remains in the foreign power. Thus, when the territories of New Mexico and California were acquired by the United States from Mexico, the right of sovereignty, or to exercise sovereign authority over the same, was incident to the transfer, and vested in the nation with the title to such territory. To hold the contrary would leave the right of sovereignty in Mexico, which cannot be admitted. The sovereignty over such territory vesting in the United States, no one can exercise jurisdiction there not derived from, or recognized by the United States. That is, the authority of the nation over such territory is absolute, unless qualified by the terms of the grant. No government can be established there but by the authority of the nation, and upon such terms and conditions as the nation in its sovereignty sees fit to impose. Such has been the authority exercised by the nation in respect to all its territories. The people of any territory desiring to become a state corporation for purposes of civil administration, have never been supposed to be able to vest themselves with the rights, powers and duties of a state government; nor have they been supposed to be able to exercise, in their own right, any public authority.

Whatever political power has been exercised by them as inhabitants of the territory, has been under the enabling power of the nation as conferred by the legislation of congress. It matters not what may be the number and character of the inhabitants of a territory; or what may be their qualifications to administer civil authority, as inhabitants of a territory of the United States, they have not, nor can they acquire any political authority except through the enabling authority of the nation through congress. All territorial legislation derives its sanction from the sovereignty of the nation; all territorial administration derives its authority from the same source. Whenever the inhabitants of a territory desire to be enfranchised with the political powers and rights of a state, that they may be authorized to administer in respect to their own local and domestic matters, they are obliged to take their charter — state constitution — upon such terms and conditions as congress, exercising the legislative authority of the nation, prescribes. The people of the territory may draft the form of their proposed constitution — may submit the same to the approval of the inhabitants — and they may approve of the same; it is still without political life or power until the sovereign authority of the nation by its incorporating and enfranchising act, gives it political existence and administrative authority. Colorado has been asking enfranchisement, Nebraska has been asking the same, but the charters presented by them did not please congress, and they prescribed the terms to which they must accede before they could be incorporated and enfranchised as political states, and become vested with political powers as state citizens.

§ 483. To create a new state within the union, requires the exercise of national authority, incorporating the inhabitants within a certain territory over which the United States has exclusive authority, and the general government has exclusive jurisdiction, into a body politic; thereby vesting them with such powers as by the national constitution are confided to state administrative authority, subject, nevertheless, to such further inhibitions and restrictions as the terms of its own constitution or charter may impose.[1] By this national act of incorporation, the political state is created; and the franchise of state citizenship is conferred; and the corporation known as a state becomes, in the hands of its

[1] See Appendix: admission of states.

citizens, an instrument for exercising the authority of the nation in respect to all subjects committed to state jurisdiction. The effect of this act of incorporation is twofold. It commits to the inhabitants of such territory the right exercised by citizens of the United States, residing beyond its limits, to participate in the administration of governmental authority in matters purely local and domestic within its limits; and consequently it confers upon such inhabitants the right to exercise exclusive jurisdiction in all matters of administration over such subjects. Before such state was created, the inhabitants thereof had no administrative authority; by such political incorporation, the inhabitants have exclusive authority politically, over their own local and domestic interests; and a right to participate in the administration of the public authority touching matters of a national character, through the instrumentality of the state and general government, in the manner prescribed by the constitution of the United States. By the act of political enfranchisement creating a new state, the inhabitants of the territory included within the limits of the new state are invested with administrative privileges merely. Their rights civilly, were the same while they were mere inhabitants of the unorganized territory. As American citizens they were entitled to that protection in the exercises of their civil rights, which the government could extend to them in their remoteness from its administrative power. Their right to participate in the administration of the public authority, through the instrumentality of the general government, so far as they possessed the requisite qualifications, might have been perfect, provided they had placed themselves within the reach of means by which that participation could be effected. But so long as they resided outside the corporate limits of a state those means could not be made available; and they were necessarily denied the exercise of such rights. Therefore, by the act of state incorporation, the inhabitants acquire the right to participate in the general administration; and, by such act, the means of exercising such power is brought within their reach.

§ 484. What, then, constitutes a state under the constitution, and within the limits of the United States? By the authority of an act of congress, the people inhabiting the territory included within the limits of the proposed state, are incorporated into a political

society for the purpose of exercising governmental powers over matters of a local and domestic character, within the limits of the described territory; subject, however, to such limitations and prohibitions as the constitution of the United States, and their own constitution prescribe. The effect of this incorporating and enfranchising act of the nation is, to institute a local government, to be intrusted with the exercise of sovereign authority over such subjects as are committed to its jurisdiction; which authority is to be administered by the citizens of such local territory, in virtue of the franchise conferred upon them by the act creating them a political body. Beside, being citizens of the United States, such state citizens are likewise invested with such other political franchises as pertain to other citizens of the United States, under the provisions of the national constitution applicable to state citizens. Therefore, a state government as a political society in the United States, may be defined to be a corporation of officers, instituted by the nation, to provide for the local administration of governmental authority in respect to local matters, which authority is to be exercised by the citizens or inhabitants of the territory over which its jurisdiction is extended. A state, as a portion of the national domain, is that territory over which the local jurisdiction of the political corporation known as a state, extends. A state, as embracing a portion of the citizens of the United States, consists of those citizens residing within the territorial limits of the political state who are so enfranchised as to be permitted to participate in the administration of the public authority committed to the local jurisdiction of such state, and through its constitutional agency, to participate in the administration of the general government. Thus, a state, as a political body or corporation, has no inherent or original sovereignty. It is a mere institution or political instrument, to be used as a means of exercising authority; not as a sovereign imparting authority. Sovereignty is present giving life and power to the institution; lending authority to the exercise of its legitimate powers; but it is not the sovereignty of the institution; nor of the people of the state to whom the exercise of local authority is committed; but it is that one undivided sovereignty of the nation which created the state and enfranchised its citizens, and set the boundaries to their powers of administration. It is that sovereignty which

alone can institute governments; can endow them with power to make and execute laws, and can compel obedience thereto against all opposing authority.

§ 485. The sovereignty which institutes state governments in the United States, fixes the limits of their jurisdiction and of their administrative authority. While it creates a state as a corporation, and confers certain powers to be exercised by it, it also imposes restrictions upon them, which it could not do, were the states, as political institutions, sovereign. The people of the United States in the institution of the general government, designed it as the instrument by means of which the interests of the people as *a nation* could be protected and preserved. In providing for the institution of the state governments, they were designed to be merely *local* in their powers; and were restricted in the administration of their authority to those interests which were of a local character. For this reason they are confined entirely to affairs among the inhabitants thereof, and to interests within their respective limits. Hence the prohibition, "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal." "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 admit of no delay."[1] It is important to remember that the authority conferred is exclusively of an administrative character, to be exercised as a trust, for the benefit of the inhabitants of the state. The authority administered by the state is not its own, but the authority of the nation; and while the state keeps within the limits of its prescribed authority to administer, its action is as valid and binding as that of the general government, or of sovereignty itself. The distinction between the authority administered by the general government and that administered by the states, extends only to the subjects of administration. The general government has to do with and for the United States as a nation; and exercises its authority in providing for the safety and welfare of the nation in respect to other powers. In its internal administration, it has to do with all the people of the nation; in respect

[1] Art. I, § 10, Const. U. S.

to those rights and interests for which the local governments are not competent to provide.

§ 486. There is also this distinction between the administrative authority of the general government and that of the states. The jurisdiction of the general government extends over every portion of territory within the limits of the nation, and its administrative authority is exclusive within such limits, until a new jurisdiction is created by its own action or permission, by which administrative authority is conferred upon others. Thus, the general government extends its jurisdiction under the constitution, to every inch of territory included within the several states, and within all the territories of the United States. This brings every inhabitant of the state and of the territories under the jurisdiction of its administrative authority. The general government, therefore, is as omnipresent throughout the nation as is sovereignty itself. Every citizen of this government is, therefore, in the eye of the law, politically present by the authority of this government in all the states and territories of the union. A national citizen exercising administrative authority, has no other locality than the nation. The authority by which he is represented in the national government, applies to every part of the national domain, and reaches to every subject of national administration. The representative in congress from the humblest district in the humblest state, legislates as well for every part of the nation as for that which he especially represents. The senators from New York legislate for Louisiana, and the senators from Louisiana do the same for New York. The national citizen residing in Delaware has as much governmental authority over questions of national interest belonging to New York, as has a national citizen residing in New York. It is important to remember that national administrative authority knows no state lines. Until a state government is instituted for the inhabitants of a particular territory, the administrative authority of the general government over the citizens or inhabitants of such territory, is necessarily exclusive. It extends as well to those interests of a local and domestic character, as to those which extend alike to all the citizens of the nation. Under such circumstances, every citizen of the United States has authority, through his representative in congress, to administer in respect to the local and domestic interests of such territory. But whenever

such territory is erected into a state, by the incorporating and enfranchising act of congress, then such administrative authority over the local and domestic affairs of the inhabitants ceases in all except those to whom the exercise of such authority has been committed, showing this change. Congress as the representative of the nation, and of every member thereof, has committed to the inhabitants of the particular territory the exercise of that authority over their local and domestic interests, which before was exercised by the nation at large; so that by the institution of the new state, the inhabitants thereof acquire, and the nation at large parts with, this administrative authority. But it is to be observed that the nation parts only with the exercise of so much administrative authority as pertains to the local jurisdiction of the state. In respect to all matters of a general or national character, pertaining to such territory or to the inhabitants thereof, the nation parts with nothing; but in the eye of the law is perpetually and potentially present to assert its authority and compel obedience.

§ 487. Under the national constitution the general government is intrusted with all governmental powers necessary and proper for the common defense and general welfare of the nation; and among the powers to be exercised by it, is that of governing the territories, and of admitting new states into the Union, supervising the form and character of their governments. In other words, the general government possesses, and can rightfully exercise all governmental authority within the limits of the nation, except so far as such authority is committed to the states. But state authority is limited to the exercise of such powers as are confined in their operation to interests of a local and domestic character; that is, to such interests as do not extend into other jurisdictions, and are not subject to other administrative authority. The authority of a state citizen as such, does not extend beyond the right to participate in the administration of the state government as applied to rights and interests within the state. He has no political authority or power beyond such limits. Laws enacted by the state legislature are confined in their legal operation to persons and subjects within their local jurisdiction. In any other state or territory, they have no force and can create no legal obligation. As state governments, they can afford citizens no protection

beyond the lines which bound their respective territories. Their authority or powers cannot be extended by comity, or compacts, for they have no capacity to make them.[1] But the citizens of the states are likewise citizens of the nation; and as national citizens they have authority co-extensive with the nation. As national citizens they are members of a political society possessing inherent and absolute sovereignty; from which their rights and authority as state citizens are derived; and to which they are subordinated. Prior to the American revolution, they had such rights of government as their colonial charters gave them; but as subjects of the British crown, the royal prerogative extended over them, and they acknowledged its rightful authority. When driven by oppression to unite in resisting the tyranny of the British government, and finally, in proclaiming for themselves independence, they then acknowledged no civil authority above them. Each colony had its own government independent of the others; and consequently there was no organized government with authority to supervise them. Although by their union for the purposes of protection and independence they became a national society, and were entitled to a national government to execute their united authority, they did not organize such government until compelled by necessity to do so to preserve their existence. During the continuance of their struggle with Great Britain, their common interest and common danger supplied, in a great degree, this demand for a national government. The danger to be provided against, took the place of governmental authority to compel the necessary action. But when these dangers were past, and peace had become established, want of national authority became alarmingly apparent, until it became manifest to all, that the nation could not be preserved without an organized government to administer its authority. The presence of this necessity compelled the people of all the states to unite in their national character, for the purpose of instituting a national government; and the result of their union was the establishment of the national constitution, and the consequent institution of the general government.

§ 488. The inevitable consequence of establishing a national government extending its jurisdiction, that it might execute national authority, throughout the nation, was the necessary subordination of the state govern-

[1] Art. 1, § 10, Const. U. S.

ments to such authority. The nation alone could be sovereign within the national domain; and it could admit of no equal authority therein. These inchoate states had never been sovereign in any national sense. When, by severing the political ties which had bound them to Great Britain, they ceased to be connected with other nations, they had no other ties to connect them with nationality, except their union as members of the American nation. None of the separate states were recognized as a nation by any government, not even by themselves. They had no claim to independent nationality, either by nature, necessity or acquirement. None of them could, from their situation or their numbers, have established or maintained an independent national existence. Consequently, they never had, nor could they ever have, the *prerogative powers and rights of sovereignty.* They had independence, until a government was organized to supervise and control their authority in all matters pertaining to independent nationality. When that occurred, and the inhabitants of these states became citizens of a sovereign and independent nation, and a government was instituted by the people to exercise their sovereign authority, then, necessarily, their local institutions became subordinated, and the partial authority of the citizens of the state, became subordinated to the sovereign authority of the citizens of the nation. In this manner, and for these reasons, the original thirteen states occupy, necessarily, the same *status* as the new states which have been created since the institution of the general government. These states, as political institutions, take their inferior position within the limits of the nation, from necessity: because, in the nature of things, they cannot occupy a higher one, while the nation is sovereign and independent. Their position is incident to the office they have to perform. Their duties and powers are necessarily local, and they are limited accordingly. Until the interests and rights of the town become superior or equal to the interests and rights of the state, the like interests of the state, cannot become superior or equal to the rights, interests and powers of the nation. The argument of Mr. Jefferson in demanding possession of the mouth of the Mississippi for the use and benefit of the United States, because, from its position in reference to the nation, no other authority could be permitted to possess it, is based upon the hypothesis, that the rights of the nation are superior to

those of any local or state character. If France, as a nation, could not be permitted to own and occupy New Orleans, as against the United States, much less could the state of Louisiana possess and exercise rights and authority over that territory superior to the rights and authority of the United States over the same. It is based upon that principle in nature, which requires the necessities of the special and particular to yield to the like necessities of the universal.

§ 489. This subordinated position and office of the state or local administration, applies as well to the original thirteen states, as to those which have been established since the organization of the national government. This subordinated position and office of state administration is inevitable. Sovereignty can admit of no superior, or equal, within its jurisdiction. If state citizenship differs from national citizenship either in its character, or the source of its authority, it must inevitably be subordinated thereto. When the people of the United States, having established their nationality, proceeded to organize a government as a means of asserting their sovereign authority as a nation throughout the national domain, that act of itself necessarily assigned to these local governments their several jurisdictions; — placed the boundaries of their authority as mere administrative institutions, beyond which they could not pass. The people of the original thirteen states, in the institution of the general government, acted in virtue of their inherent authority as national citizens, and not in virtue of any authority conferred by the state governments. The powers conferred upon the general government, were derived from the people of the nation as possessing original and inherent sovereignty, and not from them as members of these local institutions. [1]

§ 490. Since the state citizen as such, derives his power to participate in the administration of governmental authority, through the enabling and enfranchising act of the national legislature, his rights of administration as such state citizen, are derivative, and not original and inherent. His right to administer, or to participate in the administration of governmental authority in respect to matters of state interests, originated in the institution and organization of the state government. It is a political right derived from the

[1] See Appendix, p.

prerogative powers of sovereignty itself; and is not a natural or inherent right of the individual. It is a right conferred by sovereignty, by some act of enfranchisement, upon certain classes of citizens or subjects, to be exercised in a manner prescribed. When a state, as a political corporation, is created by an act of national sovereignty, and the inhabitants thereof are created state citizens, with powers to administer governmental authority over matters purely local and domestic, their political rights attach as a franchise; to be held and exercised by them, in trust for the public welfare. But the state citizen acquires no property in such franchise; nor can he have any vested interest in the same. He acquires it as a trust; and the authority creating the trust, can revoke it whenever the public welfare demands that it should be revoked. Thus, those intrusted with the exercise of governmental authority can lawfully determine to what class or classes these political rights shall extend; who may, and who may not, exercise them; for what causes they shall be forfeited; and upon what conditions they may be restored. This could not be, if political rights were natural and inherent, or if the citizen could acquire a vested interest in the same. It follows, therefore, that the franchises conferred by the institution of a state government may be forfeited by the citizens of the state, and all political rights and powers possessd by them may cease to be theirs. The principle of forfeiture is as applicable to *political*, as to other franchises. When the rights and powers conferred for a particular purpose are perverted and abused; when those franchises which were conferred as a trust to be exercised for the public good, become perverted to instruments of mischief, it is the duty of those exercising the prerogative powers of sovereignty, to reclaim the trust, and disfranchise the unworthy or criminal party perverting or abusing it. When a class of citizens, who have been enfranchised with political rights to aid in the maintenance and administration of governmental authority, for the safety and well-being of society, band themselves together and so use the franchise as to subvert and destroy society, there can be no question, as to the right and duty of those charged with the exercise of the prerogative powers of sovereignty, to disarm such guilty citizens by disfranchising them. When the citizens of a state repudiate the charter or constitution under which they have been created a polit-

ical corporation, and have been endowed with political rights; and renounce their political connection with, and allegiance to, the authority which gave them political existence; and levy war upon it that they may overthrow and destroy it, and establish themselves upon its ruins, there can be no question that their political franchises are forfeited, and they are left at the mercy of that sovereignty which they attempted, but failed, to destroy.

§ 491. Thus, in the recent rebellion, certain states assumed to renounce their political connection with, and allegiance to, the people and government of the United States; recalled their senators and representatives from the congress of the union; threw up their constitutions or charters under which they existed and exercised political rights in respect to state and national interests; adopted other constitutions upon their own assumed authority; expelled by force from their limits, all those who attempted to exercise the authority of the United States therein; tore down the flag of the union, and hoisted the flag of rebellion in its place; made war upon the nation; and exerted their utmost power to destroy it; claimed, and were recognized as having belligerent rights; carried on the war for four years, until overcome and subdued by the power of the nation they renounced and warred against; and only laid down their arms because they were conquered and utterly subdued. Under such circumstances, there remains no question, even in their own minds, that all political rights and franchises conferred upon them by the act incorporating them into political states, and endowing them with political franchises, are forfeited. The treason committed by them against the authority of the nation, is, in its nature, political death. The rights of citizenship and of the hostile rebel, cannot co-exist in the same individual. The real existence of the one character necessarily extinguishes the other. It would be a species of insanity and madness, of which no government could ever be presumed to be afflicted, to continue in the traitor, the right to exercise the franchise pertaining to loyal citizens. It would be such an assumption, as even treason itself never had the effrontery to demand.

§ 492. The condition of a state, *politically*, which has thus repudiated its allegiance to the authority of the nation, is necessarily one of *political death*. Its existence and life consist in the authority conferred upon its

inhabitants to exercise certain political rights, by means of which they can administer all necessary governmental authority over their own local and domestic interests, and can participate in the administration of the national government by the means afforded them under their state constitution. When, therefore, they have repudiated their charter; have destroyed the means by which they could possess and exercise political rights under the national constitution; have put off the character of loyalty and put on that of rebellion, there remains no foundation upon which a loyal political state can exist. It must cease with the cessation of those conditions out of which it arose, and by means of which alone it could continue. Much has been said about states with political functions and rights suspended; as though a corporation could continue, divested of all its franchises and powers; as though that which constitutes the legal artificial person could be stripped away, and leave a legal personality remaining. Such language may be applied to a natural person, who has been invested with political rights and franchises; but it cannot properly be applied to a corporation, where its personality consists in the possession of such rights and franchises. A political state which ceases to possess the rights and franchises of a political state, ceases to be a state. The very term "state" is applied to these corporate rights and franchises, as representing the legal condition of a body of people possessing and exercising them. Its name implies the political state or condition of the people constituting the enfranchised body. To destroy that political condition of the people, is to destroy the state.

§ 493. The state of Louisiana was created by that act of sovereignty which gave the people thereof a legal and an authoritative constitution of government. Prior to that act of the nation through its legislative body, the inhabitants of the Louisiana territory had no political existence or rights either as a state, or as a portion of the national family. The sovereignty of the nation extended over the persons, and the territory of Louisiana; but the inhabitants thereof had neither been incorporated or enfranchised, until by the act of congress they were created a political state, and thereby vested with the rights and franchises of state citizens, under the national constitution. After the acquisition of that territory by the United States, the sovereign authority of the nation

for all civil and political purposes over such territory was absolute. The people of the nation, through congress as their legislature, had plenary authority over all matters of internal administration within such territory. The people of the nation had purchased the same with their common treasure, and they were bound to defend it with their common blood. The territory of Louisiana had been incorporated into the national domain for the purposes of national welfare and security, to the end that the authority of the nation over it might be absolute and unquestioned. When the political state of Louisiana was created, and the inhabitants thereof were enfranchised, the nation yielded nothing of its sovereignty over the inhabitants, or the territory thereof. The only effect was to extend to the citizens of such territory the political franchises and rights incident to state citizenship under the national constitution. As a state government politically, it consisted of the offices, rights and franchises conferred upon the inhabitants of that territory, with such limitations and restrictions as their own, and the national constitution, imposed. These political franchises conferred upon certain classes of the inhabitants of such territory, the sole right to administer in respect to public interests of a local and domestic character; to participate in the manner prescribed, in the administration of the national government, and to be protected in the exercise and enjoyment of their civil liberty as citizens of the United States. But all these franchises and privileges were conferred to be held and exercised in loyalty to the authority of the nation. Every officer of the state in the exercise of the duties and powers of his office, was required to take an oath to support the constitution and government of the United States in the discharge of his official duties and trusts. When, therefore, the people of the state of Louisiana overthrew the political charter under which they had derived their political franchises and rights; when they substituted another and foreign one in its place, and raised their arms in rebellion against the nation, their political existence as a state, and their political rights as state citizens under the constitution of the United States, ceased; and the administrative authority of the nation necessarily became absolute and unqualified over the people and territory of Louisiana.

§ 494. This view has been objected to by some as being equivalent to admitting that the people of a state

have authority to dissolve the union. But this objection has no valid or rational existence. The union constituting the nation, consists in the political union of the people of the states, and not in the political union of the states themselves. The nation remains the same politically and authoritatively, whether there are thirteen or thirty-six political institutions within its borders known as states; whether there are three millions or thirty-three millions of citizens. The sovereignty of the nation, or the prerogative powers by which it establishes and administers government, does not depend upon the existence of any particular number or proportion of political states within its territorial domain, or upon the political *status* of any number or proportion of its inhabitants. The public authority of the nation exercised in the manner prescribed in the organic and fundamental act of government, is prerogative, whether participated in by the inhabitants of the rebellious states or not. That power alone, which can so divide and distract the people as to overthrow and destroy their political unity as a nation, can dissolve the union. A political state may be created, and it may cease to be, without affecting the *status* of the nation. Its creation adds nothing to, and its death can take nothing from, national existence or sovereignty.

§ 495. To secede from the union in the sense of excluding the sovereign authority of the nation over any portion of the people or territory of the United States, while the nation maintains its political existence, and has power to assert and maintain its authority, is a simple impossibility. When the people of the United States constituting the nation, consent to a separation of a portion of its territory from the national domain, or of a portion of its citizens from the body of the nation, then such separation can legally take place, by such voluntary consent. But until such assent is obtained, there is no other means left except by revolution. By the constitution of the nation, each national citizen is politically present in every part of the national domain, and has a voice through his representative, in determining by what laws each national citizen shall be governed. As a national citizen represented in the national legislature, he speaks and acts for all sections of the nation with equal authority. He has a right to claim the protection of the national government, and to enjoy the privileges of citizenship in

any and every state in the union; and he cannot be deprived of these rights and privileges except by forfeiture, consent, or force. Therefore, the inhabitants of one state have no authority to assume the political right to deprive the inhabitants of another state of the benefits of national citizenship in any state within the union.

§ 496. Since a state within the union is a political corporation created by national authority for the purpose of local administration, and as a means of providing for the participation of its citizens in the administration of the general government, it follows, that neither as people or as a political corporation, can they possess authority to withdraw from, or place themselves in rebellion against, the union. The people of the state, in their individual and in their corporate character, may levy war against the nation, and may seek to overthrow its authority; but in doing so, they act without authority, and incur the penal and political consequences of treason. Thus, when the people incorporated as a state, resolve to separate themselves and their territory from the nation, and actually levy war upon it to accomplish such purpose, using all their political and physical resources to that end, their political existence and authority in the union must cease;—not in virtue of their authority over the nation; but in virtue of the authority of the nation over them;—not in virtue of their authority to take themselves away from the jurisdiction of the nation; but in virtue of the authority of the nation to exercise its jurisdiction over them, to proclaim the forfeiture and denounce the punishment due to their crimes. It is no answer to say, they had no authority to secede, and, therefore, they could not change the *political status* of the state or people. An individual has no authority to secede, or change his *status;* nevertheless, an individual can commit treason without authority; and that of itself changes *his status.* He can deprive the government of no right or power over him; but he can deprive himself of all authority and all rights under the government. While he can cause no forfeiture on the part of the government, he can forfeit everything on his own part. It is the same with the people of a state as a political corporation; while they cannot deprive the nation of the right to exercise national authority over them and their territory, they can, by their treason, forfeit all political rights.

powers and franchises. But by such forfeiture the nation loses nothing political; they lose everything.

§ 497. While the states, as political corporations, are not constituent elements of the nation, and do not in their creation or extinction, affect the political *status* of the nation, yet they have their value as instruments of administration. As a state, each is the political equal of the other; and under the national constitution there can be no political inequality between them. Each state corporation is created by the same authority, for the same purpose, and is intrusted with the exercise of the same duties and powers. If South Carolina is to-day a state, politically, under the national constitution, she possesses the essential incidents of stateship. Her citizens necessarily possess the rights and privileges incident to such citizenship in other states. For the citizens of each state are entitled to all the privileges and immunities of our citizens of the several states,[1] and there is no authority under the constitution to withhold from them such rights and privileges. Being a state within the meaning of the constitution, congress can impose no conditions to her right of representation or participation in the general government. The right of congress thus to interfere with the liberties of citizens in the exercise of their political franchises, while the state is in true political relation under the constitution, cannot be admitted. When the people of a particular territory have been incorporated and enfranchised by the nation, so as to become politically a state under the constitution, they cannot be subjected to other conditions unknown to the constitution, except in a manner presented thereby. When the people are once incorporated and enfranchised as a state, under the national constitution, their political rights and privileges are determined beyond the power of congress to disturb them. What the citizen then claims, he demands as his right, which cannot legally be denied to him; a right secured by the faith and power of the nation. It therefore becomes a question of grave moment, is South Carolina politically a state within the meaning of the constitution? Are her citizens entitled to the guarantees of the national constitution? Have they the same political *status* as the citizens of the loyal states, who have never assumed to repudiate their allegiance to the authority which gave them political existence as state citizens? If by the polit-

[1] Art. 4, § 2, cl. 1, Const. U. S.

ical action of the people of South Carolina, as a corporate body, through the various departments of government—in severing their political connections with the nation—in renouncing their allegiance to its authority—in overturning the government by which they had maintained their political connection therewith—in organizing a government foreign and alien thereto;—and finally, in levying war upon the government and people of the United States, to the end that they might utterly subvert and destroy it—in claiming to be recognized, and in being recognized as belligerents to the United States as a nation,—she did not lose her political rights, privileges and franchises, as a political corporation, under the constitution of the United States, then she can claim for her citizens equality of political rights with the citizens of the loyal states. But, it would be difficult to satisfy South Carolina herself, that she was a state, politically connected with the United States, and entitled to representation in congress, while she was carrying on the war of the rebellion, and doing all in her power to subvert and destroy the government, of which it is now claimed by some, that she is a constitutional member. But, if there was a moment during which the citizens of South Carolina ceased to possess the rights, privileges and immunities of citizens of the United States under the national constitution, they never can regain those lost rights and privileges, without the incorporating and enfranchising act of the nation, creating them a new state, and again conferring upon them the privileges and immunities of citizenship.

§ 498. But the people of those states, which, as political corporations, went into rebellion, were thereby, in the eye of the law, politically responsible; and became, before the world, political rebels. As individuals, state citizens might remain loyal while the corporate mass went into rebellion. But as members of the political corporation receiving and exercising their political rights through its agency or instrumentality, the political character of the state citizen must abide the political character of the state corporation. If it remain loyal, the political *status* of the unconvicted citizen, is that of loyalty; but if it raise the standard of rebellion, it gives the taint of rebel, politically, to all its citizens; and they must abide its political fate. When South Carolina, as a political corporation, went into rebellion, politically, she carried all her citizens with her; and their political

rights, privileges and franchises, as citizens of the nation, ceased. When Kentucky and Maryland, as political corporations, were prevented from going into rebellion, the political *status* of their citizens, was preserved, although the spirit and acts of rebellion therein, were flagrant and undisguised. But, in dealing with the political rights of communities, government deals only with classes, and not with individuals. Thus, in creating a political state, or enfranchising the inhabitants thereof, it knows only classes, not individual members of the class. And, as the government enfranchises only by classes, so likewise, it disfranchises by classes. An individual becomes disfranchised, by becoming a member of a disfranchised class. As an individual, no man has any vested right or property, in a political franchise, further than is especially provided by law. Therefore, the government, in dealing with political franchises, can confer, withhold, or reclaim them, whenever the public welfare requires. When a political state, by going into rebellion, carries with her, politically, the citizens thereof, their political rights cease as a class, without any inquiry into the loyalty or disloyalty of any particular portion of the citizens. They acquire their political rights as a class by the act of political enfranchisement, and they may lose them, as a class, by an act of political disfranchisement. But, it is otherwise, in respect to individual and vested rights. When the consequences of treason, are to be visited upon the individual, and his life, liberty or property are to answer for his individual acts, then each citizen or inhabitant, will stand or fall upon his own merits or demerits. In such case the citizen is not civilly responsible for the political action of the state of which he chances to be a member. In such case he is to be presumed to be innocent until proved to be guilty. [1]

§ 499. As political conditions of the individual citizen, treason and loyalty are incompatible with each other.

1 Political rights are mere trusts conferred by the public authority upon its citizens or subjects, to be held and exercised exclusively for the public welfare. Therefore, the citizen acquires no vested interest in the exercise of such franchise; and the same authority which conferred the trust may modify, or revoke it at pleasure. The right to do so is one of legislative discretion, not of judicial determination. While the trust continues, the court will protect the citizen in the exercise of the same. But when, by legislative authority, it has ceased, courts of justice will look no farther than to ascertain the legislative will in respect thereto. (See *Luther* v. *Borden*, 7 How. S. C. Rep., 1; see argument of attorney-general in *State of Georgia* v. *Grant, Stanton, et al.*) In the case of *Conner* v. *The Mayor, &c., of New York*, 5 N. Y., 285, the court held, that the incumbent of an office had no property rights in the same, or in the prospective salary, or other emoluments thereof; that the right of the officer to compensation grew out of the services rendered; and not out of any contract between the government and the officer, that services should be rendered by him. See opinion of RUGGLES, J., on page 296.

That is, the presence of a treasonable purpose in the subject, is conclusive evidence of the absence of loyalty in him. But, political privileges, or franchises, have their existence only in loyalty to the enfranchising power. Therefore in all countries and under all forms of government, the inevitable consequence of treason, is political death; that is, the traitor possessing any political franchise whatever, is, by the act of treason, deprived of it. Political rights are conferred as trusts, to be exercised only for the public good, by sustaining and defending the public authority, in its just and benign administration. Hence, the very end to be subserved, by conferring political rights and privileges, is destroyed by treason. Such is its nature, and such the inevitable consequences thereof, that the ascertainment of the treason, is, of itself, a *judgment of forfeiture*. That is, any act which proclaims the treason, proclaims, also, the political death of the traitor. When the government of the United States was compelled to declare the people of certain states, as political corporations, in a state of rebellion and civil war, such proclamation carried with it, the sentence of political death, in respect to such corporations, and the members thereof.[1]

§ 500. Whatever have been the theories of men respecting the political status of those states which went into rebellion against the government of the United States, they, practically, have arrived at the same result in adjusting their political relations. The citizens of these states have been treated as deprived of their political rights and franchises. They have been made

[1] This principle is illustrated in all the action taken by the government of the United States toward the citizens of the rebellious states. President Johnson, in his proclamation of the 29th May, 1865, respecting North Carolina, asserts, among other things, that the rebellion has deprived the people of that state of all civil government; and that in order to enable the loyal people of the state to organize a state government, he appoints William W. Holden, provisional governor, whose duty it is to make regulations, enabling the loyal citizens to elect delegates, &c. It provides further, as to the qualifications essential to become a delegate or an elector. This proclamation is based upon the hypotheses that the inhabitants of North Carolina have forfeited their political rights by the rebellion, and that the executive has the authority to prescribe the manner in which they may be again invested with them. It distinctly proposes that none but loyal citizens shall participate in the organization of the new government of the state.

So far as President Lincoln attempted any movement in the direction of reconstruction, he proceeded upon the hypothesis, that unpardoned rebels had no political rights, and should be permitted to exercise no political authority. In virtue of his powers, under the constitution, and special laws enacted for that purpose, he issued his proclamations of amnesty on the 8th December, 1863, and the 26th March, 1864, in which he released the penalties incurred, and restored the rights of citizenship to certain classes of those who had been in rebellion, and who had complied with the prescribed conditions. To such, and to those who had remained loyal to the nation, he confined the exercise of political rights in the rebellious states. Congress have, likewise, observed a similar rule. In all their legislation upon the subject, they have claimed and exercised the authority of treating the inhabitants of those states as being destitute of political rights; as being subject to any conditions looking to their future enfranchisement which congress may see fit to impose.

the subjects of executive pardons from time to time.[1] Early after the downfall of the rebellion, the president issued his amnesty proclamation, excepting therefrom certain classes of the inhabitants of these insurgent states. In all official intercourse between the general

1 By the provisions of the act of congress of July 17, 1862 (§ 13), the president was authorized at any time thereafter, by proclamation, to extend to persons who had participated in the existing rebellion in any state or part thereof, pardon and amnesty, with such exceptions, and at such time and on such conditions as he might deem expedient for the public welfare. In accordance with this provision, President Lincoln, on the 8th December, 1863, and again on the 26th March, 1864, issued a proclamation of amnesty, but without effect. On the 29th day of May, 1865, President Johnson issued the following. After referring to the amnesty proclamations of President Lincoln, and stating that many who had failed to avail themselves of the benefits thereof, were then desirous of obtaining amnesty and pardon, he proceeds: "To the end, therefore, that the authority of the government of the United States may be restored, and that peace, order and freedom may be re-established, I, Andrew Johnson, President of the United States, do proclaim and declare that I hereby grant to all persons who have directly or indirectly participated in the existing rebellion, except as hereinafter excepted, amnesty and pardon with restoration of all rights of property, except as to slaves, and except in cases where legal proceedings under the laws of the United States providing for the confiscation of property of persons engaged in rebellion, have been instituted; but on the condition, nevertheless, that every such person shall take and subscribe the following oath or affirmation, and thenceforward keep and maintain said oath inviolate, and which oath shall be registered for permanent preservation, and shall be of the tenor and effect following, to wit: I ——— do solemnly swear—or affirm—in the presence of Almighty God, that I will henceforth faithfully support and defend the constitution of the United States and the union of the states thereunder; and that I will in like manner abide by and faithfully support all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves, so help me God.

"The following classes of persons are excepted from the benefits of this proclamation:

1. All who are or shall have been pretended civil or diplomatic officers, or otherwise domestic or foreign agents of the pretended Confederate government.
2. All who left judicial stations under the United States to aid the rebellion.
3. All who shall have been military or naval officers of said pretended Confederate government above the rank of colonel in the army or lieutenant in the navy.
4. All who left seats in congress of the United States to aid the rebellion.
5. All who resigned or tendered resignations of their commissions in the army or navy of the United States to evade duty in resisting the rebellion.
6. All who have engaged in any way in treating otherwise than lawfully as prisoners of war, persons found in the United States service as officers, soldiers, seamen, or in other capacities.
7. All persons who have been, or are, absentees from the United States for the purpose of aiding the rebellion.
8. All military and naval officers in the rebel service who were educated by the government in the military academy at West Point, or the United States Naval Academy.
9. All persons who held the pretended offices of governors of states in insurrection against the United States.
10. All persons who left their homes within the jurisdiction and protection of the United States and passed beyond the federal military lines into the so called Confederate states for the purpose of aiding the rebellion.
11. All persons who have been engaged in the destruction of the commerce of the United States upon the high seas, and all persons who have made raids into the United States from Canada, or been engaged in destroying the commerce of the United States upon the lakes and rivers which separate the British provinces from the United States.
12. All persons who, at the time they seek to obtain the benefits hereof by taking the oath herein prescribed, are in military, naval or civil confinement or custody, or under bonds of the civil, military or naval authorities or agents of the United States as prisoners of war, or persons detained for offenses of any kind, either before or after conviction.
13. All persons who have voluntarily participated in said rebellion, and the estimated value of whose taxable property is over twenty thousand dollars.
14. All persons who have taken the oath of amnesty as prescribed in the President's proclamation of December 8, 1863, or an oath of allegiance to the government of the United States since the date of said proclamation, and who have not thenceforward kept and maintained the same inviolate.

Provided, that special application may be made to the President for pardon by any person belonging to the excepted classes, and such clemency will be liberally extended as may be consistent with the facts of the case and the peace and dignity of the United States.'

government and these states and their people, they have not been recognized as possessing any political rights; or as having any authority to re-construct the government of their states, or to re-invest themselves with political rights. The mayors of their cities, and the governors of their states have been subject to removal by the authority of the nation. While some contended for the political death of these states; others for the doctrine that they are still states, with all political functions suspended, others still that they are states in full life and power, because they had not authority to secede, yet all agree that the government and people of the nation, had just authority to impose suitable conditions to their return as political associates and equals as members of the national family.

CHAPTER XVI.

OF THE OFFICE OF PRESIDENT AND OF VICE-PRESIDENT —THEIR DUTIES AND POWERS.

§ 501. THE president and vice-president of the United States hold their respective offices during the term of four years, and are elected in the manner following. Each state appoints, in such manner as the legislature thereof direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress. The electors so appointed are required to meet in their respective states and vote by ballot for president and vice-president, one of whom must not be an inhabitant of the same state with themselves. The ballot must designate the person voted for as president; and there must be a distinct ballot for vice-president. The electors are then required to make out a distinct list of all persons voted for as president, and of all voted for as vice-president and of the number of votes for each, which list they are required to sign, certify and transmit sealed to the seat of government of the United States, directed to the president of the senate. The president of the senate is required to open these certificates in the presence of the senate and house of representatives and to count the votes; and the person having the greatest number of votes for president, when such number is a majority of the whole number of electors, is elected

president. But if no person has such majority, then from the persons receiving the highest numbers—not exceeding three—on the list of those voted for as president, the house of representatives are required to choose immediately by ballot, the president. But in making this choice the state, by its representation, has but one vote; and to constitute a quorum for such purpose two-thirds of the states must be represented. If the house of representatives should fail to elect a president when the duty devolves upon them, by the fourth of March following, then the vice-president is required to act as president, as in case of death or other constitutional disability of the president. The person having the greatest number of votes as vice-president is elected to that office provided the number be a majority of the whole number of the electors appointed; but if no person have such majority, then from the two highest on the list, the senate choose the vice-president. A quorum for such purpose consists of two-thirds of the whole number of senators; and a majority of the whole number is necessary to a choice.[1]

§ 502. Congress determines by law, the time for choosing the electors for president and vice-president, which time the constitution requires should be uniform throughout the United States. The time fixed by congress is the second Tuesday of November.[2]

§ 503. No person, except a natural born citizen of the United States, is eligible to the office of president or of vice-president. Nor is any person eligible who has not attained the age of thirty-five years, and who has not been fourteen years a resident within the United States. These are the only constitutional qualifications prescribed as essential to the incumbent of the office of president or vice-president.[3]

§ 504. In case of the removal of the president from his office, or in case of his death, resignation or inability to discharge the powers and duties of the said office, they devolve upon the vice-president. Congress is authorized to provide by law for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president: which officer so designated is authorized and required to act accordingly, until the disability be removed, or a president be duly elected. The presi-

[1] Art. 2, § 1, Const. U. S.; and twelfth amendment of the Constitution.
[2] Art. 2, § 1, cl. 4, Const. U. S.
[3] Art. 2, § 1, cl. 5, 12th amendment to the Constitution, 3d clause.

dent is to receive a stated salary which can neither be increased or diminished during the term of his office; and he is not to receive within that period, any other emolument from the United States, or from any of them. Before entering upon the execution of the duties of his office, he is required to take the following oath or affirmation: "I do solemnly swear, or affirm, that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States."[1]

§ 505. The powers and duties which attach to the office of president of the United States, may be denominated executive, military and presidential. The constitution provides that the executive power shall be vested in a president of the United States; whereby the president is constituted the executive head of the nation, and it is made his especial duty to take care that the laws are faithfully executed. As the executive, he is simply a civil officer, whose duties are prescribed by law; and his authority in the discharge of the duties of his office, is as strictly limited to the means or measures prescribed by law, as is the authority of any executive officer, in the discharge of executive duties. That is, the president has none of the prerogative powers sometimes exercised by the king, who is the executive head under the British constitution.[2] His duties and powers, as the

[1] Art. 2, § 1, clauses 6, 7, 8 and 9, Const. U. S.

[2] Says RUTHERFORTH: "If we continue to speak of the legislative and executive power in the abstract, it will be difficult to explain rightly what is meant by *prerogative*. It cannot properly be called discretionary executive power; because the executive power, in the nature of the thing is not discretionary in any part. Whenever it acts as discretion, this privilege, unless it arises from the necessity of the case, as in the heat of military action, comes from the legislative, either by original establishment, or by long usage and custom, or by occasional permission. We shall be better able to understand what prerogative is, if we speak of the legislative and executive power, not in the abstract, but as lodged or intrusted by the state, in the hands of some one or more persons. Where the person, so intrusted with the executive power, is left, by the legislative, to act in any instance, at his own discretion, to direct by his own understanding, the public force which is naturally under the direction of the public understanding, such a discretionary power in him is called prerogative. Thus, in penal cases, if the legislative forbid the public force to be put in motion for the punishment of any action till the fact itself is proved to the public understanding in such a manner as the law appoints, and these will not suffer this force to be used but under the conduct of the law, so as to inflict only the legal penalty; thus far there is no prerogative or discretionary power in him who is intrusted with the executive. But if the legislative, instead of reserving to itself the right of judging whether such legal punishment is to be suspended, or whether the criminal is to be wholly pardoned, leaves it to him to pardon or not as he thinks proper, such a discretionary power intrusted with him is called prerogative." (*Institutes*, B. 2, ch. 3, § 8.) But this kind of prerogative power in the individual, is prerogative only in administration, not in source or origin. His discretion in such case, is derived from a higher authority, which is prerogative over him, and he is exercising the authority of another power, not his own. But the king has original prerogative power, not only prerogative in administration, but prerogative in source. There are now many limitations upon the king's prerogative, by acts of parliament, which involve the king's assent. But in the absence of such limitation, his prerogative is absolute; that is there is no higher authority on earth to restrain or prohibit the exercise thereof.

chief executive, require that he should appoint and commission such officers under him—and in the manner prescribed by the constitution and the laws,—as are necessary and proper to carry into effect the laws of the United States, in every department of internal administration. To this end the subjects of national administration are divided by law into several departments; at the head of each is placed a chief officer, as secretary of such department or bureau; such as, the secretary of state, the secretary of war, the secretary of the navy, the secretary of the treasury, the secretary of the interior and postmaster-general. These officers are nominated by the president, and by the advice and consent of the senate, are appointed as the heads of these executive departments. These officers, thus appointed and commissioned by the president, constitute the chief executive officers of the nation. As such chief officers they reside at the capital and become the constitutional advisers of the president, in whose name, and by whose official authority they act in their several departments. The names of these several departments sufficiently indicate the class of executive duties they are severally required to perform. In this manner every law of the United States, touching every subject of general administration, falls naturally, under the administration of some one or more of these departments to be administered with or without the judicial aid of the national courts, as circumstances may require. These several departments by their chief officer representing the official authority of the president, or some times by the direction of the president himself, appoint such subordinate officers as are necessary to the faithful performance of the duties, and the execution of the powers, pertaining to such departments, throughout the United States; such as postmasters, revenue and custom house officers; assessors; collectors; registers and receivers at the public land offices, and the like. In this manner provision is made for the discharge of the executive duties and powers of the president in every district of the United States. But from the executive head to the last and least officer required to administer in the executive departments of administration, all are subject to such direction and control as congress, exercising the prerogative powers of the nation, under the constitution, prescribes.

§ 506. In the execution of the laws of the United States through the intervention of the national judiciary, another class of officers are required, who act ministerially in the general department of executive administration. Of these officers, are the official or public attorneys, whose duty it is to investigate and advise the several departments on all questions of law which may arise under their respective administrations; and also to apear in court and prosecute or defend before such tribunals, the rights and interest of the nation, whenever necessary; of them also are the marshals and the deputy marshals, whose duty it is to execute the process of the court, whether *mesne or final;* who in so doing, act in the name and by the authority of the president of the United States, as the executive head of the nation. These officers—the marshals—act by authority of the special mandates or warrants placed in their hands, evidenced by the certificate of the proper officer, under the official seal of the nation. The duties to be performed by this class of executive officers are ministerial and are prescribed by law. The thing to be done or the powers to be executed by them are to be found in the process or warrant of authority placed in their hands. The manner of executing such processes, and the general powers with which they are invested, to enable them to execute the same, are the subject of legal regulation and direction, which cannot here be considered.

§ 507. Such is a general view of the framework of the executive department under the president as chief executive, in the *internal* administration of the public authority of the United States. But he is also the executive head in the *external* administration of the same, so far as the laws of the United States are capable of being enforced beyond the limits of its territory. By and with the advice and consent of the senate—two-thirds of the senators present concurring—he is empowerd to make treaties, and to nominate, and with the like advice and consent, appoint embassadors, and other public ministers, and consuls; and also to recieve embassadors and other public ministers, and to take care that the laws be faithfully executed.[1] Under the constitution he is the proper officer to be intrusted with the executive administration of all laws and regulations prescribed by congress, whether referred to in the consti-

[1] Art. 2, §§ 2 and 3, Const. U. S.

tution or otherwise. But in all this the president acts only as an officer of the law in the civil department of administration. It is the authority and power of the office, and not of the individual, he is required to execute. Being only the legal administrator of the duties and powers incident to the office created by the constitution and laws of the United States, he can exercise no *prerogative* authority or power whatever. In determining what pertains to the office of president as the civil executive of national authority, care must be exercised not to confound his official position with that of the king under the British constitution. The king possesses *prerogative* power; in theory, he is sovereign; he is the source and fountain of authority and law; and the executive powers are not unfrequently strengthened and enlarged by the supposed presence of prerogative power in the British executive. In studying British precedents, therefore, great care must be exercised to keep this distinction in view. What would be legitimate for the king to do under the British constitution, might be usurpation in the president, under the American constitution.

§ 508. As the civil executive of the nation, the president has only executive authority and power. Such authority and powers can only exist in the presence of law, by which they are created, or out of which they arise. When, therefore, the constitution vests in the president as an officer, the executive authority of the nation, it only implies such duties and powers as are created by, and arise out of the law. By this provision the president is only made the agent or instrument of the law, to do whatever the prerogative power of the nation requires of him. He is thereby made the subject of law; and is placed under its obligations as the *servant*, not the *sovereign* of the nation. The authority is *upon* him, not *from* him; and he is required to act for the public, not for himself; he is required to carry out, or into execution, the policy of the nation, as expressed in the laws of congress, which are the constitutional exponents of the national prerogative and will; and is not authorized to impose a policy of his own upon the nation. As the national executive, he has no duty or power outside of the constitution and the laws of the nation. As a citizen, he is at liberty to entertain and express opinions of economy and policy; but as an executive, he has no authority to compel their adoption; or to attempt to use

the patronage and powers of his office to enforce them. It is an impeachable offense for a high public officer to prostitute the patronage and powers of his office, to purposes of personal gain, or political advantage. As an executive officer, his whole power and duty consists in executing the law according to his best understanding and ability. The common sentiment that the president is authorized, and therefore justified, to use the great powers and patronage of that high office, as though they were his personal perquisites, to be used in influencing, and buying popular favor or partisan support, is corrupting and demoralizing in the extreme. It calls about him a class of men whose sole influence is to corrupt, demoralize and debauch any honest or just purposes, feelings or sentiments he might otherwise entertain. It commits him to the influence and control of a class of politicians whose highest virtue is, "not to leave undone, but keep unknown" in their raids upon the public treasury, and in their prostitution of the public authority to their private purposes. So universal has this been, that experience has created the public sentiment, that the conduct of the mere politician is not to be supposed to be either honest or patriotic.

§ 509. As the civil executive of the nation, the president has power to grant reprieves and pardons for offenses against the United States. A reprieve suspends the execution of the sentence for the time being, still leaving the offender subject to the punishment denounced against him. A pardon remits the penalty, and, if unconditioned, sets the offender free from the legal consequences of the offense committed. The propriety of pardoning a criminal after he has been convicted of a crime against the public has been seriously questioned by learned and able men. It has been contended that while clemency is a virtue, and one of the noblest prerogatives of the throne, that its exercise is a disapprobation of the laws made for the public good; and as a virtue, belongs to the legislator rather than to the executor of the laws—a virtue which ought to shine in the code rather than in the private judgment. That to show mankind that crimes are sometimes pardoned, and that punishment is not the necessary consequence, is to nourish the flattering hope of impunity, and is the cause of their considering every punishment inflicted an act of injustice and oppression. That the prince, in pardoning, gives up the public security in favor of an

individual, and, by his ill-judged benevolence, proclaims a public act of impunity.[1] To which it is replied: "Were it possible in every instance to maintain a just proportion between the crime and the penalty, and were the rules of testimony and the mode of trial so perfect as to preclude mistakes or injustice, there would be some color for the admission of this plausible theory. But even in that case, policy would sometimes require a remission of a punishment strictly due for a crime certainly ascertained. The very notion of mercy implies the accuracy of the claims of justice."[2] While the end of punishment in all civilized and enlightened governments is to protect the public and individuals from the selfish, sensual and malignant acts of wicked and perverse persons, as well as to reform the offender; and while nothing so weakens the restraints of the law as the hope of escaping its penalties, every practice in the administration of the public authority which tends to render uncertain the infliction of the punishment due to crime, endangers the public security, and wrongs the individual members thereof—even those who are disposed to commit criminal acts. There are those in society so under the control of their appetites, passions and propensities, that nothing but the prospect of certain punishment restrains them from the commission of crimes. To all such, this exercise of mercy becomes a license, wronging themselves and their victims. It may well be questioned whether the extending of the pardoning clemency to unquestioned criminals is not an unmitigated evil. When there has been a mistaken conviction, or where the guilt of the prisoner is questionable, even after conviction, it is proper that the power to reprieve or even pardon should exist, that an unmerited penalty may be avoided. But when there is unquestioned guilt, where the application is for mercy to the individual, and not for justice, the public has too much at stake to make the sacrifice. If the penalty be clearly too severe for the technical offense committed, the power of reprieve might be exercised, that the law-making power might adapt to the offense the proper penalty; but an appropriate penalty should, in all cases, be sure to follow a clearly ascertained crime.

§ 510. But a grave question arises under the language of the constitution as to the *extent* of the power

[1] Beccaria on Punishments, ch. 46. [2] 1 Kent's Com., lect. 13, p. 265.

of the president to grant pardons for offenses against the United States. That the people of the United States had unlimited authority over this subject, cannot be questioned. They could have authorized the president to pardon as well before, as after conviction; but the question is, did they so authorize him to exercise such power. Mr. Justice WAYNE, in delivering the opinion of the court in *ex parte* Wells,[1] said, that the word pardon meant forgiveness, release, remission. Forgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise. Release from pecuniary obligation, as where it is said, I pardon you your debt. Or it is the remission of a penalty to which one may have subjected himself. * * In the law it has different meanings which were as well understood when the constitution was made, as any other legal word in the constitution now is. Such a thing as a pardon without a designation of its kind is not known in the law. Every pardon has its peculiar denomination. They are general, special or particular, conditional or absolute. * * It—the constitution—meant that the power—to grant reprieves and pardons—was to be used according to law; that is—as it had been used in England and these states when they were colonies; not because it was a prerogative power, but as an incident of the power to pardon, particularly when the circumstance of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal; or when they are such as to show that there might be a mitigation of the punishment without lessening the obligations of vindicatory justice. Without such a power of clemency to be exercised by some department or functionary of government, it would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy. And it was with the fullest knowledge of the law upon the subject of pardons, and the philosophy of goverment in its bearing upon the constitution, when the court instructed Chief Justice MARSHALL to say[2]: "As the power has been exercised from time immemorial by the executive of that nation, whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescrib-

[1] 18 How. S. C. R., 307. [2] *United States* v. *Wilson*, 7 Pet., 162.

ing the manner in which it is to be used by the person who would avail himself of it."

§ 511. But in determining what pertains to the office of president as the civil executive of national authority, care must be exercised not to clothe him with prerogative powers; nor must such a construction be put upon the language of the constitution as would include those powers of the king which were exercised by him, not as the executive of the British nation, but as possessing prerogative power, independent of his executive office. We are to suppose the people used language in accordance with the structure and character of the American constitution of government, and not in accordance with the structure and character of the British constitution, wherein it differed from the American. The British king and the American president, though both chief executive officers of their respective governments, were nevertheless very different officers in respect to the theory of the source and limitation of their official powers. While the king, as the mere executive of the nation, was limited to the enforcement of the laws as they existed, yet as possessing prerogative powers, until subjected to the limitations of parliament, he could go further and declare a new, or abrogate the effects of the old law. But it is otherwise with the president. He has, in such respect, only executive powers, by which he is required to execute the law upon the guilty offender, when the offense has been determined, and the sentence of the law has been pronounced. To pardon or reprieve an individual, implies that he has become, in the eye of the law, the subject of punishment to be inflicted upon him. It implies that the law has pronounced him guilty, and denounced upon him the penalty. The executive, as an officer of the law, can know nothing of the guilt or innocence of a party, or of his need of a reprieve or pardon, until his guilt has been judicially ascertained. No reprieve or pardon can, in law, be granted until there be that from which a reprieve is needed, or for which a pardon is demanded. Under the genius of American institutions, the law holds all persons to be innocent until their guilt has been judicially ascertained. How, then, can the legally innocent be the subject of a legal reprieve or pardon. The king as the source and fountain of sovereignty and the law, formerly could do what, under the American theory, the legislature alone can do—to wit: he could

absolve individuals from their liability to punishment for acts committed by them against the peace and dignity of the realm. The principle asserted was, he made the law, and therefore has authority to suspend or repeal it. For it is a principle, that the authority which creates, can modify or destroy at pleasure that which it has created. The legislative authority which creates an offense or crime, and denounces its penalty, can repeal or modify the law at pleasure; can excuse the delinquent upon such conditions as it sees fit to impose. But this authority has its foundation in *prerogative*, not in *executive* power. It can be exercised by the *sovereign*, not by the *mere executive*.[1]

§ 512. The principle which calls for the existence of the reprieving and pardoning power in the executive does not extend to pardoning classes or individuals before conviction and sentence. It will be in season to remit a fine or penalty, after it has been judicially ascertained that the individual is subject thereto. The imperfection of the rules of law, or modes of trial by reason of which mistakes are liable to occur, and injustice is liable to be done, as reasons for the exercise of the pardoning power, can apply only to those who have been improperly convicted on trial; not to those who are liable to be tried and convicted, and whom the law holds to be innocent until judicially condemned. There may be cases where whole classes need to be excused from the consequenes of their criminal acts—as in case of rebellion—without going through the formality of a trial, conviction and pardon. Public acts of amnesty may be necessary and proper for the future welfare and peace of society. But such acts should proceed

[1] The king himself condemns no man. That rugged task he leaves to his courts of justice. The great operation of his scepter is mercy. His power of pardoning was said by our Saxon ancestors to be derived *a lege suæ dignitatis;* and it is declared in parliament by statute (27 Hen. VIII, c. 24), that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof united and knit to the imperial crown of the realm; and this power belongs only to the king *de facto*, and not to the king *de jure*, during the time of usurpation. In monarchies, the king acts in a superior sphere, and, though he regulates the whole government as the first mover, he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislation, magnificence, or compassion. To him, therefore, the people look up as nothing but the fountain of bounty and grace; and these repeated acts of goodness coming only from his own hand, endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection and personal loyalty which are the sure establishment of a prince. The king may pardon all offenses merely against the crown or the public, except, by the *habeas corpus* act of 31 Car. II, c. 2; the committing any man to prison out of the realm is made *præmunire*, unpardonable even by the king. Nor can the king pardon where private justice is principally concerned, in the prosecution of offenders. Nor can he pardon a common nuisance while it remains unredressed. Nor can he pardon an offense against a popular or penal statute after information brought, because the informer has acquired a private property in a part of the penalty. (4 Bl. Com., pp. 397, 398.)

from the *prerogative* powers of sovereignty, and not from an assumption of authority by a mere executive officer. If the operation of the law is to be suspended, it is the province of the law-making authority to suspend it; not of him who is instrusted with the exercise of mere executive powers, with the attendent authority to reprieve or pardon those who are condemned and put into his hands to receive the penalty. The question of general amnesty is one of policy affecting the state; and not of clemency affecting the individual. There are no reasons to be assigned in favor of conferring upon an executive officer merely, the authority to reprieve or pardon persons who have not been tried, convicted and sentenced. There is nothing in precedent to sustain such a policy.[1] It would be exceedingly dangerous to create a power in the hands of a single individual, to stand between society and those who prey upon it, to protect them from the consequences of their crimes. Whether an individual needs or merits a pardon for a murder or other crime alleged against him, cannot be known to society until his conduct has been investigated, and the quality of his actions ascertained. It cannot for a moment be admitted that a president of the United States can stand by and see a gigantic rebellion organized, and say to the insurgents, if you are unsucessful I will pardon you, and thus save you from the legal consequences of your rebellious acts. No executive officer as such, ever can possess, and under an enlightened government, no mere executive officer ever will be possessed of, such a power of pardon. The genius of the American government, the theory of the source and limitation of its authority, and the policy of all laws for the protection and preservation of society under its

[1] It is no precedent for the American president to be able to show that the kings or sovereigns of monarchical countries have exercised the power of pardoning before conviction. The theory in monarchical countries—that is, under absolute monarchies—is, that supreme prerogative power originates in, and resides with, the king or sovereign. In limited monarchies, the theory is the same; but the power in the monarch is limited by his assent to acts of limitation. Thus, in Great Britain, the king is the source of all governmental authority. But the prerogatives of the king have been limited by his assent to acts of parliament affixing such limitations. Therefore, the government of Great Britain is a limited monarchy; but the prerogatives of the king are acknowledged in everything where, by the law of nature or the restraints of parliament sanctioned by his assent, he is not prohibited from the exercise thereof. He, therefore, as the sovereign exercising absolute prerogative power, can pardon in all cases where by act of parliament he has not constitutionally bound himself not to do so. The difference between the authority of the president and the authority of the king is this: the president, as executive, can grant pardons only in cases authorized by the constitution; the king, as sovereign, can grant pardons in all cases not prohibited by the constitution. The theories of the source and limitation of authority in the president, and the same in the king, are diametrically opposed each to the other; therefore, the exercise of the rights of sovereignty by the king furnishes no safe precedent to be followed by a republican executive.

administration, forbid such an interpretation to be put upon the clause, "the president shall have power to grant reprieves and pardons for offenses against the United States."

§ 513 The power in the president to grant reprieves and pardons for offenses against the United States, will provide for all proper cases of executive clemency if confined in its application to persons convicted of such offenses. When there has been no trial or conviction of an offense, there can be no pressing emergency demanding a reprieve or pardon at the hand of the president. The executive as such, can only be called upon to exercise his clemency after the offender has come under his jurisdiction; that is, after nothing remains to be done, but to execute the sentence of the law upon him. Before conviction the executive has no jurisdiction over him as a criminal, nor can he gain any but by conviction and sentence. Upon what hypothesis then, can the mere executive officer reprieve or pardon a person unconvicted of crime. If he can do it before conviction, he can use this power as a license to the commission of crime. To suppose that an unconvicted person can require the exercise of the reprieving or pardoning power of the executive is an absurdity. There may be cases as in rebellion or civil war, where a large class of citizens may need, and public policy may require, an amnesty in their behalf. But such exigency addresses itself to the *legislative*, not to the *executive* department of government. It calls for the exercise of prerogative power, not executive clemency. The people have a right to be consulted as to the safety or propriety of admitting to political power those who have sought the destruction of public security, and the overthrow of the public authority.

§ 514. Under this provision of the constitution the president may grant a conditional pardon. This question was raised in *ex parte* Wells.[1] The prisoner had been convicted of murder and sentenced to be hung. President Fillmore had granted him a conditional pardon substantially as follows: "For divers good and sufficient reasons I have granted, and do hereby grant unto him, the said William Wells, a pardon of the offense of which he was convicted—upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment

[1] 18 How. S. C. R., 307.

for life in the penitentiary of Washington." This pardon was accepted in these words: "I hereby accept the above and within pardon with condition annexed." Afterward the prisoner made an application to the circuit court of the District of Columbia for a writ of *habeas corpus*. It was rejected, and an appeal was taken to the supreme court. No statute had been passed regulating the pardoning power of the president, consequently the president acted under the power as expressed in the constitution. It was contended that the pardon was valid, and remitted entirely the sentence of the court; and that the condition was void;—that the president affixing a condition to his pardon assumed a power not conferred by the constitution;—that, in effect, he legislated a new punishment into existence. But the supreme court held otherwise: that according to the English law on the subject, the general authority to grant pardons included every denomination of pardon known to that law; such as special or particular, conditional or absolute;—[1] that the same meaning must be given to the word as prevailed in the colonies and in England at the time it found place in the American constitution.[2]

§ 515. The power to grant pardons does not extend to impeachments. Trials by impeachment have reference only to public character and official duty. It is the mode by which one high in office, having been guilty of a breach of his official trust, is arraigned before the people to answer for his delinquency. By the terms of the constitution, the president, vice-president and all civil officers of the United States, may be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. It would, therefore, have been highly improper to have allowed the president to interfere by executive clemency either to prevent the impeachment or conviction of a faithless public officer. For similar reasons the king of England cannot interfere to protect his high officers from impeachment and conviction, although it is held that he can pardon after conviction.[3] De Lome, however, thinks it doubtful whether the king has power to remit the punishment of one condemned in consequence of impeachment.

1 See *United States* v. *Wilson*, 7 Pet., 162.
2 See *Cathcart* v. *Robinson*, 5 Pet., 264; see also 8 Watts & Sergeant, 197; 4 Black. Com., 401.
3 4 Bl. Com., 399, 400; 12 and 13 Wm. III, c. 2; Rawle on Const., ch. 17, p. 176; 1 Tuck. Bl. Com., app., 331.

He says "I once asked a gentleman very learned in the laws of their country, if the king could remit the punishment of a man condemned in consequence of an impeachment, of the house of commons. He answered me: the tories will tell you the king can; and the whigs, that he cannot." But it is not perhaps very material that the question should be decided: the great public ends are attained when a corrupt minister is removed with disgrace; and the whole system of his proceedings unveiled to the public eye.[1] But whatever may be the authority of the king in this respect, the president possesses no such power.[2]

§ 516. There is also one other offense, which, from its nature, the president cannot pardon. The constitution has committed to each branch of the national legislature the authority to punish for contempts, or for the disorderly behavior of its members. This authority is essential to the existence and independence of that body; therefore, the executive cannot be permitted to interfere between either house and the person offending. To confer upon the president or any other officer, the authority to interfere by the power of pardon, with the authority of either house to protect itself from such disturbance as would tend to interrupt its proceedings, would be to endanger the independence thereof, and thus to place the rights of the people in perpetual jeopardy.[3]

§ 517. By the provisions of the constitution the president is also created commander-in-chief of the army and navy of the United States; and also of the militia of the several states when called into the actual service of the United States.[4] But the powers and duties of the president as commander-in-chief of the army and navy, are separate and distinct from his powers and duties as the simple executive head of the nation; and neither of those functions of the presidential office derive any strength from the other. As the chief executive of the nation, he takes no authority from the military department of his office: and as commander-in-chief, he gets no aid from the civil department of the same. That is, his authority as commander-in-chief is the same as it would have been, had it been an office separated from, and independent of, the office of president of the United States. Had the constitution provided for the appoint-

1 De Lome on British Constitution, p. 95, note *a*.
2 Art. 2, § 2 of Const. U. S.; 2 Story's Com. on Const., § 1503.
3 See Story's Com. on Const., § 1503.
4 Art. 2 § 2, clause 1, Const. U. S.

ment of some other person than the presidential incumbent to that office, the powers and duties of the office would have been the same. Therefore in discussing the limitations of the authority of the president, or the extent of the same, it becomes important to ascertain and keep in mind, the particular character in which it is supposed he acted or proposes to act. If the power to be exercised, or the duty to be performed, belong to the military department, then the authority of the president to act in the premises, comes either from special legislation, or from his constitutional office as commander-in-chief. But if it pertain only to the civil side of the office, his authority must be found in the laws authorizing him to act in the premises for the purpose of executing some existing law, or enforcing some judgment or decree of the court. As commander-in-chief, the president is amenable to the laws of congress in performing the duties and exercising the functions of that office. Although he is, by the terms of the constitution, the commander-in-chief of the army and navy, and of the militia of the several states when called into the actual service of the United States, yet congress has authority to make rules concerning captures on land and water; to provide for the raising and supporting of the army and navy; and to make rules for their government; to provide for calling the militia into the national service, and for organizing, arming and disciplining the same.[1]

§ 518. How far the president of the United States had authority to re-adjust the political relations of the revolted states, and of the inhabitants thereof, to the nation, and to the general government, has been the subject of grave discussion. Shortly after the overthrow of the military power of the rebellion, and the surrender of the insurgent forces, the president was assassinated; and the vice-president became the acting president. Instead of calling together the congress or legislature of the nation to provide by law for the reconstruction of governmental institutions in the insurgent states, the acting president attempted the task under the authority and powers of the presidential office. By his proclamation of May 29, 1865, in relation to the state of North Carolina, he says, the constitution of the United States guarantees to every state a republican form of government, and protection against invasion and domestic violence—that it is the duty of the presi-

[1] Art. 1, § 8, cls. 11, 12, 13, 14, 15, 16, Const. U. S.

dent to take care that the laws be faithfully executed; he then asserts that the rebellion has deprived the people of North Carolina of all civil government; and, therefore, to enable the loyal people of the state to organize a state government, he appoints William H. Holden provisional governor, whose duty it shall be, as early as possible, to make regulations enabling the loyal citizens of the state to elect delegates to a convention for the purpose of forming a constitution. No person was to be permitted to be a delegate unless he should first take the oath required in the proclamation of amnesty,[1] and should be a voter according to the laws of the state existing before the date of the act of secession; that the convention or legislature thereafter to be assembled should prescribe the qualifications of electors and the eligibility of persons to hold office. He likewise directed the military and naval authorities to assist the provisional governor in carrying that proclamation into effect, and in no way to hinder the loyal people of the state from thus organizing a state government.

§ 519. In this proceeding the president must have acted under the authority of his office as the executive of the nation, or as commander-in-chief, or as executive in part and commander-in-chief in part, or he must have acted without authority. The occasion which called for the exercise of presidential or other authority in the adjustment of the political rights of the people of North Carolina was, that the rebellion had deprived them of all civil government; and the measures proposed were to enable the loyal people of that state to organize a state government. If it were true that the people of North Carolina had been deprived of all civil government by the rebellion, as it undoubtedly was, and the loyal people were in need of a new state organization to restore their political rights and relations to the general government, then they needed authority to reconstruct or be reconstructed coming from the sovereignty or the prerogative power of the nation. If the political government constituting the state of North Carolina had been destroyed by the political rebellion of the state, and the people had been deprived of all

[1] The oath alluded to is in these words, "I, ——, do solemnly swear—or affirm—in the presence of Almighty God, that I will henceforth faithfully support and defend the constitution of the United States, and the union of the states thereunder, and that I will in like manner abide by and faithfully support all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves, so help me God." (See President Johnson's Amnesty Proclamation of May 29, 1865.)

civil government as a state, it required the exercise of sovereign authority to reëstablish a state government therein, which should again confer upon the people the right of self-government in respect to their local and domestic interests, and the right to be represented in the general government of the nation. If the people of the state had inherent authority in themselves to reconstruct their state government, and re-establish their political rights, then the interference of the president by the appointment of a provisional governor, and by prescribing the qualifications of delegates and electors to their forthcoming convention or legislature, was unwarranted — was a usurpation. If the people did not possess such inherent authority in themselves, they needed the enabling act of congress, or of the law-making power to give them the authority. The president, as the mere executive of the nation, could only execute the law as it existed. He could enforce only such rights and privileges as were secured by law. He is charged by the constitution to take care that the laws be faithfully executed; but he is nowhere required or authorized to supply defective legislation. He is required to protect and enforce the rights of the people and of the states, where they have been ascertained by law. Beyond this, as a civil officer, he has no authority. As commander-in-chief he could exercise only martial power, and govern by martial authority. So far as the military and naval forces might be required to aid the civil authorities in the administration of their civil offices, he could command their co-operation. But as commander-in-chief he has no civil powers, nor can he confer any civil authority. Under the exigencies of war he can exercise the exigency powers of his office; but they cannot affect permanently the political or civil rights of those who, for the time being, become the subject of martial administration. As commander-in-chief, the president can appoint a military governor to administer where civil authority cannot make itself respected;[1] but he has no authority to appoint provisional governors who are to exercise civil functions, and then require the

[1] Gen. G. H. Shepley was appointed military governor of Louisiana in 1862. Subsequently, Michael Hahn, having been elected governor in March, 1864, President Lincoln invested him with the powers of military governor of that state, thus:

EXECUTIVE MANSION, WASHINGTON, *March* 15, 1864.

His Excellency Michael Hahn, Governor of Louisiana:

Until further orders, you are hereby invested with the powers exercised by the military governor of Louisiana.

Yours truly, ABRAHAM LINCOLN.

military to aid them in the enforcement of their authority. The proposition is simply this: if the people of North Carolina had by the political rebellion of the state, been deprived of all civil government, it required the authority which can institute a government to supply that which had been lost. If they had been divested of political rights and privileges through the loss of their civil government, they could be re-invested again with those rights and privileges only by the authority which could give them a valid government, through which to acquire the state rights and privileges, and the rights and privileges of state citizenship under the constitution of the United States. But no such authority could be derived from the presidential office, in any capacity whatever; that is, neither from his powers as executive or as commander-in-chief.[1]

§ 520. The president has power, with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur. The treaty-making power by which the nation becomes obligated to perform the thing stipulated, or to refrain from doing that which is agreed shall not be done, must proceed from the prerogative powers of sovereignty. The power of negotiating and contracting public treaties between nations is incident to sovereignty; and, hence, belongs to every sovereign state.[2] Public treaties between sovereigns or states are usually negotiated through the agency of ministers, or special diplomatic agents appointed for such purpose.[3] But to enable a minister or other diplomatic agent to conclude and sign a treaty with the government to which he is accredited, he must be furnished with *full power*, independent of his general letter of credit.[4] There has been much discussion whether treaties and conventions negotiated and signed by a minister with *full powers*, are binding upon the sovereign until ratified by him. It is usual for the sovereign to accompany the general full power with particular or special instructions, which are retained as a secret between the sovereign and his minister. The question discussed is, should the minister plenipotentiary, while keeping within the limits of his general powers, depart from the special instruction given him, would the sovereign be bound by such treaty or conven-

[1] See in Appendix extracts from president's message of December 4, 1865.
[2] Lawrence's Wheat., 441.
[3] Vattel, B. 2, ch. 12, § 156.
[4] Lawrence's Wheat., 443.

tion before ratifying the same. Grotius thinks the sovereign is bound by the acts of his embassador within the limits of his patent full power, although the embassador transcend or violate his secret instructions.[1] Vattel thinks the sovereign is bound by the acts of his minister within the limits of his credentials, unless the power of ratifying be expressly reserved.[2] But all this depends upon established custom. It is so exceedingly difficult to anticipate the complications that may arise during the progress of a convention or treaty, that in order to avoid all danger and difficulty, sovereigns usually reserve to themselves the power of ratifying what has been concluded upon in their name. Therefore, "the plenipotentiary commission is but a procuration *cum libera*."[3] Bynkershock lays down the rule, that if the credentials are special, and describe the particulars of the authority conferred on the minister, the sovereign is bound to ratify whatever is concluded in pursuance of such authority.[4] But if the minister exceed his authority, or undertakes to treat points not contained in his full power and instruction, the sovereign will be justified in delaying or refusing his ratification. But these questions cannot arise under the constitution of the United States. The ministers plenipotentiary or diplomatic agents of the United States can conclude no convention or treaty which will be binding upon the nation until ratified by the senate, by the approbation of two-thirds of the senators present when the question is submitted.[5]

[1] Grotius, B. 2, ch. 11, § 12; Puff., B. 3, ch. 9, § 2.
[2] Vattel, B. 2, ch. 12, § 156.
[3] Vattel, *supra*; see Lawrence's Wheat., pt. 3, ch. 2, § 5.
[4] Id., B. 2, ch. 7.
[5] The president is sometimes authorized by law to act in anticipation of the ratification, as in the case of the negotiations ending in the purchase of Louisiana, for which two millions of dollars had been appropriated, the plenipotentiaries being instructed to provide for the repayment of the advance in the event of the refusal of the United States to ratify the convention. (Mr. Madison, Secretary of State, to Mr. Livingston and Monroe, March 2d, 1802.) Also, by act of March 3d, 1847, the sum of three millions was appropriated to enable the president to conclude a treaty of peace, limits and boundaries, with Mexico, to be used by him in the event that the treaty, when signed by the authorized agents of the two governments, and ratified by Mexico, shall call for the expenditure of the same or a part thereof. (Statutes at Large, vol. 9, p. 174.) In exchanging the ratification of the treaty between the United States and Great Britain in relation to an inter-oceanic communication, the British plenipotentiary subjoined the following explanatory declaration: "In proceeding to the exchange of the ratifications of the convention signed at Washington, on the 19th of April, 1850, between her Britannic majesty and the United States of America, relative to the establishment of a communication by ship canal between the Atlantic and Pacific oceans, the undersigned, her Britannic majesty's plenipotentiary, has received her majesty's instruction to declare that her majesty does not understand the engagements of that convention to apply to her majesty's settlement at Honduras, or to its dependencies. Her majesty's ratification is exchanged under the explicit declaration above mentioned. Done at Washington, the 29th day of June, 1850. H. L. BULWER." On the 5th of July, Mr. Clayton filed a memorandum in the department of state acknowledging the receipt of the above, and

§ 521. In monarchical countries the treaty-making power is found in the monarch or king, upon the theory that he is the sovereign. Before the introduction of legislative bodies as limitations upon the prerogative powers of the monarch, thereby changing absolute to limited monarchies, the king or sovereign was absolute in his authority, to make, adjudge and execute law. Being the state, and governing by the *grace of God*, and not by the authority of the people, the power to make treaties of every description belonged absolutely to him by inheritance. When there began to be limitations imposed upon the authority or prerogative powers of the monarch, by the introduction of constitutions, or of legislative bodies, they operated upon the practice, but not upon the theory of governmental authority. The king under the British constitution, has absolute prerogative powers in every respect, where they have not been made subject to limitations by the consent of the sovereign. The power of the king to make treaties of every character and description has not been thus limited; therefore, it is said "that the prerogative of making treaties exist in the crown, in its utmost plenitude."[1] By parity of reasoning the treaty-making power in the United States, should be vested in congress, as being that branch of the government in which the prerogative powers of the nation in respect to matters of national interest are perpetually present. If the king, under the British constitution, has this prerogative power "knit to the crown," in the absence of any constitutional provision here, this power would have been knit to that sovereignty in which the law-making power resides; to be exercised through the agency by which

that he understood that the British Honduras was not embraced in the treaty of the 19th April, but declined to affirm or deny the British title; and that after signing such memorandum, which he delivered to Sir Henry Bulwer, they immediately proceeded to exchange the ratifications of the treaty. (Cong. Doc., 32d Cong., 2d sess.; Senate Ex. Doc. No. 12, Jan. 4, 1853.) Mr. Adams, minister of the United States in London, presented this point to Earl Russell, in declining to attach a declaration to the proposed convention of maritime law, August 23, 1861. Said he, "By the terms of the constitution, every treaty negotiated by the president of the United States must, before it is ratified, be submitted to the consideration of the senate. The question immediately arises, what is to be done with a declaration like that which his lordship proposes to make? Is it a part of the treaty, or is it not? If it be, then is the undersigned exceeding his instructions in signing it; for the paper made no part of the project which he was directed to propose; and in case he should sign it, the addition must be submitted to the senate for its advice and consent, together with the paper itself. If it be not, what advantage can the party making the declaration expect from it in modifying the construction of the project, when the senate have never had it before them for their approval? If it does, why did not the undersigned procure it to be incorporated into it? On the other hand, if it do not, why did he connive at the appearance of a desire to do it without effecting the object. (Papers relating to Foreign Affairs accompanying president's message, 1861, p. 123; see also Mr. Lawrence's Notes to Wheat., part 3, ch. 2, § 5.)

[1] Federalist, No. 75.

that power is constitutionally exercised. But the constitution provides otherwise; and, therefore, the treaty-making power is by it intrusted to the exercise of the president, as a mere agent or minister of the nation, possessing in himself no original or inherent authority, subject to the ratification of the senate, which as a body, is composed of the representative intelligence, prudence, wisdom and dignity of the nation. And as it is impossible to circumscribe within any definite limits this power, and leave it applicable to all exigencies which may arise in the history of a nation, the constitution has made it general and unqualified. There are reasons why congress as a body are not adapted to the exercise of this power. It not unfrequently happens in the formation of treaties, that secrecy and dispatch are indispensable. The delays incident to large assemblies, the differences of opinion, the time consumed in debate, the utter impossibility of secrecy rendered congress wholly unfit for the purpose of diplomacy.[1]

§ 522. The difference between the office of the king of England and that of the President of the United States, is also manifest in the treaty-making power. The president has the power, with the advice and consent of the senate, two-thirds of the members present concurring, to make treaties. But this authority in the president is derived from the constitution; and he acts in virtue of its authority. But it is otherwise with the king. He is the sole and absolute representative of the nation in all foreign transactions. He can of his own motion, make treaties of peace, commerce, alliance and of every other description. Under the British constitution the prerogative of making treaties exists in the crown in the utmost plenitude; and the compacts entered into by royal authority have the most complete legal validity and perfection, independent of any other sanction.[2] Upon the theory of the British constitution, the king is sovereign. He is the fountain of authority. Therefore, the treaty-making power belongs to him as the sole and absolute sovereign of the state. In this respect there is no comparison between the intended power of the president and the actual power of the British sovereign. Therefore, in determining the nature and extent of the authority of the president to make treaties or conven-

1 Story's Com. on Constitution, § 1509; 1 Kent's Com., pt. 1, § 8, p. 165.
2 See Federalist, No. 75.

tions, no aid can be derived by consulting the British constitution, or the practice of the British sovereign.

§ 523. In practice, the senate of the United States are not consulted until the treaty has been formed and laid before them for ratification. It is in the option of the president to consult with the senate during the formation of a treaty, and to take their advice in respect thereto; and since it must meet with their approbation before it can become obligatory, it would be well for him to understand their views at as early a moment as possible. When the treaty is laid before the senate for their advice and consent, that body deliberates upon it with closed doors. It then can ratify the whole or any part of the convention; or it can make such suggestions and modifications of it as it deems proper. But in such case the treaty must again be submitted to the president and the foreign party for their assent, before it can become obligatory. While the senate are in session upon the question of ratification, it is necessary that they have before them the facts and circumstances calling for such treaty and upon which such convention is based. Therefore it is common for them to require, and for the president to lay before them, all the official documents respecting such negotiations, to assist their judgment. But the house of representatives, having no voice in the ratification of treaties, have no constitutional right to insist on the production before them of such correspondence. When the treaty, to be executed, requires an appropriation of money, it is proper that the house should be informed of the propriety or justice thereof, before making the necessary appropriation.[1]

§ 524. Inasmuch as the power to make treaties is by the constitution committed to the president to be exercised under the advice and consent of the senate, it is proper that the power of appointing embassadors and other public ministers and consuls, should be committed to the same authority, to be exercised in the same man-

1 Rawle on the Constitution, ch. 7, pp. 63, 64.
Treaties of peace, when made by competent authority, are binding upon the whole nation. If the treaty require the payment of money to carry it into effect, and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law; and to refuse it would be a breach of public faith. The department of the government which is intrusted by the constitution with the treaty-making power is competent to bind the national faith in its direction; for the power to make treaties of peace must be co-extensive with all the exigencies of the nation, and necesarily involves in it that portion of the national sovereignty which has the exclusive direction of diplomatic negotiations and contracts with foreign powers, as treaties made by that power become of *absolute efficacy*, because they are the supreme law of the land. (1 Kent. Com. Lec. 8, § 3.)

ner. Therefore, under the constitution the president nominates, and with the advice and consent of the senate, he appoints, this class of officers. This clause of the constitution[1] also provides that the judges of the supreme court, and all other officers of the United States, whose appointments are not otherwise provided for by the constitution, and which shall be established by law, shall be nominated and appointed in the same manner. But it likewise authorizes congress to provide by law for vesting the power to appoint inferior officers in the president alone, in the courts of law, or in the heads of departments. What class of officers of the United States are to be included as *inferior*, has not yet been definitely determined. It would seem probable that those named in the clause could hardly be included as inferior officers. The office of embassador and public ministers, of judges of the supreme court and heads of departments are clearly principal offices in the government.[2]

§ 525. Vacancies in office are liable to occur during the recess of the senate, and it may be important to the public that they should be filled immediately. Therefore the constitution provides that the president shall have power to fill up all vacancies that may happen during such recess, by granting commissions which are to expire at the end of the next session of the senate.[3] But the term *vacancies* in the constitution does not include the creation of a new office, and the appointment of an officer to fill it. It was during the recess of the senate that Mr. Madison, in 1813, appointed and commissioned ministers to negotiate the treaty of peace of Ghent. The office, though a constitutional one, that is, one contemplated by the constitution, was created during the recess of the senate, and filled by the appointment of the president, without the advice and consent of the senate; therefore the question was raised, whether the president had constitutional authority so to do, there being no vacancy of any existing office; and the senate, at their next session, it is said, entered their protest against such practice; and subsequently it held that the president could not create the office and make such appointments during the recess of the senate.[4]

1 Art. 2, § 2, cl. 2.
2 See recent law of congress abridging the patronage of the president. App.
3 Art. 2, § 2, cl. 3.
4 See Sergeant on Const. ch. 231; 2 Executive Journal, pp. 415-500; 3d do., 297. See Story on Const., § 1559.

§ 526. Connected with the subject of appointment is also that of the power of removal from office. The constitution provides for filling vacancies which may occur during the recess of the senate, but it is silent as to the power of the president to remove from office. It would seem, in the absence of any provision to the contrary, that it should require the exercise of the same authority to remove an incumbent from office, that it takes to appoint him to office; and such seemed to have been the understanding of those who participated in founding the government. Notwithstanding the constitution makes no provision for removing an incompetent or unfaithful officer from his official position, it is a power so manifestly essential to a prudent and wise administration of government, that its existence is deemed to be unquestionable. The writers in the Federalist[1] assume the necessary existence of this authority; but they thought such power existed in the president *only with the consent of the senate.* That is, they assumed, without argument or doubt, that the consent of the senate would be necessary to remove, as well as to appoint, the incumbent. The silence of the constitution clearly indicates that it was expected that removals would not take place, except as a public necessity, to secure fidelity and efficiency in the discharge of official trusts; and it cannot be doubted that the practice of creating vacancies by removals from office, without any reference to the fidelity or efficiency of those removed, or to the better qualifications or character of those who are appointed to their places, is a violation, both of the letter and the spirit of the constitution; is a corrupt and base usurpation of power never intended to be conferred by that instrument, upon the president or any other officer or department of government; a prostitution of the patronage of government, so corrupting in its purpose and influence, as to demand the impeachment of the high officer who uses it. It would never be used by an officer or party fit to be trusted with the administration of the public authority, and the supervision of the public weal. The practice of those intrusted with the administration of the general government has been, to recognize in the president of the United States the power to remove from office at his pleasure, those whom it required the advice and consent of the senate to appoint thereto. But as this power

[1] Federalist, No. 77.

exercised by the president is an assumed one, it cannot be doubted that congress has authority to regulate its exercise. And if there is one duty which it owes to the public to perform more speedily than any other, it is to place under wholesome restraint the exercise of this power of unnecessary removals from office.[1]

§ 527. The general duties and powers of the president are enumerated in the third section of the second article in these words, "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 embassadors and other public ministers; he shall take care that the laws be faithfully executed; and shall commission all the officers of the United States."

§ 528. The language of this provision of the constitution, in form, distinguishes between the *powers* and the

[1] The exercise of this power by the president has grown up under the administration of the general government from a very early date. During the first session of congress, in 1789, this question was very fully discussed on a bill introduced into the house of representatives "to establish an executive department to be denominated the department of foreign affairs," which among other things provided, "That whenever the secretary shall be removed from office by the president of the United States, or in any other case of vacancy," etc. (1 Stat. at Large, 28.) It was then contended by the advocates of this power in the president, that it belonged to him; that it resulted from the nature of the power, and from the convenience and even necessity of its exercise. That in its nature it was a part of the executive power, and was indispensable for a proper execution of the laws, and a regular administration of public affairs; that the person in whose favor a majority of the people would unite in an election to the office of president had every presumption in his favor; that he must be presumed to possess integrity, independence and high talents; that it was impossible to suppose that he would abuse the patronage of the government, or his power of removal to the base purpose of gratifying a party, or of ministering to his own resentments, or that he would displace upright and excellent officers for a mere difference of opinion; that the public odium which would attach to such conduct, would be a perfect security against it. That to make removals from such motives, would be an impeachable offense. (3 Story's Com. on Const., §§ 393 and 394.) Such was the opinion of Mr. Madison, who was at that time a member of the house. Subsequent history teaches a different lesson as to the effect of allowing a president the exercise of this power. In 1835, a committee of congress appointed to investigate this subject, made an able report on the subject of "Executive Patronage," on the 9th of February of that year. "It is easy" (say they), "to see that the certain, direct and inevitable tendency of this practice is to convert the entire body of those in office into corrupt and supple instruments of power, and to raise up a host of hungry, greedy and subservient partisans, ready for every service, however base and corrupt. Were a premium offered for the best means of extending to the utmost the power of patronage; to destroy the love of country, and substitute a spirit of subserviency and man worship; to encourage vice and to discourage virtue, and in a word, to prepare for the subversion of liberty and the establishment of despotism, no scheme more perfect could be devised. The disease is daily becoming more aggravated and dangerous, and if it be permitted to progress for a few years longer with the rapidity with which it has of late advanced, it will soon pass beyond the reach of remedy. The question now is, not how, or where, or with whom, the danger originated, but how it is to be arrested; not the cause, but the remedy; not how our institutions and liberty have been endangered, but how they are to be restored." (Consult the practice of the administration under Andrew Johnson as acting president of the United States. See also, laws passed in 1867, to remedy the evil, in Appendix.)

duties of the president; the *powers* being *permissive;* and the *duties* being *mandatory*—thus it is the duty of the president to give to congress, from time to time, information of the state of the union; to receive embassadors and other public ministers; to see that the laws of the United States are faithfully executed, and to furnish every officer of the nation with credentials of his authority to act as such officer; therefore, the constitution provides that he *shall* do these things. He has power to convene congress on extraordinary occasions; and to adjourn them when the two houses cannot agree as to the time of adjournment; therefore, the constitution provides that he *may* do these things.[1]

§ 529. But whether the president be *required* or *permitted* to exercise certain powers intrusted to the presidential office, he is legally bound to act in good faith for the highest good of the nation; and any willful departure from his line of duty in the discharge of the high trusts committed to him, would subject him to censure, and, if necessary, impeachment. On extraordinary occasions he may convene both or either of the houses of congress. It is manifestly his duty to exercise this power in good faith, whenever the safety and welfare of the nation requires it; and although, according to the language of the constitution, it is committed to his discretion to determine what occasions shall require the exercise of this power, he is nevertheless responsible for the exercise of a reasonably sound, and a *bona fide* discretion in the premises. If he act corruptly either in omitting to assemble congress, or in adjourning them after they are assembled, he would be liable to impeachment, even though in form, the power is to be exercised in his discretion. Thus, suppose, under his power to adjourn congress to such a time as he might think proper, when there is disagreement between the two houses in respect to the time of adjournment, he should adjourn them beyond the time of the annual session; or should adjourn them on any occasion of a temporary disagreement, for the purpose of getting rid of their presence in the administration of the government, and augmenting his influenee in the same, there can be no doubt, that in so doing he would be guilty of an impeachable offense; and the congress which he should

1 See a discussion of the constitutional discrimination of the *powers and auties* of the president, by Alfred Conkling, published by Weare C. Little, Albany, 1866.

thus corruptly attempt to prorogue, would not discharge its duty to the people until it had remained long enough thereafter to impeach, convict and remove him from office, and to put a more faithful officer in his place.

§ 530. The president is required to receive embassadors and other public ministers. Embassadors and public ministers are the only accredited medium through which political relations can be maintained with foreign powers. Therefore the external administration of the public authority is most intimately connected with the creation and maintenance of these ministerial offices. The power to receive embassadors and foreign ministers carries with it also the incidental power to refuse to receive them for proper or just cause. The refusal to receive a foreign minister should be sustained by substantial reasons; otherwise it would be deemed an unfriendly act toward the sovereign appointing him, and might provoke hostilities unless accompanied with proper explanations. The grounds of refusal may be personal to the minister; or to the subject of the embassy; or to the attitude of his sovereign toward the government refusing to receive him.

§ 531. By the fourth section of the second article of the constitution of the United States, the president, vice-president, and all civil officers of the United States are liable to be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. The nature, object, and policy of impeachments have already been considered.[1] There remain but these further considerations to be discussed in respect thereto. First, what is the authority of the senate to arrest and bring before them, as the trying court, the person of the accused; and, second, what is the effect of an impeachment by the house upon the official *status* of the accused? The conduct of the presidential incumbent in the administration of the duties and powers of his office, has been such during the years 1865, 1866, and 1867, as, in the minds of a very large and respectable class of citizens, to call for his impeachment and removal from office. It is contended by one class, that as soon as the house of representatives shall find articles of impeachment against him, he will be liable to be arrested and to be brought before the bar of the senate for trial. That being arrested, there will be inability on his part to dis-

[1] Ante §§ 275 to 282.

charge the duties of his office; and, therefore, that it will be incumbent upon congress to declare what officer shall act as president until the disability be removed, or a president be elected. It is contended on the other hand, that the incumbent cannot be interfered with until after impeachment by the house and conviction by the senate. That during his trial on the impeachment he is to be left in the possession and exercise of all the powers incident to the office of president—and powers which he is charged by the house with abusing—both as the executive head of the nation, and as the commander-in-chief of the army and navy of the United States. That however dangerous it may be to leave in the hands of the individual incumbent, such powers during his trial, it is the fault of the constitution and must be submitted to by the nation.

§ 532. By the constitution of the United States the house of representatives, as a department of the government, has the sole power of impeachment;[1] and the senate has the sole power to try all impeachments;[2] and congress has power to make all laws which shall be necessary and proper for carrying into execution such powers.[3] The constitution, not having determined the manner in which the accused shall be brought before the bar of the senate for trial, or the manner in which the trial shall be conducted, has left it to congress to provide by law for the same. Congress can determine by law whether the presidential incumbent shall be arrested on impeachment by the house, and whether, on being arrested, he shall be deemed to be unable to discharge the powers and duties of his said office. The constitution has wisely left the question of inability to discharge the powers and duties of any given office, to be defined by the people of the nation, through their representatives in congress, that is, to be defined by law. What shall amount to a disqualification to discharge the high trusts of the presidential office, could with safety be committed to no other department of the government; for there is no other department so immediately from the people, and so directly responsible to them. There is no other department in which the sovereignty of the nation is so potentially and perpetually present as in the congress of the United States. There may be many causes of inability in the presidential incumbent; such as, sickness, insanity,

[1] Art. 1, § 2, cl. 5. [2] Art. 1, § 3, cl. 6. [3] Art. 1, § 8, cl. 18.

doubtful loyalty, and the like. Who except Congress, as the law-making power, can determine the nature and extent of such inability? The constitution contemplates that this inability may be of a temporary duration only, and may be removed; or it may be permanent, continuing until the election of a successor. Thus, congress may, by law, provide for the case of removal, death, resignation, or *inability*, both of the president or vice-president, declaring what officer shall act accordingly until the *disability be removed*, or a *president shall be elected*.[1]

§ 533. The provisions of the constitution upon this subject are plainly these: The president may be impeached by the house, and tried by the senate; and congress may provide by law, for the manner in which he shall be arraigned and tried before the bar of the senate. If in the opinion of congress the presidential incumbent is disqualified from properly discharging the duties of the presidential office while on trial before the senate, it can provide by law for such inability by declaring what officer shall act as president until such disability be removed, or a successor be elected. There can be no legal inability on the part of the president to discharge the duties of his office, except such as congress shall determine by law, and what shall amount to such constitutional inability necessarily rests in the judgment and discretion of congress. Their decision and action in the premises is conclusive; and there is no appeal therefrom but to the people. The constitution provides that in case of disability, etc., congress may provide for the administration of the presidential powers and duties, and has not provided what shall be deemed to amount to such disability; but has given to no other department than congress any powers in relation to the subject. The whole subject is by the constitution committed to congressional discretion, and congress has full power to declare by law, what shall amount to disqualification, and who shall administer during the continuance of such inability, etc.

§ 534. It has been contended by some that the fourth section of the second article of the constitution, should be understood to read that the president, vice-president and all civil officers of the United States shall be removed from office on impeachment for treason, bribery and other high crimes and misdemeanors; as well as for convic-

[1] Art. 2, § 1, cl. 6.

tion of the same. But such, evidently, is not the legal import of that section. An officer is not to be presumed to be guilty of the offense for which he stands impeached, until he is found guilty, after a full trial before the trying court. He had no opportunity of appearing or being heard before the house. His accusers were alone heard there. Therefore, it cannot be supposed that the people intended to authorize the final removal from office of one, who was merely accused of a high offense, without giving him an opportunity of being heard in his own defense. It cannot be doubted, that under this provision of the constitution, the officer must be convicted as well as impeached before he can be permanently removed from his office. But while the incumbent cannot be removed until convicted, he may be, under a temporary inability created or declared by law to discharge the powers and duties of the presidential officer during his trial before the bar of the senate. It is not only within the province, but it is likewise the duty, of congress to provide by law for the discharge of the presidential power and duties during the occurrence of such a possible event.

CHAPTER XVII.

OF THE JUDICIAL POWERS.

§ 535. By the express provisions of the constitution of the United States, the judicial authority of the nation is vested in one supreme court, and in such inferior courts as congress shall establish.[1] The scope of this provision in its administrative effect upon the nation, depends upon a just definition of the term "judicial power." As used in the constitution of the United States, it is to have only its technical signification, distinguishing it from the legislative and executive departments of the government. As a judicial power, its whole province is to be found in ascertaining and applying the law according to the intent and purpose for which it was made. The law being a rule of civil conduct prescribed by the legislative will of the nation, it becomes the duty of the judiciary to ascertain that will as applicable to the case properly before the court, and to declare the requirements of the law therein, by

[1] Art. 3, § 1, of the Const. U. S.

its order, judgment or decree. Thus, it is the province of the legislature, as the term implies, to give to society or to the members thereof, the laws by which they are required to regulate their civil conduct. It is the province of the judiciary to ascertain that legislative intent, and by appropriate orders, judgments or decrees, to apply the law according to such ascertained purpose and effect. The maxim, *jus dicere, non jus dare*, express with forcible brevity, the province of the judge. The function of the judge only begins where that of the legislator ends. He has no mission to perform where there is no law to be interpreted and applied. Until the legislator has spoken, and there is action or proposed action on the part of the subject, the judicial power must remain dormant. Not so with the legislative department. It is required to precede every other. It is necessarily rooted and grounded in ever-present sovereignty; not only providing for its own orderly existence and action, but for the orderly existence and action of every other department. Under the constitution of the United States, it is intrusted with the creation and organization of the national courts. It can construct and reconstruct them at pleasure. It can, by law, prescribe the rules by which the judges are to be governed in the administration of justice. It can determine what shall be the qualifications of the judges, and for what causes they may be removed by impeachment.

§ 536. But the legislative, executive and judicial departments of the general government are created by the constitution of the United States; which, in all that it directs in respect to each, is the supreme law; and each department in its administration, is limited to the authority conferred by that instrument. That is, the legislative department can exercise its powers only in respect to such subjects, as by the terms of the constitution, are committed to its jurisdiction; and to the making of such laws as are necessary and proper for carrying into effect the will of the nation as expressed or implied in that instrument. In enacting laws, congress must keep within the range of subjects committed to its jurisdiction; and must authorize or require nothing to be done which will conflict with any of the positive provisions of the constitution. But keeping within these limitations and restrictions, congress can exercise the legislative discretion of the nation; and

the judiciary are bound to interpret and apply, in good faith, the laws enacted by congress, according to the ascertained legislative intent thereof. Thus, while the judicial powers of the government are distinct from, and independent of, the legislative and executive departments, they can be exercised only in accordance with rules prescribed by law, for the ascertainment and application of the legislative will of the nation to affairs subject to its general jurisdiction.

§ 537. The judges of the supreme and inferior courts are nominated, and with the advice and consent of the senate, appointed by the president of the United States; and they hold their offices during good behavior.[1] During the continuance of the office to which they are appointed, they cannot be removed except upon impeachment and conviction of high crimes and misdemeanors. The object of this provision is to secure to the court that independence so essential to a just and faithful discharge of judicial duties. In many cases their jurisdiction is ascertained and secured by the constitution itself, in which respect the judicial powers are co-ordinate with the legislative. But in all other cases, their jurisdiction is fixed by law, which necessarily subordinates them in their jurisdiction to the legislative will. It has been questioned whether, after the courts have been organized by law, and the judges have been appointed and their salaries have been fixed, congress has the constitutional authority to repeal or modify the law in such a manner as to work a removal of a judge from office. In 1801, congress passed an act reorganizing the judiciary and authorizing the appointment of sixteen new judges with suitable salaries, to hold the circuit courts of the United States in the different circuits created by the act.[2] Under this act the circuit judges were appointed and performed their duties until the next year, when the courts established by the act were abolished, without making any provision for paying their salaries or continuing their offices.[3] It was contended by some that inasmuch as such act abolishing these courts, in effect removed these judges from office, that it was in violation of the constitution which provides, that they shall hold their office during good behavior. Judge STORY was of the opinion that such act could not be reconciled with the terms or

1 Art. 2, § 2, cl. 2 of Const. U. S.; and Art. 3, § 1, of same.
2 Act of 1801, ch. 75.
3 Act of 1802, ch. 8.

the intent of the constitution.[1] But with due respect to the opinion of the learned author, it is not conceivable that the framers of the constitution intended to impose upon the nation a constitutional obligation to maintain forever an imperfect or defective organization of the inferior court, lest, perchance, they should disturb the official life of a judicial incumbent. It is a well-settled principle, that the incumbent of an office for life or for years, has no vested right or interest in the office, or in his prospective salary. He administers for the public, not for himself, and, in the absence of any constitutional inhibition, the office may be abolished at any time, without consulting the wishes or personal interest of the incumbent. By abolishing the office, the incumbent is not removed, but his official life ceases with the cessation of the office.

§ 538. It cannot be doubted that it was the design of the authors of the constitution to commit to congress the organization and supervision of the national courts in every respect not fixed and settled by the constitution itself. The constitution provides that there shall be one supreme court and such inferior courts as congress may from time to time ordain and establish.[2] It also provides for the original and appellate jurisdiction of the supreme court in certain cases; and for the appointment of the judges; and the tenure of their office, etc. But it leaves the organization of these courts, the number of judges, and the rules by which they are to be governed, to the discretion of congress; and without the exercise of which the courts themselves could have no existence. Everything pertaining to the organization, and the practical workings of these courts, is committed necessarily, to the legislative discretion.[3]

§ 539. The legal rights of individuals cannot be protected and enforced by government except through the

[1] Com. on Const., § 1633.

[2] Judges of inferior courts do not include judges of the courts appointed in the territories of the United States under the authority given to congress to regulate the territories of the United States. Such are legislative courts created in virtue of the general sovereignty which exists in the general government over the national territories. (1 Peter's S. C. Rep., 511-546; Story's Com. on Const., § 1636.)

[3] In a recent case (*ex parte;* in matter of A. H. Garland, of Arkansas, petitioner; and also *ex parte;* in matter of R. H. Marr, of Louisiana, petitioner,) on motion in the supreme court for leave to practice as attorneys, etc., without taking the test oath prescribed by congress, as an essential part of the qualification of an attorney to be entitled to practice in such court, a majority of the judges held that the act of congress prescribing such test oath, was unconstitutional.[1] It is an anomalous decision; one which cannot stand the test of legal criticism, and will not be likely to be recognized as law. (See the dissenting opinion of Mr. Justice MILLER, concurred in by Chief Justice CHASE, and Justices SWAYNE and DAVIS, published in the Western Jurist for April, 1867. See appendix, p. .)

[1] Dec. Term, 1866, not reported.

intervention of the judiciary to interpret and apply the laws for such purpose. In matters of internal administration the executive cannot act in the execution of the law, except in pursuance of the order, judgment, or decree of the courts. In all questions directly affecting the vested or natural rights of individuals, the action of the judiciary necessarily precedes that of the executive, for the purpose of ascertaining the law, and directing its application to the purpose intended. But in respect to questions affecting the political rights of political states or communities, the judiciary cannot properly interfere. Whether the inhabitants of a territory shall be incorporated into a political state; and upon what conditions; and subject to what restrictions; are questions of legislative discretion, which the judiciary cannot review. It is the same generally, with all questions committed to the discretion of congress, which do not directly affect the natural or vested rights of the citizen.[1]

§ 540. The judicial power of the United States extends to all cases, in law or equity, arising under the constitution and laws of the United States, and treaties made under their authority; to all cases affecting embassadors, 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 from different states; and between a state, or the citizens thereof, and foreign states, citizens or subjects.[2] By the eleventh amendment to the constitution it is provided, however, "that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[3] As the judicial power of the United States extends only to *cases arising under the constitution and laws of the United States, etc.*, it is first necessary to consider what constitutes *a case*, within the meaning of this clause. To constitute a *case*, there

[1] See the recent discussions before the supreme court on the application of Georgia for a writ of injunction against Stanton, Grant and Pope, to prevent the enforcement of the reconstruction act of 1867, and which was denied by the court.

[2] Art. 3, § 2, cl. 1, Const. U. S.

[3] See Story's Com. on Const., § 1685; *Fowler* v. *Lindsey*, 3 Dall. Rep., 411; *State New York* v. *Connecticut*, 4 Id., 1, 3, 6; *United States* v. *Peters*, 5 Cranch, 115, 139; *Osborn* v. *Bank of United States*, 9 Wheat. Rep., 846.

must be the proper parties, having rights to be adjudicated; or, at least, capable of having rights to be adjudicated, arising in the manner, or between the parties, prescribed in the constitution. And since there can be *no case* for the exercise of judicial power by the national judiciary, where the proper parties do not exist; and since there can be no proper party to an action or suit, where the legal or equitable rights of a legal person have not been, or are not threatened to be, invaded, the principles involved in a case for the exercise of judicial power by the national judiciary are easy to be ascertained and applied.[1]

§ 541. In plain language, a case is an action or suit, in law or equity, instituted according to the regular course of judicial proceedings.[2] As such, there must be the proper parties to the action or suit; that is, there must be before the court a legal person as a party, whose rights are to be protected or vindicated. Any person may be such a party whose legal rights, arising under the constitution, or laws of the United States, or treaties made in pursuance thereof, have been wrongfully invaded or withheld by a person legally responsible for such wrongful conduct. So also may a person be a party and bring his case before the national judiciary, where his protection, or the enforcement of his rights, affect embassadors, other public ministers or consuls; or where they constitute a case for admiralty and maritime jurisdiction, by arising upon the high seas, which are the joint property of nations, whose rights and privileges relative thereto, are regulated by the law of nations and treaties.[3] Beyond these cases, the constitution has declared who only can be parties to suits before these national tribunals. But these parties must be persons whose legal or equitable rights have been withheld, or have been invaded; or are in such imminent danger as to call for the protective remedies administered in equity.

[1] "It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the constitution, laws and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it has then become a case; and then, and not till then, the judicial power attaches to it. A case, in the sense of the constitution, arises when some subject touching the constitution, laws or treaties of the United States, is submitted to the courts by a party who asserts his rights in the form prescribed by law." (Story on Const., § 1646, and notes.) "A case is a controversy between parties, which has taken a shape for judicial decision." (Marsh. Speech, 5 Wheat. Rep., app., 16; see also *Osborn* v. *The Bank of the United States*, 9 Wheat. Rep. 819.)

[2] Story on Const., § 1646.

[3] *Chisholm* v. *The State of Georgia*, 2 Dall. Rep., 419, 475; 2 Pet. Cond. Rep., 635, 671.

§ 542. Cases arising under the constitution are distin guished from those arising under the laws of the United States in this: The constitution of the United States confers certain powers, grants certain privileges, and secures to citizens protection in the enjoyment of certain rights, independent of any particular statutory enactment. Therefore, cases may arise under such powers, privileges, and rights; as if a citizen of one state should be denied the privileges of a citizen in another state; or if a state should attempt to make paper money a legal tender for the payment of debts; or if a person charged with a crime against the United States, should be denied the right of trial by jury; or if a soldier in time of peace, should be quartered in any house without the consent of the owner thereof; for an injury such as these, there would be a case arising under the constitution. On the other hand, cases arising under the laws of the United States are such as grow out of the legislation of congress within the scope of their constitutional authority, whether they constitute the right, the privilege, the claim, protection or defense of the party by whom they are asserted. Wherever in a judicial proceeding any questions arise touching the validity of a treaty, or statute, or authority exercised under the United States, or touching the construction of any clause of the constitution, or of any statute, or of any treaty of the United States, or touching the validity of any statute or authority exercised under any state on the ground of any repugnancy to the constitution, laws, or treaties of the United States, it has been invariably held to be a case to which the judicial power of the United States extends.[1] A case in law or equity consists of the right of the one party as well as of the other, and may be said to arise under the constitution or a law, or a treaty of the United States whenever its correct decision depends on the construction of either.[2]

§ 543. The reasons why the constitution conferred the jurisdiction contained in article three, section two, is

[1] See *Marbury* v. *Madison*, 1 Cranch., 137, 173, 174; Story's Com. on Const., § 1647; *Martin* v. *Hunter*, 1 Wheat. Rep., 304; *Cohens* v. *Virginia*, 6 Wheat. Rep, 264; see also 9 Wheat. Rep., pp. 1 and 738.

[2] See Judiciary act of 1789, ch. 20, § 25; see Story's Com., *supra*, § 1648.

The judicial power of the federal government extends to all cases in law and equity arising under the constitution. Now the powers granted to the federal government, or prohibited to the states, being all enumerated, the cases arising under the constitution can only be such as arise out of some enumerated power delegated to the federal government, or prohibited to those of the several states. These general words include what is comprehended in the next clause, namely, cases arising under the laws of the United States, etc. (See 1 Tuck. Bl. Com. App., 418; see discussion of these questions by Rawle on the Const., ch. 28.)

forcibly expressed by Chief Justice JAY[1] as follows: "It may be asked what is the precise sense and latitude in which the words 'to establish justice,' as here used, are to be understood? The answer to this question will result from the provisions made in the constitution on this head. They are specified in the second section of the third article, where it is ordained that the judicial power of the United States shall extend to ten description of cases, namely: 1. To all cases arising under this constitution; because the meaning, construction and operation of a compact ought always to be ascertained by all the parties, not by authority derived only from one of them. 2. To all cases arising under the laws of the United States; because, as such laws, constitutionally made, are obligatory on each state, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due; but by a tribunal deriving authority from both parties. 3. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by local laws, or courts of a part of the nation. 4. To all cases affecting embassadors, or other public ministers and consuls; because, as these officers are of foreign nations, whom this nation are bound to protect, and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose rights and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction. 6. To controversies to which the United States shall be a party; because, in cases in which the whole people are interested it would not be equal or wise to let any one state decide and measure out the justice due to others. 7. To controversies between two or more states; because domestic tranquillity requires that the contentions of states should be peaceably terminated by a common judicatory; and because, in a free country justice ought not to depend on the will of either of the litigants. 8. To controversies between a state and citizens of another state; because, in case a state — that is, all the citizens of it — has demands against some citizens of another state, it is better that

[1] *Chisholm* v. *The State of Georgia*, 2 Dall. Rep., 419, 475.

she should prosecute their demands in a national court, than in a court of the state to which those citizens belong; the danger of irritation and criminations, arising from apprehensions and suspicions of partiality, being thereby obviated; because, in cases where some citizens of one state have demands against all the citizens of another state, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the former; and true republican government requires that free and equal citizens should have free, fair and equal justice. 9. To controversies between citizens of the same state claiming lands under grants of different states; because, as the rights of the two states to grant the land are drawn into question, neither of the two states ought to decide the controversy. 10. To controversies between a state or the citizens thereof, and foreign states or citizens or subjects; because, as every nation is responsible for the conduct of its citizens toward other nations, all questions touching the justice due to foreign nations or people ought to be ascertained by, and depend on national authority."[1]

§ 544. Cases may arise under the laws of the United States by implication, which may be brought before the national judiciary for redress. If an officer is ordered to arrest an individual, and he does so by the legal authority of the nation, the law implies that he shall be protected in obeying such authority. It is no unusual thing for an act of congress to imply, without expressing, such exemption from state control. Collectors of revenue, carriers of the mails, operators in the mint establishment, and other national institutions of a public nature, are examples; and although there is no provision of congress expressly protecting them, such protection is necessarily incidental to the office, and is implied in the acts creating it.[2]

§ 545. The judicial power extends to all cases in law and equity. "There is hardly a subject of litigation between individuals which may not involve those

[1] Mr. Madison says that cases arising under the constitution in the sense of the above clause, are of two descriptions. One of them comprehends the cases growing out of the restrictions on the legislative power of the states, such as emitting bills of credit, making anything but gold and silver a tender in payment of debts. Should this prohibition be violated, and a suit between citizens of the same state be the consequence, this would be a case arising under the constitution before the judicial power of the United States. A second description comprehends suits between citizens and foreigners, or citizens of different states, to be decided according to the state or foreign laws, but submitted by the constitution to the judicial power of the United States. Virginia Resolutions and Report, January, 1800, p. 28.

[2] See Story's Com. on Const., § 1656; *Osborn* v. *Bank of United States*, 9 Wheat. Rep., 846, 865, 866.

ingredients of *fraud*, *accident*, *trust*, or *hardship*, which would render the matter an object of equitable rather than legal jurisdiction, as the distinction is established in several of the states. It is the peculiar province of a court of equity to relieve against what are called hard bargains. These are contracts in which, though there may have been no direct fraud or deceit sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatures to do justice without equitable as well as legal jurisdiction. This reasoning may not be so palpable in those states where the formal and technical distinction between law and equity is not maintained, as in this state, where it is exemplified by every day's practice.[1]

§ 546. The supreme court has original jurisdiction in all cases affecting embassadors, other public ministers and consuls, and those cases in which a state is a party. Such cases can only be brought in the supreme court of the United States. But all other cases of which the national judiciary can take cognizance, may, under the regulations of congress to that effect, be commenced in the subordinate or inferior courts of the United States. The supreme court is to have appellate jurisdiction both of the law and fact in all such cases, except where, under the regulations of congress, it is otherwise provided.[2] The essential element of an appellate jurisdiction is the right to revise and correct the proceedings in a cause already instituted, and does not create the cause.[3] It necessarily implies that the subject-matter has already been instituted in, and acted upon by, some other court whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms, as the legislature may prescribe. The most usual modes are by writs of error and by appeal. A writ of error is a common law process to remove the record of the inferior court into the superior or appellate court for a re-examination of the law only. An appeal is a process of civil law origin,

[1] Alexander Hamilton in the Federalist, No. 80, p. 447.
[2] Art 3, § 2, cl. 2. Story's Com. on Const., §§ 1763–1768.
[3] Story's Com. on Const., § 1761; 1 Cr. 176; 2 Pet., 449.

which brings up the whole case, subjecting the fact as well as the law to a re-examination and re-trial.[1]

§ 547. By the language, "the supreme court shall have appellate jurisdiction both as to law and fact," is not meant that the supreme court may on appeal review the decisions of a jury in mere matters of fact, and thus in effect destroy the validity of their verdict; but that in cases of equity and admiralty jurisdiction the supreme court may review the facts as well as the law.[2] The appellate jurisdiction of the supreme court extends to all cases determinable in the different modes; some in the course of the common law, and some otherwise. In reviewng those which are determinable according to the course of the common law, the court will review only questions of law; while in reviewing equity and admiralty cases, a re-examination of the facts is according to usage. If any doubt remains as to this construction the following amendment of the constitution sets the question at rest. Article seven of the amendment provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved: and that 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.

§ 548. 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.[3] This provision of the constitution applies only to the civil administration of the government. Whenever, from invasion or rebellion, the public safety may require the administration of martial authority, criminals may be tried, convicted and executed without the intervention of a jury. In the language of Judge STEWART, in refusing the writ of habeas corpus to C. L. Vallandigham on the ground that the public safety demanded his arrest and punishment: "Those who live under the protection and enjoy the blessings of our benignant government, must learn that they cannot stab its vitals with impunity. If they cherish hatred and hostility to it, and desire its subversion, let them withdraw from its jurisdiction, and seek

1 See 3 Dall. R., 321; 9 Wheat. Rep., 409-412; Story's Com. on Const., § 1762.
2 Federalist, Nos. 81 and 83; Story on Const., § 1763.
3 Art. 3, § 2, cl. 3, Const. U. S.

the fellowship and protection of those with whom they are in sympathy. If they remain with us while they are not of us, they must be subject to such a course of dealing as the great law of self-preservation prescribes and will enforce. And let them not complain if the stringent doctrine of military necessity should find them to be legitimate subjects of its action."[1]

§ 549. The right of trial by jury has from very early times, been insisted upon as the great bulwark of civil and political liberty; and has been watched with unceasing jealousy, and solicitude. This right constitutes a fandamental article of Magna Charta[2] which is that no man shall be arrested, nor imprisoned, nor banished, nor deprived of life, except by the judgment of his peers, or by the law of the land. And a trial by jury is understood to mean — generally — a trial by a jury of twelve men, impartially selected, and who must unanimously concur in the guilt of the accused before a legal conviction can be had. The object to be gained by a jury trial in criminal cases is to guard against the spirit of oppression and tyranny on the part of rulers; and a violence and vindictiveness on the part of the people. The principle involved in jury trials is forcibly expressed by Mr. Justice SMITH in *Willis* v. *Long Island Railroad Company*[3] in these words. "The wisdom of the time-honored rule of the common law which refers questions of fact to the jurors, and questions of law to the judge, is not more conspicuous in any class of cases than those which involve questions of negligence. Cases of that nature frequently come before the courts in which men of equal intelligence and judgment differ in their conclusions, simply because they differ in experience and habits, in temperament or mental organization. A course of conduct which seems sufficiently careful to a self-reliant man, who is accustomed to act promptly, may appear reckless to one who is usually circumspect and hesitating. That *average* judgment which is the result of the deliberations of twelve men of ordinary sense and experience is recognized by our jury system as a juster standard than the judgment of one man of equal experience and sense in the determination of questions of fact, and it is especially valuable in the decision of questions of negligence."

[1] See State Papers of Abraham Lincoln, by Raymond, p. 385.
[2] Magna Charta, ch. 29 of 9 Henry III.
[3] 34 N. Y., 670, 679.

§ 550. Trials for crimes must be had in the state where they are committed. The object of this clause is to secure a trial with the least possible inconvenience to the accused; that is, that he shall not be compelled to go to a trial in some distant state away from friends, witnesses and neighborhood, and thus be subjected to the indifference, and perhaps, prejudice of strangers to whom he is only known as an accused person, with whom they have no sympathy, and in whom, no interest. But while this provision of the constitution is designed to secure to individuals these benefits, it may likewise, sometimes contribute to embarrass the administration of public justice. During the great rebellion, the public sentiment of those states which went into it was such, that however guilty of treason the conspirators were, it was exceedingly difficult, if not impossible, to convict them before a jury of those states. The consequence has been, that those who were principally guilty of fomenting and carrying on the rebellion against national authority, and treason against the nation's life, have escaped with impunity. The chief of the rebellion, acting as president of the assumed confederacy, their executive head, and the commander-in-chief of their army and navy may unquestionably be prosecuted for treason in any state into which he sent his army to levy war against the United States. And it must be deemed to be the fault of the executive department of the national government, that he has not been indicted and tried in the district in which Gettysburg in Pennsylvania is situated, where his rebellious army was defeated by the national forces in July, 1863. "To constitute the crime of treason," say the court in *ex parte* Bollman [1] "war must be actually levied against the United States. To levy war, and actually to levy war, are distinct offenses. It is not the intention of the court to say, that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy are to be considered as traitors." Under this construction of the law of treason by the supreme court of the United States, there could have been no legal difficulty in the way

[1] 4 Cranch, 126; see also *United States* v. *Burr*, 4 Id., 469–508.

of indicting and trying the master spirits of the rebellion in any state where, by their aid and procurement, treason against the United States was committed. And besides this, many acts of treason were committed under the commissions of the rebel government, in territories outside of state governments; thereby giving authority to congress to provide by law, for trying the rebel chief and his co-rebels for these acts of treason, in any state of the union.[1]

CHAPTER XVIII.

INTER-STATE ADMINISTRATION.

§ 551. THE states being political corporations, instituted or continued as instruments to administer national authority, in respect to local and domestic interests within their respective limits, although independent of each other in their local administration, are not independent and foreign to each other in the authority by which they administer. Each state has sole jurisdiction or administrative authority within its own borders; but each possesses and administers the same authority, to wit, the authority of the nation. Consequently the public acts, records and judicial proceedings in each of the several states are evidence of the action and determination of the same authority. No matter how much the several states may differ in the details of state administration, or in forms and modes of proceedings, they are each legal and binding within their respective jurisdictions, in virtue of the authority which is present in every state. It is proper, therefore, to require the several states to give faith and credit to that which has been authoritatively settled in another state. Accordingly article four, section one, provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and that congress may, by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The purpose of this provision is to carry into effect the theory of the presence of but one authority in the several states, by which the public acts, records and judicial

[1] See Art. 3, § 2, cl. 3, of the Constitution of the United States.

proceedings are had. It is intended to give conclusive efficiency throughout all the states, to that authority, which had, in due form, become conclusive in any of them. It is to remove all the public acts, records, and judicial proceedings of the several states, from the category of those which, in the language of jurisprudence, are denominated "foreign," as contradistinguished from "domestic" judgments and the like,—that the jurisdiction of the court being established, the judgment thereof shall be conclusive upon the merits.[1]

§ 552. At the time the constitution was adopted, there had been a diversity of opinions in the English courts as to the credit to be given to a foreign judgment. It was generally conceded, that when the foreign judgment came in question collaterally, it was to be deemed conclusive; but when such judgments were put in suit, and made the subject of an action, the prevailing opinion seemed to be, that they were only *prima facie* evidence of a debt, and had only the force of a simple contract between the parties.[2] Mr. STARKIE was of the opinion that the better authority in the courts of England, was in favor of the conclusiveness of foreign judgments, where they were made the basis of an action or suit; and remarked, that the principle on which the conclusive quality of judgments and decrees rested applied as well to foreign as to domestic judgments.[3] The American authorities hold that a foreign judgment, when produced as the foundation of an action in the courts of this country, are never more than *prima facie* evidence; and that they may be impeached by showing that they were irregularly obtained, or, indeed, upon almost any ground which could have constituted a defense to the original suit.[4] But all American cases agree that when the foreign judgment comes only *incidentally* in question, it is conclusive. The several states in the American union are not to be deemed foreign states in respect to each other; nor are the supreme or circuit courts of the United States to be so considered in the state courts.[5]

[1] See Story's Com. on Const., § 1309, *et seq.*; see 1 Phillipps on Ev., Cowen and Hill's notes, pp. 351-353; also 3 Id., pp. 895-898, note 636.
[2] 1 Phil. Ev., ch. 3, § 2, p. 352, and authorities.
[3] 1 Stark. Ev., 6 Am. Ed., p. 228; Cowen & Hill's notes to Phil. Ev., note 636 to p. 353.
[4] See Cowen & Hill's notes to Phil. Ev., No. 636.
[5] See collection of authorities by Cowen & Hill in their notes to Phillipps' Evidence under the head of Foreign Courts, note 636, to p. 353.

§ 553. In pursuance of the authority vested in congress by the constitution, it passed an act[1] in which, after providing for the mode of proof, it provided that "the said record and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have, by law or usage, in the courts of the state from whence the said records are or shall be taken." The provisions of the act of 1790 are likewise extended to the records and judicial proceedings of the several territories of the United States, and to the countries subject to the jurisdiction of the United States.[2] In respect to this clause of the constitution, there have been two classes of construction upon the words "and the effect thereof." Some had read the clause in this sense: that congress shall have the authority to prescribe the effect of the required proof or authentication; others read it that congress shall have authority to prescribe the effect of the public acts, records and judicial proceedings in the states, when they shall be duly proved by proper authentication.[3] But the prevailing opinion is, that the latter construction should be adopted, and such is the character of legislation by congress upon that subject. By the uniform course of decisions in the several states, it is now well settled that the judgment of any of the state courts is of the same dignity in every other state as in the state where rendered; and that it is or is not conclusive in its operation as evidence, in the several state courts, according to its character in the state where pronounced;[4] and that such judgments may be wholly impeached by showing that the court rendering it had not jurisdiction.[5]

§ 554. Citizens of a state are citizens of the United States residing within the limits of the particular state of which they are citizens. There are no particular state laws creating citizenship, nor under the constitution of the United States, can such distinctions be maintained. A state as a political corporation instituted for special and local purposes, cannot create state distinctions in citizenship. Citizens of the nation residing within the limits of any of the states, are, under the national constitution, obliged to maintain their political connection with the national government, through the state corporation. And

[1] May 26, 1790, ch. 11; 2 L. U. Statutes, 102.
[2] 3 L. U. Statutes, 621.
[3] 9 Mass. Rep., 462; Cook's Rep., 420; 1 Pet. C. C. R., 74; 17 Mass., 515.
[4] Cow. & Hill's notes to Phill. Ev., note 636 to p. 353, and authorities.
[5] 1 Pet. Rep., 328, 340; 9 id., 157; 10 Wend., 75; 13 id., 407; 1 Mass., 103; 1 Paine, 55.

the constitutional rights of every citizen of the nation are supremely binding upon these state corporations. The logic is simply this: The nation, in virtue of its inherent sovereignty, has ordained and established a constitutional government, which in its authority, as the representative of the nation, is supreme over all. In its ordinance of government it has provided two modes of administration in character and jurisdiction — one general, and one local;—that is, it has provided for the institution and maintenance of a general or national administration, to be participated in by the citizens of the nation at large; and for the institution and maintenance of local or state governments, to be participated in by the citizens of the states respectively. By the constitution of the United States, the nation has made these state corporations the instruments by means of which the national citizen avails himself of his right to participate in the administration of national authority; and it has secured to him the privilege of exercising his national political rights through these state institutions. Therefore, the constitution provides, that the citizens of each state, shall be entitled to all privileges and immunities of citizens, in the several states. Every citizen of a state being also a citizen of the nation, has national rights, and national authority extending over every inch of the national domain, and over every member of the national family; therefore, he has a political right to inhabit whatever state he pleases and to enjoy all privileges and immunities of a citizen therein.[1]

§ 555. The constitution also provides that 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.[2] The necessity of this provision arises from the local character

[1] A citizen of the United States has national rights co-extensive with the jurisdiction of the national government. He has the same authority over national interests in one part of the union as in another. By his representative in congress, he speaks and acts for the whole union. By the constitution of the United States, which is both the fundamental and supreme law of the nation, each citizen is invested with this political authority over every part of the national domain, and entitled to all privileges and immunities of citizens, in the several states; that is, throughout the nation. Where, then, was the foundation for the pretended right of secession, which involved the right to exclude from the state the authority of the nation? Twenty millions of national citizens in the north and west had national authority over, and national interests in, South Carolina; rights to which they were born under the national constitution, and rights which they had exercised ever since they were born. How, then, could the people of South Carolina divest these twenty millions of their national rights within the limits of that portion of the national domain?

[2] Art. 4, § 2, cl. 2, Const. U. S.

of state authority. A state government can exercise no authority beyond the limits of the state. Its laws are only binding upon those who are found within its jurisdiction, either in person or property. Consequently, should a person violate a state regulation, or commit a criminal act, and then leave the state before being arrested or required to answer for it, he would be beyond the reach of its authority or power to punish. Nor would he be liable in the state in which he might be found, for acts committed beyond its jurisdiction. And inasmuch as, by the provisions of the constitution, no state can enter into any agreement or compact with another for any purpose, this provision became indispensable to guard against such evils. It was necessary for an authority that knew no state lines, but extended throughout all the states and territories of the Union, to provide for bringing to trial and punishment, escaping criminals, or fugitives from justice.

§ 556. At the formation of the general government, the people of the United States were residing under state governments, each of which was local and independent of the other. The people of these states were one nation. But as a nation, they had no government by which to express or execute the national will and authority. It was proposed to institute such a government of the *people* of the United States, not of the *states themselves*. Such an institution would necessarily subordinate these state institutions in all national affairs, to national authority; upon the principle that the whole is greater than any of its parts; that the authority of the whole people, is greater than the authority of a mere minority of them. But these state governments were to be continued as instruments of local or domestic administration. As local political institutions, their authority was to continue as before, limited to local interests and within their respective boundaries. These laws could have no extra-territorial force. In respect to each other, each was sovereign and independent. By the terms of the constitution no state was to have authority to enter into any agreement or compact with another state, or with a foreign power.[1] As a fact, slavery existed as a local institution in the several states,[2] and the people could not agree to abolish it. It was therefore deemed necessary to insert in the constitution a provision to secure to the owner of slaves in any of the states,

[1] Art. 1, § 10, cl. 2. [2] With one exception.

the right to pursue after, and recapture his escaping slave, in any other state within the national limits. Prior to the institution of the national government, the several states being independent and sovereign in respect to each other, had extended this right by means of an inter-state comity. But upon the institution of the general government of the nation this authority on the part of the state was to be taken away; and, as the law of the state by which the slave was held in bondage, could have no extra-territorial force; and as the state could enter into no compact or agreement with another state to establish or continue such comity, it was provided in the constitution that "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."[1]

§ 557. The sole object of this provision was to secure to the slaveholder the right to retain his property in the slave, notwithstanding his escape beyond the jurisdiction making him such; and the power to enforce such legal right in any state where his slave might be found. In society there are two sources or classes of rights in respect to their foundation or origin: one having its basis in *natural justice;* and the other *in physical force, or might.* In all things, except slavery, the American people professed to have repudiated the doctrine that *might could confer rights.* Slavery had its basis in power or force. It had no shadow of natural justice in it. Hence, it could never exist by any implication or presumption of law. Said Lord MANSFIELD, "it is of such a nature that it is incapable of being introduced on any reason, moral or political. It it so odious that nothing can support it but positive law."[2] And even under the influence it obtained over the nation, by becoming the bond of union of one of the great political parties, making and unmaking presidents and administrations, few if any of its advocates presumed so much upon the ignorance or depravity of the people, as to assert that *human slavery* had its basis in *natural justice;* or, which was the same thing, *that man had a natural right to enslave his fellow.* This class of rights — if they may be denominated such — had their basis in force merely; and their continuance always and everywhere, depended

[1] Art. 4, § 2, cl. 3. [2] In the Somersett case, 20 Howell's State trials, p. 1, 79.

upon the presence of the law which created it. Therefore the slaveholder, at the time of instituting the national government, insisted upon introducing into the constitution the *fugitive clause*, that by the authority of the nation, the local or state power creating slavery, might be extended, in respect to *fugitive slaves*, throughout the nation. For the slaveholder in South Carolina had no legal claim to the person of his slave the moment such slave should pass beyond the jurisdiction of that state; because the right, being one of force merely, ceased the moment the slave escaped and went beyond its power. Therefore, this clause was inserted in the constitution to extend, by the authority of the nation, the right of the slaveholder to claim and recapture his escaping slave.[1]

§ 558. The sense of the American people as to the nature of property in slaves, and as to the necessity of this special provision that it might be recognized, is manifested by the insertion of this clause in the constitution. At the institution of the national government, no one thought it necessary to insert in the constitution a provision securing to the owner of a *horse or other personal property*, the right to take and hold it in another state; because the right to property had its basis in *natural justice;* and was *appurtenant to the owner* thereof; and it went with him; while the right to a *slave as property* was only *appurtenant to the enslaving power;* and could only continue in the presence of such power. The owner of a horse in South Carolina could migrate with him to any state in the Union, and retain his property therein without any constitutional provision to that effect; but the owner of a *slave had no claim to him* beyond the limits of the state, except in case of fugitives; and even in such cases his claim could not be enforced beyond the limits of national authority. The claim, that because the slave was considered property in the jurisdiction making him such, therefore he should be deemed to be property everywhere, had no foundation in law. While slaves were

1 By the general law of nations no nation is bound to recognize the state of slavery as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions in favor of the subjects of other nations where slavery is recognized. If it does, it is a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation founded upon, and limited to, the range of the territorial laws. (Somersett's case, Lofft's Rep., 1; S. C., 11 State Trials, by Harg., 340; S. C., 20 Howell's State Trials, 1, 79.) It is manifest from these considerations, that if the constitution had not contained this clause every non-slaveholding state in the union would have been at liberty to have declared free all runaway slaves coming within its limits. (Story's Com. on Const., § 1812, and note.)

always considered and treated as property by the enslaving power, they were never considered or treated as such beyond the jurisdiction of such power, unless by comity. But under this provision of the constitution none but *escaping* slaves could be claimed and retaken after having passed the jurisdiction of the enslaving power. If the master voluntarily permitted his slave to go beyond the jurisdiction which enslaved him, he could not invoke the aid of this clause. It was because the slave could not be deemed property after he had passed the limits of the authority enslaving him, that the master could not legally be protected in the possession of slaves, in the territories of the United States. The law of the state had no extra-territorial force; and as persons were declared and held as slaves only in virtue of state law, as soon as they passed beyond the limits of the state they ceased to be slaves; not in virtue of any special law or statute to that effect, but in virtue of the limit of the authority by which they had been enslaved. When the master from South Carolina took his slaves into Kansas, and attempted to hold them there as such, the question arose immediately, by what authority does he introduce slavery into Kansas? By what authority can he hold a person there in slavery? The laws of South Carolina ceased in respect to him and his slaves, as soon as he left the state; therefore the authority to hold his slave ceased at the point where the slaveholding jurisdiction ceased. As the law of the state does not extend into the territory, and as the law of the nation governing in the territories does not enslave or permit slavery, by what authority could the master hold the slave in the national territories? The complaint of the master that he was deprived of his just rights in the territories, because he could not hold his slaves there, had its answer in the fact, that he had invested in a species of special property, unknown except in special localities; and, therefore, if he would enjoy that species of property, he must confine himself to such localities; and not attempt to settle in communities, where the rights of man as man, were regarded, and slavery was discarded. The fault was in the character of his investment, and not in the laws which gave to all their freedom and just rights.

§ 559. This clause of the constitution has been the subject of judicial construction;[1] and, although, by the

1 *Prigg* v. *Commonwealth of Penn.*, 16 Peters' S. C. R., 608; affirmed, 14 How., 13.

amendment of the constitution abolishing slavery, it has ceased to affect the rights or duties of American citizens, it may not be amiss to examine somewhat into the principles enunciated in such decisions, and the logic upon which they assumed to be based. The palpable meaning of the clause, "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such labor or service, but shall be delivered up on claim of the party to which such service or labor may be due," is, that the state into which the fugitive might escape, should make no law, or adopt no regulation by which to prevent the master or owner from pursuing after, and reclaiming his escaping slave. The clause itself is so palpable in its meaning as to admit of no construction. It is not a clause conferring power either upon the general or state government. It is entirely restrictive in its character—restrictive of state action. It is said he shall be delivered up on claim. But such claim can be preferred against no one who has not the fugitive either in his custody or within his control. The meaning of this provision is plainly this. Should a fugitive be brought before state authority by *habeas corpus* or otherwise, suing for his liberty, and should the master or owner establish his legal claim under the laws of the state from which he escaped, the court would not be at liberty to discharge such fugitive in consequence of any state law or regulation, but would be required to deliver him to the claimant.

§ 560. The circumstances attending the introduction of this clause into the constitution, the object for which it was introduced, together with the language of the clause clearly demonstrate, *that no duty was imposed upon any one by this clause, except upon the person or authority detaining the fugitive from the custody of the party to whom the labor or service was due.* Even in his own state the master or owner could prefer no claim for his fugitive upon any one who had not the custody or control of him. He could make no demand for him, either upon his government or the citizens thereof, unless they had the slave in their custody. This clause was not intended to give the master greater facilities for retaking his escaping slave throughout the nation, than he possessed under his own state government. This clause simply extended to the master of an escaping slave, the right to recapture him anywhere within the

national limits; and, on establishing his claim under the laws of the state from which the escape was made, to reclaim and take him back, without let or hinderance from state laws or state regulations. It intended to leave the master to find and retake his escaping slave in any part of the nation, as he might in any part of the state, in the absence of any legal provision to aid him. But it did not confer any power or impose any duty other than as above stated, upon any person or government.

§ 561. In the case of Prigg against the commonwealth of Pennsylvania,[1] the supreme court of the United States, among other things, held that this clause of the constitution was restrictive of state, not federal, action; that the states were precluded from all authority to legislate upon the subject; that it was no part of the duty of an officer of the state government, or of any citizen thereof, to aid the claimant in arresting or securing the fugitive, or to do anything in aid of that provision. That no claim or demand could be made upon any officer or citizen of the national government to assist in capturing and bringing before the proper tribunal the escaping fugitive; that the claim could be made upon no one until the owner or claimant, his agent or attorney, had seized the fugitive and brought him before a competent tribunal, and had presented his proofs—that until then no obligation could be imposed upon any one—that so much of the clause as says, the fugitive shall be delivered up on claim, when construed with other parts of the same clause, can refer only to those who are detaining him by virtue of some state law or regulation, after the validity of the master's claim had been established; that if there should be any national law or national regulation, or any defect in the master's title under any law or regulation of the state from which he escaped, by which he would there be discharged, there would be no obligation upon any one to deliver him up.

§ 562. The supreme court, in the Prigg case, took the broad ground that a state could pass no law, or make no regulation whatever, touching the subject-matter of this clause, for the purpose of carrying the same into effect or otherwise;—that any regulation, by a state even, for the purpose of trying the question of fact, whether the alleged fugitive was in reality such, or whether he owed labor or service, would be uncon-

1 16 Pet. Rep., 608; affirmed, 14 How., 13.

stitutional; — that any detention for such trial, would postpone the possession of the master, and deprive him of that immediate command of his services to which he might be entitled; — and that it would operate as a discharge "*pro tanto*" from the labor and service due; — that the question of discharge could never be "*how much*" he is discharged from, but whether he is discharged "*from any*" labor or service by the necessary operation of a law or regulation of a state. The principle involved in the opinion of the court as above stated, if observed, would deny to a state all authority to protect a citizen thereof from arrest and extradition, provided the arrest was made under pretense that he was a fugitive from labor or service. He might be taken from his home at any time, without legal process, and be transported to a remote part of the state to be brought before a district or circuit judge; there to be tried upon a question involving his personal liberty for life; without notice to prepare for trial; without process to obtain witnesses, without counsel or the means of obtaining any.[1]

§ 563. At the time the constitution was ordained and established, and the general government was instituted, it does not appear that the people contemplated the acquisition of other territory than what they then possessed. The provision of the constitution that congress might admit new states into the contemplated union, referred as well to states then existing which might not at once unite in ratifying the constitution, as to those which might be formed in the then existing territories. In the progress of the revolution, it was perceived that from

1 It is worthy of notice, that in the decision of this case, each of the judges gave opinions; and while they were intent upon holding that congress had the exclusive right of legislation upon this subject, a majority of the court could agree upon no ground for so holding. Indeed, scarcely any two of the judges, were able to agree as to reasons for holding such an opinion; so that the decision seems to have been given without any other satisfactory reason than that the court desired to have it so. Cases thus decided, while they become precedents, are not satisfactory to the profession; for it cannot be disguised, that they are based more upon the feelings of the men, than the convictions and judgment of the court; and often betray more of the politician than of the judge. Fortunately for all, this clause has become obsolete or nearly so, by the abolition of slavery throughout the United States.

The position taken by the court in this case virtually made the liberties of the citizens of the free states to depend upon the slave code of South Carolina. It was only necessary for a stranger to appear in our midst, and to lay claim to a human being as his property, or slave — no matter who that being might be. It might be the wife or child of a well-known citizen. The power of the state to investigate such a case was gone; because, in the language of the court, the constitution had vested the power to investigate such claims, *exclusively*, in such tribunals as congress should appoint. A debauchee lusts for a fair woman; and under pretense that she is a fugitive, owing him service, etc., he seizes her, without process, and carries her off, pretending to be in search of a proper tribunal to try the question; and while this is going on, all legal power and authority in the state to arrest the outrage and try the question of owing service are suspended, because the constitution has committed that subject to another jurisdiction.

the extent of territory of several of the states, it might become expedient to divide the same into two or more states; besides it became an interesting question whether the right to this vacant territory pertaining to the crown at the time of the revolution, belonged to the several states within whose chartered limits it was situated; or whether it ought not belong to the nation in its federative character, by whose expense of blood and treasure it had been acquired. This was a subject of protracted and ardent controversy; but at length some of the states yielded to the solicitations of congress, and most of the unpatented territory was ceded to the nation.[1] To induce the states to make liberal cessions, congress declared that the ceded territory should be disposed of for the common benefit of the union, and should be formed into republican states, with the same rights of sovereignty, freedom and independence, as the other states; that they should be of a suitable extent of territory not less than one hundred and not more than one hundred and fifty miles square and that the reasonable expenses incurred by the state, since the commencement of the revolutionary war, in subduing the British posts, or in maintaining or acquiring the territory should be reimbursed.[2] It was with reference principally to this territory that this clause of the constitution was adopted. The general precaution, that no new state should be formed, by dividing or taking parts of several existing states for that purpose, without the concurrence of congress, and of the legislature of the states concerned, was highly proper. So likewise was the provision that no new state should be formed by the junction of two or more states or parts of states.

§ 564. Although the constitution made no express provision for the acquisition of new territory by the nation, it was soon demonstrated that such powers were essential to any government intrusted with the execution of national authority. In 1801, when France was about to acquire, and come into possession of Florida and the Louisiana territory, including the mouth of the Mississippi river, the nation determined that that outlet to the products of a large portion of the territory of the United States, could not be intrusted in the hands of any foreign power; and by the general consent of the nation, the Louisiana terri-

[1] 1 Tuck. Bla. Com., app. pp. 283-286; 2 Pitkin's History, ch. 11 p. 33-36; Story's Com. on Const., §§ 227, 228.

[2] 1 Secret Journals of Congress, Sept. 6, 1780, pp. 440-444; 6 Journals of Congress, Oct. 10, p. 213; 2 Pitkin's Hist., ch. 11, pp. 34-36; Story on Const., § 1316, and note.

tory was purchased. Indeed, so vital to the security and prosperity of the nation was the possession of the mouth of the Mississippi, that Mr. Jefferson instructed Mr. Livingston, our minister at Paris, to represent in substance to the French nation, that any attempt on its part to occupy New Orleans as against the United States would be deemed a just cause of war. The rights of sovereignty necessarily incident to nationality include the right to acquire territory whenever the security and welfare of the nation demand it.[1] The treaty-making power necessarily includes all authority essential to such acquisition. Since that time, the nation has acquired territory from Mexico, including a portion of Texas, New Mexico and California. And a treaty has been in progress between the United States and Russia for the acquisition by the United States, of the Russian possessions in America.

§ 565. Shortly after the inauguration of the rebellion in 1861, the legislature of Virginia passed an ordinance of secession, and assumed to take the State of Virginia out of the union. The people in the northern and western part of the state were loyal to the union, and refused to be bound by the treasonable action of those who had undertaken to force them into rebellion. Measures were soon after inaugurated to bring about a political division of the state, which resulted in the establishment of a new state called "West Virginia," consisting of forty-eight counties. This state was admitted into the union in pursuance of an act of congress passed December 31, 1862.[2]

§ 566. As the general government was instituted for the purpose of exercising national authority over all matters pertaining to national security and welfare, it was necessarily charged with the regulation and government of the territories belonging to the nation, and therefore the constitution committed to congress the power to dispose of, and make all needful rules and regulations respecting the territory and other property belonging to the United States.[3] When for any purpose or by any means, the nation acquires territory, the title to the same vests in the nation as a corporate society. It does not belong to individuals as members of the national society, and they can have no property in, or authority over, such territory except through the author-

[1] Ante, § .
[2] 3d Session of the 37th Congress, ch. 6, p. 633.
[3] Art. 4, § 3, cl. 2, Const. U. S.

ity of the nation as expressed through the law-making power thereof. During the political struggles between the anti-slavery and pro-slavery parties in the United States, questions of national authority over the territories of the United States were raised and discussed. The slaveholder insisted upon his right to take his slaves with him into these territories, and to hold them there as slaves; thus establishing slavery in the territories, and to accomplish this end, divers theories respecting the rights of the inhabitants in, and the authority of the government over, these territories were instituted and discussed. There was one theory denominated in political parlance, "squatter sovereignty," which contended that those who inhabited a territory had the sole authority of determining the character of the domestic or local institutions to be introduced therein. If they were in favor of slavery in the territory, then slavery might be introduced, against the wishes or consent of the people of the United States. This class of political philosophers had their origin in a theory introduced in 1846, by General Cass, to wit, that congress had only a property jurisdiction over the territories of the United States, and had no authority over the local and domestic concerns of the inhabitants thereof.[1] This theory was introduced as a means of defense against what was denominated the "*Wilmot Proviso*," which proposed that congress should, by law, make it impossible to create any future slave states out of free territory. These theories were discussed by the leading political parties at times with great earnestness, but were never accepted or acted upon by the government or people of the United States. They had their influence in the political canvass, but were never recognized in the halls of legislation or upon the bench.

§ 567. Those who denied to congress the right to legislate for the territories of the United States, were obliged to assert the right of the nation to acquire territory, not in virtue of any constitutional provision to that effect, but in virtue of national sovereignty. This involved the absolute fallacy of their theory. The nation, in virtue of its sovereignty, acquired territory from like sovereign nations. The question then arose, did the nation acquire only a *property* jurisdiction over such territory, leaving the sovereignty in France, Mexico, or Spain, or did she acquire the *sovereignty* likewise? It could not

[1] See his letter to A. O. P. Nicholson, of Tennessee.

be denied that in acquiring the territory of Florida, Louisiana, New Mexico and California, the sovereignty had been acquired, and being acquired, it had been vested in the people as a nation, there to remain until by the legislative will of the nation, it should be transferred to another like sovereign. This proposition was easy of comprehension. The people of the nation, in virtue of their inherent sovereignty, acquired the property in, and sovereignty over, the territories of the United States. When acquired by purchase, they were paid for out of the common treasury; when by conquest, they were acquired by the common blood of the nation; and when the title was transferred, it was transferred to the nation at large. Therefore every citizen of the United States had a right to participate in the regulation and government of the same through the national legislature.

§ 568. The fourth section of the fourth article of the constitution provides that "the United States shall guaranty to every state in this Union, a republican form of government; and shall protect each of them against invasion; and on application of the legislature or of the executive—when the legislature cannot be convened—against domestic violence." By the term "*the United States*," as here used, is understood the people of the United States, acting through the agency of the general government; that is, those who ordained and established the constitution, and instituted the general government as a means of administering their authority. This provision of the constitution is in itself the authoritative guaranty, to be carried into execution through the general government. The parties to this guaranty are the people of the nation on the one hand, and the people of the state on the other, each with all, and all with each, that the local or state government under which they live, shall be in form republican. The language of this clause is peculiar. It is not that the nation shall guaranty to the states that every associate state shall be republican in form; but it shall guaranty to every state, a republican form of government; the guaranty is to each state, that is, to the people of each state that the local or state government shall be republican in form. It is the guaranty of the thirty millions of the nation, to the one hundred and twelve thousand of the inhabitants of Delaware, that the local or state government of Delaware shall be republican.

§ 569. The states as political corporations were not parties to the constitution; but the citizens of the states in their character as national citizens were parties to it. The states as political corporations stood in need of no such guaranty. The people of the state had authority to determine the form of their government prior to the institution of the general government; and if they desired one republican in form, they could have it without any guaranty from the nation. It was not the design of this provision to secure the people of a state against their own future volitions, should they, on the failure of the system they were then adopting, desire to change the form of their local government. It was not to the *state* as a corporation or an association of people that the guaranty was made; but to the *individual*, crushed and overwhelmed by an insolent and oppressive majority; it was to him as a citizen of the United States whether in the majority or the minority, that the guaranty was given to secure him not only from *individual* but *governmental* oppression. The ends sought to be accomplished by the institution of the general and state governments are better secured by construing this guaranty as extending to all the people of the several states, and thus securing to each the benefits of a republican form of government, than by any other construction. It thus pledges the faith and power of the nation to every citizen, that the local government under which he lives shall be republican, and that he shall be entitled to sustain to it the relation of a free citizen.

§ 570. It has been urged that the term "*republican*" is vague and indefinite; that the worst kinds of despotism have flourished under governments "*republican in form;*" and the republics of Greece, and Rome, and Italy have been cited. It is admitted, that looking at simple precedents without an investigation of the principles involved in a republican government, the friends of freedom have little to hope from a government republican merely in its form. But an investigation of the principles which give name to a republican government, and an observation of the manner in which, and the reasons for which, that form of government is prescribed by and guaranteed in, the constitution of the United States, make it a bulwark of American liberty, which cannot be evaded or overthrown. As a corporation a state may be republican in form, while but a moiety of the people are represented in the government;—it

may be republican in form, while its proportions are cramped and distorted by limitations and partialities. The idea of a republic necessarily places the sovereignty in the people. It supposes that those who administer the public authority do so by the authority of the people, that is by the governing portion of them. Governments have been called republics which have been under the direction of a wealthy or aristocratic class, in which the masses of the people had no voice. Nevertheless they were denominated republican, as distinguished from monarchies. The principles upon which such governments were administered, taken in respect to the administration thereof, were republican, and they were denominated republics; and a guaranty made to the governing class that the government should be to them republican in form would have been fulfilled. But had the guaranty been made to each individual subject of that government, that for the protection of his rights the government should be to him republican, it would not have been realized. When, however, it is remembered that the guaranty under consideration was made by all the people of the United States with each and every citizen thereof, that the local or state government under which he should live, should be *to him* republican in form, it became the highest guaranty of civil protection which could be given to a citizen.

§ 571. The Federalist sometimes speaks of the American Union as though it was a confederacy; and at other times as though it was a government of the people. In commenting upon this clause of the constitution, it treats the union as a confederacy. It says, "in a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist, that the form of government under which the compact was entered into, should be substantially maintained. But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the constitution. Governments of dissimilar principles and forms have been found less adapted to a federal coalition of any sort, than those of a kindred nature. 'As the confederate republic of

Germany consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland. Greece was undone as soon as the king of Maçedon obtained a seat among the Amphictyons.'"[1]

§ 572 But the plain statement of the case seems to be this:—The people of the United States in the institution of the general and state governments were providing for the administration of their authority in such a manner, as to secure to themselves and their posterity the blessings of civil liberty. It was a part of their system to commit the management of all local and domestic interests to local governments, which, in the exercise of their authority within the sphere of their administration, were to be independent of the general government, and of the people of the other states or portions of the nation. These local or state institutions already existed over most of the national domain; and were to be instituted whenever and wherever future occasion might require. Every national citizen was likewise a state citizen; subject to the administration of these local governments, in all that pertained to his local and domestic interests. As a state citizen, no one had any authority to interfere with, or direct, the administration of governmental authority, in other states; and yet his safety and welfare as a national citizen, would be greatly affected by the political character of the other local governments. It was therefore a matter of necessary precaution that the people of the nation should at all times retain the political supervision of the character of these local or state institutions, and see to it, that, in character, they should be in harmony with the American theory and principle of government.

§ 573. These states, in territory, are but portions of the national domain; in inhabitants, but families of national citizens; in political individuality, but corporate instruments of national administration, instituted for local and special purposes. It was therefore the duty of the nation, to protect them against foreign invasion from without, and domestic violence from within, to enable them to discharge the duties imposed upon them, and to secure to the people the blessings of civil liberty. The constitution therefore provides, that the nation shall protect each state against invasion and domestic violence.[2]

[1] Montesquieu, B. 9, ch. 1, 2; Federalist, No. 21; Story's Com. on Const., § 1815.
[2] Art. 4, § 4, Const. U. S.

CHAPTER XIX.

OF AMENDMENTS TO THE CONSTITUTION.

§ 574. THE constitution of the United States was ordained and established for the purpose of instituting a goverment authorized to speak and act for the nation The experience of thirteen years under the confederacy, had demonstrated the fact, that a nation could not exist and maintain its independence, without a government intrusted with the exercise of supreme authority over every subject essential to a true nationality. The people of the United States ordained and established the constitution to the end that such a government might be instituted. In the institution of such government, they took especial care to act in virtue of their authority as members of the national society; as people of the *United* —not of the *separate* States. When the constitution had been framed by delegates from the several states, and made ready to be submitted, it was especialy provided, that it should be submitted to the *people* of the states, and not to the *states* as political corporations,— for their ratification. That the legislatures of the several states should provide by law for the calling of primary conventions of the people to whom the proposed constitution should be submitted. The object of these requirements was to institute a national government of the people; and not a confederated government of the political states. It was to base the government upon the inherent sovereignity of the American nation, and make it supreme over all local or state authority in its administration. In such action, they occupied a plane *above* constitutions, and spake with the authority that *ordains* and *establishes* independent of constitutions; an authority which pertains to society in its sovereign relations to each and every member thereof; acknowledging no superior save God and his laws, natural and Divine. Therefore they said, "This constitution and the laws of United States made in pursuance thereof, etc., *shall be the* supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."[1]

[1] Art. 6, cl. 2, Const. U. S.

§ 575. In providing for amendments to this constitution, the people retained the authority to make such changes as experience should demonstrate to be necessary for the safety and welfare of the nation. Article five provides that "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 a part or 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."

§ 576. This provision points out two modes of amendment of the constitution, one at the instance of the general government, through the instrumentality of congress; the other at the instance of the states. Congress, whenever two-thirds of each house concur in the expediency of an amendment may propose the same; and when it is ratified by the legislatures of three-fourths of the several states, or by conventions, as congress shall direct, it becomes a part of the constitution. Or the legislatures in two-thirds of the several states may apply for a convention for proposing amendments, which congress is obliged to call on such application, and the amendments proposed by such convention, to become a part of the constitution, must be ratified in the same manner as when proposed by congress.

§ 577. Whether the proposed amendments to the constitution shall be ratified or rejected by the action of the state legislatures, or by the action of conventions of the people in the several states, depends upon the discretion of congress. The amendment, when made, becomes, to all intents and purposes, a part of the constitution; and, therefore, of the supreme law of the land. The authority involved in making these amendments is superior to the constitution itself; that is, it must be an authority which can add new provisions, or remove existing ones, at pleasure. For this reason congress, as the national legislature, determines whether the proposed amendments shall be submitted for ratification, to the state legislatures, or to conventions of the people, so that the ratification or rejection of any proposed amendment, will be by national, and

not state authority. By this provision of the constitution, an amendment may be made conferring upon the general government full jurisdiction over any subject, at the expense of state administrative authority, even against the consent of one-fourth of the states; that is, a state is liable to be deprived of any portion of its jurisdiction without its consent. This of itself, demonstrates the superior authority of the nation over that of the states. No political corporation can be deemed sovereign when its will is subject to a higher legal authority. Sovereignty, as an attribute of civil government, is the supreme authority and power by which a state is governed, and implies the right of commanding in the last resort. Therefore, there can be no absolute sovereignty in a state, where the authority of its constitution and laws are liable to be overruled by a higher authority.

§ 578. The mode pointed out by the constitution in which amendments may be made, evinces great wisdom and prudence on the part of those who framed and adopted it. Being a new experiment in government, it could not be presumed to be sufficiently perfect, not to require amendments to adapt it to the needs of the expanding nation; nevertheless it should guard against impulse or haste in changing its principles to meet any supposed need, or to supply any apparent defect. The requirement, therefore, that before any amendment should be made, it should be proposed by two-thirds of each house of congress, or by a convention called on the application of the legislatures of two-thirds of the states; and that the amendments thus proposed before they should become valid as parts of the constitution, should be ratified by three-fourths of the votes of the states, etc., seems to be eminently wise and safe. The necessity for an amendment must become palpable before it can be proposed; and it must be essential to the security or welfare of the nation, or three-fourths of the states through their legislatures or conventions would hardly be inclined to adopt it. The time required, and the deliberation which would be had, in proposing and ratifying any amendment, would be sufficient to insure wise and prudent action on the part of the best minds of the nation.

§ 579. The people of the United States were exceeding jealous of power in the hands of those charged with the administration of the general government. They seemed continually to lose sight of the fact, that the

national government was as eminently theirs, and as immediately responsible to them, as was the government of the states;—that it was to them, as national citizens, what the state government was to them, as state citizens—that both were their own institutions, created for their own protection and welfare;—that the state and national citizen was one and the same individual, having one and the same interests to be protected and promoted—that the character and interests of an individual as a national citizen, could never prompt him to injure and oppress himself as a state citizen;—that therefor, there never could be a disposition on the part of the nation to trench upon the rights and liberties of the citizens of the state. In short, that the body, consisting of *all* the members, could never find an interest or an inclination, to make war upon its *individual* members. So the national citizen could never be placed in a situation where either interest or inclination would lead him to injure himself as a state citizen. The constitution of government, while it made the legislative office permanent, provided for returning one branch thereof to the people every two years; so that the individual members of the legislature could not separate themselves from the people, and legislate for permanent advantage to themselves. There could be no inducement to usurp authority, or to accumulate power in the government as against the people; for those who did so would soon be returned to the people to suffer the oppression of their own begetting. The members of the general government not being permanent, and being obliged to live as citizens under the laws of their own enacting, would not be inclined to injure themselves by wicked, weak or imprudent legislation. They had lived, hitherto, under a national government monarchical in theory and practice. That government, in its authority and interests, had been separated from the masses, and was not responsible to them. The independence they had proclaimed, and maintained, was achieved to vindicate the rights of the citizen against the oppression of such government. It was, therefore, natural for them to feel and act as they did, until such early impressions of the natural separation of the interests of the government and people were removed. Under the influence of these feelings, they demanded that the constitution should contain guarantees in favor of the people as against the government, in the nature of bills of rights,

such as had been demanded of King John, Charles the First, and other princes. Most of the amendments to the constitution which were made soon after, were of this character.

§ 580. Bills of rights, in their origin, are stipulations between the prince and his subjects; that is between the government and people, for the limitation of prerogative authority in the administration of the government. These stipulations are proper, and not unfrequently necessary, in monarchical countries where the government in origin, authority, and interest, is separated from the people. But in democratic countries, where the people themselves are not only the source of governmental authority, but the administrators of it, there is less occasion to guard their liberties by limitations and restrictions in the nature of such bills. There are possibilities of temporary abuses of governmental powers which would endanger, for the moment, the rights and liberties of the citizen. To guard against such temporary dangers, it is proper to insert in the fundamental law, limitations and restrictions of such a character as will be likely to prevent their occurrence. Thus, the first amendment to the constitution provides that congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof. In that respect government is to leave man to his own conscience, and to take upon himself the responsibilities of being true to the demands of his religious nature. He must be left to adapt his creed to his convictions; and both, to such light and understanding as a free inquiry into his own nature, needs, duty and relation to God and man will give him. History and observation have taught, that nothing is more likely to occur under any form of government, than an effort to impose upon others, the religious creeds and observances of those who, in influence or power, lead society. Therefore to guard against such a possible attempt this provision was inserted in the fundamental law.

§ 581. Says Judge STORY:[1] "How far any government has a right to interfere in matters touching religion has been a subject much discussed by writers upon public and political law. The right and the duty of the government to interfere in matters of religion have been maintained by many distinguished authors, as well those who were the warmest advocates of free govern-

[1] Com. on Const. § 1871.

ments, as those who were attached to governments of a more arbitrary character. Indeed the right of society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice. The promulgation of the great doctrines of religion, the benign attributes and providence of one Almighty God, the responsiblity to Him for all our actions, founded upon moral freedom and accountability; a future state of rewards and punishments; the cultivation of all the moral, social and benevolent virtues, can never be a matter of indifference in any well ordered community.[1] It is indeed difficult to conceive how any civilized society can well exist without them. It is impossible for those who believe in the truths of christianity as a divine revelation, to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects. This is a point wholly distinct from that right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience."

§ 582. "The real difficulty lies in ascertaining the limits to which government may rightfully go in fostering and encouraging religion. Three cases may easily be supposed. One where government affords aid to a particular religion, leaving all persons free to adopt any other. Another where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others. A third where it creates such an establishment, and excludes all persons not belonging to it, either wholly or in part, from any participation in the public honors, trusts, emoluments, privileges and immunities of the state. For instance, a government may simply declare that the christian religion shall be the religion of the state; and shall be aided and encouraged in all the varieties of sects belonging to it. Or it may declare that the Catholic or the Protestant religion shall be the religion of the state, leaving every man to the free enjoyment of his own religious opinions. Or it may establish the doctrines of a particular sect, as of Episcopalians, as the religion of the state, with a like freedom; or it may establish the doctrines of a particular sect, as exclusively the religion of the state,

[1] Burlamaqui, pt. 3, p. 171.

tolerating others to a limited extent, or excluding all not belonging to it from all public honors, trusts, emoluments, privileges and immunities."

§ 583. There is no real difficulty in determining the true limit of governmental action in respect to morality, religion or any other state of the individual by which he is to be made a better member of society. There is a wide distinction between what the public authority should *encourage*, and what it should *ordain and establish;* and there is likewise a wide distinction between *religion*, as a state of the heart or affections, and *theology*, or the philosophy or science by which that religious condition is to be induced in the individual. Religion has respect to what a *man is;* theology to what a *man believes* and *practices*. *True* religion consists in that spiritual condition or state of the individual by means of which he becomes *united to*, and *at one with*, God. *True* theology consists in that faith and practice by which that true religious condition is to be attained. Government can appropriately encourage that faith and practice, which appears to it, to lead to that true religious condition or state, and in this way, to encourage religion. It can create and endow schools and seminaries of learning with such a view. But it cannot, constitutionally or appropriately, determine what particular faith and practice shall be adopted and followed by a citizen or class of citizens, nor can it use the public authority to establish any particular mode or form of faith.

§ 584. It is the province of government to protect society from such conduct on the part of citizens, as tends directly to destroy public morality and virtue; or to inflict evils upon individuals and society. Practices may be encouraged, or even required, in the name of religion, which it would be the duty of government not only *not to encourage*, but absolutely to prohibit and punish. There is, and can be no limit to the follies and absurdities practiced and inculcated in the name of religion. A parent may feel called upon to sacrifice his child; or a mother, her babe. A wife or widow, to burn upon the funeral pile. One may profess to believe it to be his duty to live in a state of sexual permiscuity, and to beget as many children as he has the physical ability. These and a thousand such absurd and hurtful notions may be promulgated and practiced as a religious privilege, duty and obligation. No one will presume to

question either the authority or the duty of the government, to protect society against such pernicious practices, even though it should interfere with the religion of the Hindoo or the Mormon. The true scope of governmental policy and authority in respect to religion would seem to be, to encourage that faith and practice which tends directly to produce in the individual a high sense of responsibility to the ALL-TRUE, ALL-PURE, ALL-JUST, WISE and GOOD, and to prohibit those practices which are in their nature criminal or whose direct and inevitable tendencies are to produce criminal acts. When a person does an act which is prohibited by law as criminal or hurtful to individuals or society, he is responsible for the injury, without any inquiry into the moral, political or religious philosophy by which he attempts to excuse himself. He is punished for the crime committed against individuals or society, not for an error in his religious faith or practice. The constitution intends to protect all in the practice and enjoyment of their religious faith, so far as it does not beget or inculcate criminal or hurtful civil practices. The remaining part of this clause provides for the freedom of speech and of the press, independent of the exercise of governmental authority.

§ 585. The second amendment of the constitution provides that the right of the people to keep and bear arms shall not be infringed, because a well-regulated militia is necessary to the security of a free state. The militia are the citizen soldiers, as distinguished from those who are trained to arms as a profession, and who constitute the elements of a standing army. To be an efficient militiaman the right to keep and bear arms is essential. This provision had its source in that jealousy of power in the hands of the general government, so manifest in the people, at the time the constitution was framed and adopted. This right in the people to keep and bear arms, although secured by this provision of the constitution, is held in subjection to the public safety and welfare. Whenever for any cause, the public safety shall require the substitution of *martial* for *civil* administration, then the maxim, *salus respublicæ suprema lex*, applies; and this constitutional right may be temporarily suspended. But while civil authority bears sway, this provision of the constitution is the supreme law upon that subject. Of the same character is the third amendment. 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 the manner prescribed by law. In time of peace, when the civil administration of authority is competent to protect society, every man's house is his castle. The king even cannot pass his threshold without express or implied permission. But in time of war, when civil authority is supplanted by martial power, because force must answer to force, then the particular security of the individual subject must yield to the safety and welfare of the state. Then the public authority must clothe itself with all necessary power over the persons and property of the subject, and wield it for the public good.

§ 586. The fourth amendment to the constitution is but a continued enumeration of those limitations and restrictions of governmental authority, deemed essential to the security of the citizen. It provides that the right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures shall not be violated: and that no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized. Such substantially was the rule of the common law.[1] But after the restoration in England, a practice had obtained in the secretary's office of issuing general warrants to arrest persons of certain classes or practices, without naming any; authorizing the officers to apprehend all suspected persons. Under such general warrant great abuses were practiced. The question of the legality of these warrants coming before the king's bench, they were held to be void for uncertainty.[2] But this provision, like those going before, is only a limitation upon the *civil* authority of the general government. Whenever martial law becomes necessary, these restrictions and limitations cannot be appealed to.

§ 587. 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 offense 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

[1] 3 Cranch, 447; 1 Leading Crim. cases, p. 161; 9 Georgia, 73.
[2] 3 Burr, 1743; 4 Bl. Com., 291, note to same; 3 Cranch, 447.

of law; nor shall private property be taken for public use without just compensation,[1] and in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. The object of these amendments is to secure to every citizen or inhabitant of the nation, who may chance to be accused of a crime against the peace and dignity thereof, an honest and fair opportunity to vindicate himself before the tribunals of his country. First, he shall not be required to make any answer to a criminal accusation, until that has been formally reduced to writing and attested by responsible official parties, having legal authority to investigate the facts and frame the accusation. Second, having once been legally tried for an offense, he shall not be tried again for the same offense, and thus be twice put in jeopardy therefor. Third, he shall not be required to be a witness against himself in any criminal trial. Fourth, he shall be entitled to a speedy and public trial, before a jury of the district or state in which the crime is alleged to have been committed, which district must have been ascertained and determined by law before the commission of such crime. He may demand to be informed of the nature and cause of the accusation, and to be confronted on trial with the witnesses against him; and to demand and have the compulsory process of the court to obtain his witnesses, and the assistance of counsel to aid him in his defense. These rights being secured to the accused, there is little danger of an oppressive trial, or an unjust conviction.

§ 588. The state and national constitutions by which the general and state governments were instituted and empowered to act, were instruments or powers executed by the people, to these respective corporations. All governmental authority proceeded directly or indirectly from the nation, in which alone sovereignty inheres. The constitution of the general government enumerated the subjects of general jurisdiction, over which that government was to preside, and in respect to which, it

[1] 6th Amendment.

alone had authority to Administer. The constitution likewise, by prohibitions and restrictions, guarded against the exercise of certain powers by the states. Then, lest there should be any misunderstanding as to the source and limitation of governmental authority in the general and state governments, it is provided by the tenth amendment, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The object of this clause is to make the definition and distribution of political powers under the administration of the two classes of government more distinct and certain. Power to administer in respect to a certain class of subjects, had been given to the general government; and it was desirable that the remaining governmental powers should be intrusted to state administration for local and domestic purposes. Therefore, having defined the subjects of general administration, and having given to the general government full powers in respect thereto, it would have accomplished the purpose had in view, to have said, all remaining governmental powers shall be exercised by the states respectively, had it not been, that the exercise of certain powers had been prohibited to the states; and besides it was not certain, that in the enumeration of subjects committed to the general administration, every subject essential to the prosperity, security, and welfare of the nation, had been included. If there were any such subjects or powers, they were not to be considered as being intrusted to state administration, but were reserved to the people themselves. This reservation to the people shows, that in the estimation of those who framed and adopted this constitution, the ultimate source of the authority by which the general government was instituted, was in the people, and not in the states as political corporations.

§ 589. The last amendment made to the constitution of the United States is in these words: Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.[1] Under this amendment, congress has full power to provide for such political administration in the several

[1] 13 U. S. Statutes at Large, p. 567.

states as to secure freedom to every citizen or inhabitant thereof. This provision of the constitution, together with section four of article four, gives to the general government full power to supervise state legislation upon the subject of the political franchise of its citizens or inhabitants, whenever, in their judgment, it becomes necessary to carry into effect these guarantees. If a republican form of government, or freedom from slavery or involuntary servitude cannot be secured in any state without giving to the people the elective franchise, it cannot be doubted that congress has full power to do so.

APPENDIX.

NO. 1.

The first step taken by the American Colonies toward establishing their nationality, was by the appointment of delegates to meet in convention and take into consideration their actual situation; and the differences subsisting between them and Great Britain. This convention met in Carpenter's Hall, in the city of Philadelphia, on the 5th of September, 1774. On that occasion delegates attended from New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, from the city and county of New York, and other counties in the province of New York, New Jersey, Pennsylvania, New Castle, Kent and Sussex, on Delaware, Maryland, Virginia, and South Carolina. Peyton Randolph was unanimously chosen president of the congress, and Charles Thomson was unanimously chosen secretary. On the 14th of September, delegates from North Carolina appeared and took their seats, in the congress. This congress continued in session until the 26th of October, when, having first passed a resolution (Oct. 22) recommending delegates to meet again at Philadelphia on the 10th of May, 1775, it was dissolved. On the 22d of October, Peyton Randolph being unable to attend, on account of indisposition, Henry Middleton was chosen to supply his place as president of the congress.

On the 10th of May, 1775, according to the recommendation of the preceding congress, the delegates from the same several colonies, with the exception of Rhode Island, assembled at the State House in Philadelphia, when Peyton Randolph was, a second time, unanimously elected president, and Charles Thomson was unanimously chosen secretary, of said second congress. On the 24th of May, Peyton Randolph being under the necessity of returning home, the chair became vacant; and John Hancock was unanimously elected president, in his place. On the 14th of June it was resolved to raise several companies of riflemen, by enlistment, for one year, to serve in the American

Continental Army; it established the pay of the officers and privates, and appointed a committee to prepare rules and regulations for the government of the army. On the 15th of June, it was resolved that a general should be appointed to command all the continental forces, raised or to be raised, for the defense of American liberty; and George Washington was unanimously elected and commissioned as such general.

NO. 2.

COMMISSION OF GEORGE WASHINGTON AS COMMANDER-IN-CHIEF OF THE ARMY OF THE UNITED COLONIES.

"*In Congress.* The delegates of the United Colonies of New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, New Castle, Kent and Sussex, on Delaware, Maryland, Virginia, North Carolina and South Carolina, — To George Washington, Esquire: We, reposing especial trust and confidence in your patriotism, conduct and fidelity, do, by these presents, constitute and appoint you to be general and commander-in-chief of the army of the United Colonies, and of all the forces raised, or to be raised by them, and of all others who shall voluntarily offer their service, and join the said army for the defense of the American liberty, and for repelling every hostile invasion thereof; and you are hereby vested with full power and authority to act as you shall think for the good and welfare of the service. And we do hereby strictly charge and require all officers and soldiers under your command to be obedient to your orders, and diligent in the exercise of their several duties. And we do also enjoin and require you to be careful in executing the great trust reposed in you, by causing strict discipline and order to be observed in the army, and that the soldiers are duly exercised, and provided with all convenient necessaries. And you are to regulate your conduct, in every respect, by the rules and discipline of war (as herewith given you), and punctually to observe and follow such orders and directions, from time to time, as you shall receive from this or a future Congress of the said United Colonies, or a committee of Congress, for that purpose appointed. This commission to continue in force until revoked by this or a future Congress. By order of the Congress. John Hancock, *Presi-*

dent. Dated Philadelphia, June 19, 1775. Attested, Charles Thomson, *Secretary.*"

On the 1st of August, Congress adjourned to the 5th of September, 1775. Congress again convened agreeably to their adjournment, but did not form a quorum for business until the 13th inst., when delegates from Georgia appeared, produced their credentials and took their seats in Congress. On the 25th of November, Congress passed resolutions directing seizures and capture, under commissions obtained from them, together with condemnation of British vessels employed in a hostile manner against the colonies, and pointed out the mode of trial and condemnation, and the apportionment of prizes. On the 28th of November, Congress adopted rules for the regulation of the Navy of the United Colonies. On the 2d of December an exchange of prisoners was declared proper. Thus Congress continued step by step organizing a force to repel the assaults of the British government upon the liberties of the colonies, until, on the 4th of July, 1776, they adopted and promulgated to the world the Declaration of Independence.*

NO. 3.

In Congress, July 4, 1776.

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA.

WHEN, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self evident — that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new govern-

* See the writings of Thomas Jefferson, Vol. 1, p. 10, as to the proceedings of Congress from June 7, 1776, to July 4. See 1 Elliott's Debates, by Lippincott & Co., p. 56.

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

Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly, all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world. He has refused his assent to laws the most wholesome and necessary for the public good. He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws, for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature — a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable and distant from the repository of their public records, for the sole purpose fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such disso utions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large, for their exercise, the state remaining in the mean time, exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these states, for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out their substance. He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation.

For quartering large bodies of armed troops among us:—For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states:—For cutting off our trade with all parts of the world: For imposing taxes on us without our consent:—For depriving us, in many cases, of the benefits of trial by jury:—For transporting us beyond seas to be tried for pretended offenses:—For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:—For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our governments:—For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection and waging war against us. He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the work of death, desolation and tyranny

already begun, with circumstances of cruelty and perfidity scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connections 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. And for the support of this declaration, with a firm

reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

NEW HAMPSHIRE.

Josiah Bartlett,
William Whipple,
Matthew Thornton.

MASSACHUSETTS BAY.

Samuel Adams,
John Adams,
Robert Treat Paine,
Elbridge Gerry.

RHODE ISLAND, &C.

Stephen Hopkins,
William Ellery.

CONNECTICUT.

Roger Sherman,
Samuel Huntington,
William Williams,
Oliver Wolcott.

NEW YORK.

William Floyd,
Philip Livingston,
Francis Lewis,
Lewis Morris.

NEW JERSEY.

Richard Stockton,
John Witherspoon,
Francis Hopkinson,
John Hart,
Abraham Clark.

PENNSYLVANIA.

Robert Morris,
Benjamin Rush,
Benjamin Franklin,
John Morton,
George Clymer,
James Smith,
George Taylor,
James Wilson,
George Ross.

DELAWARE.

Cesar Rodney,
George Read,
Thomas M'Kean.

MARYLAND.

Samuel Chase,
William Paca,
Thomas Stone,
C. Carroll, of Carrollton.

VIRGINIA.

George Wythe,
Richard Henry Lee,
Thomas Jefferson,
Benjamin Harrison,
Thomas Nelson, Jr.,
Francis Lightfoot Lee,
Carter Braxton.

NORTH CAROLINA.

William Hooper,
Joseph Hewes,
John Penn.

SOUTH CAROLINA.

Edward Rutledge,
Thomas Heyward, Jr.,
Thomas Lynch, Jr.
Arthur Middleton.

GEORGIA.

Button Gwinett,
Lyman Hall,
George Walton.

NO. 4.

While the declaration of independence was under consideration Congress took measures for the formation of a political union of the colonies. They appointed a committee to prepare a form of Confederation between the colonies, which consisted of one member from each colony. Mr. Bartlet, Mr. S. Adams, Mr. Hopkins, Mr. Sherman, Mr. R. R. Livingston, Mr. Dickinson, Mr. M'Kean, Mr. Stone, Mr. Nelson, Mr. Hewes, Mr. E. Rutledge and Mr. Gwinnett were appointed such committee. This committee reported the draft of Articles of Confederation, which was debated and amended from time to time, until on the 15th of November, 1777, the Articles were agreed to by Congress. They were submitted to the legislatures of the several states, to

be considered, and if agreed to, they were advised to authorize their delegates in Congress to ratify the same. On the 9th day of July, 1778, the delegates of the several states having been authorized by the legislatures of their respective states to ratify the Articles of Confederation, proceeded to do so as follows:

ARTICLES OF CONFEDERATION.

TO ALL TO WHOM THESE PRESENTS SHALL COME,

We, the undersigned, Delegates of the States affixed to our names, send greeting:

WHEREAS the delegates of the United States of America, in Congress assembled, did, on the fifteenth day of November, in the year of our Lord one thousand seven hundred and seventy-seven, and in the second year of the Independence of America, agree to certain Articles of Confederation and Perpetual Union, between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in the words following, viz.:

Articles of Confederation and Perpetual Union, between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE 1. The style of this confederacy shall be, "The United States of America."

ART. 2. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

ART. 3. The said states hereby severally enter into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon, them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ART. 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this

Union, the free inhabitants of each of these states — paupers, vagabonds, and fugitives from justice, excepted — shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof, respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state from any other state, of which the owner is an inhabitant; provided also, that no imposition, duty, or restriction, shall be laid by any state on the property of the United States, or either of them.

If any person, guilty of, or charged with, treason, felony, or other high misdemeanor, in any state, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up, and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given, in each of these states, to the records, acts, and judicial proceedings, of the courts and magistrates of every other state.

Art. 5. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state, to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No state shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the United States in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace.

ART. 6. No state, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into, by the United States in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any state, except such number only as shall be deemed necessary, by the United States in Congress assembled, for the defense of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only as, in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such state; but every state shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide, and have constantly ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No state shall engage in any war without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to

invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such state be infested by pirates; in which case, vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ART. 7. When land forces are raised by any State for the common defense, all officers of or under the rank of colonel shall be appointed by the legislature of each State, respectively, by whom such forces shall be raised, or in such manner as such State shall direct; and all vacancies shall be filled up by the State which first made the appointment.

ART. 8. All charges of war, and all other expenses that shall be incurred for the common defense or general warfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land, within each state, granted to or surveyed for any person, as such land, and the buildings and improvements thereon, shall be estimated, according to such mode as the United States in Congress assembled shall, from time to time, direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States in Congress assembled.

ART. 9. The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances; provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodi-

ties whatsoever — of establishing rules for deciding, in all cases, what captures, on land or water, shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of capture; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise, between two or more states, concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent, of any state in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties, by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each state, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the

manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall, in like manner, be final and decisive, the judgment or sentence, and other proceedings, being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "*well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward;*" provided, also, that no state shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil, claimed under different grants of two or more states, whose jurisdiction, as they may respect such lands, and the states which passed such grants, are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner, as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated; establishing and regulating post-offices from one state to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United

States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled, shall have authority to appoint a committee to sit in the recess of Congress, to be denominated "a committee of the states," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction — to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years — to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses — to borrow money or emit bills on the credit of the United States, transmitting, every half year, to the respective states, an account of the sums of money so borrowed or emitted — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisitions shall be binding; and thereupon the legislature of each state shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled; but if the United States in Congress assembled shall, on consideration of circumstances, judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed and equipped, in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same; in which case they shall raise, officer, clothe, arm and equip, as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled, shall never engage in a war; nor grant letters of marque and reprisal in time of peace; nor enter into any treaties or alliances; nor coin money;

nor regulate the value thereof; nor ascertain the sums and expenses necessary for the defense and welfare of the United Stater, or any of them; 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 assent to the same; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in Congress aseembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United shall be appointed by the states within which their offices are States, so that no period of the adjournment shall be for a longer duration than the space of six months; and shall publish the journal of their proceedings monthly, except such parts thereof, relating to treaties, alliances, or military operations, as in their judgment requires secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the journal when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ART. 10. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine states, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine states in the Congress of the United States assembled is requisite.

ART. 11. Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to, all the advantages of this union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ART. 12. All bills of credit emitted, moneys borrowed, and debts contracted, by or under the authority of Congress, before the assembling of the United States in pursuance of the present

Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith, are hereby solemnly pledged.

ART. 13. Every state shall abide by the determination of the United States in Congress assembled, on all questions which, by this Confederation, are submitted to them. And the articles of this Confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration, at any time hereafter, be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislature of every state.

RATIFICATION.

And whereas it has pleased the Great Governor of the world to incline the hearts of the legislatures we respectfully represent in Congress, to approve of and to authorize us to ratify the said Articles of Confederation and Perpetual Union: *Know ye*, That we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and Perpetual Union, and all and singular the matters and things therein contained; and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions which, by the said Confederation, are submitted to them; and that the articles thereof shall be inviolably observed by the states we respectively represent; and that the union shall be perpetual.

In witness whereof, we have hereunto set our hands, in Congress. Done at Philadelphia, in the state of Pennsylvania, the ninth day of July, in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the Independence of America.

On the part and behalf of the state of New Hampshire.

Josiah Bartlett, John Wentworth, Jun., Aug. 8, 1778.

On the part and behalf of the state of Massachusetts Bay.

John Hancock,
Samuel Adams,
Elbridge Gerry,
Francis Dana,
James Lovell,
Samuel Holten.

On the part and behalf of the state of Rhode Island and Providence Plantations.

William Ellery, John Collins.
Henry Marchant,

On the part and behalf of the state of Connecticut.

Roger Sherman, Titus Hosmer,
Samuel Huntington, Andrew Adams.
Oliver Wolcott,

On the part and behalf of the state of New York.

Jas. Duane, Wm. Duer,
Fra. Lewis, Gouv. Morris.

On the part and behalf of the state of New Jersey.

Jno. Witherspoon, Nath. Scudder, Nov. 26, 1778.

On the part and behalf of the state of Pennsylvania.

Robert Morris, William Clingan,
Daniel Roberdeau, Joseph Reed, 22d July, 1778.
Jona. Bayard Smith,

On the part and behalf of the state of Delaware.

Thos. M'Kean, Feb. 13, '79, Nicholas Van Dyke.
John Dickinson, May 5, '79,

On the part and behalf of the state of Maryland.

John Hanson, March 1, '81, Daniel Carroll, do.

On the part and behalf of the state of Virginia.

Richard Henry Lee, Jno. Harvie,
John Banister, Francis Lightfoot Lee.
Thomas Adams,

On the part and behalf of the state of North Carolina.

John Penn, July 21, '78, Corns. Harnett.
Jno. Williams,

On the part and behalf of the state of South Carolina.

Henry Laurens, Richard Hutson,
William Henry Drayton, Thos. Heyward, Jun.
Jno. Mathews,

On the part and behalf of the state of Georgia.

Jno. Walton, July 24, '78, Edw'd Langworthy.
Edw'd Telfair,

After the termination of the war the defects in the Articles of Confederation became apparent. The Congress provided for, had not been invested with sufficient powers to enable it to provide for the exigencies of national existence. It could recommend, but it had no power to require compliance with its recommendations. It could not even raise a dollar for national purposes. Its attention was necessarily turned immediately to the subject of providing a revenue as a means of preserving the national faith and credit. But it was continually baffled in its

efforts, by the jealousies and antagonisms existing among the several states. On the 18th of April, 1783, Congress, by nine States, adopted the following recommendations to be submitted to the several states:

NO. 5.

Resolved, That it be recommended to the several states, as indispensably necessary to the restoration of public credit, and to the punctual and honorable discharge of the public debts, to invest the United States in Congress assembled with a power to levy, for the use of the United States, the following duties upon goods imported into the said states from any foreign port, island, or plantation:

Upon all rum of Jamaica proof, per gallon,	4-90ths	of a dollar.
Upon all other spirituous liquors,.....	3-90ths	do.
Upon Maderia wine,.....	12-90ths	do.
Upon all other wines,.....	6-90ths	do.
Upon common Bohea tea, per lb.,.....	6-90ths	do.
Upon all other teas,.....	24-90ths	do.
Upon pepper, per lb.,.....	3-90ths	do.
Upon brown sugar, per lb.,.....	½-90th	do.
Upon loaf sugar,.....	2-90ths	do.
Upon all other sugars,.....	1-90th	do.
Upon molasses, per gallon,.....	1-90th	do.
Upon cocoa and coffee, per lb.,.....	1-90th	do.

Upon all other goods, a duty of five per cent. *ad valorem*, at the time and place of importation.

Provided, That none of the said duties shall be applied to any other purpose than the discharge of the interest or principal of the debts contracted, on the faith of the United States, for supporting the war, agreeably to the resolution of the 16th day of December last, nor be continued for a longer term than twenty-five years; and *provided*, that the collectors of the said duties shall be appointed by the states within which their offices are to be respectively exercised; but when so appointed, shall be amenable to, and removable by, the United States in Congress assembled, alone; and in case any state shall not make such appointment within one month after notice given for that purpose, the appointment may be made by the United States in Congress assembled.

That it be further recommended to the several states to establish, for a term limited to twenty-five years, and to appropriate to the discharge of the interest and principal of the debts contracted on the faith of the United States for supporting the war, substantial and effectual revenues, of such nature as they may judge most convenient, for supplying their respective proportions of one million five hundred thousand dollars, annually, exclusive of the afore-mentioned duties, which proportion shall be fixed and equalized from time to time, according to the rule which is, or may be, prescribed by the Articles of Confederation; and in case the revenues established by any state shall at any time yield a sum exceeding its actual proportion, the excess shall be refunded to it; and in case the revenues of any state shall be found to be deficient, the immediate deficiency shall be made up by such state with as little delay as possible, and a future deficiency guarded against by an enlargement of the revenues established; *Provided*, that, until the rule of the Confederation can be carried into practice, the proportions of the said one million five hundred thousand dollars shall be as follows, viz:

New Hampshire,	52,708	Delaware,	22,443
Massachusetts,	224,427	Maryland,	141,517
Rhode Island,	32,318	Virginia,	256,487
Connecticut,	132,091	North Carolina,	109,006
New York,	128,243	South Carolina,	96,183
New Jersey,	83,358	Georgia,	16,030
Pennsylvania,	205,189		

The said last-mentioned revenues to be collected by persons appointed as aforesaid, but to be carried to the separate credit of the states within which they shall be collected.

That an annual account of the proceeds and application of all the afore-mentioned revenues shall be made out and transmitted to the several states, distinguishing the proceeds of each of the specified articles, and the amount of the whole revenue received from each state, together with the allowances made to the several officers employed in the collection of the said revenues.

That none of the preceding resolutions shall take effect until all of them shall be acceded to by every state; after which unanimous accession, however, they shall be considered as forming a mutual compact, among all the states, and shall be irrevocable by any one of them, without the concurrence of the whole, or a majority of the United States in Congress assembled.

That, as a further means, as well of hastening the extinguishment of the debts, as of establishing the harmony of the United States, it be recommended to the states which have passed no acts towards complying with the resolutions of Congress of the 6th of September, and 10th of October, 1780, relative to the cession of territorial claims, to make the liberal cessions therein recommended, and to the states which may have passed acts complying with the said resolutions in part only, to revise and complete such compliance.

That, as a more convenient and certain rule of ascertaining the proportions to be supplied by the states respectively to the common treasury, the following alteration in the Articles of Confederation and perpetual Union between these states, be, and the same is hereby agreed to in Congress; and the several states are advised to authorize their respective delegates to subscribe and ratify the same, as part of the said instrument of union, in the words following, to wit:

So much of the 8th of the Articles of Confederation and Perpetual Union, between the thirteen states of America, as is contained in the words following, to wit, "All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any person, as such land, and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled shall from time to time direct and appoint," is hereby revoked and made void; and in place thereof, it is declared and concluded, the same having been agreed to in a Congress of the United States, that all charges of war, and all other expenses, that have been, or shall be, incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, except so far as shall be otherwise provided for, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes, in each state; which number shall be trienni-

ally taken and transmitted to the United States in Congress assembled, in such mode as they shall direct and appoint.

April 26, 1783.— The committee, consisting of Mr. Madison, Mr. Ellsworth and Mr. Hamilton, appointed to prepare an address to the states, to accompany the act of the 18th of this month, reported a draft, which being read and amended, was agreed to, as follows:

NO. 6.

ADDRESS TO THE STATES, BY THE UNITED STATES IN CONGRESS ASSEMBLED.

To accompany the Act of April 18, 1783.

The prospect which has for some time existed, and which is now happily realized, of a successful termination of the war, together with the critical exigencies of public affairs, has made it the duty of Congress to review and provide for the debts which the war has left upon the United States, and to look forward to the means of obviating dangers which may interrupt the harmony and tranquillity of the confederacy. The result of their mature and solemn deliberations, on these great objects, is contained in their several recommendations of the 18th inst., herewith transmitted. Although these recommendations speak themselves the principles on which they are founded, as well as the ends which they propose, it will not be improper to enter into a few explanations and remarks, in order to place in a stronger view the necessity of complying with them.

The first measure recommended is, effectual provision for the debts of the United States. The amount of these debts, as far as they can now be ascertained, is 42,000,375 dollars. To discharge the principal of this aggregate debt at once, or in any short period, is evidently not within the compass of our resources; and, even if it could be accomplished, the ease of the community would require that the debt itself should be left to a course of gradual extinguishment, and certain funds be provided for paying, in the mean time, the annual interest. The amount of the annual interest is computed to be 2,415,956 dollars. Funds, therefore, which will certainly and punctually produce this annual sum, at least, must be provided.

Observations on Revenue.

In devising these funds, Congress did not overlook the mode of supplying the common treasury, provided by the Articles of

Confederation; but, after the most respectful consideration of that mode, they were constrained to regard it as inadequate, and inapplicable to the form into which the public debt must be thrown. The delays and uncertainties incident to a revenue to be established and collected, from time to time, by thirteen independent authorities, is, at first view, irreconcilable with the punctuality essential in the discharge of the interest of a national debt. Our own experience, after making every allowance for transient impediments, has been a sufficient illustration of this truth. Some departure, therefore, in the recommendation of Congress, from the Federal Constitution, was unavoidable; but it will be found to be as small as could be reconciled with the object in view, and to be supported, besides, by solid considerations of interest and sound policy.

The fund which presented itself on this, as it did on a former occasion, was a tax on imports. The reasons which recommended this branch of revenue, have heretofore been stated in an act, of which a copy, No. 2, is now forwarded, and need not be here repeated. It will suffice to recapitulate, that taxes on consumption are always least burdensome, because they are least felt, and are borne too by those who are both willing and able to pay them; that, of all taxes on consumption, those on foreign commerce are most compatible with the genius and policy of free states; that, from the relative positions of some of the more commercial states, it will be impossible to bring this essential resource into use without a concerted uniformity; that this uniformity cannot be concerted through any channel so properly as through Congress, nor for any purpose so aptly as for paying the debts of a revolution, from which an unbounded freedom has accrued to commerce.

In renewing this proposition to the states, we have not been unmindful of the objections which heretofore frustrated the unanimous adoption of it. We have limited the duration of the revenue to the term of twenty-five years; and we have left to the states themselves the appointment of the officers who are to collect it. If the strict maxims of national credit alone were to be consulted, the revenue ought manifestly to be coexistent with the object of it, and the collection placed in every respect under that authority which is to dispense the former, and is responsible for the latter. These relaxations will, we trust, be regarded, on one hand, as the effect of a

disposition in Congress to attend, at all times, to the sentiments of those whom they serve, and, on the other hand, as a proof of their anxious desire that provision may be made, in some way or other, for an honorable and just fulfillment of the engagements which they have formed.

To render this fund as productive as possible, and, at the same time, to narrow the room for collusions and frauds, it has been judged an improvement of the plan, to recommend a liberal duty on such articles as are most susceptible of a tax according to their quantity, and are of most equal and general consumption; leaving all other articles, as heretofore proposed, to be taxed according to their value.

The amount of this fund is computed to be 915,956 dollars. Accuracy, in the first essay, on so complex and fluctuating a subject, is not to be expected. It is presumed to be as near the truth as the defect of proper materials would admit.

The residue of the computed interest is 1,500,000 dollars, and is referred to the states to be provided for by such funds as they may judge most convenient. Here, again, the strict maxims of public credit gave way to the desire of Congress to conform to the sentiments of their constituents. It ought not to be omitted, however, with respect to this portion of the revenue, that the mode in which it is to be supplied varies so little from that pointed out in the Articles of Confederation, and the variations are so conducive to the great object proposed, that a ready and unqualified compliance on the part of the states may be the more justly expected. In fixing the quotas of this sum, Congress, as may be well imagined, were guided by very imperfect lights, and some inequalities may consequently have ensued. These, however, can be but temporary, and, as far as they may exist at all, will be redressed by a retrospective adjustment, as soon as a constitutional rule can be applied.

The necessity of making the two foregoing provisions one indivisible and irrevocable act, is apparent. Without the first quality, partial provision only might be made where complete provision is essential; nay, as some states might prefer and adopt one of the funds only, and the other states the other fund only, it might happen that no provision at all would be made: without the second, a single state, out of the thirteen, might at any time involve the nation in bankruptcy, the mere practica-

bility of which would be a fatal bar to the establishment of national credit. Instead of enlarging on these topics, two observations are submitted to the justice and wisdom of the legislatures. First, the present creditors, or rather the domestic part of them, having either made their loans for a period which has expired, or having become creditors, in the first instance, involuntarily, are entitled, on the clear principles of justice and good faith, to demand the principal of their credits, instead of accepting the annual interest. It is necessary, therefore, as the principal cannot be paid to them on demand, that the interest should be so effectually and satisfactorily secured, as to enable them, if they incline, to transfer their stock at its full value. Secondly, if the funds be so firmly constituted as to inspire a thorough and universal confidence, may it not be hoped that the capital of the domestic debt, which bears the high interest of six per cent, may be canceled by other loans obtained at a more moderate interest? The saving by such an operation would be a clear one, and might be a considerable one.

Thus much for the interest of the national debt: for the discharge of the principal within the term limited, we rely on the natural increase of the revenue from commerce, on requisitions to be made from time to time for that purpose, as circumstances may dictate, and on the prospect of vacant territory. If these resources should prove inadequate, it will be necessary, at the expiration of twenty-five years, to continue the funds now recommended, or to establish such others as may then be found more convenient.

With a view to the resource last mentioned, as well as to obviate disagreeable controversies and confusions, Congress have included in their present recommendations a renewal of those of the 6th day of September, and of the 10th day of October, 1780. In both these respects, a liberal and final accommodation of all interfering claims of vacant territory is an object which cannot be pressed with too much solicitude.

The last object recommended is a constitutional change of the rule by which a partition of the common burdens is to be made. The expediency, and even necessity, of such a change, has been sufficiently enforced by the local injustice and discontents which have proceeded from valuations of the soil in every state where the experiment has been made. But how infinitely must these evils be increased, on a comparison of such valuations among

the states themselves! On whatever side, indeed, this rule be surveyed, the execution of it must be attended with the most serious difficulties. If the valuations be referred to the authorities of the several states, a general satisfaction is not to be hoped for. If they be executed by officers of the United States traversing the country for that purpose, besides the inequalities against which this mode would be no security, the expense would be both enormous and obnoxious. If the mode taken in the act of the 17th day of February last, which was deemed, on the whole, least objectionable, be adhered to, still the insufficiency of the data to the purpose to which they are to be applied must greatly impair, if not utterly destroy, all confidence in the accuracy of the result; not to mention that, as far as the result can be at all a just one, it will be indebted, for that advantage, to the principle on which the rule proposed to be substituted is founded. This rule, although not free from objections, is liable to fewer than any other that could be devised. The only material difficulty which attended it in the deliberations of Congress, was to fix the proper difference between the labor and industry of free inhabitants and of all other inhabitants. The ratio ultimately agreed on was the effect of mutual concessions; and if it should be supposed not to correspond precisely with the fact, no doubt ought to be entertained that an equal spirit of accommodation among the several legislatures will prevail against little inequalities which may be calculated on one side or on the other. But notwithstanding the confidence of Congress as to the success of this proposition, it is their duty to recollect that the event may possibly disappoint them, and to request that measnres may still be pursued for obtaining and transmitting the information called for in the act of the 17th of February last, which, in such event, will be essential.

The plan thus communicated and explained by Congress must now receive its fate from their constituents. All the objects comprised in it are conceived to be of great importance to the happiness of this confederated republic — are necessary to render the fruits of the revolution a full reward for the blood, the toils, the cares, and the calamities which have purchased it. But the object, of which the necessity will be peculiarly felt, and which it is peculiarly the duty of Congress to inculcate, is the provision recommended for the national debt. Although this debt is greater than could have been wished, it is still less, on the

whole, than could have been expected; and, when referred to the cause in which it has been incurred, and compared with the burdens which wars of ambition and of vain glory have entailed on other nations, ought to be borne not only with cheerfulness, but with pride. But the magnitude of the debt makes no part of the question. It is sufficient that the debt has been fairly contracted, and that justice and good faith demand that it should be fully discharged. Congress had an option between different modes of discharging it. The same option is the only one that can exist with the states. The mode which has, after long and elaborate discussion, been preferred, is, we are persuaded, the least objectionable of any that would have been equal to the purpose. Under this persuasion, we call upon the justice and plighted faith of the several states to give it its proper effect, to reflect on the consequences of rejecting it, and to remember that Congress will not be answerable for them.

If other motives than that of justice could be requisite on this occasion, no nation could ever feel stronger; for to whom are the debts to be paid?

To *an ally*, in the first place, who, to the exertion of his arms in support of our cause, has added the succors of his treasure; who, to his important loans, has added liberal donations; and whose loans themselves carry the impression of his magnanimity and friendship.

To *individuals in a foreign country*, in the next place, who were the first to give so precious a token of their confidence in our justice, and of their friendship for our cause, and who are members of a republic which was second in espousing our rank among nations.

Another class of creditors is *that illustrious and patriotic band of fellow-citizens*, whose blood and whose bravery have defended the liberties of their country; who have patiently borne, among other distresses, the privation of their stipends, whilst the distresses of their country disabled it from bestowing them; and who, even now, ask for no more than such a portion of their dues as will enable them to retire from the field of victory and glory into the bosom of peace and private citizenship, and for such effectual security, for the residue of their claims, as their country is now unquestionably able to provide.

The remaining class of creditors is composed partly of such of our fellow-citizens as originally lent to the public the use of

their funds, or have since manifested most confidence in their country, by receiving transfers from the lenders; and partly of those whose property has been either advanced or assumed for the public service. To discriminate the merits of these several descriptions of creditors, would be a task equally unnecessary and invidious. If the voice of humanity plead more loudly in favor of some than of others, the voice of policy, no less than of justice, pleads in favor of all. A wise nation will never permit those who relieve the wants of their country, or who rely most on its faith, its firmness, and its resources, when either of them is distrusted, to suffer by the event.

Let it be remembered, finally, that it has ever been the pride and boast of America, that the rights for which she contended were the rights of human nature. By the blessings of the Author of these rights on the means exerted for their defense, they have prevailed against all opposition, and form the basis of thirteen independent states. No instance has heretofore occurred, nor can any instance be expected hereafter to occur, in which the unadulterated forms of republican government can pretend to so fair an opportunity of justifying themselves by their fruits. In this view, the citizens of the United States are responsible for the greatest trust ever confided to a political society. If justice, good faith, honor, gratitude, and all the other qualities which ennoble the character of a nation, and fulfill the ends of government, be the fruits of our establishments, the cause of liberty will acquire a dignity and lustre which it has never yet enjoyed, and an example will be set which cannot but have the most favorable influence on the rights of mankind. If, on the other side, our governments should be unfortunately blotted with the reverse of these cardinal and essential virtues, the great cause which we have engaged to vindicate will be dishonored and betrayed, the last and fairest experiment in favor of the rights of human nature will be turned against them, and their patrons and friends exposed to be insulted and silenced by the votaries of tyranny and usurpation.

By order of the United States in Congress assembled.

NO. 7.

On the 30th April, 1784, Congress agreed to the following further recommendations:

"The trust reposed in Congress renders it their duty to be attentive to the conduct of foreign nations, and to prevent or restrain, as far as may be, all such proceedings as might prove injurious to the United States. The situation of commerce at this time claims the attention of the several States, and few objects of greater importance can present themselves to their notice. The fortune of every citizen is interested in the success thereof; for it is the constant source of wealth and incentive to industry; and the value of our produce and our land must ever rise or fall in proportion to the prosperous or adverse state of trade.

"Already has Great Britain adopted regulations destructive of our commerce with her West India Islands. There was reason to expect that measures so unequal, and so little calculated to promote mercantile intercourse, would not be persevered in by an enlightened nation. But these measures are growing into a system. It would be the duty of Congress, as it is their wish, to meet the attempts of Great Britain with similar restrictions on her commerce; but their powers on this head are not explicit, and the propositions made by the legislatures of the several states render it necessary to take the general sense of the Union on this subject.

"Unless the United States in Congress assembled shall be vested with powers competent to the protection of commerce, they can never command reciprocal advantages in trade; and without these, our foreign commerce must decline, and eventually be annihilated. Hence it is necessary that the states should be explicit, and fix on some effectual mode by which foreign commerce not founded on principles of equality may be restrained.

"That the United States may be enabled to secure such terms, they have

"*Resolved*, That it be, and it hereby is, recommended to the legislatures of the several States, to vest the United States in Congress assembled, for the term of fifteen years, with power to prohibit any goods, wares, or merchandise, from being imported into, or exported from, any of the states, in vessels

belonging to, or navigated by, the subjects of any power with whom states shall not have formed treaties of commerce.

"*Resolved*, That it be, and it hereby is, recommended to the legislatures of the several states, to vest the United States in Congress assembled, for the term of fifteen years, with the power of prohibiting the subjects of any foreign state, kingdom, or empire, unless authorized by treaty, from importing into the United States any goods, wares, or merchandise, which are not the produce or manufacture of the dominions of the sovereign whose subjects they are.

"*Provided*, That to all acts of the United States in Congress assembled, in pursuance of the above powers, the assent of nine states shall be necessary."

The result of all this was that the several States did not agree upon any plan in accordance with these several recommendations, and it became apparent that nothing could be accomplished in this manner.

On the 21st day of January, 1786, in the House of Delegates in Virginia, it was

Resolved, That Edmund Randolph, James Madison, Jun., Walter Jones, St. George Tucker, Meriwether Smith, David Ross, William Ronald and George Mason, Esquires, be appointed commissioners, who, or any five of whom, shall meet such commissioners as may 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 said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permament 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 effectually to provide for the same that the said commissioners shall immediately transmit to the several States copies of the preceding resolution, with a circular letter requesting their concurrence therein, and proposing a time and place for the meeting aforesaid.

Test, JOHN BECKLEY, *C. H. D.*

1786, *January* 21.

Agreed to by the Senate. H. BROOKE, *C. S.*

By his excellency, Patrick Henry, Esquire, Governor of the Commonwealth of Virginia, it is hereby certified that John

Beckley, the person subscribing the above resolve, is Clerk of the House of Delegates, and that due faith and credit is, and ought to be, paid to all things done by him by virtue of his office.

Given under my hand, as Governor, and under the Seal of
[L. S.] the Commonwealth, at Richmond, the 6th day of July, 1786. P. HENRY.

NO. 8.

"To the Honorable the Legislatures of Virginia, Delaware, Pennsylvania, New Jersey and New York, the commissioners from the said states respectively, assembled at Annapolis, humbly beg leave to report,—

"That, pursuant to their several appointments, they met at Annapolis, in the state of Maryland, on the 11th day of September, instant; and having proceeded to a communication of their powers, they found that the states of New York, Pennsylvania and Virginia, had, in substance, and nearly in the same terms, authorized their respective commissioners 'to meet such commissioners as were or might be appointed by the other states in the Union, at such time and place as should be agreed upon by the said commissioners, to take into consideration the trade and commerce of the United States; to consider how far a uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony; and to report to the several states such an act relative to this great object as, when unanimously ratified by them, would enable the United States in Congress assembled, effectually to provide for the same.'

"That the state of Delaware had given similar powers to their commissioners, with this difference only, that the act to be framed in virtue of these powers, is required to be reported 'to the United States in Congress assembled, to be agreed to by them, and confirmed by the legislatures of every state.'

"That the state of New Jersey had enlarged the object of their appointment, empowering their commissioners 'to consider how far a uniform system in their commercial regulations and *other important matters* might be necessary to the common interest and permanent harmony of the several states;' and to report such an act on the subject as, when ratified by them, 'would enable the United States in Congress assembled, effectually to provide for the exigencies of the Union.'

"That appointments of commissioners have also been made by the states of New Hampshire, Massachusetts, Rhode Island and North Carolina, none of whom, however, have attended; but that no information has been received by your commissioners, of any appointment having been made by the states of Connecticut, Maryland, South Carolina or Georgia.

"That the express terms of the powers to your commissioners, supposing a deputation from all the states, and having for object the trade and commerce of the United States, your commissioners did not conceive it advisable to proceed on the business of their mission under the circumstances of so partial and defective a representation.

"Deeply impressed, however, with the magnitude and importance of the object confided to them on this occasion, your commissioners cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken to effect a general meeting of the states, in a future convention, for the same and such other purposes as the situation of public affairs may be found to require.

"If, in expressing this wish, or in intimating any other sentiment, your commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence that a conduct dictated by an anxiety for the welfare of the United States will not fail to receive an indulgent construction.

"In this persuasion your commissioners submit an opinion, that the idea of extending the powers of their deputies to other objects than those of commerce, which has been adopted by the state of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future convention. They are the more naturally led to this conclusion, as, in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the federal system.

"That there are important defects in the sytem of the federal government, is acknowledged by the acts of all those states which have concurred in the present meeting; that the defects, upon a closer examination, may be found greater and more

numerous than even these acts imply, is at least so far probable, from the embarrassments which characterize the present state of our national affairs, foreign and domestic, as may reasonably be supposed to merit a deliberate and candid discussion, in some mode which will unite the sentiments and councils of all the states. In the choice of the mode, your commissioners are of opinion that a convention of deputies from the different states, for the special and sole purpose of entering into this investigation, and digesting a plan for supplying such defects as may be discovered to exist, will be entitled to a preference, from considerations which will occur without being particularized.

"Your commissioners decline an enumeration of those national circumstances on which their opinion respecting the propriety of a future convention, with more enlarged powers, is founded; as it would be a useless intrusion of facts and observations, most of which have been frequently the subject of public discussion, and none of which can have escaped the penetration of those to whom they would in this instance be addressed. They are, however, of a nature so serious, as, in the view of your commissioners, to render the situation of the United States delicate and critical, calling for an exertion of the united virtue and wisdom of all the members of the confederacy.

"Under this impression, your commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the Union, if the states, by whom they have been respectively delegated, would themselves concur, and use their endeavors to procure the concurrence of the other states, in the appointment of commissioners, to meet at Philadelphia on the second Monday in May 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 legislatures of every state, will effectually provide for the same.

"Though your commissioners could not with propriety address these observations and sentiments to any but the states they have the honor to represent, they have nevertheless concluded, from motives of respect, to transmit copies of this report

to the United States in Congress assembled, and to the executive of the other states.

"By order of the Commissioners.

"Dated at ANNAPOLIS, *September* 14, 1786.

Resolved, That the chairman sign the aforegoing report in behalf of the commissioners. Then adjourned without day.

New York.
Egbert Benson,
Alexander Hamilton.
New Jersey.
Abra. Clark,
Wm. Ch. Houston,
James Schureman.
Pennsylvania.
Tench Coxe.

Delaware.
George Read,
John Dickinson,
Richard Bassett.
Virginia.
Edmund Randolph,
James Madison, Jun.,
St. George Tucker.

NO. 9.

These resolutions were submitted to Congress on the 21st of February, 1787, and the result was that Congress agreed to the following preamble and resolutions:

"Whereas there is provision, in the Articles of Confederation and Perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the legislatures of the several states, and whereas experience hath evinced that there are defects in the present Confederation; as a mean to remedy which, several of the states, and particularly the state of New York, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these States a firm national government,—

"*Resolved*, That, in the opinion of Congress, it is expedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and the several legislatures, such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and the preservation of the Union."

The states severally, in compliance with these recommendations, appointed the following as delegates to meet in convention on the second Monday of May, 1787.

LIST OF THE MEMBERS OF THE FEDERAL CONVENTION, WHICH FORMED THE CONSTITUTION OF THE UNITED STATES.

From			*Attended* 1787,
NEW HAMPSHIRE, ...	1.	John Langdon,	July 23.
		John Pickering,	
	2.	Nicholas Gilman,	July 23.
		Benjamin West,	
MASSACHUSETTS, ...		*Francis Dana,*	
		Elbridge Gerry,	May 29.
	3.	Nathaniel Gorham,	May 28.
	4.	Rufus King,	May 25.
		Caleb Strong,	May 28.
RHODE ISLAND, ...		[No appointment.]	
CONNECTICUT, ...	5.	Wm. Sam. Johnson,	June 2.
	6.	Roger Sherman,	May 30.
		Oliver Ellsworth,	May 29.
NEW YORK, ...		Robert Yates,	May 25.
	7.	Alexander Hamilton,	May 25.
		John Lansing,	June 2.
NEW JERSEY, ...	8.	William Livingston,	June 5.
	9.	David Brearly,	May 25.
		William C. Houston,	May 25.
	10.	William Patterson,	May 25.
		John Nelson,	
		Abraham Clark,	
	11.	Jonathan Dayton,	June 21.
PENNSYLVANIA, ...	12.	Benjamin Franklin,	May 28.
	13.	Thomas Mifflin,	May 28.
	14.	Robert Morris,	May 25.
	15.	George Clymer,	May 28.
	16.	Thomas Fitzsimons,	May 25.
	17.	Jared Ingersoll,	May 28.
	18.	James Wilson,	May 25.
	19.	Gouverneur Morris,	May 25.
DELAWARE, ...	20.	George Read,	May 25.
	21.	Gunning Bedford, Jun.,	May 28.
	22.	John Dickinson,	May 28.
	23.	Richard Basset,	May 25.
	24.	Jacob Broom,	May 25.
MARYLAND, ...	25.	James M'Henry,	May 29.
	26.	Daniel of St. Thomas Jenifer,	June 2.
	27.	Daniel Carroll,	July 9.
		John Francis Mercer,	August 6.
		Luther Martin,	June 9.
VIRGINIA, ...	28.	George Washington,	May 25.
		Patrick Henry,	(declined.)
		Edmund Randolph,	May 25.
	29.	John Blair,	May 25.
	30.	James Madison, Jun.,	May 25.
		George Mason,	May 25.
		George Wythe,	May 25.
		J. M'Clurg, [room of P. Henry.]	May 25.
NORTH CAROLINA, ...		*Richard Caswell,*	(resigned.)
		Alexander Martin,	May 25.

North Carolina, ...		William R. Davie, ...	May	25.
	31.	Wm. Blount, [room of R. Caswell.]	June	20.
		Willie Jones, ...	(declined.)	
	32.	Richard D. Speight, ...	May	25.
	33.	H. Williamson, [room of W. Jones.]	May	25.
South Carolina, ...	34.	John Rutledge, ...	May	25.
	35.	Charles C. Pinckney, ...	May	25.
	36.	Charles Pinckney, ...	May	25.
	37.	Pierce Butler, ...	May	25.
Georgia, ...	38.	William Few, ...	May	25.
	39.	Abraham Baldwin, ...	June	11.
		William Pierce, ...	May	31.
		George Walton,		
		William Houstoun, ...	June	7.
		Nathaniel Pendleton,		

Those with numbers before their names signed the Constitution,..... 39
Those in *Italics* never attended,... 10
Members who attended, but did not sign the Constitution,..... 16

65

NO. 10.

The following are the credentials of the members of the Federal Convention:

CREDENTIALS OF MEMBERS OF THE FEDERAL CONVENTION.

STATE OF NEW HAMPSHIRE.

In the Year of our Lord 1787.

An Act for appointing Deputies from this State to the Convention proposed to be holden in the city of Philadelphia, in May, 1787, *for the Purpose of revising the federal Constitution.*

Whereas, in the formation of the federal compact, which frames the bond of union of the American states, it was not possible, in the infant state of our republic, to devise a system which, in the course of time and experience, would not manifest imperfections that it would be necessary to reform:

And whereas, the limited powers, which, by the Articles of Confederation, are vested in the Congress of the United States, have been found far inadequate to the enlarged purposes which they were intended to produce; and whereas Congress hath, by repeated and most urgent representations, endeavored to awaken this, and other states of the Union, to a sense of the truly critical and alarming situation in which they may inevitably be involved, unless timely measures be taken to enlarge the powers of Congress, that they may be thereby enabled to avert the dangers which threaten our existence as a free and independent people; and

whereas this state hath been ever desirous to act upon the liberal system of the general good of the United States, without circumscribing its views to the narrow and selfish objects of partial convenience; and has been at all times ready to make every concession, to the safety and happiness of the whole, which justice and sound policy could vindicate;—

Be it therefore enacted, by the Senate and House of Representatives, in General Court convened, That John Langdon, John Pickering, Nicholas Gilman and Benjamin West, Esqrs., be and hereby are, appointed commissioners: they or any two of them, are hereby authorized and empowered, as deputies from this state, to meet at Philadelphia said Convention, or any other place to which the Convention may be adjourned, for the purposes aforesaid, there to confer with such deputies as are, or may be, appointed by the other states for similar purposes, and with them to discuss and decide upon the most effectual means to remedy the defects of our federal Union, and to procure and secure the enlarged purposes which it was intended to effect, and to report such an act to the United States in Congress, as, when agreed to by them, and duly confirmed by the several states, will effectually provide for the same.

State of New Hampshire. — In the House of Representatives, June 27, 1787. The following bill having been read a third time,— voted that it pass to be enacted. Sent up for concurrence.

JOHN SPARHAWK, *Speaker.*

In Senate, the same day. This bill having been read a third time,— voted that the same be enacted.

JOHN SULLIVAN, *President.*

Copy examined, per Joseph Pearson, *Secretary.* [L. S.]

COMMONWEALTH OF MASSACHUSETTS.

By his excellency, James Bowdoin, Esq., Governor of the Com-
[L. S.] monwealth of Massachusetts.

To the Hon. Francis Dana, Elbridge Gerry, Nathaniel Gorham, Rufus King and Caleb Strong, Esqrs., Greeting:

Whereas Congress did, on the 21st day of Feburary, A. D. 1787, resolve, "That, in the opinion of Congress, it is expedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several states, be

held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal constitution adequate to the exigencies of government and the preservation of the Union;" And whereas the General Court have constituted and appointed you their delegates, to attend and represent this commonwealth in the said proposed Convention, and have by a resolution of theirs of the 10th of March last, requested me to commission you for that purpose;—

Now, therefore, Know ye, That, in pursuance of the resolutions aforesaid I do, by these presents, commission you, the said Francis Dana, Elbridge Gerry, Nathaniel Gorham, Rufus King, and Caleb Strong, Esqrs., or any three of you, to meet such delegates as may be appointed by the other, or any of the other States in the Union, to meet in Convention at Philadelphia, at the time and for the purposes aforesaid.

In testimony whereof, I have caused the public seal of the commonwealth aforesaid to be hereunto affixed.

Given at the Council Chamber, in Boston the ninth day of April, A. D. 1787, and in the 11th year of the independence of the United States of America.

JAMES BOWDOIN.

By his excellency's command.—JOHN AVERY, Jun., *Secretary.*

STATE OF CONNECTICUT.

At a General Assembly of the State of Connecticut, in America,
[L. S.] holden at Hartford, on the second Thursday of May, A. D. 1787.

An Act for appointing Delegates to meet in Convention of the States, to be held in Philadelphia on the second Monday of May instant.

Whereas, the Congress of the United States, by their act of the 21st February, 1787, have recommended that, on the second Monday of May inst., a Convention of delegates, who shall have been appointed by the several States, to be held at Philadelphia, for the sole and express purpose of revising the Articles of the Confederation;—

Be it enacted by the governor, council, and representatives, in General Court assembled, and by the authority of the

same, That the Hon. William Samuel Johnson, Roger Sherman, and Oliver Ellsworth, Esqrs., be, and they hereby are, appointed delegates to attend the said Convention, and are requested to proceed to the city of Philadelphia, for that purpose, without delay; and the said delegates, and, in case of sickness or accident, such one or more of them as shall attend the said Convention, is and are hereby authorized and empowered to represent this State therein, and to confer with such delegates appointed by the several States, for the purposes mentioned in the said act of Congress, that may be present and duly empowered to sit in said Convention, and to discuss upon such alterations and provisions, agreeably to the general principles of republican government, as they shall think proper to render the Federal Constitution adequate to the exigencies of government and the preservation of the Union; and they are further directed, pursuant to the said act of Congress, to report such alterations and provisions as may be agreed to by a majority of the United States represented in Convention, to the Congress of the United States, and to the General Assembly of this State.

A true copy of record. Examined by

GEORGE WILLYS, *Secretary.*

STATE OF NEW YORK.

By his excellency, George Clinton, Governor of the State of [L. S.] New York, general and commander-in-chief of all the militia, and admiral of the navy of the same.

To all to whom these presents shall come:

It is by these presents certified, that John M'Kesson, who has subscribed the annexed copies of resolutions, is clerk of the Assembly of this State.

In testimony whereof, I have caused the privy seal of the said State to be hereunto affixed, this 9th day of May, in the 11th year of the independence of the said State.

GEORGE CLINTON.

STATE OF NEW YORK.—IN ASSEMBLY, *February* 28, 1787.—A copy of a resolution of the honorable the Senate, delivered by Mr. Williams, was read, and is in the words following, viz.:

Resolved, If the honorable the Assembly concur therein, that three delegates be appointed on the part of this State, to meet such delegates as may be appointed on the part of the

other States, respectively, on the second Monday in May next, at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and to the several legislatures, such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the several States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union; and that in case of such concurrence, the two houses of the legislature will, on Tuesday next, proceed to nominate and appoint the said delegates, in like manner as is directed by the Constitution of this State for nominating and appointing delegates to Congress.

Resolved, That this house do concur with the honorable the Senate in the said resolution.

In Assembly, *March* 6, 1787.—*Resolved*, That the Hon. Robert Yates, Esq., Alexander Hamilton, and John Lansing, Jun., Esqrs., be and they are hereby nominated by this house delegates on the part of this State, to meet such delegates as may be appointed on the part of the other States, respectively, on the second Monday in May next, at Philadelphia, pursuant to concurrent resolutions of both houses of the legislature, on the 28th ultimo.

Ordered, That Mr. N. Smith deliver a copy of the last preceding resolution to the honorable the Senate.

A copy of a resolution of the honorable the Senate was delivered by Mr. Vanderbilt, that the Senate will immediately meet this house in the Assembly Chamber, to compare the list of persons nominated by the Senate and Assembly, respectively, as delegates, pursuant to the resolutions before mentioned.

The honorable the Senate accordingly attended in the Assembly Chamber, to compare the lists of persons nominated for delegates, as above mentioned.

The list of persons nominated by the honorable the Senate were the Hon. Robert Yates, John Lansing, Jun., and Alexander Hamilton, Esqrs.; and on comparing the lists of the persons nominated by the Senate and Assembly respectively, it appeared that the same persons were nominated in both lists; thereupon, *Resolved*, that the Hon. Robert Yates, John Lansing, Jun., and Alexander Hamilton, Esqrs., be, and they are hereby declared duly nominated and appointed delegates, on the part of this State, to meet such delegates as may be appointed

on the part of the other States, respectively, on the second Monday in May next, at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and to the several legislatures, such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the several States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union.

True extracts from the journals of the Assembly.

JOHN M'KESSON, *Clerk.*

STATE OF NEW JERSEY.

To the Hon. David Brearly, William Churchill Houston, William Patterson, and John Neilson, Esqrs., Greeting:

The Council and Assembly, reposing especial trust and confidence in your integrity, prudence and ability, have, at a joint meeting, appointed you, the said David Brearly, William Churchill Houston, William Patterson, and John Neilson, Esqrs., or any three of you, commissioners, to meet such commissioners as have been, or may be, appointed by the other States in the Union, at the city of Philadelphia, in the commonwealth of Pennsylvania, on the second Monday in May next, for the purpose of taking into consideration the state of the Union as to trade and other important objects, and of devising such other provisions as shall appear to be necessary to render the constitution of the federal government adequate to the exigencies thereof.

In testimony whereof, the great seal of the State is hereunto affixed. Witness, William Livingston, Esq., governor, captain-general, and commander-in-chief in and over the State of New Jersey, and territories thereunto belonging chancellor and ordinary in the same, at Trenton, the 23d day of November, in the year of our Lord, 1786, and of our sovereignty and independence the eleventh.

WILLIAM LIVINGSTON.

By his excellency's command.—BOWES REED, *Secretary.*

STATE OF NEW JERSEY.

To his excellency, William Livingston, and the Hon. Abraham [L. S.] *Clark, Esqrs, Greeting:*

The Council and Assembly, reposing especial trust and confidence in your integrity, prudence, and ability, have at a joint meeting, appointed you, the said William Livingston and Abraham Clark, Esqrs., in conjunction with the Hon. David Brearly, William Churchill Houston, and William Patterson, Esqrs., or any three of you, commissioners, to meet such commissioners as have been appointed by the other States in the Union, at the city of Philadelphia, in the commonwealth of Pennsylvania, on the second Monday in this present month, for the purpose of taking into consideration the state of the Union, as to trade and other important objects, and of devising such other provisions as shall appear to be necessary to render the constitution of the federal government adequate to the exigencies thereof.

In testimony whereof, the great seal of the State is hereunto affixed. Witness, William Livingston, Esq., governor, captain-general, and commander-in-chief, in and over the State of New Jersey, and territories thereunto belonging, chancellor and ordinary in the same, at Burlington, the 18th day of May, in the year of our Lord 1787, and of our sovereignty, and independence the eleventh.

WIL. LIVINGSTON.

By his excellency's command.—BOWES REED, *Secretary.*

STATE OF NEW JERSEY.

To the Hon. J. Dayton, Esq.

The Council and Assembly, reposing especial trust and confidence in your integrity, prudence and ability, have, at a joint meeting, appointed you, the said Jonathan Dayton, Esq., in conjunction with his excellency, William Livingston, the Hon. David Brearly, William Churchill Houston, William Patterson and Abraham Clark, Esqrs., or any three of you, commissioners, to meet such commissioners as have been appointed by the other states in the Union, at the city of Philadelphia, in the commonwealth of Pennsylvania, for the purpose of taking into consideration the state of the Union as to trade and other important objects, and of devising such other provisions as shall appear to

be necessary to render the constitution of the federal government adequate to the exigencies thereof.

In testimony whereof the great seal of the state is hereunto affixed. Witness, Robert Lettice Hooper, Esq., vice-president, captain-general and commander-in chief in and over the state of New Jersey, and territories thereunto belonging, chancellor and ordinary in the same, at Burlington, the fifth day of June, in the year of our Lord 1787, and of our sovereignty and independence the eleventh.

ROBERT L. HOOPER.

By his honor's command.— BOWES REED, *Secretary.*

COMMONWEALTH OF PENNSYLVANIA.

An Act appointing Deputies to the Convention intended to be held in the City of Philadelphia, for the purpose of revising the Federal Constitution.

SECTION 1. Whereas the General Assembly of this commonwealth, taking into their serious consideration the representations heretofore made to the legislatures of the several states in the Union, by the United States in Congress assembled, and also weighing the difficulties under which the confederated states now labor, are fully convinced of the necessity of revising the Federal Constitution, for the purpose of making such alterations and amendments as the exigencies of our public affairs require: And whereas the legislature of the state of Virginia have already passed an act of that commonwealth, empowering certain commissioners to meet at the city of Philidelphia, in May next, a convention of commissioners or deputies from the different states; and the legislature of this state are fully sensible of the important advantages which may be derived to the United States, and every of them, from co-operation with the commonmealth of Virginia and the other states to the Confederation, in the said design.

SEC. 2. *Be it enacted, and it is hereby enacted, by the representatives of the freemen of the commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same,* That Thomas Mifflin, Robert Morris, George Clymer, Jared Ingersoll, Thomas Fitzsimons, James Wilson and Gouverneur Morris, Esqrs., are hereby appointed deputies from this state, to meet in the Convention of the deputies of the respective states

of North America, to be held at the city of Philadelphia, on the 2d day in the month of May next; and the said Thomas Mifflin, Robert Morris, George Clymer, Jared Ingersoll, Thomas Fitzsimons, James Wilson and Gouverneur Morris, Esqrs., or any four of them, are hereby constituted and appointed deputies from this state, with powers to meet such deputies as may be appointed and authorized by the other states, to assemble in the said Convention, at the city aforesaid, and join with them in devising, deliberating on, and discussing, all such alterations and further provisions as may be necessary to render the Federal Constitution fully adequate to the exigencies of the Union, and in reporting such act or acts, for that purpose, to the United States in Congress assembled, as, when agreed to by them, and duly confirmed by the several states, will effectually provide for the same.

SEC. 3. *And be it further enacted by the authority aforesaid*, That, in case any of the said deputies hereby nominated shall happen to die, or to resign his or their said appointment or appointments, the supreme executive council shall be, and hereby are, empowered and required to nominate and appoint other person or persons, in lieu of him or them so deceased, or who has or have so resigned, which person or persons, from and after such nomination and appointment, shall be and hereby are, declared to be vested with the same powers respectively as any of the deputies nominated and appointed by this act is vested with by the same: *Provided always*, that the council are not hereby authorized, nor shall they make any such nomination or appointment, except in vacation and during the recess of the General Assembly of this state. Signed by order of the house,

[L. S.] THOMAS MIFFLIN, *Speaker.*

Enacted into a law at Philadelphia, on Saturday, December 30, in the year of our Lord 1786.

PETER ZACHARY LLOYD,
Clerk of the General Assembly.

I, Matthew Irwine, Esq., master of the rolls for the state of Pennsylvania, do certify the preceding writing to be a true copy (or exemplification) of a certain act of Assembly lodged in my office.

In witness whereof, I have hereunto set my hand and seal of
[L. S.] office, the 15th May, A. D. 1787.

MATTHEW IRWINE, *M. R.*

A Supplement to the Act entitled "An Act appointing Deputies to the Convention intended to be held in the City of Philadelphia, for the purpose of revising the Federal Constitution.

SECTION 1. Whereas, by the act to which this act is a supplement, certain persons were appointed as deputies from this state to sit in the said Convention; And whereas it is the desire of the General Assembly, that his excellency, Benjamin Franklin, Esq., president of this state, should also sit in the said Convention, as deputy from this state; therefore,

SEC. 2. *Be it enacted, and it is hereby enacted, by the representatives of the freemen of the commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same,* That his excellency, Benjamin Franklin, Esq., be, and he is hereby, appointed and authorized to sit in the said Convention as a deputy from this state, in addition to the persons heretofore appointed; and that he be, and he hereby is, invested with like powers and authorities as are invested in the said deputies, or any of them. Signed by order of the House,

THOMAS MIFFLIN, *Speaker.*

Enacted into a law at Philadelphia, on Wednesday the 28th day of March, in the year of our Lord 1787.

PETER ZACHARY LLOYD,
Clerk of the General Assembly.

I, Matthew Irwine, Esq., master of the rolls for the state of Pennsylvania, do certify the above to be a true copy (or exemplification) of a supplement to a certain act of Assembly, which supplement is lodged in my office.

In witness whereof, I have hereunto set my hand and seal of
[L. S.] office, the 15th May, A. D. 1787.

MATTHEW IRWINE, *M. R.*

DELAWARE STATE.

His excellency, Thomas Collins, Esq., president, captain-general, and commander-in-chief of the Delaware state.

To all to whom these presents come, Greeting:

Know ye, that, among the laws of the said state, passed by the
[L. S.] General Assembly of the same, on the 3d day of February, in the year of our Lord 1787, it is thus enrolled:

"In the eleventh year of the independence of the Delaware state."

"*An Act appointing Deputies from this State to the Convention proposed to be held in the City of Philadelphia, for the Purpose of revising the Federal Constitution.*"

Whereas, the General Assembly of this state are fully convinced of the necessity of revising the Federal Constitution, and adding thereto such further provisions as may render the same more adequate to the exigencies of the Union; And whereas the legislature of Virginia have already passed an act of that commonwealth, appointing and authorizing certain commissioners to meet at the city of Philadelphia, in May next, a Convention of commissioners or deputies from the different states; and this state being willing and desirous of co-operating with the commonwealth of Virginia, and the other states in the Confederation, in so useful a design:

Be it therefore enacted by the General Assembly of Delaware, that George Read, Gunning Bedford, John Dickinson, Richard Bassett, and Jacob Broom, Esqrs., are hereby appointed deputies from this State to meet in the Convention of the deputies of other States to be held at the city of Philadelphia, on the 2d day of May next; and the said George Read, Gunning Bedford, John Dickinson, Richard Basset, and George Broom, Esqrs., or any three of them, are hereby constituted and appointed deputies from this State, with powers to meet such deputies as may be appointed and authorized by the other States to assemble in the said Convention at the city aforesaid, and to join with them in devising. deliberating on, and discussing, such alterations and further provisions as may be necesary to render the Federal Constitution adequate to the exigencies of the Union; and in reporting such act or acts, for that purpose, to the United States in Congress assembled, as, when agreed to by them, and duly confirmed by the several States, may effectually provide for the same. So always and provided, that such alterations or further provisions, or any of them, do not extend to that part of the fifth article of the Confederation of the said States, finally ratified on the 1st day of March, in the year 1781, which declares that, "In determining questions in the United States in Congress assembled, each State shall have one vote."

And be it enacted, That in case any of the said deputies hereby nominated shall happen to die, or resign his or their appointment, the president or commander-in-chief, with the

advice of the privy council, in the recess of the General Assembly, is hereby authorized to supply such vacancies.

Signed by the order of the House and Assembly,

JOHN COOK, *Speaker.*

Signed by the order of the Council,

GEORGE CRAGHED, *Speaker.*

Passed at Dover, February 3, 1787.

All and singular which premises, by the tenor of these presents, I have caused to be exemplified. In testimony whereof, I have hereunto subscribed my name, and caused the great seal of the said State to be affixed to these presents, at New Castle, the 2d day of April, in the year of our Lord 1787, and in the 11th year of the independence of the United States of America.

THOMAS COLLINS.

Attest, JAMES BOOTH, *Secretary.*

STATE OF MARYLAND.

An Act for the Appointment of, and conferring Powers on, Deputies from this State to the Federal Convention.

Be it enacted by the General Assembly of Maryland, That the Hon. James M'Henry, Daniel of St. Thomas Jenifer, Daniel Carroll, John Francis Mercer, and Luther Martin, Esqrs., be appointed and authorized, on behalf of this State, to meet such deputies as may be appointed and authorized, by any other of the United States, to assemble in Convention at Philadelphia, for the purpose of revising the federal system and to join with them in considering such alterations and further provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union; and in reporting such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and duly confirmed by the several States, will effectually provide for the same; and the said deputies, or such of them as shall attend the said Convention, shall have full power to represent this State for the puposes aforesaid; and the said deputies are hereby directed to report the proceedings of the said Convention, and any act agreed to therein, to the next session of the General Assembly of this State.

By the House of Delegates, May 26, 1787. Read and assented to.

By order, WM. HARWOOD, *Clerk.*

True copy from the original, WM. HARWOOD, *Clerk H. D.*
By the Senate, May 26, 1787. Read and assented to.
By order, J. DORSEY, *Clerk.*
True copy from the original. J. DORSEY, *Clerk Senate.*
W. SMALLWOOD.

COMMOWEALTH OF VIRGINIA.

General Assembly begun and held at the Public Buildings in the city of Richmond, on Monday, the 16th day of October, in the year of our Lord, 1786.

An Act for appointing Deputies from this Commonwealth to a Convention proposed to be held in the City of Philadelphia, in May next, for the Purpose of revising the Federal Constitution.

Whereas, the commissioners who assembled at Annapolis, on the 14th day of September last, for the purpose of devising and reporting the means of enabling Congress to provide effectually for the commercial interests of the United States, have represented the necessity of extending the revision of the federal system to all its defects, and have recommended that deputies for that purpose be appointed by the several legislatures, to meet in Convention, in the city of Philadelphia, on the 2d day of May next,—a provision which was preferable to a discussion of the subject in Congress, where it might be too much interrupted by the ordinary business before them, and where it would, besides, be deprived of the valuable counsels of sundry individuals who are disqualified by the constitution or laws of particular states, or restrained by peculiar circumstances from a seat in that assembly. And whereas the General Assembly of this commonwealth, taking into view the actual situation of the confederacy, as well as reflecting on the alarming representations made, from time to time, by the United States in Congress, particularly in their act of the 15th day of February last, can no longer doubt that the crisis is arrived at which the good people of America are to decide the solemn question—whether they will, by wise and magnanimous efforts, reap the just fruits of that independence, which they have so gloriously acquired, and of that union which they have cemented with so much of their common blood—or whether, by giving way to unmanly jealousies and prejudices, or to partial and transitory interests, they will renounce the auspicious blessings prepared

for them by the revolution, and furnish to its enemies an eventful triumph over those by whose virtue and valor it has been accomplished: And whereas the same noble and extended policy, and the same fraternal and affectionate sentiments, which originally determined the citizens of this commonwealth to unite with their brethren of the other states in establishing a federal government, cannot but be felt with equal force now as motives to lay aside every inferior consideration, and to concur in such further concessions and provisions as may be necessary to secure the great objects for which that government was instituted, and to render the United States as happy in peace as they have been glorious in war:

Be it therefore enacted by the General Assembly of the Commonwealth of Virginia, That seven commissioners be appointed, by joint ballot of both houses of Assembly, who, or any three of them, are hereby authorized, as deputies from this commonwealth, to meet such deputies as may be appointed and authorized by other States, to assemble in Convention at Philadelphia, as above recommended, and to join with them in devising and discussing all such alterations and further provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union; and in reporting such an act, for that purpose, to the United States in Congress, as, when agreed to by them, and duly confirmed by the several states, will effectually provide for the same.

And be it further enacted, That, in case of the death of any of the said deputies, or of their declining their appointments, the executive is hereby authorized to supply such vacancies; and the governor is requested to transmit forthwith a copy of this act to the United States in Congress, and to the executives of each of the States in the Union.

[Signed,] JOHN JONES, *Speaker of the Senate.*
JOSEPH PRENTIS, *Speaker of the House of Delegates.*
A true copy from the enrollment.—JOHN BECKLEY, *Clerk H. D.*

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IN THE HOUSE OF DELEGATES.

MONDAY, *the 4th of December*, 1786.

The house, according to the order of the day, proceeded, by joint ballot with the Senate, to the appointment of seven deputies, from this commonwealth, to a Convention proposed to be held in the city of Philadelphia, in May next, for the purpose of

revising the Federal Constitution; and the members having prepared tickets with the names of the persons to be appointed, and deposited the same in the ballot-boxes, Mr. Corbin, Mr. Matthews, Mr. David Stuart, Mr. George Nicholas, Mr. Richerd Lee, Mr. Wills, Mr. Thomas Smith, Mr. Goodall, and Mr. Tuberville, was nominated a committee to meet a committee from the Senate, in the conference chamber and jointly with them to examine the ballot-boxes, and report to the house on whom the majority of the votes should fall. The committee then withdrew, and, after some time, returned into the house, and reported that the committee had, according to order, met a committee from the Senate, in the conference chamber, and jointly with them examined the ballot-boxes, and found a majority of votes in favor of George Washington, Patrick Henry, Edmund Randolph, John Blair, James Madison, George Mason, and George Wythe, Esqrs. [Extract from the journal.]

JOHN BECKLEY, *Clerk H. Delegates*

Attest, JOHN BECKLEY, *Clerk H. D.*

IN THE HOUSE OF SENATORS.

MONDAY, *the 4th of December*, 1786.

The Senate, according to the order of the day, proceeded, by joint ballot with the House of Delegates, to the appointment of seven deputies, from this commonwealth, to a Convention proposed to be held in the city of Philadelphia, in May next, for the purpose of revising the Federal Constitution; and the members having prepared tickets, with the names of the persons to be appointed, and deposited the same in the ballot-boxes, Mr. Anderson, Mr. Nelson and Mr. Lee, were nominated a committee to meet a committee from the House of Delegates, in the conference chamber, and jointly with them to examine the ballot-boxes, and report to the house on whom the majority of votes should fall. The committee then withdrew, and, after some time, returned into the house, and reported that the committee had, according to order, met a committee from the House of Delegates, in the conference chamber, and jointly with them examined the ballot-boxes, and found a majority of votes in favor of George Washington, Patrick Henry, Edmund Randolph, John Blair, James Madison, George Mason, and George Wythe, Esqrs. [Extract from the journal.]

JOHN BECKLEY, *Clerk H. D.*

Attest, H. BROOK, *Clerk S.*

[L. S.] VIRGINIA, TO WIT:

I do hereby certify and make known, to all whom it may concern, that John Beckley, Esq., is clerk of the House of Delegates for this commonwealth, and the proper officer for attesting the proceedings of the General Assembly of the said commonwealth, and that full faith and credit ought to be given to all things attested by the said John Beckley, Esq., by virtue of his office as aforesaid.

Given under my hand, as governor of the commonwealth of Virginia, and under the seal thereof, at Richmond, this 4th day of May, 1787. EDM. RANDOLPH.

[L. S.] VIRGINIA, TO WIT:

I do hereby certify, that Patrick Henry, Esq., one of the seven commissioners appointed by joint ballot of both houses of Assembly of the commonwealth of Virginia, authorized as a deputy therefrom to meet such deputies as might be appointed and authorized by other states to assemble in Philadelphia, and to join with them in devising and discussing all such alterations and further provisions as might be necessary to render the Federal Constitution adequate to the exigencies of the Union, and in reporting such an act for that purpose to the United States in Congress as, when agreed to by them, and duly confirmed by the several states, might effectually provide for the same, did decline his appointment aforesaid; and thereupon, in pursuance of an act of the General Assembly, of the said commonwealth, entitled "An Act for appointing deputies from this commonwealth to a Convention proposed to be held in the city of Philadelphia, in May next, for the purpose of revising the Federal Constitution," I do hereby, with the advice of the council of state, supply the said vacancy by nominating James M'Clurg, Esq., a deputy for the purposes aforesaid.

Given under my hand, as governor of the said commenwealth, and under the seal thereof, this 2d day of May, in the year of our Lord, 1787.

EDM. RANDOLPH.

THE STATE OF NORTH CAROLINA.

To the Hon. Alexander Martin, Esq., Greeting:

Whereas, our General Assembly, in their late session, holden at Fayetteville, by adjournment, in the month of January last,

did, by joint ballot of the Senate and House of Commons, elect Richard Caswell, Alexander Martin, William Richardson Davie, Richard Dobbs Spaight and Willie Jones, Esqrs., deputies to attend a Convention of delegates from the several United States of Ameriea, proposed to be held at the city of Philadelphia, in May next, for the purpose of revising the Federal Constitution:

We do therefore, by these presents, nominate, commissionate, and appoint you, the said Alexander Martin, one of the deputies for and in behalf, to meet with our other deputies at Philadelphia, on the 1st of May next, and with them, or any two of them, to confer with such deputies as may have been, or shall be, appointed by the other states, for the purpose aforesaid: To hold, exercise and enjoy, the appointment aforesaid, with all powers, authorities and emoluments, to the same belonging, or in any wise appertaining—you conforming, in every instance, to the act of our said Assembly, under which you are appointed.

Witness, Richard Caswell, Esq., our governor, captain-general and commander-in-chief, under his hand and our seal, at Kinston, the 24th day of February, in the eleventh year of our independence, A. D. 1787.

RICH. CASWELL.

By his excellency's command.

WINSTON CASWELL, *P. Secretary.* [L. S.]

THE STATE OF NORTH CAROLINA.

To the Hon. William Richardson Davie, Esq., Greeting:

Whereas our General Assembly, in their late session, holden at Fayetteville, by adjournment, in the month of January last, did, by joint ballot of the Senate and House of Commons, elect Richard Caswell, Alexander Martin, William Richardson Davie, Richard Dobbs Spaight and Willie Jones, Esqrs., deputies to attend a Convention of delegates from the several United States of America, proposed to be held in the city of Philadelphia, in May next, for the purpose of revising the Federal Constitution,—

We do therefore, by these presents nominate, commissionate and appoint you, the said William Richardson Davie, one of the deputies for and in our behalf, to meet with other deputies at Philadelphia, on the 1st day of May next, and with them, or any two of them, to confer with such deputies as may have been, or

shall be, appointed by the other states, for the purpose aforesaid: To hold, exercise and enjoy, the said appointment, with powers authorities and emoluments, to the same belonging, or in any wise appertaining—you conforming, in every instance, to the act of our said Assembly, under which you are appointed.

Witness, Richard Caswell, Esq., our governor, captain-general and commander-in-chief, under his hand and our great seal, at Kinston, the 24th day of February, in the eleventh year of our independence, A. D. 1787.

RICH. CASWELL.

By his excellency's command.

WINSTON CASWELL, *P. Secretary.* [L. S.]

THE STATE OF NORTH CAROLINA.

To the Hon. Richard Dobbs Spaight, Esq., Greeting:

Whereas our General Assembly, in their late session, holden at Fayetteville, by adjournment, in the month of January last, did, by joint ballot of the Senate and House of Commons, elect Richard Caswell, Alexander Martin, William Richardson Davie, Richard Dobbs Spaight and Willie Jones, Esqrs., deputies to attend a Convention of delegates from the several United States of America, proposed to be held in the city of Philadelphia, in May next, for the purpose of revising the Federal Constitution,—

We do therefore, by these presents, nominate, commissionate and appoint you, the said Richard Dobbs Spaight, one of the deputies for and in behalf of us to meet with our other deputies at Philadelphia, on the 1st day of May next, and with them, or any two of them, to confer with such deputies as may have been, or shall be, appointed by the other states, for the purposes aforesaid: To hold, exercise, and enjoy, the said appointment, with all powers, authorities and emoluments, to the same incident and belonging, or in any wise appertaining — you conforming in every instance, to the act of our said Assembly, under which you are appointed.

Witness, Richard Caswell, Esq., our governor, captain-general and commander-in-chief, under his hand and our great seal, at Kinston, the 14th day of April, in the eleventh year of our independence, A. D. 1787.

RICH. CASWELL.

By his excellency's command.

WINSTON CASWELL, *P. Secretary.* [L. S.]

STATE OF NORTH CAROLINA.

His excellency, Richard Caswell, Esq., governor, captain-general, and commander-in-chief, in and over the state aforesaid.

To all to whom these presents shall come, Greeting:

Whereas, by an act of the General Assembly of the said State, passed the 6th day of January last, entitled "An Act for appointing deputies from this State to a Convention proposed to be held in the city of Philadelphia, in May next, for the purpose of revising the Federal Constitution," among other things it is enacted, "that five commissioners be appointed by a joint ballot of both hoth houses of Assembly, who, or any three of them, are hereby authorized as deputies from this State to meet at Philadelphia, on the 1st day of May next, then and there to meet and confer with such deputies as may be appointed by the other States for similar purposes and with them to discuss and decide upon the most effectual means to remove the defects of our federal union, and to procure the enlarged purposes which it was intended to effect; and that they report such an act to the General Assembly of this State, as, when agreed to by them, will effectually provide for the same." And it is by the said act further enacted, "That, in case of the death or resignation of any of the deputies or of their declining their appointments, his excellency, the governor for the time being, is hereby authorized to supply such vacancies": "And whereas, in consequence of the said act, Richard Caswell, Alexander Martin, William Richardson Davie, Richard Dobbs Spaight, and Willie Jones, Esqrs., were, by joint ballot of the two houses of Assembly, elected deputies for the purposes aforesaid; And whereas the said Richard Caswell hath resigned his said appointment, as one of the deputies aforesaid;—

Now, know ye, That I have appointed, and by these presents do appoint, the Hon. William Blount, Esq., one of the deputies to represent this State in the Convention aforesaid, in the room and stead of the aforesaid Richard Caswell, hereby giving and granting to the said William Blount the said powers, privileges, and emoluments, which the said Richard Caswell would have been vested with, or entitled to, had he continued in the appointment aforesaid.

Given under my hand, and the great seal of the State, at Kinston, the 23d day of April, Anno Domini 1787, and in the 11th year of American independence. RICH. CASWELL.

By his excellency's command.

WINSTON CASWELL, *P. Secretary.* [L. S.]

STATE OF NORTH CAROLINA.

His excellency, Richard Caswell, Esq., governor, captain-general, and commander in-chief, in and over the state aforesaid.

To all to whom these presents shall come, Greeting:

Whereas, by an act of the General Assembly of the said State, passed the 6th day of January last, entitled "An Act for appointing deputies from this State, passed the 6th day of January last, entitled "An Act for appointing deputies from this State to a Convention proposed to be held in the city of Philadelphia, in May next, for the purpose of revising the Federal Constitution," among other things it is enacted, "that five commissioners be appointed by joint ballot of both houses of Assembly, who, or any three of them, are hereby authorized, as deputies from this State to meet at Philadelphia, on the 1st day of May next, then and there to meet and confer with such deputies as may be appointed by the other States for similar purposes, and with them to discuss and decide upon the most effectual means to remove the defects of our federal union, and to procure the enlarged purposes which it was intended to effect, and that they report such an act to the General Assembly of this State as, when agreed to by them, will effectually provide for the same; "And it is by the said act further enacted, "That in case of the death or resignation of any of the deputies, or their declining their appointments, his excellency, the Governor for the time being, is hereby authorized to supply such vacancies;"—

And whereas, in consequence of the said act, Richard Caswell, Alexander Martin, William Richardson Davie, Richard Dobbs Spaight, and Willie Jones, Esqrs., were, by joint ballot of the two houses of the Assembly, elected deputies for the purpose aforesaid; And whereas the said Willie Jones hath declined his appointment as one of the deputies aforesaid;

Now, know ye, that I have appointed, and by these presents, do appoint, the Hon. Hugh Williamson, Esq., one of the deputies to represent this State in the Convention aforesaid, in the room and stead of the aforesaid Willie Jones, hereby giving and granting to the said Hugh Williamson the same powers, privileges, and emoluments, which the said W. Jones would have been vested with and entitled to, had he acted under the appointment aforesaid.

Given under my hand and the great seal of the State, at Kinston, the 3d day of April, Anno Domini 1787, and in the 11th year of American independence.

By his excellency's command. RICH. CASWELL.

DALLAM CASWELL, *Pro. Secretary.*

STATE OF SOUTH CAROLINA.

By his excellency, Thomas Pinckney, Esq., governor and commander-in-chief, in and over the State aforesaid.

To the Hon. John Rutledge. Esq., Greeting:

By virtue of the power and authority in me vested by the legislature of this State, in their act passed the 8th day of March last, I do hereby commission you, the said John Rutledge, as one of the deputies appointed from this State, to meet such deputies or commissioners as may be appointed and authorized by other of the United States to assemble in Convention, at the city of Philadelphia, in the month of May next, or as soon thereafter as may be, and to join with such deputies or commissioners (they being duly authorized and empowered) in devising and discussing all such alterations, clauses, articles, and provisions, as may be thought necessary to render the Federal Constitution entirely adequate to the actual situation and future good government of the confederated States; and that you, together with the said deputies or commissioners, or a majority of them, who shall be present (provided the State be not represented by less than two), do join in reporting such an act to the United States in Congress assembled, as, when approved and agreed to by them, and duly ratified and confirmed by the several States, will effectually provide for the exigencies of the Union.

Given under my hand and the great seal of the State, in the city of Charleston, this 10th day of April, in the year of our Lord 1787, and of the sovereignty and independence of the United States of America the eleventh.

By his excellency's command. THOMAS PINCKNEY.

PETER FRENEAU, *Secretary.* [L. S.]

STATE OF SOUTH CAROLINA.

By his excellency, Thomas Pinckney, Esq., governor and commander-in-chief in and over the State aforesaid.

To the Hon. Charles Pinckney, Esq., Greeting:

By virtue of power and authority in me vested by the legis-

lature of this State, in their act passed the 8th day of March last, I do hereby commission you, the said Charles Pinckney, as one of the deputies appointed from this State to meet such deputies or commissioners as may be appointed and authorized by other of the United States, to assemble in Convention at the city of Philadelphia, in the month of May next, or as soon thereafter as may be, and to join with such deputies or commissioners (they being duly authorized and empowered) in devising and discussing all such alterations, clauses, articles, and provisions, as may be thought necessary to render the Federal Constitution entirely adequate to the actual situation and future good government of the confederated States; and that you, together with the said deputies or commissioners, or a majority of them who shall be present (provided the State be not represented by less than two), do join in reporting such an act to the United States in Congress assembled, as, when approved and agreed to by them, and duly ratified and confirmed by the several States, will effectually provide for the exigencies of the Union.

Given under my hand and the great seal of the State, in the city of Charleston, this 10th day of April, in the year of our Lord 1787, and of the sovereignty and independence of the United States of America the eleventh.

THOMAS PINCKNEY.

By his excellency's command.

PETER FRENEAU, *Secretary.* [L. S.]

STATE OF SOUTH CAROLINA.

By his excellency, Thomas Pinckney, Esq., governor and commander-in-chief in and over the state aforesaid.

To the Hon. Charles Cotesworth Pinckney, Esq., Greeting:

By virtue of the power and authority in me vested by the legislature of this state, in their act passed the 8th day of March last, I do hereby commission you, the said Charles Cotesworth Pinckney, as one of the deputies appointed from this state, to meet such deputies or commissioners as may be appointed and authorized by other of the United States, to assemble in convention at the city of Philadelphia, in the month of May next, or as soon thereafter as may be, and join with such deputies or commissioners (they being duly authorized and empowered) in devising and discussing all such altera-

tions, clauses, articles, and provisions, as may be thought necessary to render the Federal Constitution entirely adequate to the actual situation and future good government of the confederated states; together with the said deputies or commissioners, or a majority of them who shall be present (provided the state be not represented by less than two), to join in reporting such an act to the United States in Congress assembled, as, when approved and agreed to by them, and duly ratified and confirmed by the several states, will effectually provide for the exigencies of the Uuion.

Given under my hand and the great seal of the state, in the city of Charleston, this 10th day of April, in the year of our Lord 1787, and of the sovereignty and independence of the United States of America the eleventh.

THOMAS PINCKNEY.

By his excellency's command.

PETER FRENEAU, *Secretary.* [L. S.]

STATE OF SOUTH CAROLINA.

By his excellency, Thomas Pinckney, Esq., governor and commander-in-chief over the state aforesaid.

To the Hon. Pierce Butler, Esq., Greeting:

By virtue of the power and authority in me vested by the legislature of this state, in their act passed the 8th day of March last, I do hereby commission you, the said Pierce Butler, as one of the deputies appointed from this state, to meet such deputies or commissioners as may be appointed or authorized by other of the United States, to assemble in Convention at the city of Philadelphia, in the month of May next, or as soon thereafter as may be, and to join with such deputies or commissioners (they being duly authorized and empowered) in devising and discussing all such alterations, clauses, articles and provisions, as may be thought necessary to render the Federal Constitution entirely adequate to the actual situation and future good government of the confederated states; and that you, together with the said deputies and commissioners, or a majority of them who shall be present (provided the state be not represented by less than two), do join in reporting such an act to the United States in Congress assembled, as, when approved and agreed to by them, and duly ratified and confirmed by the several states, will effectually provide for the exigencies of the Union.

Given under my hand and the great seal of the state, in the city of Charleston, this 10th day of April, in the year our Lord 1787, and of the sovereignty and independence of the United States of America the eleventh.

THOMAS PINCKNEY.

By his excellency's command.

PETER FRENEAU, *Secretary.* [L. S.]

STATE OF GEORGIA.

By the Hon. George Mathews, Esq., captain-general, governor, and commander-in-chief in and over the state aforesaid.

To all to whom these presents shall come, Greeting:

Know ye, That John Milton, Esq., who hath certified the annexed copy of an ordinance, entitled "An Ordinance for the Appointment of Deputies from this state, for the Purpose of revising the Federal Constitution," is secretary of the said state, in whose office the archives of the same are deposited; Therefore, all due faith, credit, and authority, are, and ought to be, had and given the same.

In testimony whereof, I have hereunto set my hand, and caused the great seal of the said state to be put and affixed, at Augusta, the 24th day of April, in the year of our Lord 1787, and of our sovereignty and independence the eleventh. GEO. MATHEWS.

By his honor's command.—J. MILTON. [L. S.]

An Ordinance for the Appointment of Deputies from this State, for the Purpose of revising the Federal Constitution.

Be it ordained by the representatives of the freemen of the State of Georgia, in General Assembly met, and by authority of the same, that William Few, Abraham Baldwin, William Pierce, George Walton, William Houston, and Nathaniel Pendleton, Esqrs., be, and they are hereby, appointed commissioners, who, or any two or more of them, are hereby authorized, as deputies from this state, to meet such deputies as may be appointed and authorized by other states, to assemble in Convention at Philadelphia, and to join with them in devising and discussing all such alterations and further provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union, and in reporting such an act for that purpose to the United States in Congress assembled as, when

agreed to by them, and duly confirmed by the several states, will effectually provide for the same. In case of the death of any of the said deputies, or of their declining their appointments, the executive are hereby authorized to supply such vacancies.

By order of the house.

Signed, WM. GIBBONS, *Speaker.*

AUGUSTA, the 10th *February*, 1787.

GEORGIA, *Secretary's Office.*

The above is a true copy from the original ordinance deposited in my office.

AUGUSTA, 24th *April*, 1787. J. MILTON, *Secretary.*

The State of Georgia, by the grace of God, free, sovereign, and independent.

To the Hon William Few, Esq.:

Whereas you, the said William Few, are, in and by an ordinance of the General Assembly of our said state, nominated and appointed a deputy to represent the same in a Convention of the United States, to be assembled at Philadelphia, for the purposes of devising and discussing all such alterations and further provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union,—

You are therefore hereby commissioned to proceed on the duties required of you in virtue of the said ordinance.

Witness our trusty and well-beloved George Mathews, Esq., our captain-general, governor, and commander-in-chief, under his hand and our great seal, this 17th day of April, in the year of our Lord 1787, and of our sovereignty and independence the eleventh.

GEO. MATHEWS, [L. S.]

By his honor's command.

J. MILTON, *Secretary.*

The State of Georgia, by the grace of God, free, sovereign, and independent,

To the Hon. William Pierce, Esq.

Whereas you, the said William Pierce, are, in and by an ordinance of the General Assembly of our said state, nominated and appointed a deputy to represent the same in Convention of the United States, to be assembled at Philadelphia, for the purpose

of devising and discussing all such alterations and further provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union,—You are therefore hereby commissioned to proceed on the duties required of you in virtue of the said ordinance.

Witness our trusty and well-beloved George Mathews, Esq., our captain-general, governor and commander-in-chief, under his hand and our great seal, at Augusta, this 17th day of April, in the year of our Lord 1787, and of our sovereignty and independence the eleventh.

GEORGE MATHEWS, [L. S.]

By his honor's command.

J. MILTON, *Secretary.*

The State of Georgia, by the grace of God, free, sovereign, and independent.

To the Hon. William Houston, Esq.:

Whereas you, the said William Houston, are, in and by an ordinance of the General Assembly of our said state, nominated and appointed a delegate to represent the same in Convention of the United States, to be assembled at Philadelphia, for the purpose of devising and discussing all such alterations and further provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union,—

You are therefore hereby commissioned to proceed on the duties required of you in virtue of the same ordinance.

Witness our trusty and well-beloved George Mathews, Esq., our captain-general, governor and commander-in-chief, under his hand and our great seal, at Augusta, this 17th day of April, in the year of our Lord 1787, and of our sovereignty and independence the eleventh.

GEO. MATHEWS, [L. S.]

By his honor's command.

J. MILTON, *Secretary.*

NO. 11.

JOURNAL OF THE FEDERAL CONVENTION.

This Convention assembled on the 14th of May 1787, at the State House in the city of Philadelphia, and adjourned from

time to time until the 25th of that month when the following Delegates appeared and took seats in the Convention:

Massachusetts.

The Hon. Rufus King, Esq.

New York.

The Hon. Robert Yates, and
Alexander Hamilton, Esqrs.

New Jersey.

The Hon. David Brearly,
Wm. Churchill Houston, and
Wm. Patterson, Esqrs.

Pennsylvania.

The Hon. Robert Morris,
Thomas Fitzsimmons,
James Wilson, and
Gouverneur Morris, Esqrs.

Delaware.

The Hon. George Read,
Richard Bassett, and
Jacob Broom, Esqrs.

Virginia.

His Excellency George Washington, Esq.
His Excellency E. Randolph, Esq.
The Hon. John Blair,
James Madison,
George Mason,
George Wythe, and
James M'Clurg, Esqrs.

North Carolina,

The Hon. Alexander Martin,
William Richardson Davie,
Richard Dobbs Spaight, and
Hugh Williamson, Esqrs.

South Carolina.

The Hon. John Rutledge,
Charles Cotesworth Pinckney,
Charles Pinckney, and
Pierce Butler, Esqrs.

Georgia.

The Hon. William Few, Esq.

NO. 12.

The Convention organized by electing George Washington as president, and William Jackson, as secretary of the Convention.

The deliberations of this Convention resulted in submitting to Congress a draft of the Constitution accompanied by the following resolutions:

"*Resolved*, That the preceding Constitution be laid before the United States in Congress assembled; and that it is the opinion of this Convention, that it should afterwards 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; and that each Convention, assenting to and ratifying the same, should give notice thereof to the United States in Congress assembled.

"*Resolved*, That it is the opinion of this Convention, that, as soon as the conventions of nine states shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the states which shall have ratified the same; and a day on which the electors should assemble to vote for the president and the time and place for commencing proceedings under this Constitution; that, after such publication, the electors should be appointed, and the senators and representatiees elected; that the electors

should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed, and directed, as the Constitution requires, to the secretary of the United States in Congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president of the Senate for the sole purpose of receiving, opening, and counting the votes, for President; and that, after he shall be chosen, the Congress, together with the President, should without delay, proceed to execute this Constitution."

"*Provided*, That no state shall be restrained from imposing the usual duties on produce exported from that state, for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses on such produce, while in the custody of public officers; but all such regulations shall, in case of abuse, be subject to the revision and control of Congress:"

CONSTITUTION.

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 I.

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 II.

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.

No person shall be a Representative who shall not have attained 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.

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.

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

The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECTION III.

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.

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.

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.

The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.

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.

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.

Judgment in cases of impeachment shall not extend farther than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION IV.

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.

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 V.

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.

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

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.

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 VI.

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.

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 VII.

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.

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.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.

The Congress shall have power To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and exercises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

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;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas and offences against the law of nations;

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

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

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

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

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;

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

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 IX.

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 eighteen hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

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.

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

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

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.

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.

No title of nobility shall be grated 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 X.

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

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 I.

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;

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.

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.

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.

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.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act

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

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased or 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.

Before he enter on the execution of his office, he shall take the following oath or affirmation: "*I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.*"

SECTION II.

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 offenses against the United States, except in cases of impeachment.

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.

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 III.

He shall from time to time give to the Congress the 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 IV.

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 I.

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 II.

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

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.

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 III.

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.

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 I.

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 II.

The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

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.

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

SECTION III.

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 Legislature of the States concerned as well as of the Congress.

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 IV.

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

ARTICLE V.

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.

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.

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.

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.

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

Done in convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GEO. WASHINGTON,
President, and deputy from Virginia.

NEW HAMPSHIRE.
John Langdon,
Nicholas Gilman.

MASSACHUSETTS.
Nathaniel Gorham,
Rufus King.

NEW JERSEY.
William Livingston,
David Brearley,
William Patterson,
Jonathan Dayton.

PENNSYLVANIA.
Benjamin Franklin,
Thomas Mifflin,
Robert Morris,
George Clymer,
Thomas Fitzimons,
Jared Ingersoll,
James Wilson,
Gouverneur Morris.

DELAWARE.
George Reed,
Gunning Bedford, jun.
John Dickinson,
Richard Bassett,
Jacob Broom.

CONNECTICUT
William Samuel Johnson,
Roger Sherman.

NEW YORK.
Alexander Hamilton.

MARYLAND.
James M'Henry,
Daniel of St. Tho. Jenifer,
Daniel Carrol.

VIRGINIA.
John Blair,
James Madison, jr.

NORTH CAROLINA.
William Blount,
Richard Dobbs Spaight,
Hugh Williamson.

SOUTH CAROLINA.
John Rutledge,
Charles C. Pinckney,
Charles Pinckney,
Pierce Butler.

GEORGIA.
William Few,
Abraham Baldwin.

Attest: WILLIAM JACKSON, *Secretary.*

On the 17th of September, 1787, the Federal Convention, having signed the draft of the constitution and closed its labors, adjourned without day.

On the 28th of September, 1787, the Congress having received the report of the Convention assembled at Philadelphia, and which had drafted the Constitution, resolved to submit the same to the people of the several States. This resolution was in these words:

"*Resolved, unanimously*, 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."

The report of the draft of the Constitution was accordingly submitted to the several state legislatures, which severally passed acts calling conventions, for the purpose of submitting the draft of the Constitution to the consideration of the people through their delegates chosen for that purpose. These Conventions having been called, and the draft of the Constitution having been submitted to them, they severally reported to Congress their ratification of the same as follows:

THE RATIFICATIONS OF THE TWELVE STATES,

Reported in the General Convention.

DELAWARE.—December 7, 1787.

We, the deputies of the people of the Delaware state, in Convention met, having taken in our serious consideration the Federal Constitution proposed and agreed upon by the deputies of the United States in a General Convention held at the city of Philadelphia, on the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, have approved, assented to, ratified, and confirmed, and by these presents do, in virtue of the power and authority to us given, for and in behalf of ourselves and our constituents, fully, freely, and entirely approve of, assent to, ratify, and confirm the said Constitution.

Done in Convention, at Dover, this seventh day of December, in the year aforesaid, and in the year of the independence of the United States of America the twelfth.

In testimony whereof, we have hereunto subscribed our names.

Sussex County.	*Kent County.*	*Newcastle County.*
John Ingraham,	Nicholas Ridgely,	James Latimer, *President*,
John Jones,	Richard Smith,	James Black,
William Moore,	George Fruitt,	John James,
William Hall,	Richard Bassett,	Gunning Bedford, Sen.,
Thomas Laws,	James Sykes,	Kensey Johns,
Isaac Cooper,	Allen M'Lean,	Thomas Watson,
Woodman Storkley,	Daniel Cummins, Sen.,	Solomon Maxwell,
John Laws,	Joseph Barker,	Nicholas Way,
Thomas Evans,	Edward White,	Thomas Duff,
Israel Holland.	George Manlove.	Gunning Bedford, Jun.

To all to whom these Presents shall come, Greeting:

I, Thomas Collins, president of the Delaware state, do hereby certify, that the above instrument of writing is a true copy of the original ratification of the Federal Constitution by the Convention of the Delaware state, which original ratification is now in my possession.

In testimony whereof, I have caused the seal of the Dela-
[L. S.] ware state to be hereunto annexed.

THOMAS COLLINS.

PENNSYLVANIA.—DECEMBER 12, 1787.

IN THE NAME OF THE PEOPLE OF PENNSYLVANIA.

Be it known unto all men, that we, the delegates of the people of the commonwealth of Pennsylvania, in General Convention assembled, have assented to and ratified, and by these presents do, in the name and by the authority of the same people, and for ourselves, assent to and ratify the foregoing Constitution for the United States of America. Done in Convention at Philadelphia, the twelfth day of December, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

FREDERICK A. MUHLENBERG, *President.*

George Latimer,	Anthony Wayne,	Benjamin Pedan,
Benjamin Rush,	William Gibbons,	John Arndt,
Hilary Baker,	Richard Downing,	Stephen Balliat,
James Wilson,	Thomas Cheney,	Joseph Horsefield,
Thomas M'Kean,	John Hannum,	David Dashler,
To. Macpherson,	Stephen Chambers,	William Wilson,
John Hunn,	Robert Coleman,	John Boyd,
George Gray,	Sebastian Graff,	Thomas Scott,
Samuel Ashmead,	John Hubley,	John Nevill,
Enoch Edwards,	Jasper Yeates,	John Alison,
Henry Wynkoop,	Henry Slagle,	Jonathan Roberts,
John Barclay,	Thomas Campbell,	John Richards,
Thomas Yardley,	Thomas Hartley,	James Morris,
Abraham Stout,	David Grier,	Timothy Pickering,
Thomas Bull,	John Black,	Benjamin Elliott,

Attest: . JAMES CAMPBELL, *Secretary.*

NEW JERSEY.—DECEMBER 18, 1787.

IN CONVENTION OF THE STATE OF NEW JERSEY.

Whereas a Convention of Delegates from the following states, viz.,—New Hampshire, Massachusetts, Connecticut, New

York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, — met at Philadelphia, for the purpose of deliberating on, and forming, a Constitution for the United States of America, — finished their session on the 17th day of September last, and reported to Congress the form which they had agreed upon, in the words following viz.: [See the *Constitution.*]

And whereas Congress, on the 28th day of September last, unanimously did resolve, "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;"

And whereas the legislature of this state did, on the 29th day of October last, resolve in the words following, viz., "*Resolved, unanimously*, That it be recommended to such of the inhabitants of this state as are entitled to vote for representatives in General Assembly, to meet in their respective counties on the fourth Tuesday in November next, at the several places fixed by law for holding the annual elections, to choose three suitable persons to serve as delegates from each county in a state Convention, for the purposes hereinbefore mentioned, and that the same be conducted agreeably to the mode, and conformably with the rules and regulations, prescribed for conducting such elections;

"*Resolved, unanimously*, That the persons so elected to serve in state Convention, do assemble and meet together on the second Tuesday in December next, at Trenton, in the county of Hunterdon, then and there to take into consideration the aforesaid Constitution and if approved of by them, finally to ratify the same, in behalf and on the part of this state, and make report thereof to the United States in Congress assembled, in conformity with the resolutions thereto annexed.

"*Resolved*, That the sheriffs of the respective counties of this state shall be, and they are hereby, required to give as timely notice as may be, by advertisements, to the people of their counties, of the time place, and purpose of holding elections, as aforesaid."

And whereas the legislature of this state did also, on the 1st day of November last, make and pass the following act, viz.,

"An Act to authorize the people of this state to meet in convention, deliberate upon, agree to, and ratify, the Constitution of the United States proposed by the late General Convention, —Be it enacted by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same, that it shall and may be lawful for the people thereof, by their delegates, to meet in Convention to deliberate upon, and, if approved of by them, to ratify, the Constitution for the United States proposed by the General Convention held at Philadelphia, and every act, matter, and clause, therein contained, conformedly to the resolutions of the legislature passed the 29th day of October, 1787, — any law, usage, or custom, to the contrary in any wise notwithstanding;"

Now be it known, that we, the delegates of the state of New Jersey, chosen by the people thereof, for the purpose aforesaid, having maturely deliberated on and considered the aforesaid proposed constitution, do hereby, for and on behalf of the people of the said state of New Jersey, agree to, ratify, and confirm, the same and every part thereof.

Done in Convention, by the unanimous consent of the members present, this 18th day of December, in the year of our Lord 1787, and of the independence of the United States of America the twelfth.

In witness whereof, we have hereunto subscribed our names.

JOHN STEVENS, *President*,
and Delegate from the county of Hunterdon.

County of Cape May,	Jesse Hand, Jeremiah Eldridge, Matthew Willdin.
Hunterdon,	David Brearly, Joshua Corshon.
Morris,	William Windes, William Woodhull, John Jacob Faesch.
Cumberland,	David Potter, Jonathan Bowen, Eli Elmer.
Sussex,	Robert Ogden, Thomas Anderson, Robert Hoops.
Bergen,	John Fell, Peter Zobriskie, Cornelius Hennion.
Essex,	John Chetwood, Samuel Hay, David Crane.
County of Middlesex,	John Neilson, John Beatty, Benjamin Manning.
Monmouth,	Elisha Lawrence, Samuel Breese, William Crawford.
Somerset,	John Witherspoon, Jacob R. Hardenberg, Frederick Frelinghuysen.
Burlington,	Thomas Reynolds, Geo. Anderson, Joshua M. Wallace.
Gloucester,	Richard Howell, Andrew Hunter, Benjamin Whitall.
Salem,	Whitten Cripps, Edmund Wetherby.

Attest:
SAMUEL W. STOCKTON, *Secretary.*

STATE OF GEORGIA.—January 2, 1788.

In Convention, Wednesday, January 2, 1788.

To all to whom these presents shall come, Greeting:

Whereas the form of a Constitution for the government of the United States of America, was, on the 17th day of September, 1787, agreed upon and reported to Congress by the deputies of the said United States convened in Philadelphia, which said Constitution is written in the words following, to wit:

And whereas the United States in Congress assembled did, on the 28th day of September, 1787, *resolve*, unanimously, "That the said report, with the resolution 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."

And whereas the legislature of the State of Georgia did, on the 26th day of October, 1787, in pursuance of the above recited resolution of Congress, *resolve*, That a convention be elected on the day of the next general election, and in the same manner that representatives are elected; and that the said Convention consist of not more than three members from each county; and that the said Convention should meet at Augusta, on the 4th Tuesday in December then next, and, as soon thereafter as convenient, proceed to consider the said report and resolutions, and to adopt or reject any part or the whole thereof.

Now know ye, that we, the delegates of the people of the State of George, in convention met, pursuant to the resolutions of the legislature aforesaid, having taken into our serious consideration the said Constitution, have assented to, ratified, and adopted, and by these presents do, in virtue of the powers and authority to us given by the people of the said State for that purpose, for and in behalf of ourselves and our constituents, fully and entirely assent to, ratify, and adopt, the said Constitution.

Done in Convention, at Augusta, in the said State, on the 2d day of January, in the year of our Lord 1788, and of the independence of the United States the 12th.

In witness whereof, we have hereunto subscribed our names.

JOHN WEREAT, *President,*
and delegate for the county of Richmond.

County of	
Chatham,	W. Stephens, Joseph Habersham.
Effingham,	Jenhim Davis, N. Brownson.
Burke,	Edward Telfair, H. Todd.
Richmond,	William Few, James M'Niel.
Wilkes,	Geo. Matthews, Flor. Sullivan, John King.
Liberty,	James Powell, John Elliot, James Maxwell.
Glynn,	George Handley, Christopher Hillary, J. Milton.
Camden,	Henry Osborn, James Seagrove, Jacob Weed.
Washington,	Jared Irwin, John Rutherford.
Greene,	Robert Christmas, Thomas Daniel, R. Middleton.

CONNECTICUT. — JANUARY 9, 1788.

IN THE NAME OF THE PEOPLE OF THE STATE OF CONNECTICUT.

We, the delegates of the people of said state, in general Convention assembled, pursuant to an act of the legislature in October last, have assented to, and ratified, and by these presents do assent to, on the 17th day of September, A. D. 1787, for the United States, of America.

Done in Convention, this 9th day of January, A. D. 1788.

In witness whereof, we have hereunto set our hands.

MATTHEW GRISWOLD, *President.*

Jeremiah Wadsworth,	Jabez Fitch,	John Curtiss,
Jesse Root,	Nehemiah Beardsley,	Asa Barnes,
Isaac Lee,	James Potter,	Stephen Mix Mitchell,
Selah Hart,	John Chandler,	John Chester,
Zebulon Peck, Jun.,	Isaac Burnham,	Oliver Ellsworth,
Elisha Pitkin,	John Wilder,	Roger Newbury,
Erastur Wolcott,	Mark Prindle,	Roger Sherman,
John Watson,	Jedediah Hubbel,	Pierpont Edwards,
John Treadwell,	Aaron Austin,	Samuel Beach,
William Judd,	Samuel Canfield,	Daniel Holbrook,
Nathaniel Minor,	Daniel Everitt,	John Holbrook,
Jonathan Sturges,	Hezekiah Fitch,	Gideon Buckingham,
Thaddeus Burr,	Joshua Porter,	Lewis Mallet, Jun.
Elisha Whittlesey,	Benjamin Hinma,	Joseph Hopkins,
Joseph Moss White,	Joseph Mosely,	John Welton,
Amos Mead,	Wait Goodrich,	Richard Law,
Amasa Learned,	Simeon Smith,	Robert M'Cune,
Samuel Huntington,	Hendrick Dow,	Daniel Sherman,
Jedediah Huntington,	Seth Paine,	Samuel Orton,
Isaac Huntington,	Asa Witter,	Asher Miller,
Robert Robbins,	Moses Cleveland,	Samuel H. Parsons,
Daniel Foot,	Samson Howe,	Ebenezer White,
Eli Hyde,	William Danielson,	Hezekiah Goodrich,
Joseph Woodbridge,	William Williams,	Dyer Throop,
Stephen Billings,	James Bradford,	Jabez Chapman,
Andrew Lee,	Joshua Dunlap,	Cornelius Higgins,

William Noyes,
Joshua Raymond, Jun.,
Jeremiah Halsey,
Wheeler Coit,
Charles Phelps,
John Beach,
Hezekiah Rogers,
Lemuel Sanford,
William Heron,
Philip Burr Bradley,
Nathan Dauchy,
James Davenport,
John Davenport, Jun.,
Wm. Samuel Johnson,
Elisha Mills,
Eliphalet Dyer,
Jedediah Elderkin,
Daniel Learned,
Moses Campbell,
Benjamin Dow,
Oliver Wolcott,
Jedediah Strong,
Moses Hawley,
Charles Burrell,
Nathan Hale,
Daniel Miles,
Asaph Hall,
Epaphras Sheldon,
Eleazer Curtiss,
John Whittlesey,
Dan. Math. Brinsmade,
Thomas Fenn,
David Smith,
Hezekiah Brainard,
Theophilus Morgan,
Hezekiah Lane,
William Hart,
Samuel Shipman,
Jeremiah West,
Samuel Chapman,
Ichabod Warner,
Samuel Carver,
Jeremiah Ripley,
Ephraim Root,
John Phelps,
Isaac Foot,
Abijah Sessions,
Caleb Holt,
Seth Crocker.

STATE OF CONNECTICUT, ss.

HARTFORD, *January Ninth*, Anno Domini 1788.

The foregoing ratification was agreed to, and signed as above, by one hundred and twenty-eight, and dissented to by forty delegates in convention, which is a majority of eighty-eight.

Certified by MATTHEW GRISWOLD, *President.*

Teste. JEDEDIAH STRONG, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS.

FEBRUARY 17, 1788.

The Convention having impartially discussed, and fully considered, the Constitution for the United States of America, reported to Congress by the Convention of Delegates from the United States of America, and submitted to us by a resolution of the General Court of the said Commonwealth, passed the 25th day of October last past, — and acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the universe in affording the people of the United States, in the course of His providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn compact with each other, by assenting to and ratifying a new Constitution, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity — do, in the name and in behalf of the people of the commonwealth of Massachusetts, assent to and ratify the said Constitution for the United States of America.

And as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears, and quiet the apprehensions, of many of the good people of this commonwealth, and more effectually guard against an undue administration of the federal government, the Convention do therefore recommend that the following alterations and provisions be introdnced into the said Constitution:

I. That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised.

II. That there shall be one representative to every thirty thousand persons, according to the census mentioned in the Constitution, until the whole number of the representatives amounts to two hundred.

III. That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution.

IV. That Congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then until Congress shall have first made a requisition upon the states to assess, levy, and pay, their respective proportions of such requisition, agreeably to the census fixed in the said Constitution, in such way and manner as the legislatures of the states shall think best; and in such case if any state shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such state's proportion together with interest thereon at the rate of six per cent per annum, from the time of payment prescribed in such requisition.

V. That Congress erect no company of merchants with exclusive advantages of commerce.

VI. That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

VII. The Supreme Judicial Federal Court shall have no jurisdiction of causes between citizens of different States, unless the matter in dispute, whether it concerns the realty or personalty,

be of the value of three thousand dollars at the least; nor shall the federal judicial powers extend to any actions between citizens of different States, where the matter in dispute, whether it concerns the realty or personalty, is not of the value of fifteen hundred dollars at least.

VIII. In civil actions between citizens of different States, every issue of fact, arising in actions of common law, shall be tried by a jury, if the parties, or either of them, request it.

IX. Congress shall at no time consent that any person, holding an office of trust or profit under the United States, shall accept of a title of nobility, or any other title or office, from any king, prince, or foreign state.

And the convention do, in the name and in behalf of the people of this commonwealth, enjoin it upon their representatives in Congress, at all times, until the alterations and provisions aforesaid have been considered, agreeably to the 5th article of the said Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions, in such manner as is provided in the said article.

And that the United States in Congress assembled may have due notice of the assent and ratification of the said Constitution by this Convention, it is *Resolved*, That the assent and ratification aforesaid be engrossed on parchment, together with the recommendation and injunction aforesaid, and with this resolution; and that his excellency, John Hancock, Esq., president, and the Hon. William Cushing, Esq., vice-president of this Convention, transmit the same, countersigned by the secretary of the Convention, under their hands and seals, to the United States in Congress assembled.

JOHN HANCOCK, *President.*
WILLIAM CUSHING, *Vice-President.*
GEORGE RICHARDS MINOT, *Secretary.*

Pursuant to the resolution aforesaid, we, the president and vice-president above named, do hereby transmit to the United States in Congress assembled the same resolution, with the above assent and ratification of the Constitution aforesaid, for the United States, and the recommendation and injunction above specified.

In witness whereof, we have hereunto set our hands and seals, at Boston, in the commonwealth aforesaid, this 7th day of

February, Anno Domini 1788, and in the twelfth year of the independence of the United States of America.

JOHN HANCOCK, *President.* [L. S.]
WM. CUSHING, *Vice-President.* [L. S.]

MARYLAND.—April 28, 1788.

In Convention of the Delegates of the People of the State of Maryland, April 28, 1788.

We, the delegates of the people of the State of Maryland, having fully considered the Constitution of the United States of America, reported to Congress by the Convention of deputies from the United States of America, held in Philadelphia, on the 17th day of September, in the year 1787, of which the annexed is a copy, and submitted to us by a resolution of the General Assembly of Maryland, in November session, 1787, do, for ourselves, and in the name and on the behalf of the people of this State, assent to and ratify the said Constitution.

In witness whereof, we have hereunto subscribed our names.

GEO. PLATER, *President.*

Richard Barnes,	Richard Potts,	George Gale,
Charles Chilton,	Abraham Few,	Henry Waggaman,
N. Lewis Sewall,	William Paca,	John Stewart,
William Tilghman,	William Granger,	James Gordon Heron,
Donalson Yeates,	Joseph Wilkinson,	Samuel Evans,
Isaac Perkins,	Charles Graham,	Fielder Bowie,
John Gale,	John Cheslea, Jun.,	Osb. Sprigg,
N. Hammond,	W. Smith,	Benjamin Hall,
Daniel Sullivan,	G. R. Brown,	George Digges,
James Shaw,	J. Parnham,	Nicholas Carrole,
Jos. Gilpin,	Zeph. Turner,	A. C. Hanson,
H. Hollingsworth,	Michael Jenifer Stone,	James Tilghman,
John Done,	R. Goldsborough, Jun.,	John Seney,
Thomas Johnson,	Edward Lloyd,	James Hollyday,
Thomas S. Lee,	John Stevens,	William Hemsley,
Peter Chaille,	Peter Edmonson,	Henry Shryock,
James Martin,	James M'Henry,	Thomas Cramphin,
William Morris,	John Coulter,	Richard Thomas,
J. Richardson,	Thomas Sprigg,	William Deakins, Jun.,
William Richardson,	John Stull,	Benj. Edwards.
Matt. Driver,	Moses Rawlings,	

Attest.—Wm. Harwood, *Clerk.*

STATE OF SOUTH CAROLINA.—May 23, 1788.

In Convention of the people of the State of South Carolina, by their representatives held in the city of Charleston, on Monday the 12th day of May, and continued by divers adjournments to Friday, the 23d day of May, Anno Domini 1788, and in the 12th year of the independence of the United States of America.

The Convention, having maturely considered the Constitution, or form of government, reported to Congress by the Convention of Delegates from the United States of America, and submitted to them by a resolution of the legislature of this State, passed the 17th and 18th days of February last, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to the people of the said United States, and their posterity,—Do, in the name and behalf of the people of this State, hereby assent to and ratify the said Constitution.

Done in Convention, the 23d day of May, in the year of our Lord 1788, and of the independence of the United States of America the twelfth.

THOMAS PINCKNEY, *President.* [L. S.]
Attest. JOHN SANDFORD DART, *Secretary.* [L. S.]

And whereas it is essential to the preservation of the rights reserved to the several States, and the freedom of the people, under the operations of a general government, that the right of prescribing the manner, time, and places, of holding the elections to the federal legislature, should be forever inseparably annexed to the sovereignty of the several States,—This Convention doth declare, that the same ought to remain, to all posterity, a perpetual and fundamental right in the local, exclusive of the interferenee of the general government, except in cases where the legislatures of the States shall refuse or neglect to perform and fulfill the same, according to the tenor of the said Constitution.

This Convention doth also declare, that no section or paragraph of the said Constitution warrants a construction that the States do not attain every power not expressly relinquished by them, and vested in the general government of the Union.

Resolved, That the general government of the United States ought never to impose direct taxes, *but* where the moneys arising from the duties, imports, and excises, are insufficient for the public exigencies, *nor then until* Congress shall have made a requisition upon the States to assess, levy, and pay, their respective proportions of such requisitions; and in case any State shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such state's proportion, together with interest thereon, at the rate of six

per centum per annum from the time of payment prescribed by such requisition.

Resolved, That the third section of the sixth article ought to be amended, by inserting the word "other" between the words "no" and "religious."

Resolved, That it be a standing instruction to all such delegates as may hereafter be elected to represent this State in the general government, to exert their utmost abilities and influence to effect an alteration of the Constitution, conformably to the aforegoing resolutions.

Done in Convention, the 23d day of May in the year of our Lord 1788, and of the independence of the United States of America the twelfth.

THOMAS PINCKNEY, *President.* [L. S.]
Attest. JOHN SANDFORD DART, *Secretary.* [L. S.]

STATE OF NEW HAMPSHIRE.—JUNE 21, 1788.

IN CONVENTION OF THE DELEGATES OF THE PEOPLE OF THE STATE OF NEW HAMPSHIRE, JUNE THE 21ST 1788.

The Convention having impartially discussed and fully considered the Constitution for the United States of America, reported to Congress by the Convention or Delegates from the United States of America, and submitted to us by a resolution of the General Court of said State, passed the 14th day of December last past, and acknowledging with grateful hearts the goodness of the Supreme Ruler of the universe in affording the people of the United States, in the course of His providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn compact with each other, by assenting to and ratifying a new Constitution, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity,—Do, in the name and behalf of the people of the State of New Hampshire, assent to and ratify the said Constitution for the United States of America. And as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this State, and more effectually guard against an undue administration of the federal government,—The Convention do therefore

recommend that the following alterations and provisions be introduced into the said Constitution:

I. That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised.

II. That there shall be one representative to every thirty thousand persons, according to the census mentioned in the Constitution, until the whole number of representatives amount to two hundred.

III. That Congress do not exercise the powers vested in them by the fourth section of the first article but in cases when a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress; nor shall Congress in any case make regulations contrary to a free and equal representation.

IV. That Congress do not lay direct taxes but when the moneys arising from impost, excise, and their other resources, are insufficient for the public exigencies, nor then, until Congress shall have first made a requisition upon the States to assess, levy, and pay, their respective proportions of such requisition, agreeably to the census fixed in the said Constitution, in such way and manner as the legislature of the State shall think best; and in such case, if any State shall neglect, then Congress may assess and levy such State's proportion, together with the interest thereon, at the rate of six per cent per annum, from the time of payment prescribed in such requisition.

V. That Congress shall erect no company of merchants with exclusive advantages of commerce.

VI. That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

VII. All common law cases between citizens of different States shall be commenced in the common law courts of the respective States: and no appeal shall be allowed to the federal court, in such cases, unless the sum or value of the thing in controversy amount to three thousand dollars.

VIII. In civil actions between citizens of different States, every issue of fact, arising in actions at common law, shall be tried by jury, if the parties, or either of them, request it.

IX. Congress shall at no time consent that any person holding an office of trust or profit under the United States, shall accept any title of nobility, or any other title or office, from any king, prince or foreign state,

X. That no standing army shall be kept up in time of peace, unless with the consent of three-fourths of the members of each branch of Congress; nor shall soldiers, in time of peace, be quartered upon private houses, without the consent of the owners.

XI. Congress shall make no laws touching religion, or to infringe the rights of conscience.

XII. Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.

And the Convention do, in the name and in behalf of the people of this State, enjoin it upon their representatives in Congress, at all times until the alterations and provisions aforesaid have been considered agreeably to the fifth article of the said Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions, in such manner as is provided in the article.

And that the United States in Congress assembled may have due notice of the assent and ratification of the said Constitution by this Convention, it is *Resolved*, That the assent and ratification aforesaid be engrossed on parchment, together with the recommendation and injunction aforesaid, and with this resolution; and that John Sullivan, Esq., president of the Convention, and John Langdon, Esq., president of the State, transmit the same, countersigned by the secretary of Convention, and the secretary of State, under their hands and seals, to the United States in Congress assembled.

JOHN SULLIVAN, *Pres. of the Conv.* [L. S.]
JOHN LANGDON, *Pres. of the State.* [L. S.]

By order. { JOHN CALF, *Secretary of Convention.*
{ JOSEPH PEARSON, *Secretary of State.*

VIRGINIA.—to wit.—JUNE 26, 1788.

We, the delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the Federal Convention, and

being prepared as well as the most mature deliberation hath enabled us, to decide thereon,—Do, in the name and in behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them, and at their will; that, therefore, no right, of any denomination, can be canceled, abridged, restrained, or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that, among other essential rights, the liberty of conscience, and of the press, cannot be canceled, abridged, restrained, or modified, by any authority of the United States. With these impressions, with a solemn appeal to the Searcher of all hearts for the purity of our intentions, and under the conviction that whatsoever imperfections may exist in the Constitution ought rather to be examined in the mode prescribed therein, than to bring the Union into danger by a delay with a hope of obtaining amendments previous to the ratifications,—We, the said delegates, in the name and in behalf of the people of Virginia, do, by these presents, assent to and ratify the Constitution recommended, on the 17th day of September, 1787, by the Federal Convention, for the government of the United States, hereby announcing to all those whom it may concern, that the said Constitution is binding upon the said people, according to an authentic copy hereto annexed, in the words following. [See *Constitution.*]

Done in Convention, this 26th day of June, 1788.

By order of the Convention.

EDM. PENDLETON, *President.* [L. S.]

[*See* DEBATES IN CONVENTION, *where the Declaration or Bill of Rights, and Amendments, are printed at large.*]

UNITED STATES IN CONGRESS ASSEMBLED.

WEDNESDAY, *July* 2, 1788.

The State of New Hampshire having ratified this Constitution, transmitted to them by the act of the 28th of September last, and transmitted to Congress their ratification, and the

same being read, the president reminded Congress that this was the ninth ratification transmitted and laid before them; whereupon,—

On motion of Mr. Clarke, seconded by Mr. Edwards,—

Ordered, That the ratifications of the Constitution of the United States, transmitted to Congress, be referred to a committee to examine the same and report an act to Congress for putting the said constitution into operation, in pursuance of the resolutions of the late Federal Convention.

On the question to agree to this order, the yeas and nays being required by Mr. Yates:

New Hampshire,	Mr. Gilman, ... *Ay.*	*Ay.*
	Mr. Wigate, ... *Ay.*	
Massachusetts,	Mr. Dane, ... *Ay.*	*Ay.*
	Mr. Otis, ... *Ay.*	
Rhode Island,	Mr. Arnold	*Excused.*
	Mr. Hazard, ...	
Connecticut,	Mr. Huntington, ... *Ay.*	*Ay.*
	Mr. Edwards, ... *Ay.*	
New York,	Mr. L'Hommedieu, *Ay.*	*Divided.*
	Mr. Yates, ... *No.*	
New Jersey	Mr. Clarke, ... *Ay.*	*Ay.*
	Mr. Elmer, ... *Ay.*	
	Mr. Dayton, ... *Ay.*	
Pennsylvania,	Mr. Bingham, ... *Ay.*	*Ay.*
	Mr. Read, ... *Ay.*	
Maryland,	Mr. Contee, ... *Ay.*	
Virginia	Mr. Griffin, ... *Ay.*	*Ay.*
	Mr. Carrington, ... *Ay.*	
	Mr. Brown, ... *Ay.*	
South Carolina,	Mr. Huger, ... *Ay.*	*Ay.*
	Mr. Parker, ... *Ay.*	
	Mr. Tucker, ... *Ay.*	
Georgia,	Mr. Few, ... *Ay.*	*Ay.*
	Mr. Baldwin. ..... *Ay.*	

So it passed in the affirmative.

STATE OF NEW YORK.—July 26, 1788.

We, the delegates of the people of the state of New York, duly elected and met in Convention, having maturely considered the Constitution for the United States of America, agreed to on the 17th day of September, in the year 1787, by the Convention then assembled at Philadelphia, in the commonwealth of Pennsylvania (a copy whereof precedes these presents), and having also seriously and deliberately considered the present situation of the United States,—Do declare and make known,—

That all power is originally vested in, and consequently

derived from, the people, and that government is instituted by them for their common interest, protection, and security.

That the enjoyment of life, liberty, and the pursuit of happiness, are essential rights, which every government ought to respect and preserve.

That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same; and that those clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.

That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others.

That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people *capable of bearing arms*, is the proper, natural, and safe defense of a free state.

That the militia should not be subject to martial law, except in time of war, rebellion, or insurrection.

That standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that at all times the military should be under strict subordination to the civil power.

That, in time of peace, no soldier ought to be quartered in any house without the consent of the owner, and in time of war only by the civil magistrate, in such manner as the laws may direct.

That no person ought to be taken, imprisoned, or disseized of his freehold, or be exiled, or deprived of his privileges, franchises, life, liberty, or property, but by due process of law.

That no person ought to be put twice in jeopardy of life or

limb, for one and the same offense; nor, unless in case of impeachment, be punished more than once for the same offense.

That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of *habeas corpus.*

That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

That (except in the government of the land and naval forces, and of the militia when in actual service, and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States; and such trial should be speedy, public, and by an impartial jury of the county where the crime was committed; and that no person can be found guilty without the unanimous consent of such jury. But in cases of crimes not committed within any county of any of the United States, and in cases of crimes committed within any county in which a general insurrection may prevail, or which may be in the possession of a foreign enemy, the inquiry and trial may be in such county as the Congress shall by law direct; which county, in the two cases last mentioned, should be as near as conveniently may be to that county in which the crime may have been committed;—and that, in all criminal prosecutions, the accused ought to be informed of the cause and nature of his accusation, to be confronted with his accusers and the witnesses against him, to have the means of producing his witnesses, and the assistance of counsel for his defense; and should not be compelled to give evidence against himself.

That the trial by jury, in the extent that it obtains by the common law of England, is one of the greatest securities to the rights of a free people, and ought to remain inviolate.

That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property; and therefore, that all warrants to search suspected places, or seize any freeman, his papers, or property, without information, upon oath or affirmation, of sufficient cause, are grievous and oppressive; and that all general warrants (or such

in which the place or person suspected are not particularly designated) are dangerous, and ought not to be granted.

That the people have a right peaceably to assemble together to consult for their common good, or to instruct their representatives, and that every person has a right to petition or apply to the legislature for redress of grievances.

That the freedom of the press ought not to be violated or restrained.

That there should be, once in four years, an election of the President and Vice-President, so that no officer, who may be appointed by the Congress to act as President, in case of the removal, death, resignation, or inability, of the President and Vice-President, can in any case continue to act beyond the termination of the period for which the last President and Vice-President were elected.

That nothing contained in the said Constitution is to be construed to prevent the legislature of any state from passing laws at its discretion, from time to time, to divide such state into convenient districts, and to apportion its representatives to and amongst such districts.

That the prohibition contained in the said Constitution, against *ex post facto* laws, extends only to laws concerning crimes.

That all appeals in causes determinable according to the course of common law, ought to be by writ of error, and not otherwise.

That the judicial power of the United States, in cases in which a State may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a State.

That the judicial power of the United States, as to controversies between citizens of the same State, claiming lands under grants from different States, is not to be construed to extend to any other controversies between them, except those which relate to such lands, so claimed, under grants of different States.

That the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, is not in any case to be increased, enlarged, or extended, by any faction, collusion, or mere suggestion; and that no treaty is to be construed so to operate as to alter the constitution of any State.

Under these impressions, and declaring that the rights afore-

said cannot be abridged or violated and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration,—We, the said delegates, in the name and in the behalf of the people of the State of New York, do, by these presents, assent to and ratify the said Constitution. In full confidence, nevertheless, that, until a convention shall be called and convened for proposing amendments to the said Constitution, the militia of this State will not be continued in service out of this State, for a longer term than six weeks, without the consent of the legislature thereof; that the Congress will not make or alter any regulation in this State, respecting the times, places and manner, of holding elections for senators or representatives, unless the legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance be incapable of making the same; and that, in those cases, such power will only be exercised until the legislature of this State shall make provision in the premises; that no excise will be imposed on any article of the growth, production, or manufacture of the United States, or any of them, within this State, ardent spirits excepted; and the Congress will not lay direct taxes within this State, but when the moneys arising from the impost and excise shall be insufficient for the public exigencies, nor then, until Congress shall first have made a requisition upon this State to assess, levy, and pay the amount of such requisition, made agreeably to the census fixed in the said Constitution, in such way and manner as the legislature of this State shall judge best; but that in such case, if the State shall neglect or refuse to pay its proportion, pursuant to such requisition, then the Congress may assess and levy this State's proportion, together with interest, at the rate of six per centum per annum, from the time at which the same was required to be paid.

Done in Convention, at Poughkeepsie, in the county of Dutchess, in the State of New York, the 26th day of July, in the year of our Lord 1788.

By order of the Convention.

GEO. CLINTON, *President.*

Attested: JOHN M'KESSON, A. B. BANKER, } *Secretaries.*

And the Convention do, in the name and behalf of the people of the State of New York, enjoin it upon their representatives in Congress to exert all their influence, and use all reasonable means, to obtain a ratification of the following amendments to the said Constitution, in the manner prescribed therein; and in all laws to be passed by the Congress, in the mean time, to conform to the spirit of the said amendments, as far as the Constitution will admit.

That there shall be one representative for every thirty thousand inhabitants, according to the enumeration or census mentioned in the Constitution, until the whole number of representatives amounts to two hundred, after which that number shall be continued or increased, but not diminished, as the Congress shall direct, and according to such ratio as the Congress shall fix, in conformity to the rule prescribed for the apportionment of representatives and direct taxes.

That the Congress do not impose any excise on any article (ardent spirits excepted) of the growth, production, or manufacture of the United States, or any of them.

That Congress do not lay direct taxes but when the moneys arising from the impost and excise shall be insufficient for the public exigencies, nor then, until Congress shall first have made a requisition upon the States to assess, levy, and pay, their respective proportions of such requisition, agreeably to the census fixed in the said Constitution, in such way and manner as the legislatures of the respective States shall judge best; and in such case, if any State shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such State's proportion, together with interest at the rate of six per centum per annum, from the time of payment prescribed in such requisition.

That the Congress shall not make or alter any regulation, in any State, respecting the times, places, and manner, of holding elections for senators and representatives, unless the legislature of such State shall neglect or refuse to make laws and regulations for the purpose, or from any circumstance be incapable of making the same, and then only until the legislature of such State shall make provision in the premises; provided, that Congress may prescribe the time for the election of representatives.

That no person, except natural-born citizens, or such as were citizens on or before the 4th day of July, 1776, or such as held

commissions under the United States during the war, and have at any time since the 4th day of July, 1776, become citizens of one or other of the United States, and who shall be freeholders, shall be eligible to the places of President, Vice President, or members of either house of the Congress of the United States.

That the Congress do not grant monopolies, or erect any company with exclusive advantages of commerce.

That no standing army or regular troops shall be raised, or kept up, in time of peace, without the consent of two thirds of the senators and representatives present in each house.

That no money be borrowed on the credit of the United States without the assent of two thirds of the senators and representatives present in each house.

That the Congress shall not declare war without the concurrence of two-thirds of the senators and representatives present in each house.

That the privilege of the *habeas corpus* shall not, by any law, be suspended for a longer term than six months, or until twenty days after the meeting of the Congress next following the passing the act for such suspension.

That the right of Congress to exercise exclusive legislation over such district, not exceeding ten miles square, as may, by cession of a particular State, and the acceptance of Congress, become the seat of government of the United States, shall not be so exercised as to exempt the inhabitants of such district from paying the like taxes, imposts, duties, and excises, as shall be imposed on the other inhabitants of the State in which such district may be; and that no person shall be privileged within the said district from arrest for crimes committed, or debts contracted, out of the said district.

That the right of exclusive legislation, with respect to such places as may be purchased for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings, shall not authorize the Congress to make any law to prevent the laws of the States, respectively, in which they may be, from extending to such places in all civil and criminal matters, except as to such persons as shall be in the service of the United States; nor to them with respect to crimes committed without such places.

That the compensation for the senators and representatives be ascertained by standing laws; and that no alteration of the existing rate of compensation shall operate for the benefit of the

representatives until after a subsequent election shall have been had.

That the Journals of the Congress shall be published at least once a year, with the exception of such parts, relating to treaties or military operations, as, in the judgment of either house, shall require secrecy; and that both houses of Congress shall always keep their doors open during their sessions, unless the business may, in their opinion, require secrecy. That the yeas and nays shall be entered on the Journals whenever two members in either house may require it.

That no capitation tax shall ever be laid by Congress.

That no person be eligible as a senator for more than six years in any term of twelve years; and that the legislatures of the respective States may recall their senators, or either of them, and elect others in their stead, to serve the remainder of the time for which the senators so recalled were appointed.

That no senator or representative shall, during the time for which he was elected, be appointed to any office under the authority of the United States.

That the authority given to the executives of the States to fill up the vacancies of senators be abolished, and that such vacancies be filled by the respective legislatures.

That the power of Congress to pass uniform laws concerning bankruptcy shall only extend to merchants and other traders; and the States, respectively, may pass laws for the relief of other insolvent debtors.

That no person shall be eligible to the office of President of the United States a third time.

That the executive shall not grant pardons for treason, unless with the consent of the Congress; but may, at his discretion, grant reprieves to persons convicted of treason, until their cases can be laid before Congress.

That the President, or person exercising his powers for the time being, shall not command an army in the field in person, without the previous desire of the Congress.

That all letters patent, commissions, pardons, writs, and processes of the United States, shall run in the name of *the people of the United States*, and be tested in the name of the President of the United States, or the person exercising his powers for the time being, or the first judge of the court out of which the same shall issue, as the case may be.

That the Congress shall not constitute, ordain, or establish, any tribunals of inferior courts, with any other than appellate jurisdiction, except such as may be necessary for the trial of cases of admiralty and maritime jurisdiction, and for the trial of piracies and felonies committed on the high seas; and in all other cases to which the judicial power of the United States extends, and in which the Supreme Court of the United States has not original jurisdiction, the causes shall be heard, tried, and determined, in some one of the State Courts, with the right of appeal to the Supreme Court of the United States, or other proper tribunal, to be established for that purpose by the Congress, with such exceptions, and under such regulations, as the Congress shall make.

That the court for the trial of impeachments shall consist of the Senate, the Judges of the Supreme Court of the United States, and the first or senior judge, for the time being, of the highest court of general and ordinary common-law jurisdiction in each State; that the Congress shall, by standing laws, designate the courts in the respective States answering this description, and, in States having no courts exactly answering this description, shall designate some other court, preferring such, if any there be, whose judge or judges may hold their places during good behavior; provided, that no more than one judge, other than Judges of the Supreme Court of the United States, shall come from one State.

That the Congress be authorized to pass laws for compensating the judges for such services, and for compelling their attendance; and that a majority, at least of the said judges shall be requisite to constitute the said court. That no person impeached shall sit as a member thereof; that each member shall, previous to the entering upon any trial, take an oath or affirmation honestly and impartially to hear and determine the cause; and that a majority of the members present shall be necessary to a conviction.

That persons aggrieved by any judgment, sentence or decree of the Supreme Court of the United States, in any cause in which that court has original jurisdiction, with such exceptions, and under such regulations, as the Congress shall make concerning the same, shall, upon application, have a commission, to be issued by the President of the United States to such men learned in the law as he shall nominate, and by and with

the advice and consent of the Senate appoint not less than seven, authorizing such commissioners, or any seven or more of them, to correct the errors in such judgment, or to review such sentence and decree, as the case may be, and to do justice to the parties in the premises.

That no judge of the Supreme Court of the United States shall hold any other office under the United States, or any of them.

That the judicial power of the United States shall extend to no controversies respecting land, unless it relate to claims of territory or jurisdiction between states, and individuals under the grants of different States.

That the militia of any state shall not be compelled to serve without the limits of the State, for a longer term than six weeks, without the consent of the legislature thereof.

That the words *without the consent of the Congress*, in the seventh clause of the ninth section of the first article of the Constitution, be expunged.

That the senators and representatives, and all executive and judicial officers of the United States, shall be bound by oath or affirmation not to infringe or violate the constitution or rights of the respective States.

That the legislatures of the respective States may make provision, by law, that the electors of the election districts, to be by them appointed, shall choose a citizen of the United States, who shall have been an inhabitant of such district for the term of one year immediately preceding the time of his election, for one of the representatives of such State.

Done in Convention, at Poughkeepsie, in the county of Dutchess, in the State of New York, the 26th day of July, in the year of our Lord 1788.

By order of the Convention.

GEO. CLINTON, *President.*

Attested: JOHN M'KESSON, AB. B. BANKER, } *Secretaries.*

STATE OF NORTH CAROLINA.—AUGUST 1, 1788.

IN CONVENTION, *August* 1, 1788.

Resolved, that a declaration of rights, asserting and securing from encroachments the great principles of civil and religious liberty, and the unalienable rights of the people, together with

amendments to the most ambiguous and exceptionable parts of the said Constitution of government, ought to be laid before Congress, and the convention of the States that shall or may be called for the purpose of amending the said Constitution, for their said consideration, previous to the ratification of the Constitution aforesaid on the part of the State of North Carolina.

SAM. JOHNSON.

By order. J. HUNT, *Secretary.*

On the 14th of July, 1788, the committee reported an act for putting the constitution into operation, which was debated until the 13th of September of the same year, when the following resolution was adopted:

"Whereas the Convention assembled in Philadelphia, pursuant to the resolution of Congress of the 21st of February, 1787, did, on the 17th of September, in the same year, report to the United States in Congress assembled a Constitution for the people of the United States; whereupon Congress, on the 28th of the same September, did resolve, unanimously, '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;' and whereas the Constitution so reported by the Convention, and by Congress transmitted to the several legislatures, has been ratified in the manner therein declared to be sufficient for the establishment of the same, and such ratifications, duly anthenticated, have been received by Congress, and are filed in the office of the secretary; therefore, —

"*Resolved*, That the first Wednesday in January next be the day for appointing electors in the several states which, before the said day, shall have ratified the said Constitution; that the first Wednesday in February next be the day for the electors to assemble in their respective states, and vote for a President; and that the first Wednesday in March next be the time, and the present seat of Congress the place, for commencing proceedings under the said Constitution."

The elections of the several states were held conformably to the above resolution. On Wednesday the 4th of March, 1789, proceedings commenced under the Constitution; and on the 30th of April, of the same year, GEORGE WASHINGTON, elected

by the unanimous suffrage of the electors, was inaugurated as President of the United States.

On the 11th of January, 1790, the following ratification of the Constitution, by the state of North Carolina, was communicated by President Washington to both houses of Congress:

STATE OF NORTH CAROLINA.—NOVEMBER 21, 1789.

IN CONVENTION.

Whereas the General Convention which met in Philadelphia, in pursuance of a recommendation of Congress, did recommend to the citizens of the United States a Constitution or form of government in the following words, namely,—

"We, the people," &c. [Here follows the Constitution of the United States, *verbatim.*]

Resolved, That this Convention, in behalf of the freemen, citizens and inhabitants of the state of North Carolina, do adopt and ratify the said Constitution and form of government.

Done in Convention this 21st day of November, one thousand seven hundred and eighty-nine.

(Signed) SAMUEL JOHNSON,
President of the Convention.

J. HUNT, }
JAMES TAYLOR, } *Secretaries.*

RHODE ISLAND.—MAY 29, 1790.

[The Constitution of the United States of America precedes the following ratification.]

Ratification of the Constitution by the Convention of the State of Rhode Island and Providence Plantations.

We, the delegates of the people of the state of Rhode Island and Providence Plantations, duly elected and met in Convention, having maturely considered the Constitution for the United States of America, agreed to on the seventeenth day of September, in the year one thousand seven hundred and eighty-seven, by the Convention then assembled at Philadelphia, in the commonwealth of Pennsylvania (a copy whereof precedes these presents), and having also seriously and deliberately considered the present situation of this state, do declare and make known,—

I. That there are certain natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, — among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.

II. That all power is naturally vested in, and consequently derived from, the people; that magistrates, therefore, are their trustees and agents, and at all times amenable to them.

III. That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness. That the rights of the states respectively to nominate and appoint all state officers, and every other power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or to the departments of government thereof, remain to the people of the several states, or their respective state governments, to whom they may have granted the same; and that those clauses in the Constitution which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed as exceptions to certain specified powers, or as inserted merely for greater caution.

IV. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence; and therefore all men have a natural, equal, and unalienable right to the exercise of religion according to the dictates of conscience; and that no particular religious sect or society ought to be favored or established, by law, in preference to others.

V. That the legislative, executive, and judiciary powers of government should be separate and distinct; and, that the members of the two first may be restrained from oppression, by feeling and participating the public burdens, they should, at fixed periods, be reduced to a private station, returned into the mass of the people, and the vacancies be supplied by certain and regular elections, in which all or any part of the former members to be eligible or ineligible, as the rules of the constitution of government and the laws shall direct.

VI. That elections of representatives in legislature ought to be free and frequent; and all men having sufficient evidence of permanent common interest with, and attachment to, the

community, ought to have the right of suffrage; and no aid, charge, tax, or fee, can be set, rated, or levied, upon the people without their own consent, or that of their representatives so elected, nor can they be bound by any law to which they have not in like manner consented for the public good.

VII. That all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people in the legislature, is injurious to their rights, and ought not to be exercised.

VIII. That, in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury in his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces), nor can he be compelled to give evidence against himself.

IX. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the trial by jury, or by the law of the land.

X. That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed.

XI. That in controversies respecting property, and in suits between man and man, the ancient trial by jury, as hath been exercised by us and our ancestors, from the time whereof the memory of man is not to the contrary is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.

XII. That every freeman ought to obtain right and justice, freely and without sale, completely and without denial, promptly and without delay; and that all establishments or regulations contravening these rights are oppressive and unjust.

XIII. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

XIV. That every person has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property; and therefore, that all warrants to search suspec-

ted places, to seize any person, his papers, or his property, without information upon oath or affirmation of sufficient cause, are grievous and oppressive; and that all general warrants (or such in which the place or person suspected are not particularly designated) are dangerous, and ought not to be granted.

XV. That the people have a right peaceably to assemble together to consult for their common good, or to instruct their representatives; and that every person has a right to petition or apply to the legislature for redress of grievances.

XVI. That the people have a right to freedom of speech, and of writing and publishing their sentiments. That freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

XVII. That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defense of a free state; that the militia shall not be subject to martial law, except in time of war, rebellion, or insurrection; that standing armies in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that, at all times, the military should be under strict subordination to the civil power; that in time of peace, no soldier ought to be quartered in any house without the consent of the owner, and in time of war only by the civil magistrates, in such manner as the law directs.

XVIII. That any person religiously scrupulous of bearing arms ought to be exempted upon payment of an equivalent to employ another to bear arms in his stead.

Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments hereafter mentioned will receive an early and mature consideration, and conformably to the fifth article of said Constitution, speedily become a part thereof, — We, the said delegates, in the name and in the behalf of the people of the state of Rhode Island and Providence Plantations, do, by these presents, assent to and ratify the said Constitution. In full confidence, nevertheless, that until the amendments hereafter proposed and undermentioned shall be agreed to and ratified, pursuant to the aforesaid fifth article, the militia of this state will not be continued in service out of this state, for a

longer term than six weeks, without the consent of the legislature thereof; that the Congress will not make or alter any regulation in this state respecting the times, places, and manner of holding elections for senators or representatives, unless the legislature of this state shall neglect or refuse to make laws or regulations for the purpose, or, from any circumstance, be incapable of making the same; and that, in those cases, such power will only be exercised until the legislature of this state shall make provision in the premises; that the Congress will not lay direct taxes within this state, but when the moneys arising from impost, tonnage, and excise, shall be insufficient for the public exigencies, nor until the Congress shall have first made a requisition upon this state to assess, levy, and pay, the amount of such requisition made agreeable to the census fixed in the said Constitution, in such way and manner as the legislature of this State shall judge best; and that Congress will not lay any capitation or poll-tax.

Done in Convention at Newport, in the county of Newport, in the State of Rhode Island and Providence Plantations, the twenty-ninth day of May, in the year of our Lord one thousand seven hundred and ninety and in the fourteenth year of the independence of the United States of America.

By order of the Convention.

(Signed) DANIEL OWEN, *President.*

Attest. DANIEL UPDIKE, *Secretary.*

And the Convention do, in the name and behalf of the people of the State of Rhode Island and Providence Plantations, enjoin it upon their senators and representative or representatives, which may be elected to represent this State in Congress, to exert all their influence, and use all reasonable means, to obtain a ratification of the following amendments to the said Constitution, in the manner prescribed therein; and in all laws to be passed by the Congress in the mean time, to conform to the spirit of the said amendments, as far as the Constitution will admit.

AMENDMENTS.

I. The United States shall guaranty to each state its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this Constitution expressly delegated to the United States.

II. That Congress shall not alter, modify, or interfere in, the times, places or manner, of holding elections for senators and representatives, or either of them, except when the legislature of any state shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same, or in case when the provision made by the state is so imperfect as that no consequent election is had, and then only until the legislature of such state shall make provision in the premises.

III. It is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state; but to remove all doubts or controversies respecting the same, that it be especially expressed, as a part of the Constitution of the United States, that Congress shall not, directly or indirectly, either by themselves or through the judiciary, interfere with any one of the States, in the redemption of paper money already emitted, and now in circulation, or in liquidating and discharging the public securties of any one state; that each and every state shall have exclusive right of making such laws and regulations for the before mentioned purpose as they shall think proper.

IV. That no amendments to the Constitution of the United States, hereafter to be made, pursuant to the fifth article, shall take effect, or become a part of the Constitution of the United States, after the year one thousand seven hundred and ninety-three, without the consent of eleven of the States heretofore united under the Confederation.

V. That the judicial powers of the United States shall extend to no possible case where the cause of action shall have originated before the ratification of this Constitution, except in disputes between States about their territory, disputes between persons claiming lands under grants of different States, and debts due to the United States.

VI. That no person shall be compelled to do military duty otherwise than by voluntary enlistment, except in cases of general invasion; anything in the second paragraph of the sixth article of the Constitution, or any law made under the Constitution, to the contrary notwithstanding.

VII. That no capitation or poll-tax shall ever be laid by Congress.

VIII. In cases of direct taxes, Congress shall first make requisitions on the several States to assess, levy, and pay, their respective proportions of such requisitions, in such way and manner as the legislatures of the several States shall judge best; and in case any State shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such State's proportion, together with interest, at the rate of six per cent per annum, from the time prescribed in such requisition.

IX. That Congress shall lay no direct taxes without the consent of the legislatures of three-fourths of the States in the Union.

X. That the Journal of the proceedings of the Senate and House of Representatives shall be published as soon as conveniently may be, at least once in every year; except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy.

XI. That regular statements of the receipts and expenditures of all public moneys shall be published at least once a year.

XII. As standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity, and as, at all times, the military should be under strict subordination to the civil power, that, therefore, no standing army or regular troops shall be raised or kept up in time of peace.

XIII. That no moneys be borrowed, on the credit of the United States, without the assent of two-thirds of the Senators and Representatives present in each House.

XIV. That the Congress shall not declare war without the concurrence of two-thirds of the Senators and Representatives present in each House.

XV. That the words "without the consent of Congress," in the seventh clause in the ninth section of the first article of the Constitution be expunged.

XVI. That no judge of the Supreme Court of the United States shall hold any other office under the United States, or any of them; nor shall any officer appointed by Congress, or by the President and Senate of the United States, be permitted to hold any office under the appointment of any of the States.

XVII. As a traffic tending to establish or continue the slavery of any part of the human species is disgraceful to the cause of

liberty and humanity, that Congress shall, as soon as may be, promote and establish such laws and regulations as may effectually prevent the importation of slaves of every description into the United States.

XVIII. That the state legislatures have power to recall, when they think it expedient, their federal senators, and to send others in their stead.

XIX. That Congress have power to establish a uniform rule of inhabitancy or settlement of the poor of the different states throughout the United States.

XX. That Congress erect no company with exclusive advantages of commerce.

XXI. That when two members shall move and call for the ayes and nayes on any question, they shall be entered on the Journals of the houses respectively.

Done in Convention, at Newport, in the county of Newport, in the state of Rhode Island and Providence Plantations, the twenty-ninth day of May, in the year of our Lord one thousand seven hundred and ninety, and the 14th year of the independence of the United States of America.

By order of the Convention.

(Signed) DANIEL OWEN, *President.*

Attest. DANIEL UPDIKE, *Secretary.*

On the 9th of February, 1791, the following acts of the state of Vermont, relating to the Constitution, were communicated to Congress:

STATE OF VERMONT.

An Act to authorize the People of this State to meet in Convention, to deliberate upon and agree to the Constitution of the United States.

Whereas, in the opinion of this legislature, the future interest and welfare of this state render it necessary that the Constitution of the United States of America, as agreed to by the Convention at Philadelphia, on the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, with the several amendments and alterations, as the same has been established by the United States, should be laid before the people of this state for their approbation, —

It is hereby enacted, by the General Assembly of the state of Vermont, That the first constable in each town shall warn

the inhabitants, who, by law, are entitled to vote for representatives in General Assembly, in the same manner as they warn freemen's meetings, to meet in their respective towns on the first Tuesday of December next, at ten o'clock forenoon, at the several places fixed by law for holding the annual election; and when so met they shall proceed, in the same manner as in the election of representatives, to choose some suitable person, from each town, to serve as a delegate in a state convention, for the purpose of deliberating upon and agreeing to the Constitution of the United States as now established; and the said constable shall certify to the said convention the person so chosen in the manner aforesaid. And,

It is hereby further enacted, by the authority aforesaid, That the persons so elected to serve in State convention, as aforesaid, do assemble and meet together on the first Thursday of January next, at Bennington, then and there deliberate upon the aforesaid Constitution of the United States, and if approved of by them, finally to assent to and ratify the same, in behalf and on the part of the people of this State, and make report thereof to the governor of this State for the time being, to be by him communicated to the President of the United States, and the legislature of this State.

STATE OF VERMONT, SECRETARY'S OFFICE,
BENNINGTON, *January* 21, 1791.

The preceding is a true copy of an act passed by the legislature of the State of Vermont, the twenty-seventh day of October, in the year of our Lord one thousand seven hundred and ninety.

ROSWELL HOPKINS, *Secretary of State.*

IN CONVENTION OF THE DELEGATES OF THE PEOPLE OF THE STATE OF VERMONT.

Whereas, by an act of the commissioners of the State of New York, done at New York, the seventeenth day of October, in the fifteenth year of the independence of the United States of America, one thousand seven hundred and ninety, every impediment, as well on the part of the State of New York as on the part of the State of Vermont, to the admission of the State of Vermont into the Union of the United States of America, is removed; in full faith and assurance that the same will stand approved and ratified by congress.

This Convention having impartially deliberated upon the Constitution of the United States of America, as now established,

submitted to us by an act of the General Assembly of the State of Vermont, passed October the twenty-seventh, one thousand seven hundred and ninety,—Do, in virtue of the power and authority to us given for that purpose, fully and entirely approve of, assent to, and ratify, the said Constitution; and declare that, immediately from and after this State shall be admitted by the Congress into the Union, and to a full participation of the benefits of the government now enjoyed by the States in the Union, the same shall be binding on us, and the people of the State of Vermont forever.

Done at Bennington, in the county of Bennington, the tenth day of January, in the fifteenth year of the independence of the United States of America, one thousand seven hundred and ninety-one.

In testimony whereof, we have hereunto subscribed our names.

(Signed) THOMAS CHITTENDEN, *President.*

Signed by one hundred and five members—dissented, four.

Attest. ROSWELL HOPKINS, *Secretary of Convention.*

NO. 14.

At the first session of the first Congress under the Constitution, the following resolution was adopted:

CONGRESS OF THE UNITED STATES;

Begun and held in the City of New York, on Wednesday, the 4th of March, 1789.

"The conventions of a number of the States having, at the time of their adopting of the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution:

"*Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled,* two-thirds of both houses concurring, that the following articles be proposed to the legislatures of the several States, as amendments to the Constitution of the United States, all or any of which articles, when ratified by three-fourths of the said legislatures, to be valid, to all intents and purposes, as part of the said Constitution, namely —

"*Articles in addition to, and Amendment of, the Constitution of the United States of America, proposed by Congress, and*

ratified by the Legislatures of the several States, pursuant to the Fifth article of the original Constitution.

"ART. I. After the first enumeration required by the first article of the Constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand.

"ART. II. No law varying the compensation for services of the senators and representatives shall take effect, until an election of representatives shall have intervened.

"ART. III. 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.

"ART. IV. A well-regulated militia being necessary to the seeurity of a free State, the right of the people to keep and bear arms shall not be infringed.

"ART. V. 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 prescribed by law.

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

"ART. VII. 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 offense, to be twice be 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.

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

"ART. IX. 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 in common law.

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

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

"ART. XII. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

"FREDERICK AUGUSTUS MUHLENBERG,
Speaker of the House of Representatives.

"JOHN ADAMS, *Vice-President of the United States, and President of the Senate.*"

NO. 15.

Which, being transmitted to the several State legislatures, were decided upon by them, according to the following returns:

By the State of New Hampshire.—Agreed to the whole of the said amendments, except the 2d article.

By the State of New York.—Agreed to the whole of the said amendments, except the 2d article.

By the State of Pennsylvania.—Agreed to the 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, and 12th articles of the said amendments.

By the State of Delaware.—Agreed to the whole of the said amendments except the 1st article.

By the State of Maryland.—Agreed to the whole of the said twelve amendments.

By the State of North Carolina.—Agreed to the whole of the said twelve amendments.

By the State of Rhode Island and Providence Plantations. —Agreed to the whole of the said twelve articles.

By the State of New Jersey.—Agreed to the whole of the said amendments except the 2d article.

By the State of Virginia.—Agreed to the whole of the said twelve articles.

No returns were made by the States of Massachusetts, Connecticut, Georgia and Kentucky.

The amendments thus proposed became a part of the Constitution, the first and second of them excepted, which were not ratified by a sufficient number of the State legislatures.

At the first session of the third Congress, the following amendment was proposed to the State legislatures:

UNITED STATES IN CONGRESS ASSEMBLED.

"*Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled,* two-thirds of both houses concurring, That the following article be proposed to the legislatures of the several States, as an amendment to the Constitution of the United States; which when ratified by three-fourths of the said legislatures, shall be valid as part of the said Constitution, namely,—

"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 or subjects of any foreign State.

"FREDERICK AUGUSTUS MUHLENBERG,
Speaker of the House of Representatives.
"JOHN ADAMS, *Vice-President of the United States, and President of the Senate.*

"Attest. J. BECKLEY, *Clerk of the House of Representatives.*
SAM. A. OTIS, *Secretary of the Senate.*"

From the Journals of the House of Representatives, at the second session of the third Congress, it appears that returns from the State legislatures, ratifying this amendment, were received, as follows:—

From New York, Massachusetts, Vermont, New Hampshire, Georgia, and Delaware.

At the first session of the fourth Congress, further returns, ratifying the same amendment, were received from Rhode Island and North Carolina.

At the second session of the fourth Congress, on the 2d of March, 1787, the following resolution was adoped:

"UNITED STATES IN CONGRESS ASSEMBLED.

"*Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President be requested to adopt some speedy and effectual means of obtaining information from the States of Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Tennessee, and South Carolina, whether they have ratified the amendment proposed by Congress to the Constitution concerning the suability of States; if they have, to obtain the proper evidence thereof.

"JONATHAN DAYTON,

Speaker of the House of Representatives.

"WILLIAM BINGHAM.

President, pro tempore, of the Senate.

Approved March 2, 1797.

"GEORGE WASHINGTON,

President of the United States."

At the second session of the fifth Congress, the following message from the President of the United States was transmitted to both houses:

From a report of the Secretary of State, made under the direction of President Adams, on the 28th December, 1797, it appeared that the States of Connecticut, Maryland and Virginia, had ratified the amendment; that New Jersey and Pennsylvania had not ratified it; South Carolina had not definitely acted upon it. No answers had been received from Kentucky and Tennessee.

MESSAGE.

"*Gentlemen of the Senate, and Gentlemen of the House of Representatives:—*

"I have an opportunity of transmitting to Congress a report of the Secretary of State, with a copy of an act of the legislature of the State of Kentucky consenting to the ratification of the amendment of the Constitution of the United States proposed by Congress, in their resolution of the second day of

December, 1793, relative to the suability of States. This amendment having been adopted by three-fourths of the several States, may now be declared to be a part of the Constitution of the United States.

"UNITED STATES, *January* 8, 1798. JOHN ADAMS."

NO. 16.

"EIGHTH CONGRESS OF THE UNITED STATES.

At the First Session, begun and held at the City of Washington, in the Territory of Columbia, on Monday, the seventeenth of October, one thousand eight hundred and three.

"*Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled,* two-thirds of both houses concurring, That, in lieu of the third paragraph of the first section of the second article of the Constitution of the United States,—which, when ratified by three-fourths of the legislatures of the several States, shall be valid to all intents and purposes, as a part of the said Constitution, to wit,—

"'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 a 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 representations 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.

"'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 that purpose shall consist of two-thirds of the whole number of the Senators, and a majority of the whole number shall be necessary to a choice.

"'But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.'

"Attest. JOHN BECKLEY,
Clerk of the House of Representatives of the United States.
"SAM. A. OTIS,
Secretary to the Senate of the United States."

At the same session, an act passed of which the following is the 1st section:

"*An act supplementary to an Act, entitled An Act relative to the election of a President and Vice-President of the United States, and declaring the Officer who shall act as President, in Case of Vacancies in the Offices both of President and Vice-President.*

"*Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled*, That, whenever the amendment proposed, during the present session of Congress, to the Constitution of the United States, respecting the manner of voting for President and Vice-President of the United States, shall have been ratified by the legislatures of three-fourths of the several states, the secretary of state shall forthwith cause a notification thereof to be made to the executive of every state, and shall also cause the same to be published in at least one of the newspapers printed in each state, in which the laws of the United States are annually published. The

executive authority of each state shall cause a transcript of the said notification to be delivered to the electors appointed for that purpose, who shall first thereafter meet in such state, for the election of a President and Vice-President of the United States; and whenever the said electors shall have received the said transcript of notification, or whenever they shall meet more than five days subsequent to the publication of the above-mentioned amendment, in one of the newspapers of the state, by the secretary of state, they shall vote for President and Vice-President of the United States, respectively, in the manner directed by the above-mentioned amendment; and, having made and signed three certificates of all the votes given by them, each of which certificates shall contain two distinct lists—one, of the votes given for President, and the other, of the votes given for Vice-President—they shall seal up the said certificates, certifying on each that lists of all the votes of such state given for President, and of all the votes given for Vice-President, are contained therein, and shall cause the said certificates to be transmitted and disposed of, and in every other respect act in conformity with the provisions of the act to which this is a supplement. And every other provision of the act to which this is a supplement, and which is not virtually repealed by this act, shall extend and apply to every election of a President and Vice-President of the United States, made in conformity to the above-mentioned amendment to the Constitution of the United States."

NO. 17.

And on the 25th of September, 1804, the following notice, in pursuance of the above provision, was issued from the state department:

"*By James Madison, Secretary of State of the United States.*

"Public notice is hereby given, in pursuance of the act of Congress passed on the 26th March last, entitled 'An Act supplementary to the Act entitled An Act relative to the Election of a President and Vice-President of the United States, and declaring the officer who shall act as President, in case of vacancies in the offices both of President and Vice-President,' That the amendment proposed, during the last session of Congress, to the Constitution of the United States, respecting the manner of voting for President and Vice-President of the

United States, has been ratified by the legislatures of three-fourths of the several states—to wit, by those of Vermont, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, Ohio, Kentucky, Tennessee, North Carolina, South Carolina, and Georgia, and has thereby become valid as part of the Constitution of the United States.

"Given under my hand, at the city of Washington, this twenty-fifth day of September, 1804.

(Signed) JAMES MADISON."

NO. 18.

LOUISIANA.

To illustrate the mode of investing the people of a territory with the franchise of a political state in the Union, take the history of Louisiana from the time of the cession of that territory by France to the United States, until the state of Louisiana was incorporated and her inhabitants enfranchised.

By an act of congress of October 31, 1803, the President of the United States was authorized to take possession of, and to occupy the territory ceded by France to the United States—the Louisiana territory—and to maintain the authority of the nation therein by the employment of the army and navy to any extent necessary; and, until the expiration of that session of congress, unless a temporary government was sooner provided the military, civil and judicial powers exercised by the officers of the existing government, were to be vested in such persons as the president might appoint, for the purpose of maintaining and protecting the inhabitants of the territory in the free enjoyment of their liberty, property and religion. (2 United States Statutes at Large, p. 245)

On the 26th March, 1804, by an act of congress of that date, the country ceded by France to the United States under the name of the Louisiana territory, was divided into two territories; and the lands south of the Mississippi territory was denominated the territory of Orleans, and a territorial government was organized therein. The executive power in the territory was vested in a governor, who was to be appointed by the president; a secretary was to be appointed by the president, whose duty it was, under the direction of the governor, to record and preserve all the papers and proceedings of the executive, and all the acts of the governor and legislative counsels, and transmit authentic copies of the proceedings of

the governor in his executive department, every six months, to the president.

The legislative powers for the territory were vested in the governor and a legislative council to be appointed by the president, consisting of thirteen of the most fit and discreet persons of the territory. Their laws were to be laid before congress, and if disapproved by them, they were to be of no force. This act also provided for the establishment of a judiciary department, the judges, marshals, and district attorney to be appointed by the president. The governor and council were to have no control over the primary disposition of the soil, nor to tax the lands of the United States; nor to decide upon any interfering claims. The laws of the United States were to be enforced in such territory. (2 United States Statutes at Large, pp. 283, 284.) The residue of the Louisiana territory was to be called the district of Louisiana, and was substantially, for political or governmental purposes, annexed to the territory of Indiana, to be under the government of the officers of that territory. (See 2 United States Statutes at Large, p. 287.)

By the act of congress of February 20, 1811, to enable the people of the territory of Orleans to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, it was provided, that the inhabitants of all that part of the territory or country ceded under the name of Louisiana by the treaty made at Paris, etc., between the United States and France, contained within the limits therein described, etc., are hereby authorized to form for themselves a constitution and state government, and to assume such name as they may deem proper under the provisions, and upon the conditions therein mentioned. Then followed the directions as to the persons who should participate in the formation of the constitution and government, and such other directions and conditions as congress saw fit to impose upon them. (See 2 United States Statutes at Large, pp. 641, 642.)

Under this enabling act of congress, the authorized inhabitants of that territory elected their delegates, held their convention, prepared their constitution of state government, and submitted the same to congress, which, on the 8th of April, 1812, by preamble, reciting that the people of the territory of Orleans, within the boundaries therein set forth, had,

under the enabling act of February 20, 1811, formed a constitution and state government, and had submitted said constitution to congress, which was approved. Therefore congress enacted that the said State of Louisiana should be one, and it was thereby declared to be one of the United States of America; and admitted into the Union on an equal footing with the original states. (See 2 United States Statutes at Large, pp. 701, 702, 703, 704.)

In tracing the legal and political history of the formation and incorporation of the State of Louisiana into the Union, the reader will find the substantial history of all the new states, which have been created and admitted into political union with the other states since the organization of the general government. This of itself is a sufficient refutation of the theory of the original and inherent sovereignty of the states as political institutions.

MISSISSIPPI.

March 1, 1817, congress passed an act to enable the people of the western part of the Mississippi territory to form a constitution and a state government, and for the admission of such state in the Union, on an equal footing with the original states. (3 United States Statutes at Large, pp. 348, 349.) The people of the territory having complied with the provisions of the enabling act aforesaid, were admitted as a political corporation, into the Union by a joint resolution of congress, Dec. 10, 1817. (See 3 United States Statutes at Large, p. 472.)

The history of the incorporation and admission of new states into the Union has always been by the authority of the United States, and not by the authority of the states themselves.

NO. 19.

SUPREME COURT OF THE UNITED STATES.

**Ex-parte:* In the matter of A. H. GARLAND, of Arkansas, Petitioner. *Ex-parte:* In the matter of R. H. MARR, of Louisiana, Petitioner,	On motion for leave to practice as attorneys, etc.
and	
JOHN A. CUMMINGS, Plaintiff in Error *v.* THE STATE OF MISSOURI.	In error to the S. C. of the State of Mo.

Mr. Justice MILLER dissenting.†

I dissent from the opinion of the court just announced. * * * * * * * The constitution of the United States makes ample provision for the establishment of courts of justice to administer her laws, and to protect and enforce the rights of her citizens. Article III, Section I, of that instrument, says that "the judicial power of the United States shall be vested in one supreme court, and such inferior courts as the congress may, from time to time, ordain and establish." Section 8, of Article I, closes its enumeration of the powers conferred on congress by the broad declaration that it shall have authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers, vested by the constitution in the government of the United States, or in any department thereof."

Under these provisions congress has ordained and established circuit courts, district courts, and territorial courts, and has, by various statutes, fixed the number of the judges of the supreme court. It has limited and defined the jurisdiction of all these, and determined the salaries of the judges who hold them. It has provided for their necessary officers, as marshals, clerks, prosecuting attorneys, bailiffs, commissioners, and jurors. And by the act of 1789, commonly called the judiciary act, passed by the first congress assembled under the constitution, it is among other things enacted, that "in all the courts of the United States the parties may plead and manage their causes personally or by the assistance of such counsel or attorneys-at-law as,

* December Term, 1866.

† Chief Justice Chase and Justices Swayne and Davis concurring. Want of space prevents us from publishing this interesting and valuable opinion at length. We select from it such parts as relate to the position and duties of attorneys, and to the definition of bills of attainder and *ex post facto* laws.

by the rules of the said courts respectively, shall be permitted to manage and conduct causes therein."

It is believed that no civilized nation of modern times has been without a class of men intimately connected with the courts, and with the administration of justice, called, variously, attorneys, counselors, solicitors, proctors, and other terms of similar import. The enactment which we have just cited recognizes this body of men, and their utility in the judicial system of the United States, and imposes upon the courts the duty of providing rules, by which persons entitled to become members of this class may be permitted to exercise the privilege of managing and conducting causes in these courts. They are as essential to the successful working of the courts, as the clerks, sheriffs, and marshals, and perhaps as the judges themselves, since no instance is known of a court of law without a bar.

The right to practice law in the courts as a profession, is a privilege granted by the law, under such limitations or conditions in each state or government as the law-making power may prescribe. It is a privilege and not an absolute right. The distinction may be illustrated by the difference between the right of a party to a suit in court to defend his own cause, and the right of another to appear and defend for him. The one, like the right to life, liberty, and the pursuit of happiness, is inalienable. The other is the privilege conferred by law on a person who complies with the prescribed conditions.

Every state in the Union, and every civilized government, has laws by which the right to practice in its courts may be granted, and makes that right to depend on the good moral character and professional skill of the party on whom the privilege is conferred. This is not only true in reference to the first grant of license to practice law, but the continuance of the right is made, by these laws, to depend upon the continued possession of those qualities.

Attorneys are often deprived of this right, upon evidence of bad moral character, or specific acts of immorality and dishonesty which show that they no longer possess the requisite qualifications.

All this is done by law, either statutory or common; and whether the one or the other, equally the expression of legislative will, for the common law exists in this country only as it is adopted or permitted by the legislatures, or by constitutions.

No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of congress, to the same extent that they are under legislative control in the states, or in any other government; and to the same extent that the judges, clerks, marshals, and other officers of the court are subject to congressional legislation. Having the power to establish the courts, to provide for and regulate the practice in those courts, to create their officers, and prescribe their functions, can it be doubted that congress has the full right to prescribe terms for the admission, rejection, and expulsion of attorneys, and for requiring of them an oath, to show whether they have the proper qualifications for the discharge of their duties? * * * * * * *

The majority of this court, however, do not base their decisions on the mere absence of authority in congress, and in the states, to enact the laws which are the subject of consideration, but insist that the constitution of the United States forbids, in prohibitory terms, the passage of such laws, both to the congress and to the States. The provisions of that instrument, relied on to sustain this doctrine, are those which forbid Congress and the states, respectively, from passing bills of attainder and *ex post facto* laws. It is said that the act of congress, and the provision of the constitution of the state of Missouri under review, are in conflict with both these prohibitions, and are therefore void.

I will examine this proposition, in reference to these two clauses of the constitution, in the order in which they occur in that instrument.

1. In regard to bills of attainder, I am not aware of any judicial decision by a court of federal jurisdiction which undertakes to give a definition of that term. We are therefore compelled to recur to the bills of attainder passed by the English parliament, that we may learn so much of their peculiar characteristics as will enable us to arrive at a sound conclusion, as to what was intended to be prohibited by the constitution.

The word attainder is derived, by Sir Thomas Tomlins, in his law dictionary, from the words *attincta* and *attinctura*, and is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death." The effect of this corruption of blood was, that the party attainted

lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance.

This attainder, or corruption of blood, as a consequence of judicial sentence of death, continued to be the law of England, in all cases of treason, to the time that our constitution was framed, and, for aught that is known to me, is the law of that country, on condemnation for treason, at this day.

Bills of attainder, therefore, or acts of attainder, as they were called after they were passed into statutes, were laws which declared certain persons *attainted*, and their blood corrupted so that it had lost all heritable quality. Whether it declared other punishment or not, it was an act of attainder if it declared this. This also seems to have been the main feature at which the authors of the constitution were directing their prohibition; for after having, in article I, prohibited the passage of bills of attainder—in section nine, to congress, and in section ten, to the states—there still remained to the judiciary the power of declaring attainders. Therefore, to still further guard against this odious form of punishment, it is provided, in section 3, of article III, concerning the judiciary, that, while congress shall have power to declare the punishment of treason, no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

This, however, while it was the chief, was not the only peculiarity of bills of attainder which was intended to be included within the constitutional restriction. Upon an attentive examination of the distinctive features of this kind of legislation, I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned, which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial.

2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule.

3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry. (See Story on the Constitution, Sec. 1344.)

It is no cause for wonder that men who had just passed successfully through a desperate struggle in behalf of civil liberty should feel a detestation for legislation of which these were the prominent features. The framers of our political system had a full appreciation of the necessity of keeping separate and distinct the primary departments of the government. Mr. Hamilton, in the seventy-eighth number of the Federalist, says that he agrees with the maxim of Montesquieu, that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And others of the ablest numbers of that publication are devoted to the purpose of showing that in our Constitution these powers are so justly balanced and restrained that neither will probably be able to make much encroachment upon the others. Nor was it less repugnant to their views of the security of personal rights, that any person should be condemned without a hearing, and punished without a law previously prescribing the nature and extent of that punishment. They therefore struck boldly at all this machinery of legislative despotism, by forbidding the passage of bills of attainder and *ex post facto* laws, both to congress and to the states.

It remains to inquire whether, in the act of congress under consideration (and the remarks apply with equal force to the Missouri Constitution), there is found any one of these features of bills of attainder, and if so, whether there is sufficient in the act to bring it fairly within the description of that class of bills.

It is not claimed that the law works a corruption of blood. It will therefore be conceded at once, that the act does not contain this leading feature of bills of attainder.

Nor am I capable of seeing that it contains a conviction or sentence, of any designated person or persons. It is said that it is not necessary to a bill of attainder that the party to be affected should be named in the act, and the attainder of the Earl of Kildare and his associates is referred to as showing that the act was aimed at a class. It is very true that bills of attainder have been passed against persons by some description, when their names were unknown. But in such cases the law leaves nothing to be done to render its operation effectual, but to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out. Such was the case alluded to.

The act declared the guilt and punishment of the Earl of Kildare, and all who were associated with him in his enterprise, and all that was required to insure their punishment was to prove that association.

If this were not so, then the act was mere *brutum fulmen*, and the parties other than the earl could only be punished, notwithstanding the act, by proof of their guilt before some competent tribunal.

No person is pointed out in the act of congress, either by name or by description, against whom it is to operate. The oath is only required of those who propose to accept an office or to practice law; and as a pre-requisite to the exercise of the functions of the lawyer, or the officer, it is demanded of all persons alike. It is said to be directed as a class to those alone who were engaged in the rebellion; but this is manifestly incorrect, as the oath is exacted alike from the loyal and the disloyal, under the same circumstances, and *none* are compelled to take it. Neither does the act declare any conviction, either of persons or classes. If so, who are they, and of what crime are they declared to be guilty? Nor does it pronounce any sentence or inflict any punishment. If by any possibility it can be said to *provide* for conviction and sentence, though not found in the act itself, it leaves the party himself to determine his own guilt or innocence, and pronounce his own sentence. It is not, then, the act of congress, but the party interested, that tries and condemns. We shall see, when we come to the discussion of this act in its relation to *ex post facto* laws, that it inflicts no punishment.

A statute, then, which designates no criminal, either by name or description—which declares no guilt, pronounces no sentence, and inflicts no punishment—can in no sense be called a bill of attainder.

2. Passing now to consider whether the statute is an *ex post facto* law, we find that the meaning of that term as used in the constitution is a matter which has been frequently before this court, and it has been so well defined as to leave no room for controversy. The only doubt which can arise is as to the character of the particular case claimed to come within the definition, and not as to the definition of the phrase itself.

All the cases agree that the term is to be applied to criminal causes alone, and not to civil proceedings. In the language of

Justice STORY, in the case of *Watson* v. *Mercer* (8 Peters, 88), "*ex post facto* laws relate to penal and criminal proceedings, which impose punishment and forfeiture, and not to civil proceedings, which affect private rights retrospectively." (*Calder* v. *Bull*, 3 Dallas, 386; *Fletcher* v. *Peck*, 6 Cranch, 87; *Ogden* v. *Saunders*, 12 Wheaton, 266; *Satterlee* v. *Matthewson*, 2 Peters, 380.)

The first case on the subject is that of *Calder* v. *Bull*, and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded. The court divides all laws which come within the meaning of that clause of the constitution into four classes —

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2d. Every law that aggravates a crime, or makes it greater than it was when committed.

3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

4th. Every law that alters the rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offense to convict the offender.

Again, the court says, in the same opinion, that "the true distinction is between *ex post facto* laws and retrospective laws," and proceeds to show that, however unjust the latter may be, they are not prohibited by the constitution, while the former are.

This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the constitution added to the classes of laws here set forth, as coming within that clause of the organic law. In looking carefully at these four classes of laws, two things strike the mind as common to them all —

1st. That they contemplate the trial of some person charged with an offense.

2d. That they contemplate a punishment of the person found guilty of such offense.

Now, it seems to me impossible to show that the law in question contemplates either the trial of a person for an offense committed before its passage, or the punishment of any person

for such an offense. It is true that the act requiring an oath provides a penalty for falsely taking it. But this provision is prospective, as no one is supposed to take the oath until after the passage of the law. This prospective penalty is the only thing in the law which partakes of a criminal character. It is in all other respects a civil proceeding. It is simply an oath of office, and it is required of all office-holders alike. As far as I am informed, this is the first time in the history of jurisprudence that taking an oath of office has been called a criminal proceeding. If it is not a criminal proceeding, then, by all the authorities, it is not an *ex post facto* law.

No *trial* of any person is contemplated by the act for any past offense. Nor is any party supposed to be charged with any offense in the only proceeding which the law provides.

A person proposing to appear in the court as an attorney is asked to take a certain oath. There is no charge made against him that he has been guilty of any of the crimes mentioned in that oath. There is no prosecution. There is not even an implication of guilt by reason of tendering him the oath, for it is required of the man who has lost everything in defense of the government, and whose loyalty is written in the honorable scars which cover his body, the same as of the guiltiest traitor in the land. His refusal to take the oath subjects him to no prosecution. His taking it clears him of no guilt, and acquits him of no charge.

Where, then, is this *ex post facto* law which tries and punishes a man for a crime committed before it was passed? It can only be found in those elastic rules of construction which cramp the powers of the federal government when they are to be exercised in certain directions, and enlarges them when they are to be exercised in others. No more striking example of this could be given than the cases before us, in one of which the constitution of the United States is held to confer no power on congress to prevent traitors practicing in her courts, while in the other it is held to confer power on this court to nullify a provision of the constitution of the state of Missouri, relating to a qualification required of ministers of religion.

But the fatal vice in the reasoning of the majority is in the meaning which they attach to the word punishment, in its application to this law, and in its relation to the definitions which have been given of the phrase, *ex post facto* laws.

Webster's second definition of the word punish is this: "In a loose sense, to afflict with punishment, etc., with a view to amendment, to chasten." And it is in this loose sense that the word is used by this court, as synonymous with chastisement, correction, loss, or suffering to the party supposed to be punished, and not in the legal sense, which signifies a penalty inflicted for the commission of a crime.

And so, in this sense, it is said that whereas persons who had been guilty of the offenses mentioned in the oath were, by the laws then in force, only liable to be punished with death and confiscation of all their property, they are by a law passed since these offenses were committed, made liable to the enormous additional punishment of being deprived of the right to practice law!

The law in question does not in reality deprive a person guilty of the acts therein described of any right which he possessed before; for it is equally sound law, as it is the dictate of good sense, that a person who, in the language of the act, has voluntarily borne arms against the government of the United States while a citizen thereof, or who has voluntarily given aid, comfort, counsel, or encouragement to persons engaged in armed hostility to the goverment, has, by doing those things, forfeited his right to appear in her courts and take part in the administration of her laws. Such a person has exhibited a trait of character which, without the aid of the law in question, authorizes the court to declare him unfit to practice before it, and to strike his name from the roll of its attorneys if it be found there.

I have already shown that this act provides for no indictment or other charge, that it contemplates and admits of no trial, and I now proceed to show that even if the right of the court to prevent an attorney, guilty of the acts mentioned, from appearing in its forum, depended upon the statute, that still it inflicts no punishment in the legal sense of that term.

Punishment, says Mr. WHARTON in his Law Lexicon, is "the penalty for transgressing the law;" and this is, perhaps, as comprehensive, and at the same time as accurate a definition as can be given. Now what law is it whose transgression is punished in the case before us? None is referred to in the act, and there is nothing on its face to show that it was intended as an additional punishment for any offense described in any other

act. A part of the matters of which the applicant is required to purge himself on oath may amount to treason, but surely there could be no intention or desire to inflict this small additional punishment for a crime whose penalty already was death and confiscation of property.

In fact the word punishment is used by the court in a sense which would make a great number of laws, partaking in no sense of a criminal character, laws for punishment, and therefore *ex post facto.*

A law, for instance, which increased the facility for detecting frauds by compelling a party to a civil proceeding to disclose his transactions under oath would result in his punishment in this sense, if it compelled him to pay an honest debt which could not be coerced from him before. But this law comes clearly within the class described by this court in *Watson* v. *Mercer*, as civil proceedings which affect private rights retrospectively.

Again, let us suppose that several persons afflicted with a form of insanity heretofore deemed harmless, shall be found all at once to be dangerous to the lives of persons with whom they associate. The state, therefore, passes a law that all persons so affected shall be kept in close confinement until their recovery is assured. Here is a case of punishment in the sense used by the court for a matter existing before the passage of the law. Is it an *ex post facto* law? And if not, in what does it differ from one? Just in the same manner that the act of congress does, namely, that the proceeding is civil and not criminal, and that the imprisonment in the one case and the prohibition to practice law in the other, are not punishments in the legal meaning of that term.

The civil law maxim, "*Nemo debet bis vexari, pro una et eadem causa,*" has been long since adopted into the common law as applicable both to civil and criminal proceedings, and one of the amendments of the constitution incorporates this principle into that instrument so far as punishment affects life or limb. It results from this rule, that no man can be twice lawfully punished for the same offense. We have already seen that the acts of which the party is required to purge himself on oath constitute the crime of treason. Now if the judgment of the court in the cases before us, instead of permitting the parties to appear without taking the oath, had been the other

way, here would have been the case of a person who, on the reasoning of the majority, is punished by the judgment of this court for the same acts which constitute the crime of treason.

Yet, if the applicant here should afterward be indicted for treason on account of these same acts, no one will pretend that the proceedings here could be successfully pleaded in bar of that indictment. But why not? Simply because there is here neither trial or punishment within the legal meaning of these terms.

I maintain that the purpose of the act of congress was to require loyalty as a qualification of all who practice law in the national courts. The majority say that the purpose was to impose a punishment for past acts of disloyalty.

In pressing this argument it is asserted by the majority that no requirement can be justly said to be a qualification which is not attainable to all, and that to demand a qualification not attainable by all is a punishment.

The constitution of the United States provides as a qualification for the offices of president and vice-president that the person elected must be a native-born citizen. Is this a punishment to all those naturalized citizens who can never attain that qualification? The Constitution of nearly all the states require as a qualification for voting that the voter shall be a *white male* citizen. Is this a punishment for all the blacks who can never become white?

Again, it was a qualification required by some of the State constitutions for the office of judge that the person should not be over sixty years of age. To a very large number of the ablest lawyers in any State this is a qualification to which they can never attain, for every year removes them farther away from the designated age. Is it a punishment?

The distinguished commentator on American law, and chancellor of the state of New York, was deprived of that office by this provision of the constitution of that state, and he was thus, in the midst of his usefulness, not only turned out of office but he was forever disqualified from holding it again by a law passed after he had accepted the office.

This is a much stronger case than that of a disloyal attorney forbid by law to practice in the courts, yet no one ever thought the law was *ex post facto* in the sense of the constitution of the United States.

Illustrations of this kind could be multiplied indefinitely, but they are unnecessary.

The history of the time when this statute was passed—the darkest hour of our great struggle—the necessity for its existence, the humane character of the president who signed the bill, and the face of the law itself, all show that it was purely a qualification, exacted in self-defense, of all who took part in administering the government in any of its departments, and that it was not passed for the purpose of inflicting punishment, however merited, for past offenses.

I think I have now shown that the statute in question is within the legislative power of congress in its control over the courts and their officers, and that it was not void as being either a bill of attainder or an *ex post facto* law. * * * * *

NO. 20.

CONSTITUTION OF THE UNITED STATES.

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, 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. 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.

§ 2. 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.

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.

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.

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

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

§ 3. 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.

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.

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.

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

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.

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.

Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

§ 4. 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.

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.

§ 5. Each house shall be 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.

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

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.

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.

§ 6. 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.

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.

§ 7. 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.

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.

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

§ 8. The congress shall have power

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

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;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

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

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

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

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;

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

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.

§ 9. 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.

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.

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

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

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.

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.

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.

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

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. 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:

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:

[* 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.]

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.

* This clause within brackets has been superseded and annulled by the 12th amendment.

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.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

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.

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

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

§ 2. 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 offenses against the United States, except in cases of impeachment.

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 embassadors, 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 appoint-

ment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments.

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.

§ 3. 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 embassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

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

§ 2. 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 embassadors, 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.

In all cases affecting embassadors, other public ministers and consuls, and those in which a state be 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.

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.

§ 3. 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.

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. 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.

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

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.

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

§ 3. 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 part of states, without

the consent of the legislature of the states concerned, as well as of the congress.

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 any particular state.

§ 4. 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.

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.

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.

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

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.

The ratification of the convention of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

DONE in convention by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord, one thousand seven hundred and eighty-seven, and of the independence of the United States the twelfth. IN WITNESS whereof we have hereunto subscribed our names.

GEORGE WASHINGTON,
*President and Deputy from Virginia.**

AMENDMENTS TO THE CONSTITUTION
OF THE UNITED STATES OF AMERICA.

Proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original 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.

* The constitution was adopted on the 17th September, 1787, by the convention appointed in pursuance of the resolution of the congress of the confederation, of the 21st February, 1787, and was ratified by the conventions of the several states, as follows, viz.:

Delaware,.....December 7th, 1787.	South Carolina,.....May 23d, 1788.
Pennsylvania,.....December 12th, 1787.	New Hampshire,.... ....June 21st, 1788.
New Jersey,.....December 18th, 1787.	Virginia .....June 26th, 1788.
Georgia, ...January 2d, 1788.	New York,..... .....July 26th, 1788.
Connecticut,.....January 9th, 1788.	North Carolina,...November 21st, 1789.
Massachusetts,.....February 6th, 1788.	Rhode Island,.....May 29th, 1790.
Maryland,.....April 28th, 1788.	

† The first ten amendments to the federal constitution, were proposed by the first congress; were ratified by the several states in 1789-91, and became valid, December 15, 1791. There were two other amendments proposed, but not adopted, viz.:

"1. After the first enumeration required by the first article of the constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by congress, that there shall not be less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred, after which the proportion shall be so regulated by congress that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand persons.

"2. No law, varying the compensation for the services of the senators and representatives, shall take effect until an election of representatives shall have intervened."

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 warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and person 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 offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

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

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-exam-

ined 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 punishment 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.†

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 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

* Recommended by the Third Congress, and became valid January 8, 1798.
† Recommended by the Eighth Congress, and became valid September 25, 1804.

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. 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, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

ARTICLE XIII.*

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

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

AMENDMENTS *to the Constitution of the United States, recommended by Congress, but not approved by the required number of States.*

RECOMMENDED BY JOINT RESOLUTION OF CONGRESS, IN 1810.

"If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honor, or shall, without the consent of congress, accept and retain any present, pension, office or emolument, of any kind whatever from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapa-

* Recommended by joint resolution of Congress, February 1, 1865, and declared a part of the constitution by a public declaration of the secretary of state, December 18, 1865, it having been adopted by twenty-seven states, viz.: Illinois Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina and Georgia, in the order here named. Oregon ratified the amendment on the 11th of November, 1865.

ble of holding any office of trust or profit under them, or either of them."

[Only twelve states adopted this amendment, viz.: Missouri, Kentucky, Ohio, Delaware, Pennsylvania, New Jersey, Vermont, Tennessee, Georgia, North Carolina, Massachusetts and New Hampshire, in the order named. In New York and Rhode Island it was rejected, and in Connecticut, South Carolina and Vermont no definite action was taken. See State Papers, 15th Cong., vol. iv. No. 76.]

RECOMMENDED BY JOINT RESOLUTION OF CONGRESS, MARCH, 1861.

ARTICLE XIII.

"No amendment shall be made to the constitution which will authorize or give to congress the power to abolish or interfere, within any state, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state."

AMENDMENT NOW PENDING FOR ADOPTION.*

RECOMMENDED BY JOINT RESOLUTION OF CONGRESS, JUNE 16, 1866.

ARTICLE XIV.

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

§ 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one

* A certificate from the department of state, dated April 24th, 1867, shows that twenty states had, on that date, notified their acceptance of this amendment, viz.: Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan and Massachusetts.

years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in congress, or elector of president, vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof: but congress may by a vote of two-thirds of each house remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States, nor any state, shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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

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