HISTORY OF THE CONSTITUTION OF THE UNITED STATES

CURTIS

II

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With respect,

Yr. Obt. Servts.

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Columbia College,
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HISTORY

OF THE

ORIGIN, FORMATION, AND ADOPTION

OF THE

CONSTITUTION OF THE UNITED STATES;

WITH

NOTICES OF ITS PRINCIPAL FRAMERS.

BY

GEORGE TICKNOR CURTIS.

IN TWO VOLUMES.

VOLUME II.

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CONTENTS

OF

VOLUME SECOND.

BOOK IV.

FORMATION OF THE CONSTITUTION.

CHAPTER I.

PRELIMINARY CONSIDERATIONS. — ORGANIZATION OF THE CONVENTION. — POSITION OF THE STATES. — RULE OF INVESTIGATION.

	Page
Explanation of the Author's Plan	3, 4
Preservation of Republican Government	5–7
Nature of American Freedom	7–9
Its Dependence upon the Union	9, 10
Intention of the Framers of the Constitution	11
Hamilton's Purposes	11
The Confederation officially condemned	11, 12
Purposes of the States	12
The declared Objects of the Convention	13
Nature of the previous Union	14, 15
General Purpose of the People	16
Powers of the Convention	17
Opposite Views of the Members	18
Presence of Slavery in the States	19, 20
The Slaves in some Form to be considered	20–22
How they were regarded under the Confederation	21
Complex Relations of the Subject	22
All the States but one represented in Convention	23
Absence of Rhode Island	24, 25

Application of the Minority of Rhode Island 25, 26
Position of the States in Convention 27, 28
Reserved Authority of the People 28, 29
Present Importance of the Process of forming the Constitution . 29
Cautions to be used in Interpretation 30

CHAPTER II.

CONSTRUCTION OF A LEGISLATIVE POWER.—BASIS OF REPRESENTATION AND RULE OF SUFFRAGE.—POWERS OF LEGISLATION.

Randolph's Outline of a Constitution 32
Referred to Committee of the Whole 32
Idea of a National Government 32–35
Rule of Suffrage in the Legislature 35
First Parties in the Convention 36
Representatives in one Branch to be chosen by the People . . 37
Representation of the People 39–40
States in some way to be represented 40, 41
State Legislatures to choose the Members of the other Branch . 41
Ratio of Representation as between the States 42–44
Basis of the Representative System 44–49
Rule of Suffrage in the Senate 48
Consequences of Numerical Representation 49, 50
Powers to be conferred on the Legislature 50
Control of State Legislation 51–55
Population of the States 55

CHAPTER III.

CONSTRUCTION OF THE EXECUTIVE AND THE JUDICIARY.

Of how many Persons the Executive to consist 56
Negative to be given to the Executive 57
Mode of choosing the Executive 59
Purpose and Necessity of a Judiciary 60
To be made supreme 65
Its Jurisdiction 65
Tenure of the Judicial Office 67
Note on the Judicial Tenure 69

CHAPTER IV.

ADMISSION OF NEW STATES. — GUARANTY OF REPUBLICAN GOVERNMENT. — POWER OF AMENDMENT. — OATH TO SUPPORT THE NEW SYSTEM. — RATIFICATION.

The Union destined to be enlarged 75
Jefferson's Measure for the Admission of New States in 1784 . 76
Want of Power in the Confederation 77
Power to be supplied in the Constitution 78
Guaranty of State Governments to be provided 79
Necessity and Utility of the Guaranty 80–83
A Mode of Amendment to be provided 84
Oath to support the Constitution 84
Mode of Ratification 84–86
Report of the Committee of the Whole 86

CHAPTER V.

ISSUE BETWEEN THE VIRGINIA AND THE NEW JERSEY PLANS. — HAMILTON'S PROPOSITIONS. — MADISON'S VIEW OF THE NEW JERSEY PLAN.

General Character of the Virginia Plan 89
Difficulties and Obstacles in its Way 91
The chief Cause of Opposition 92
The counter Plan by the New Jersey Members 92
Referred to a Second Committee of the Whole 92
Argument of Patterson in its Support 93
Hamilton interposes 94
The Nature of the Issue pending 95
Hamilton's Leading Principles 95
He states the Courses open to the Convention 96
Explains the Principles on which Government must be founded 96–98
Objects to the New Jersey Plan 98, 99
Not satisfied with the Virginia Plan 99
His Views of what must be done 99, 100
Introduces his own Plan 101
It must be judged by the Issue pending 101–106
Madison examines the New Jersey Plan 106
Explains its Effect on the smaller States 107
Declares the Representation to be the great Difficulty . . . 108
The States must be represented proportionally 109
The Virginia Plan again adhered to 109
Note on the Opinions of Hamilton 110

CHAPTER VI.

CONFLICT BETWEEN THE NATIONAL AND FEDERAL SYSTEMS. — DIVISION OF THE LEGISLATURE INTO TWO CHAMBERS. — DISAGREEMENT OF THE STATES ON THE NATURE OF REPRESENTATION IN THE TWO BRANCHES. — THREATENED DISSOLUTION OF THE UNION.

Different Magnitudes of the States 116
Inequalities in other Respects 117
The Majority and Minority of States 117, 118
Views of New York 118–121
Luther Martin's Opinions 121
Position of Connecticut 122
Nature of the Question between the Larger and the Smaller States 122–125
Advantages of a National System 127
Difficulties attending it 128
Dangers of adhering inflexibly to Theory 129
Division of the Legislature into Two Chambers 130
Origin of the Division in England 130, 131
Practical Advantages of the Separation 131, 132
Why resisted by the Minority 133
Defect in the Virginia Plan 133
Mode of electing the Members 134
Rule of Suffrage for the House 135
Madison's View of the Interest of the Small States 136
Hamilton on the Consequences of Dissolution 136, 137
Evil Results of a perfect Theory 137
Purpose of a Senate 138
Necessity for a distinct Basis 138–140
Irreconcilable Differences 140
Proposition of Compromise rejected 141
Disagreement on the Senate 141
Consequences of a Failure to form a Constitution 142–144

CHAPTER VII.

FIRST GRAND COMPROMISES OF THE CONSTITUTION. — POPULATION OF THE STATES ADOPTED AS THE BASIS OF REPRESENTATION IN THE HOUSE. — RULE FOR COMPUTING THE SLAVES. — EQUALITY OF REPRESENTATION OF THE STATES ADOPTED FOR THE SENATE.

Appointment of a Committee of Compromise 145
Representation adjusted by the Committee 146

Character of the Compromise 147
How treated in the Convention 147, 148
Apportionment of Representatives re-arranged 148, 149
Objections to the Plan 149, 150
Representation of the Slaves 150
Combined Rule of Numbers and Wealth 151
Test Question respecting the Slaves 153
Necessity for their Admission into the Basis of Representation 154–162
The Difficulties only to be adjusted by Compromise 162
Form of the Compromise 163, 164
Equality of Vote adopted for the Senate 165, 166
Value of this Feature of the Constitution 166, 167
Population of the Slaveholding and Non-slaveholding States compared 168

CHAPTER VIII.

POWERS OF LEGISLATION. — CONSTITUTION AND CHOICE OF THE EXECUTIVE. — CONSTITUTION OF THE JUDICIARY. — ADMISSION OF NEW STATES. — COMPLETION OF THE ENGAGEMENTS OF CONGRESS. — GUARANTY OF REPUBLICAN CONSTITUTIONS. — OATH TO SUPPORT THE CONSTITUTION. — RATIFICATION. — NUMBER OF SENATORS. — QUALIFICATIONS FOR OFFICE. — SEAT OF GOVERNMENT.

The General Interests of the Union to be provided for 170
Constitution, Laws, and Treaties to be Supreme 170
Appointment and Powers of the Executive 171
Re-eligibility of the Executive 172, 173
Tenure of the Office 173
Right of Suffrage in Choice of the Executive 174
Appointment by Electors 175
Construction of the Judiciary 176
Admission of New States 176
Completion of the Engagements of Congress 176
Guaranty of Republican Governments 177
Future Amendments 177
Oath to Support the Constitution 177
Ratification 177
Objects of a Popular Ratification 177–184
Constitution to be submitted to the Congress 185
Number of Senators 186

Qualifications for Office 186
Property Qualification 187
Seat of the National Government 189
General Pinckney's Notice respecting Slaves and Exports . . 189
Resolutions sent to Committee of Detail 190

CHAPTER IX.

REPORT OF THE COMMITTEE OF DETAIL. — CONSTRUCTION OF THE LEGISLATURE. — TIME AND PLACE OF ITS MEETING.

Power confided to the Committee of Detail 193
Their Draft of a Constitution 194
Right of Suffrage 194
Foreign-born Inhabitants 195–198
Immigration to be encouraged 197
Qualifications for Voting 198–202
Power of Naturalization 199
Qualifications for Office 203–210
Spirit of the Constitution 211
Ratio of Representation 212–214
Money Bills 215–222
Qualifications of Senators 223, 224
Number of Senators 224–226
Method of Voting in the Senate 226–228
Vacancies in the Senate and House 229
Powers of the Senate 229–240
Senatorial Term 240–242
Disqualifications of Members of both Branches . . . . . 242 *et seq.*
Parliamentary Corruption 242–244
Executive Influence 244–256
Time and Place for Elections 257
Pay of Members 258, 259
Impeachments 260–262
Quorum of each House 262
Separate Powers of each House 262–263
President of the Senate 263
Enactment of Laws 264
President's Negative 265–268
Seat of Government 268–277
Session of Congress 277, 278

CHAPTER X.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — THE POWERS OF CONGRESS. — THE GRAND COMPROMISES OF THE CONSTITUTION RESPECTING COMMERCE, EXPORTS, AND THE SLAVE-TRADE.

General Principles of the Powers of Legislation 279, 280
Limitations 280
Exports and the Slave-Trade 281
Fitness and Unfitness of a Tax on Exports 282
Variety in the Exports of the United States 283
Impracticability of such a Tax 284
The Slave-Trade Controversy . . . . . 285 *et seq.*
How adjusted . . . . . 289 *et seq.*
Restrictions on the Revenue and Commercial Powers . . . 289
Regulation of Commerce . . . . . 291 *et seq.*
Settlement of the Revenue and Commercial Powers . 295 *et seq.*
Propositition of Compromise 301
Arrangement of the Compromise 303
Value of the Compromise 307
Benefits of the Revenue and Commercial Powers 309

CHAPTER XI.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — THE REMAINING POWERS OF CONGRESS. — RESTRAINTS UPON CONGRESS AND UPON THE STATES.

Purpose of the Revenue Power . . . . . 318 – 322
Preference of Ports prohibited 323, 324
Duties, &c. to be equal 325
Commerce with the Indian Tribes . . . . . 325 – 328
Uniform Rule of Naturalization 328
Coining and Regulating Value of Money 328
Standard of Weights and Measures 328
Post-Offices and Post-Roads 328
Power to borrow Money . . . . . 328 – 330
Tribunals inferior to the Supreme Court 330
Rules as to Captures 330
Offences against the Law of Nations 331
Counterfeiting 332
War Power 332

Raising and supporting Armies 333
Navy 334
Power over the Militia 334–338
Necessary and proper Laws to execute the Specific Powers . . 338
Patents and Copyrights 339
Power over Territories 341–358
Admission of New States 358
Restraints upon Congress 359
Suspension of the *habeas corpus* 359
Bills of Attainder 360
Ex post facto Laws . . . . . 360 *et seq.*
Titles of Nobility 362
Gifts and Emoluments from foreign Princes 362
Restraints upon the States . . . . . 362 *et seq.*
Obligation of Contracts 365
State Imposts 369
Tonnage Duties 370
Other Restraints 371

CHAPTER XII.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — SUPREMACY OF THE NATIONAL GOVERNMEMT. — DEFINITION AND PUNISHMENT OF TREASON.

Principles of the National Supremacy 372
Preamble of the Constitution 373
Supremacy effected through the Judicial Power 374
Ratification 375
Meaning and Operation of the Supremacy 376–381
Its Effect on the Growth of the Country 381–384
Definition and Punishment of Treason 384–387

CHAPTER XIII.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — ELECTION AND POWERS OF THE PRESIDENT.

Election of the President, why not made directly by the People . 388
Origin of the Plan of Electors 389
Choice of President and Vice-President 390–395
Succession of the Vice-President to the Presidency . . 395–398

Mode of filling the Vacancy when there is no Vice-President . . 398
Mode of choosing the Electors 398, 399
Opening of the Votes of the Electors 399, 400
Modifications of the Mode of Election made by the Amendment 400, 401
Contingency, for which no Provision is made . . . 401–403
Qualifications for the Presidency 404
Salary of the President 404–407
Question of a Cabinet, or a Council 407–409
Powers of the President . . . . . 409 *et seq.*
Executive Power 412, 413
Pardoning Power 413, 414
Treaty-making Power 414–417
Appointing Power 417, 418
To give Information on the State of the Union 419
Power to convene Congress 419

CHAPTER XIV.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — FORMATION OF THE JUDICIAL POWER.

Scope of the Judicial Power 421–431
Its Purposes 431–445

CHAPTER XV.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — EFFECT OF RECORDS. — INTER-STATE PRIVILEGES. — FUGITIVES FROM JUSTICE AND FROM SERVICE.

Intimacy of the Relations between the People of the States . . 447
Difference between the Confederation and the Constitution . 447, 448
Privileges of Citizenship in all the States 448
Effect of Records 449
Fugitives from Justice 449, 450
Fugitives from Service 450–467

CHAPTER XVI.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — GUARANTY OF REPUBLICAN GOVERNMENT AND INTERNAL TRANQUILLITY. — OATH TO SUPPORT THE CONSTITUTION. — MODE OF AMENDMENT. — RATIFICATION AND ESTABLISHMENT OF THE CONSTITUTION. — SIGNING BY THE MEMBERS OF THE CONVENTION.

Purpose of the Guaranty of Republican Government 468
Meaning of the Guaranty 469
American Sense of a "Republican" Government 471
Amendment a Conservative Element 473
Distinction between Amendment and Revolution . . 473–474
Settlement of the Mode of Amending the Constitution . . 474–477
Restrictions on the Power of Amendment 477, 478
Oath to support the Constitution 478
Establishment of the Constitution provided for 479–485
Signatures of the Delegates 485–487
The Issue presented 487

BOOK V.

ADOPTION OF THE CONSTITUTION.

CHAPTER I.

GENERAL RECEPTION OF THE CONSTITUTION. — HOPES OF A REUNION WITH GREAT BRITAIN. — ACTION OF THE CONGRESS. — STATE OF FEELING IN MASSACHUSETTS, NEW YORK, VIRGINIA, SOUTH CAROLINA, MARYLAND, AND NEW HAMPSHIRE. — APPOINTMENT OF THEIR CONVENTIONS.

Public Anxiety 491
Rumors about the Bishop of Osnaburg 492
Scheme of the Tories 493, 494
Publication of the Constitution 495
Its Friends and Opponents 495, 496
Position of the People 497, 498

Reception of the Instrument in Congress 499
Action upon it 500
Reception in Massachusetts 501
Reception in New York 502–504
Reception in Virginia 505, 506
Jefferson's Opinion 506, 507
Course recommended by Jefferson 508
Washington's Exertions 509
Patrick Henry's Course in the Legislature 510
Debate in the Legislature of South Carolina 511
Action of the Legislature of Maryland 512
Luther Martin's Address 512–514
State of Opinion in New Hampshire 514
The real Crisis anticipated 515
Chances for the Constitution 516
Uncertainty of the Result 517

CHAPTER II.

RATIFICATIONS OF DELAWARE, PENNSYLVANIA, NEW JERSEY, GEORGIA, AND CONNECTICUT, WITHOUT OBJECTION. — CLOSE OF THE YEAR 1787. — BEGINNING OF THE YEAR 1788. — RATIFICATION OF MASSACHUSETTS, THE SIXTH STATE, WITH PROPOSITIONS OF AMENDMENT. — RATIFICATION OF MARYLAND WITHOUT OBJECTION. — SOUTH CAROLINA, THE EIGHTH STATE, ADOPTS, AND PROPOSES AMENDMENTS.

Delaware ratifies unanimously 518
Prestige of Philadelphia 519
James Wilson in the Convention of Pennsylvania 520
His Defence of the Constitution 521–524
Ratification of Pennsylvania 524
Position of New Jersey 524, 525
Ratifies the Constitution 526
Position of Georgia 526
Ratifies the Constitution 527
Convention of Connecticut 527, 528
Her Adoption 529
New Aspect of the Subject 529, 530
Convention of Massachusetts assembles 530
Nature of her Opposition 531

Value of her State Constitution 532
Parties in her Convention 532, 533
Samuel Adams and the Opposition 533, 534
The Federal Leaders 534
They recognize the Necessity for Amendments 535
Dangers of this Admission 535, 536
Hancock proposes the Amendments 537
Ratification procured by them 538
Conduct of the Minority 539
Nature of the Amendments 539, 540
The People of Boston rejoice 540
Influence of Massachusetts on New Hampshire 541
Critical Position of Maryland 542
Her Ratification 543
Rejoicings in Baltimore 543
Good News from South Carolina 544
Liberal Conduct of her People 544, 545
Defence of the Constitution by her Delegates 546
The Convention admits the Justice of the Commercial Power . . 547
Efforts of the Opposition 548
Charleston celebrates the Constitution 548

CHAPTER III.

Ratifications of New Hampshire, Virginia, and New York, with Proposed Amendments.

New Hampshire, Virginia, and New York are to act in the same Month 549
Hamilton's Expresses arranged 550
Virginia Convention meets 551
Patrick Henry leads the Opposition 552
His peculiar Tendencies 553
Character of his Politics 554
Edmund Randolph's Position 555
Unexpectedly supports the Constitution 556
George Mason on the Power of Direct Taxation 557
Henry denounces the Constitution 558
Madison defends it 559
He denies the Dangers imputed to it 560
Henry vouches the Advice of Jefferson 561

Jefferson's Advice misconstrued 562
Henry persists in pressing his View of it 563
It strengthens the Opposition 564
They employ the Mississippi Question 565
True Aspect of that Question 566
Madison's Answer to the Opposition 567
Negotiations opened with the Anti-Federalists of New York and Pennsylvania 568
The Convention of New York assembles 568
Hamilton at the Intersection of his Expresses 569
His Critical and Responsible Position 569, 570
Nature of his Ambition 570, 571
His Opinion of the Purposes of the Opposition 571
His Answer to their Plans 572
He receives News of the Ratification by New Hampshire . . . 573
Chancellor Livingston announces the Ratification of the Ninth State 574
The Opposition not subdued 574
Hamilton's Conduct at this Crisis 575–578
He despatches a Courier to Richmond 578
But the Constitution is ratified before the Courier arrives . . 578
How its Ratification was obtained 579–581
Henry's magnanimous Submission 581
The News from Virginia received at Philadelphia 582
Elaborate Procession in Honor of the Constitution 583
Hamilton receives the News from Virginia 584
He consults his Friends 585
They force the Opposition to an Issue 586
Hamilton advises with Madison 587
An Unconditional Ratification carried 588
The Federalists unite in a Call for a Second General Convention 588
Their Justification for so doing 589–592
The City of New York celebrates the Adoption of the Constitution 592
Honors paid to Hamilton by the People 592–595

CHAPTER IV.

Action of North Carolina and Rhode Island. — Conclusion.

Convention of North Carolina assembles 596
Refuses to ratify the Constitution 597
Elements of the Opposition in Rhode Island 598

Local Parties in the State 599
Town and Country divided 600
Spirit of a Majority of the People 600, 601
They reject the Constitution 602
Embarrassing Position of the Union 603
Conclusion 604

APPENDIX.

Constitution of the United States of America 607
Articles in Addition to, and Amendment of, the Constitution of the United States of America 619

INDEX 623

BOOK IV.

FORMATION OF THE CONSTITUTION.

CHAPTER I.

PRELIMINARY CONSIDERATIONS. — ORGANIZATION OF THE CONVENTION. — POSITION OF THE STATES. — RULE OF INVESTIGATION.

AFTER long wanderings through the struggles, the errors, and the disappointments of the earlier years of our constitutional history, I now come to consider that memorable assembly to which they ultimately led, in order to describe the character of an era that offered the promise of a more vigorous nationality, and presented the alternative of final dissolution. How the people of the United States were enabled to seize the happy choice of one of these results, and to escape the disasters of the other, is to be learned by examining the mode in which the Constitution of the United States was framed.

In approaching this interesting topic, I am naturally anxious to place myself at once on a right understanding with the reader, — to apprise him of the purpose of the discussions to which he is invited, and to guard against expectations which might be entertained, but which will not be fulfilled.

In a work designed for general and — as I venture to hope it may prove — for popular use, it would be out of place, as it certainly would be

impracticable within the limits of a single volume, to undertake the explanation and discussion of all those particular questions of construction that must constantly arise under almost every clause and feature of such an instrument as the Constitution of the United States, and which, as our whole experience has taught us, are fruitful both of extensive debate and of wide as well as honest diversities of opinion. I shall consider questions of construction only so far as may be necessary to elucidate my subject; for I propose, in writing the history of the formation of the Constitution, to describe rather those great modifications in the principles and structure of the Union that took place in the period at which we have now arrived in the course of this work; to state the essential features of the new government; and to trace the process by which they were evolved from the elements to which the framers of that government resorted.

Happily for us, the materials for such a description are ample. The whole civil change which transformed the character of our Union, and established for it a national government, took place peacefully and quietly, within a single twelvemonth. It was attended with circumstances which enable us to ascertain its character with a high degree of certainty. The leading purposes that were entertained and carried out were not left to the conjecture of posterity, but were recorded by deliberative assemblies, whose acts of themselves expressed and ascertained the objects and intentions of the national

will. First framed by an assembly in which the States participating in the change were fully represented, and subsequently debated and ratified in conventions of the people in the separate States, the general nature and design of the Constitution may be traced and understood without serious difficulty.

But to the right understanding of its nature and objects, a careful examination of the proceedings of the national Convention is, in the first place, essential. Before we enter, however, upon this examination, there are certain preliminary facts that explain the circumstances in which the Convention was assembled, and which will enable us to appreciate the results at which it arrived. To these, therefore, the reader is now desired to turn.

First of all, then, it is to be remembered that the national Convention of 1787 was assembled with the great object of framing a system of government for the united interests of the thirteen States, by which the forms and spirit of republican liberty could be preserved. The warnings and teachings of the ten preceding years, which I have attempted to describe in a previous volume, had presented to the people of these States the serious question, whether their system of conducting their common affairs then rested upon principles that could secure their permanent prosperity and happiness. That the States had national interests; that each of them stood in relations to the others, and to the rest of the world, which its separate and unaided power was unable to manage with success; and that even its own

internal peace and prosperity required some external protection, — had been brought home to the convictions of the people by an experience that commenced with the day on which they declared themselves independent, and had now forced upon them its last stern and sorrowful lesson in the general despondency of the national heart. As they turned anxiously and fearfully to the near and dear interests involved in their separate and internal concerns, they saw that self-government was a necessity of their existence. They saw that equality before the law for the whole people; the right and the power to appoint their own rulers; the right and the power to mould and form and modify every law and institution at their own sovereign will, — to lay restraints upon their own power, or not to lay them, — to limit themselves by public compact to a particular mode of action, or to remain free to choose other modes, — were the essential conditions of American society. In a word, they beheld that republican and constitutional liberty, which, with all that it comprehends and all that it bestows, was not only altogether lovely in their eyes, but without which there could be no peace, no social order, no tranquillity, and no safety for them and their posterity.

This liberty they knew must be preserved. They loved it with passionate devotion. They had been trained for it by the whole course of their political and social history. They had fought for it through a long and exhausting war. Their habits of thought

and action, their cherished principles, their hopes, their life as a people, were all bound up in it; and they knew that, if they suffered it to be lost, there would remain for them nothing but a heritage of shame, and ages of confusion, strife, and sorrow.

Great as was their devotion to this republican liberty, and ardent as was their love of it, they did not value it too highly. The doctrine that all power resides originally in the people; that they are the source of all law; that their will is to be pronounced by a majority of their numbers, and can know no interruption, — was not first discovered in America. But to this principle of a democracy the people of the American States had added two real and important discoveries of their own. They had ascertained that their own power might be limited by compacts which would regulate and define the modes in which it shall be exercised. Their written constitutions had taken the place of the royal charters which formerly embraced the fundamental conditions of their political existence, but with this essential difference, — that whereas the charter emanated from a foreign sovereign to those who claimed no original authority for themselves, the constitution proceeded from the people, who claimed all authority to be resident in themselves alone. While the charter embraced a compact between the foreign sovereign and his subjects who lived under it, the constitution, framed by the people for their own guidance in exercising their sovereign power, became a com-

pact between themselves and every one of their number. In this substitution of one supreme authority for another, some limitation of the mode in which the sovereign power was to act became the necessary consequence of the change; for as soon as the people had declared and established their own sovereignty, some declaration of the nature of that sovereignty, and some prescribed rules for its exercise, became immediately necessary, and that declaration and those rules became at once a limitation of power, extending to every citizen the protection of every principle involved in them, until the same authority which had established should change them.

Against the evils, too, that might arise from the unrestricted control of a majority of the people over the fundamental law, — against the abuse of their power by frequent and passionate changes of the rules which limit its exercise for the time being, — they had discovered the possibility of limiting the mode in which the organic law itself was to be changed. By prescribing certain forms in which the change was to be made, and especially by requiring the fact, that a change had been decreed by those having a right to make it, to be clearly and carefully ascertained by a particular evidence, they guarded the fundamental law itself against usurpation and fraud, and greatly diminished the influences of haste, prejudice, and passion.

Such was the nature of American republican liberty; not then fully understood, not then fully

developed in all the States, but yet discovered, — a liberty more difficult of attainment, more elaborate in its structure, and therefore more needful of defence, than any of the other forms of constitutional freedom under which civilized man had hitherto been found.

Now, the fate of republican liberty in America, at that day, depended directly upon the preservation of some union of the States, and not simply upon the existing State institutions, or upon the desires of the people of each separate State. It is true, that their previous training and history, and their own intelligent choice, had made the States, in all their forms and principles, republican governments; and almost all of them had, at this period, written constitutions, in which the American ideal of such governments was aimed at, and more or less nearly reached. But how long were these constitutions, these republican forms, to exist? What was to secure them? Who was to stand as their guarantor and protector, and to vindicate the right of the majority to govern and alter and modify? Who was to enforce the rules which the people of a State had prescribed for their own action, when threatened by an insurgent and powerful minority? Who was to protect them against foreign invasion or domestic violence? There was no common sovereign, or supreme arbiter, to whom they could all alike appeal. There was no power upon this broad continent to whom the States could intrust the duty of preserving their institutions inviolate, except the people of the United

States in some united and sovereign capacity. No single State, however great its territory or its population, could have discharged these duties for itself by its unaided power; for no one of them could have repelled a foreign invasion alone, and the government of one of the most respectable and oldest of them, whose people had exhibited as much energy as any other community in America, had almost succumbed to the first internal disorder which it had been forced to encounter.

The preservation of the Union of the States was, therefore, essential to the continuance of their independence, and to the continuance of republican constitutional liberty, — of that liberty which resides in law duly ascertained to be the authentic will of a majority. With this vastly important object before them, the people of the States of course could give to the Union no form that would not reflect the same spirit, and harmonize with the nature of their existing institutions. To have left their State governments resting upon the broad basis of popular freedom acting through republican forms, and to have framed, or to have attempted to frame, national institutions on any other model, would have been an act of political suicide. To enable the Union to preserve and uphold the authority of the people within the respective States, it must itself be founded on the same authority, must embody the same principles, spring from the same source, and act through similar institutions.

Accordingly, the student of this portion of our

history will find everywhere the clearest evidence that, so far as the purpose of forming a national government of a new character was entertained at the period when the Convention was assembled, a republican form for that government was a foregone conclusion. Not only did no State entertain any purpose but this, but no member of the Convention entered that body with any expectation of a different result. There is but one of the statesmen composing that assembly to whom a purpose of creating what has been called a monarchical government has ever been distinctly imputed; and with regard to him, as much as to every other person in the Convention, I shall show that the imputation is unjust. Hamilton, — for it is to him of course that I now allude, — together with many others, believed that a failure, at that crisis, to establish a government of sufficient energy to pervade the whole Union with the necessary control, would bring on at once a state of things that must end in military despotism. Hence his efforts to give to the republican form, which he acknowledged to be the only one suited to the circumstances and condition of the country, the highest degree of vigor, stability, and power that could be attained.

Another very important fact, which the reader is to carry along with him into the examination of the proceedings of the Convention, is, that by the judgment of the old Congress, and of every State in the Union save one,[1] the Confederation had been de-

[1] Rhode Island.

clared defective and inadequate to the exigencies of government, and the preservation of the Union. That this declaration was expressly intended to embrace the principle of the Union, or looked to the substitution of a system of representative government, to which the people of the States should be the immediate parties, in the place of their State governments, does not appear from the proceedings which authorized and constituted the Convention. In substance, those proceedings ascertained that there were great defects in the existing Confederation; that there were important purposes of the federal Union which it had failed to secure; and that a Convention of all the States, for the purpose of revising and amending the Articles of Confederation, was the most probable means of establishing a firm general government, and was therefore to be held. But what were the original purposes of the Union, or what purposes had come to be regarded as essential to the public welfare, was not indicated in most of the acts constituting the Convention. Virginia, whose declaration preceded that of Congress and of the other States, and on whose recommendation they all acted, had made the commercial interests of the United States the leading object of the proposed assembly; but she had also declared the necessity of extending the revision of the federal system to all its defects, and had advised further concessions and provisions, in order to secure the great objects for which that system was originally instituted. These general and somewhat indefinite purposes were de-

clared by the other States, without any material variation from the terms employed by Virginia.[1]

Hence it is that the previous history of the Union becomes important to be examined before we can appreciate the great general purposes of its original formation, as they were understood at the time of these proceedings, or can appreciate the further purposes that were intended to be engrafted upon it. The declarations made by the Congress and the States seem obviously to embrace two classes of objects; the one is what, in the language of Virginia, they conceived to have been "the great objects for which the federal government was instituted"; the other is the "exigencies of the Union," for peace as well as for war, as they had been displayed and developed by the defects of the Confederation, and by its failures to secure the general welfare. The first of these classes of objects could be ascertained by reference to the terms and provisions of the Articles of Confederation; the second could only be ascertained by resorting to the history of the confederacy, and by regarding its recorded failures to promote the general prosperity as proofs of what the exigencies of the Union demanded in a general government.[2]

[1] New Jersey specifically contemplated a regulation of commerce. See the proceedings of Congress, and those of the States, *ante*, Vol. I. pp. 361, 367, notes.

[2] Thus, for example, the regulation of commerce was not one of the original purposes for which the Union was formed in 1775 or in 1781. But it became one of the exigencies of the Union, by becoming a national want, and by the revealed incompetency of most of the States to deal with the subject so as to

In the first volume of this work we have examined the nature and operation of the previous Union, in both of its aspects, and we must carry the results of that examination along with us in studying the formation of the new system. We have seen the character of the Union which was formed by the assembling of the Revolutionary Congress, to enable the States to secure their independence of the crown of Great Britain. We have seen that, from the jealousies of the States, even this Congress never assumed the whole revolutionary authority which its situation and office would have entitled it to exercise. We have seen also, that, from the want of a properly defined system, and from the absence of all proper machinery of government, it was unable to keep an adequate army in the field, until, in a moment of extreme emergency, it conferred upon the Commander-in-chief the powers of a dictator. We have witnessed the establishment of the Confederation, — a government which bore within itself the seeds of its own destruction; for it relied entirely, for all the sinews of war, upon requisitions on the States, with which the States perpetually refused or neglected to comply. We have thus seen the war lingering and languishing until foreign aid could be procured, and until loans of foreign money supplied the means of keeping it alive long enough for the admirable courage, perseverance, and energy of

promote their own welfare, or to avoid injury to their confederates. So of a great many other things, for which we must resort, as the framers of the Constitution resorted, to the history of the times.

Washington to bring it to a close, against all obstacles and all defects of the civil power. When the war was at length ended, and the duty of paying the debts thus incurred to the meritorious and generous foreign creditor, and the more than meritorious and generous domestic creditor, pressed upon the conscience of the country, we have seen that there was no power in the Union to command the means of paying even the interest on its obligations. We have seen that the treaty of peace could not be executed; that the Confederation could do nothing to secure the republican governments of the States; that the commerce of the country could not be protected against the policy of foreign governments, constantly watching for advantages which the clashing interests of the different States at all times held out to them; and that, with the rule which required the assent of nine States to every important measure, it was possible for the Congress to refuse or neglect to do what it was of the last importance to the people of the United States they should do. Finally, we have seen that what now kept the existing Union from dissolution, as it had been one immediate inducement to its formation, was the cession of the vast Northwestern territory to the United States; and that over this territory new States were forming, to take their places in the band of American republics, while the Confederation possessed no sufficient power to legislate for their condition, or to secure their progress toward the great ends of civil liberty and prosperity.

A retrospection, therefore, of the previous history of the Confederacy, while it reveals to us the public appreciation of the national wants and the national failures, displays the general purposes contemplated by the States when they undertook effectually to provide for "the exigencies of the Union." But what the nature of the proposed changes was to be, and in what mode they were to be reached, was, as we have seen, left undetermined by the constituent States when they assembled the Convention; and we are now, therefore, brought to the third preliminary fact, necessary to be regarded in our future inquiries, namely, the condition of the actual powers of that assembly.

The Confederation has already been described as a league, or federal alliance between independent and sovereign States, for certain purposes of mutual aid. So far as it could properly be called a government, it was a government for the States in their corporate capacities, with no power to reach individuals; so that, if its requirements were disregarded, compulsion could only be directed — if against anybody — against the delinquent member of the association, the State itself.

At the time when the Convention was assembled, the general purpose entertained throughout the Union appears to have been, by a revision and amendment of the Articles of Confederation, to give to the Congress power over certain subjects, of which that instrument did not admit of its taking cognizance, and to add such provisions as would

render its power efficient. But it was not at all understood by the country at large, that, while the nominal powers of the Confederation might be increased at the pleasure of the States, those powers could not be made effectual without a change in the principle of the government. Hence, the idea of abolishing the Confederation, and of erecting in its place a government of a totally different character, was not entertained by the States, or, if entertained at all, was not expressed in the public acts of the States by which the Convention was called. This idea, however, was perhaps not necessarily excluded by the terms employed by the States in the instruction of their delegates; and we may therefore expect to find the members of that assembly, in construing or defining the powers conferred upon it, taking a broader or narrower view of those powers, according to the character of their own minds, the nature of their previous public experience, and the real or supposed interests of their particular States.

Many of the persons who had been clothed with this somewhat vague and indeterminate authority to "revise" the existing federal system, and to agree upon and propose such amendments and further provisions as might effectually provide for the "exigencies of the Union," were statesmen who had passed the active period of their previous lives in vain endeavors to secure efficient action for the powers possessed by the Congress, both under the revolutionary government and under the Confederation.

They were selected by their States on account of this very experience, and in order that their counsels might be made available to the country.[1] They saw that the mere grant of further powers, or the mere consent that the Congress should have jurisdiction over certain new subjects, would be of no avail while the government continued to rest upon the vicious principle of a naked federal league, leaving the question constantly to recur, whether the compact was not virtually dissolved by the refusal of individual States to discharge their federal obligations. These persons, consequently, came to the Convention feeling strongly the necessity for a radical change in the principles and structure of the national Union; but feeling also great embarrassment as to the mode in which that change was to be effected.

On the other hand, there were other members of the Convention who came with a disposition to adhere to the more literal meaning of their instructions, and who did not concur in the alleged necessity for a radical change of the principle of the government. Fearing that the power and consequence of their own States would be diminished by the introduction of numbers as a basis of representation, they adhered to the system of representation by States, and insisted that nothing was needed to cure the evils that pressed upon the country, but to enlarge the jurisdiction of the Congress under that system. They were naturally, therefore, the first

[1] See the preamble to the act of Virginia, *ante*, Vol. I. p. 367, note.

to suggest and the last to surrender the objection, that the Convention had received no authority, either from the States or from the Congress, to do anything more than revise the Articles of Confederation, and recommend such further powers as might be engrafted upon the present system of the Union.

That the construction of their powers by the latter class of the members of the Convention comported with the mere terms of the acts of the States, and with the general expectation, I have more than once intimated; but we shall see, as the experiment of framing the new system proceeded, that the views of the other class were equally correct; that the addition of further powers to the existing system of the Union would have left it as weak and inefficient as it had been before; and that what were universally regarded as the "exigencies of the Union" — which was but another name for the wants of the States — could only be provided for by the creation of a different basis for the government.

Another fact which we are to remember is the presence, in five of the States represented in the Convention, of large numbers of a distinct race, held in the condition of slaves. Whatever mode of constituting a national system might be adopted, if it was to be a representative government, the existence of these persons must be recognized and provided for in some way. Whatever ratio of representation might be established, — whether the States were to be represented according to the numbers of their

inhabitants, or according to their wealth, — this part of the population of the slave-holding States presented one of the great difficulties to be encountered. A change of their condition was not now, and never had been, one of the powers which those States proposed to confide to the Union. In no previous form of the confederacy had any State proposed to surrender its own control over the condition of persons within its limits, or its power to determine what persons should share in the political rights of that community; and no State that now took part in the new effort to amend the present system of the Union proposed to surrender this control over its own inhabitants, or sought to acquire any control over the condition of persons within any of the other States.

The deliberations of the Convention were therefore begun with the necessary concession of the fact, that slavery existed in some of the States, and that the existence and continuance of that condition of large masses of its population was a matter exclusively belonging to the authority of each State in which they were found. Not only was this concession implied in the terms upon which the States had met for the revision of the national system, but the further concession of the right to have the slave populations included in the ratio of representation became equally unavoidable. They must be regarded either as persons or as chattels. If they were persons, and the basis of the new government was to be a representation of the inhabitants of the

States according to their numbers, — the only mode of representation consistent with republican government, — their precise condition, their possession or want of political rights, could not affect the propriety of including them in some form in the census, unless the basis of the government should be composed exclusively of those inhabitants of the States who were acknowledged by the laws of the States as free. The large numbers of the slaves in some of the States would have made a government so constructed entirely unequal in its operation, and would have placed those States, if they had been willing to enter it, — as they never could have been, — in a position of inferiority which their wealth and importance would have rendered unjustifiable. On the other hand, if the wealth of the States was to be the measure of their representation in the new government, the slaves must be included in that wealth, or they must be treated simply as persons. The slaves might or might not be persons, in the view of the law, where they were found; but they were certainly in one sense property under that law, and as such they were a very important part of the wealth of the State. The Confederation had already been obliged to regard them, in considering a rule by which the States should contribute to the national expenses. They had found it to be just, that a State should be required to include its slaves among its population, in a certain ratio, when it was called upon to sustain the national burdens in proportion to its numbers; and they had recommended

the adoption of this fundamental rule as an amendment of the federal Articles.[1] Either in one capacity, therefore, or in the other, or in both, — either as persons or as property, or as both, — the Union had already found it to be necessary to consider the slaves. In framing the new Union, it was equally necessary, as soon as the equality of representation by States should give place to a proportional and unequal representation, to regard these inhabitants in one or the other capacity, or in both capacities, or to leave the States in which they were found, and to which their position was a matter of grave importance, out of the Union.

This difficulty should be rightly appreciated and fairly stated by the historian who attempts to describe its adjustment, and it should be carefully regarded by the reader. What reflections may arise upon the facts that we have to consider, — what should be the judgment of an enlightened benevolence upon the whole matter of slavery, as it was dealt with or affected by the Constitution of the United States, — may perhaps find an appropriate place in some future discussion.

Here, however, the reader must approach the threshold of the subject with the expectation of finding it surrounded by many and complex relations. History should undoubtedly concern itself

[1] See the Resolve of Congress, passed April 18, 1783, proposing to amend the Articles of Confederation. This Resolve was the origin of the proportion of three fifths, in counting the slaves. See *post*, Chapter II. p. 48; *ante*, Vol. I. p. 213, note 2.

with the interests of man. But it is bound, as it makes up the record of events which involve the destinies and welfare of different races, to look at the aggregate of human happiness. It is not to rest, for its final conclusions, in seeming or in real inconsistencies; in real or apparent conflicts between opposite principles; or in the mere letter of those adjustments by which such conflicts have been avoided, or reconciled, or acknowledged. It is to arrive at results. It is to draw the wide deduction which will show whether human nature has lost or gained by the conditions and forms of national existence which it undertakes to describe. As the question should always be, in such inquiries, whether any different and better result was attainable under all the circumstances of the case, — a question to which a calm and dispassionate examination will generally find an answer, — the amount of positive good that has been gained for all, or of positive evil that has been averted from all, is the true justification of existing institutions.

The Convention, when fully organized, embraced a representation from all the States, with the single exception of Rhode Island.

Connecticut, which had steadily opposed the measure of a Convention,[1] came into it at a late period, and did not send a delegation until a fortnight after the time appointed for its session.[2] It had always been the inclination of that State to retain in her

[1] Madison, Elliot, V. 96.

[2] Ibid. 124.

own hands the regulation of commerce; she had taxed imports from some of her neighbors, and this advantage, as it was considered, had made her reluctant to enlarge the powers of the Union. Her delegation appeared on the 28th of May.

That of New Hampshire was not appointed until the latter part of June,[1] and did not appear until the 23d of July.[2]

Rhode Island, small in territory and in numbers, but favorably situated for the pursuits of commerce, had strenuously resisted every effort to enlarge the powers of the Union. Ever since the Declaration of Independence, the people of that State had clung to the opportunity, afforded by their situation, of taxing the contiguous States, through their consumption of commodities brought into its numerous and convenient ports. For this object they had refused their assent to the revenue system of 1783; and as the failure of that system had prevented an exhibition of some of the benefits to be derived from uniform fiscal regulations, the local government of Rhode Island adhered, in 1786 – 7, to what they had always regarded as the true interest of their State. They did, it is true, appoint delegates to the commercial convention at Annapolis, but the persons appointed did not attend; and when the resolve which sanctioned the Convention of 1787 was adopted in Congress, Rhode Island was not represented in that body.

[1] Elliot, I. 126. [2] Ibid. 351.

When the recommendation of the Congress came before the legislature of the State, there appears to have been a strong party in favor of making an appointment of delegates to the Convention. The mercantile part of the population had come to entertain more liberal and far-seeing notions of their true interests; and the views of some of the more intelligent of the farmers and mechanics had been much modified. But by far the larger portion of the people — wedded to a system of paper money, which furnished almost their sole currency, and vaguely apprehending that a new government for the Union would destroy it, seeking the abolition of debts, public and private, and jealous of all influence from without — were in a condition to be ruled by their demagogues, rather than to be enlightened and aided by their statesmen. In May, the legislature rejected a proposition to appoint delegates to the Federal Convention; and in June, although the upper house, or Governor and Council, embraced the measure, it was again negatived in the House of Assembly by a large majority. The minority then formed an organization, which never lost sight of the national relations of the State, and which finally succeeded in bringing her into the Union under the new Constitution, in 1790.

Immediately after the first rejection of the proposal to unite with the other States in reforming the Confederation, a body of commercial persons in Providence addressed a letter to the Convention, expressing the opinion that full power for the regu-

lation of the commerce of the United States, both foreign and domestic, ought to be vested in the national council, and that effectual arrangements should also be made for giving operation to the existing powers of Congress in their requisitions for national purposes. Their object in this communication was to prevent an impression among the other States, unfavorable to the commercial interests of Rhode Island, from growing out of the circumstance of their being unrepresented in the Convention. Expressing the hope that the result of its deliberations would be to "strengthen the Union, promote the commerce, increase the power, and establish the credit of the United States," they pledged their influence and best exertions to secure the adoption of that result by the State of Rhode Island. The signers of this letter formed the nucleus of that party which afterwards fulfilled the pledge thus given to the Convention.

The absence of Rhode Island did not occasion a serious embarrassment. The resolve of Congress recommending the Convention did not expressly require the presence of all the States; and the commissions given by each of the States which adopted the recommendation clearly implied that their delegates were to meet and act with the delegations of such other States as might see fit to be represented. The communication of the minority party in Rhode Island was received and read, and the interests of that State were attended to throughout the proceedings.

We are now carefully to observe the position of the States when thus assembled in Convention. Their meeting was purely voluntary; they met as equals; and they were sovereign political communities, whom no power could rightfully coerce into a change of their condition, and with whom such a change must be the result of their own free and intelligent choice, governed by no other than the force of circumstances. That they were independent of foreign control was ascertained by the Declaration of Independence, by the war, and by the Treaty of Peace. That they were independent of each other, except so far as they had made certain mutual stipulations in the Articles of Confederation, was the necessary result of the events which had made the people of each State its rightful and exclusive sovereigns. We must recur, therefore, to the Articles of Confederation for the purpose of determining the nature of the position in which the States now stood.

When the States, in 1781, entered into the confederacy then established, they reserved their freedom, sovereignty, and independence, and every jurisdiction, power, and right not expressly delegated to the United States. By the provisions of the federal compact, these separate and sovereign communities committed to a general council the management of certain interests common to them all; in that council they were represented equally, each State having one vote; but as neither the powers conferred upon that body, nor the restraints

imposed by the States upon themselves, were to be enforced by any agreed sanctions, the parties to the compact were left to a voluntary performance of their stipulations. Still, there were certain powers which the States agreed should be exercised by the United States in Congress assembled, and certain duties towards the confederacy which they agreed to discharge; and therefore, so far as authority and jurisdiction had been conferred upon the United States, so far they had been surrendered by the States. The peculiarity of the case was, that the powers surrendered were ineffectual for the want of appropriate means of coercion.

These powers the States did not propose to recall. The Union was unbroken, though feeble, and trembling on the verge of dissolution. The purpose of all was to strengthen and secure its powers, to add somewhat to their number, and to render the whole efficient and operative by providing some form of direct and compulsory authority. For this end, as members of an existing confederacy, in possession of all the powers not previously delegated to the Union, the States had assembled upon the same equality, and under the same form of representation, with which they had always acted in the Congress.

As the States had conferred certain powers upon the Confederation, so it was equally competent to them to enlarge and add to those powers. They had formed State governments, and established written constitutions. But the people of the States, and not their governments, held the supreme, absolute,

and uncontrollable power. They had created, and they could modify or destroy; they could withdraw the powers conferred upon one class of agents, and bestow them upon another class. What was wanted was the discovery of some mode of proceeding, which, by involving the consent of the State governments, would avoid the appearance and the reality of revolution, and make the contemplated changes consist with the American idea of constitutional action.

Here also it seems proper to state the reasons why the process of framing the Constitution is so important as to demand a careful exhibition of the proceedings of those to whom this great undertaking was intrusted.

The Convention had confessedly no power to enact or establish anything. It was a representative body, clothed with authority to agree upon a system of government to be recommended to the adoption of their constituents. The constituents were twelve of the thirteen States of the confederacy, each having an equal voice and vote in the proceedings; but neither the assent nor the dissent of a State, in the Convention, to the whole system, or to any part of it, bound the people of that State to receive or to reject it when it should come before them. Still, the results of the various determinations of a majority of the States in this body; the purposes of particular provisions which those results clearly disclose; the relations which they evince between the different parts of the system, — are all of

the utmost importance in determining the sense in which the whole ultimately came before the enacting authority for approval or rejection. If, for example, a majority of the States came to a very early determination that the principle of the government should no longer be that of an exclusive representation of States, but should include a representation of the people of the different States in some fair and equitable ratio; if they adhered to this throughout their deliberations, and adjusted everything with reference to it; and if, when they finally provided for a mode of establishing the new system, they submitted it directly to the people of each State to declare whether they would be so represented, — it is manifest that these results of their action have much to do with the inquiry, What is the true nature of the present government of the United States?

Every student of the proceedings and discussions in the national Convention should, however, be careful not to extend this principle of general interpretation to the views, opinions, or arguments expressed or employed by individuals in that assembly. The line of argument or illustration adopted by different members may be more or less important, as tending to explain the scope or purpose of a particular decision arrived at by a vote of the Convention; and occasionally, as will be seen in reference to the arrangements which were finally entered into as mutual concessions or compromises between different interests, the discussions will be found to

be of great significance and importance. But it is, after all, to the results themselves, and to the principles involved in the various decisions of the Convention, as indicated by the votes taken, that we are to look for the landmarks that are to guide our inquiries into the fundamental changes, improvements, and additions proposed by the Convention to the country, and afterwards adopted by the people of the States.

CHAPTER II.

CONSTRUCTION OF A LEGISLATIVE POWER. — BASIS OF REPRESENTATION, AND RULE OF SUFFRAGE. — POWERS OF LEGISLATION.

THE Convention having been organized, Governor Randolph of Virginia[1] submitted a series of resolutions, embracing the principal changes that ought to be proposed in the structure of the federal system.

Mr. Charles Pinckney of South Carolina also submitted a plan of government, which, with Governor Randolph's resolutions, was referred to a committee of the whole. It is not necessary here to state the details of these several systems; for although that introduced by Randolph gave a direction to the deliberations of the committee, the results arrived at were in some respects materially different.

The first distinct departure that was made from the principles of the Confederation was involved in one of the propositions brought forward by Governor Randolph, "that a NATIONAL government ought to be established, consisting of a supreme legislative, executive, and judiciary"; and as this proposition was

[1] Edmund Randolph. See *ante*, Vol. I. p. 480.

affirmed in the committee by a vote of six States, it is important to understand the sense in which it was understood by them.[1]

Most of the framers of the Constitution seem to have considered that a compact between sovereign States, which rested for its efficacy on the good faith of the parties, and had no other compulsory operation than a resort to arms against a delinquent member, was a "federal" government. This was the principle of the Confederation. At this early stage of their deliberations, the idea which was intended by those who favored a change of that principle, when they spoke of a "national" government, was one that would be a supreme power with respect to certain national objects committed to it, and that would have some kind of direct compulsory action upon individuals. This distinction was understood by all to be real and important. It led directly to the question of the powers of the Convention, and formed the early line of division between those who desired to adhere to the existing system, and those who aimed at a radical change. The former admitted the necessity for a more effective government, and supposed that the Confederation could be made so by distributing its powers into the three great departments of a legislative, executive, and judiciary; but they did not suggest any

[1] Massachusetts, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, *ay*, 6; Connecticut, *no*, 1; New York divided (Colonel Hamilton *ay*, Mr. Yates *no*). Madison, Elliot, V. 132, 134.

mode by which those powers could be made supreme over the authority of the separate States. The latter contended, that there could be no such thing as government unless it were a supreme power, and that there could be but one supreme power over the same subjects in the same community; that supreme power could not from the nature of things act on the States collectively, in the usual and peaceful mode in which the operations of government ought to be conducted, but that it must be able to reach individuals; and that, as the Confederation could not operate in this way, the distribution of its powers into distinct departments would be no improvement upon the present condition of things.

But when the distinction between a national and a federal government had been so far developed, the subject was still left in a great degree vague and indeterminate. What was to mark this distinction as real, and give it practical effect? By what means was the government, which was now, as all admitted, a mere federal league between sovereign States, to become, in any just sense, national? The idea of a nation implies the existence of a people united in their political rights, and possessed of the same political interests. A national government must be one that exercises the political rights, and protects the political interests, of such a people. But, hitherto, the people of the United States had been divided into distinct sovereignties; and although by the Articles of Confederation some portion of the sovereign power of each of the separate States had

been vested in a general government, that government had been found inefficient, and incapable of resisting the great power that had been reserved to the respective States, and was constantly exerted by them. The difficulty was, that the constituent parties to the federal union were themselves political governments and sovereigns; the people of the States had no direct representation, and no direct suffrage, in the general legislature; and as in a republican government the representation and the suffrage must determine its character, it became obvious that, in order to establish a national government that would embrace the political rights and interests of the people inhabiting the States, the basis of representation and the rule of suffrage must be changed.

It being assumed that the new government was to be divided into the three departments of the legislative, executive, and judiciary, several questions at once presented themselves with regard to the constitution of the national legislature. Was it to consist of one or of two houses? and if the latter, what was to be the representation and the rule of suffrage in each?

The resolutions of Governor Randolph raised the question as to the rule of suffrage, before the committee had determined on the division of the legislative power into two branches. One of his propositions was, "That the rights of suffrage in the national legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem

best in different cases." This was no sooner propounded, than a difficulty was suggested by the deputies of the State of Delaware, which threatened to impede the whole action of the Convention. They declared that they felt restrained by their commissions from assenting to any change of the rule of suffrage, and announced their determination to retire from the Convention if such a change were adopted. The firmness and address of Madison and Gouverneur Morris surmounted this obstacle. They declared that the proposed change was absolutely essential to the formation of a national government; but they consented to postpone the question, having ascertained that it would finally be carried.[1]

The committee thereupon immediately determined that the national legislature should consist of two branches,[2] and proceeded to consider the mode of representation and suffrage in both. As the discussions proceeded, the members became divided into two parties upon the general subject; the one was for a popular basis and a proportionate representation in both branches; the other was in favor of an equal representation by States in both. The first issue between them was made upon the House, or what was termed the first branch of the legislature. On the one side it was urged, that to give the election of this branch to the people of the States would make the new government too democratic;

[1] Madison, Elliot, V. 134, 135.

[2] Ibid. 135. The vote of Pennsylvania, in compliance with the wishes of Dr. Franklin, was given for a single house.

that the people were unsafe depositaries of such a power, not because they wanted virtue, but because they were liable to be misled; and that the State legislatures would be more likely to appoint suitable persons. On the other hand, it was admitted that an election of the more numerous branch of the national legislature by the people would introduce a true democratic principle into the government, and this, it was said, was necessary. It was urged that this branch of the legislature ought to know and sympathize with every part of the community, and ought therefore to be taken, not only from different parts of the republic, but also from different districts of the larger members of it. The broadest possible basis, it was said, ought to be given to the new system; and as that system was to be republican, a direct representation of the people was indispensable. To increase the weight of the State legislatures, by making them electors of the national legislature, would only perpetuate some of the worst evils of the Confederation.

A decided majority of the States sustained the election of the first branch of the national legislature by the people.[1] Great efforts were, however, subsequently made to change this decision; and the discussion which ensued on a motion that this branch should be elected by the State legislatures, throws much light upon the nature of the govern-

[1] Massachusetts, New York, Pennsylvania, Virginia, North Carolina, Georgia, *ay*, 6; New Jersey, South Carolina, *no*, 2; Connecticut and Delaware divided.

ment which the friends of an election by the people were aiming to establish. From that discussion it appears that the idea was already entertained of forming a government that should have a vigorous authority derived directly from the people of the States, — one that should possess both the force and the sense of the people at large. For the formation of such a government one of two courses was necessary: either to abolish the State governments altogether; or to leave them in existence, and to regard the people of each State as competent to withdraw from their local governments such portions of their political power as they might see fit to bestow upon a national government. The latter plan was undoubtedly a novelty in political science; for no system of government had yet been constructed in which the individual stood in the relation of subject to two distinct sovereignties, each possessed of a distinct sphere, and each supreme in its own sphere. But if the American doctrine were true, that all supreme power resides originally in the people, and that all governments are constituted by them as the agents and depositaries of that power, there could be no incompatibility in such a system. The people who had deposited with a State government the sovereign power of their community, could withdraw it at their pleasure; and as they could withdraw the whole, they could withdraw a part of it. If a part only were withdrawn, or rather, if the supreme power in relation to particular objects were to be taken from the State governments, and vested

in another class of agents, leaving the authority of the former undiminished except as to those particular objects, the individual might owe a double allegiance, but there could be no confusion of his duties, provided the powers withdrawn and revested were clearly defined.

The advocates of a national government, besides and beyond the intrusting of a particular jurisdiction to that government, wished to make it certain that its legislative power, in each act of legislation, should rest on the direct authority of the people. For this purpose they desired to avoid all agency of the State governments in the appointment of the members of the national legislature. They held this to be necessary for two reasons. In the first place, they said that in a national government the people must be represented; and that in a republican system the real constituent should act directly, and without any intermediate agency, in the appointment of the representative. In the second place, they deduced from the objects of a national government the necessity for excluding the agency of the State governments in the appointment of those who were to exercise its legislative power. Those objects, they contended, were not fully stated by their opponents. The latter generally regarded the objects of the Union as confined to defence against foreign danger and internal disorder; the power to make binding treaties with foreign countries; the regulation of commerce, and the power to derive

revenues therefrom.[1] The former insisted that another great object must be, to provide more effectually for the security of private rights, and the steady dispensation of justice. Mr. Madison declared that republican liberty could not long exist under the abuses of it which had been practised in some of the States, where the uncontrollable power of a majority had enabled debtors to elude their creditors, the holders of one species of property to oppress the holders of another species, and where paper money had become a stupendous fraud. These evils had made it manifest that the power of the State governments, even in relation to some matters of internal legislation, must be to some extent restrained; and in order effectually to restrain it, the national government must, in the construction of its departments, as well as in its powers, be derived directly from the people.[2]

These views again prevailed as to the first branch, and Mr. Pinckney's proposition for electing that branch by the State legislatures was negatived by a vote of three States in the affirmative, and eight in the negative.[3]

But as soon as the impracticability of abolishing the State governments was seen and admitted, — and it was at once both seen and admitted by some

[1] See Mr. Sherman's remarks, made in committee, June 6; Madison, Elliot, V. 161.

[2] See Mr. Madison's views, as stated in his debates, Elliot, V. 161.

[3] Connecticut, New Jersey, South Carolina, *ay*, 3; Massachusetts, New York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, Georgia, *no*, 8.

of the strongest advocates for a national government, — it became apparent to a large part of the assembly, that to exclude those governments from all agency in the election of both branches of the national legislature would be inexpedient. It would obviously have been theoretically correct to have given the election of both the Senate and the House to the people of the States, especially when it was intended to adhere to the principle of a proportionate representation of the people of the States in both branches.[1] But the necessity for providing some means by which the States, as States, might defend themselves against encroachments of the national government, made it apparent that they must become, in the election, a constituent part of the system. No mode of doing this presented itself, except to give the State legislatures the appointment of the less numerous branch of the national legislature, — a provision which was finally adopted in the committee by the unanimous vote of the States.[2]

The results thus reached had settled for the present the very important fact, that the people of the States were to be represented in both branches of the legislature; that for the one they were to elect their representatives directly, and for the other they were to be elected by the legislature of the State.

But when it had been ascertained by whom the members of the two branches were to be elected,

[1] Mr. Wilson was in favor of this plan, and Mr. Madison seems to have favored it.

[2] Madison, Elliot, V. 170.

there remained to be determined the decisive question, which was to mark still more effectively the distinction between a purely national and a purely federal government, namely, the rule of suffrage, or the ratio of representation in the national legislature.

The rule of suffrage adopted in the first Continental Congress was, as we have seen, the result of necessity; for it was impossible to ascertain the relative importance of each Colony; and, moreover, that Congress was in fact an assembly of committees of the different Colonies, called together to deliberate in what mode they could aid each other in obtaining a redress of their several grievances from Parliament and the Crown. But while, from the necessity of the case, they assigned to each Colony one vote in the Congress, they looked forward to the time when the relative wealth or population of the Colonies must regulate their suffrage in any future system of continental legislation.[1] The character of the government formed by the Articles of Confederation had operated to postpone the arrival of this period; because it was in the very nature of that system that each State should have an equal voice with every other. This system was the result of the formation of the State governments, each of which had become the present depositary of the political powers of an independent people.

But if this system were to be changed, — if the

[1] *Ante*, Vol. I. Book I. ch. I. pp. 15 – 17.

people of the States were to be represented in each branch of the national legislature, — some ratio of representation must be adopted, or the idea of connecting them as a nation with the government that was to be instituted must be abandoned. It was obviously for the interest of the larger States, such as Virginia, Pennsylvania, and Massachusetts, — then the three leading States in point of population, — to have a proportionate representation of their whole inhabitants, without reference to age, sex, or condition. On the other hand, it was for the interest of the smaller States to insist on an equality of votes in the national legislature, or at least on the adoption of a ratio that would exclude some portions of the population of the great States. Some of the lesser States were exceedingly strenuous in their efforts to accomplish these objects, and more than once, in the course of the proceedings, declared their purpose to form a union on no other basis.

In this posture of things the alternatives were, either to form no union at all, or only to form one between the large States willing to unite on the basis of proportionate representation; or to abolish the State governments, and throw the whole into one mass; or to leave the distinctions and boundaries between the different States, and adopt some equitable ratio of suffrage, as between the people of the several States, in the national legislature. The latter course was adopted in the committee, as to the first branch, by a vote of seven States in the

affirmative, against three in the negative, one being divided.[1]

The question was then to be determined, by what ratio the representation of the different States should be regulated; and here again any one of several expedients might be adopted. The basis of representation might be made to consist of the whole number of voters, or those on whom the States had conferred the elective franchise; or it might be confined to the white inhabitants, excluding all other races; or it might include all the free inhabitants of every race, excluding only the slaves; or it might embrace the whole population of each State. Some examination of each of these plans will illustrate the difficulties which had to be encountered.

To have adopted the number of legal voters of the States as the ratio of representation in the national legislature would have been to adopt a system in which there were great existing inequalities. The elective franchise had been conferred in the different States upon very different principles; it was very broad in some of the States, and much narrower in others, according to their peculiar policy and manners. These inequalities could scarcely have been removed; for the right of suffrage in some of the States was more or less connected with their systems of descent and distribution of property, and those systems could not readily be changed, so

[1] Massachusetts, Connecticut, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, *ay*, 7; New York, New Jersey, Delaware, *no*, 3; Maryland, divided.

as to adapt the condition of society to the new interest of representation and influence in the general government. This plan was, therefore, out of the question.

It was nearly as impracticable, also, to confine the basis of representation to the white inhabitants of the States. Some of the States — such as Massachusetts, Connecticut, Rhode Island, New York, and Pennsylvania, in which slavery was already, or was ultimately to become, extinct, and Maryland, North Carolina, and Virginia, where slavery was likely to remain — had large numbers of free blacks. These inhabitants, who were regarded as citizens in some of the States, but not in others, were in all a part of their populations, contributing to swell the aggregate of the numbers and wealth of the State, and thus to raise it in the scale of relative rank. Their personal consequence, or social rank, was a thing too remote for special inquiry. A State that contained five or ten thousand of these inhabitants might well say, that, although of a distinct race, they formed an aggregate portion of its free population, too large to be omitted without opening the door to inquiries into the condition and importance of other classes of its free inhabitants. This was the situation of all the Northern States except New Hampshire, as well as of all the Middle and Southern States; and it was especially true of Virginia, which had nearly twice as many free colored persons as any other State in the Union.

It was equally impracticable to form a national

government in which the basis of representation should be confined to the free inhabitants of the States. The five States of Maryland, Virginia, North Carolina, South Carolina, and Georgia, including their slaves, were found by the first census, taken three years after the formation of the Constitution, to contain a fraction less than one half of the whole population of the Union.[1] In three of those States the slaves were a little less than half, and in two of them they were more than half, as numerous as the whites.[2] There was no good reason, therefore, — except the theoretical one that a slave can have no actual voice in government, and consequently does not need to be represented, — why a class of States containing nearly half of the whole population of the confederacy should consent to exclude such large masses of their populations from the basis of representation, and thereby give to the free inhabitants of each of the other eight States a relatively larger share of legislative power than would fall to the free inhabitants of the States thus situated. The objection arising from the political and social condition of the slaves would have had great weight, and indeed ought to have been decisive of the question, if the object had been to efface the boundaries of the States, and to form a purely consolidated republic. But this purpose, if ever entertained at all,

[1] They contained 1,793,407 inhabitants; the other eight States had 1,845,595 when the federal census of 1790 was taken.

[2] See the census of 1790, *post*, p. 55.

could not be followed by the framers of the Constitution. They found it indispensable to leave the States still in possession of their distinct political organizations, and of all the sovereignty not necessary to be conferred on the central power, which they were endeavoring to create by bringing the free people of these several communities into some national relations with each other. It became necessary, therefore, to regard the peculiar social condition of each of the States, and to construct a system of representation that would place the free inhabitants of each distinct State upon as near a footing of political equality with the free inhabitants of the other States as might, under such circumstances, be practicable. This could only be done by treating the slaves as an integral part of the population of the States in which they were found, and by assuming the population of the States as the true basis of their relative representation.

It was upon this idea of treating the slaves as inhabitants, and not as chattels, or property, that the original decision was made in the committee of the whole, by which it was at first determined to include them.[1] Having decided that there ought to be an equitable ratio of representation, the commit-

[1] The population of the States was adopted in the committee of the whole, instead of their quotas of contribution, which, in one or another form, was the alternative proposition. The slaves were included, in a proportion accounted for in the text, as a part of the aggregate *population;* and it was not until a subsequent stage of the proceedings that this result was defended on the ground of their forming part of the aggregate *wealth* of the State.

tee went on to declare that the basis of representation ought to include 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 they then added to the population thus described three fifths of all other persons not comprehended in that description, except Indians not paying taxes. The proportion of three fifths was borrowed from a rule which had obtained the sanction of nine States in Congress, in the year 1783, when it was proposed to change the basis of contribution by the States to the expenses of the Union from property to population.[1] At that time, the slaveholding States had consented that three fifths of their slaves should be counted in the census which was to fix the amount of their contributions; and they now asked that, in the apportionment of representatives, these persons might still be regarded as inhabitants of the State, in the same ratio. The rule was adopted in the committee, with the dissent of only two States, New Jersey and Delaware; but on the original question of substituting an equitable ratio of representation for the equality of suffrage that prevailed under the Confederation, New York united with New Jersey and Delaware in the opposition, and the vote of Maryland was divided.

The next step was to settle the rule of suffrage in the Senate; and although it was earnestly contended

[1] *Ante*, Vol. I. Book II. ch. III. p. 213, note 2, where the origin of the proportion of three fifths is explained.

that the smaller States would never agree to any other principle than an equality of votes in that body,[1] it was determined in the committee, by a vote of six States against five, that the ratio of representation should be the same as in the first branch.[2]

Thus it appears that originally a majority of the States were in favor of a numerical representation in both branches. The three States of Virginia, Pennsylvania, and Massachusetts, the leading States in population, and with them North Carolina, South Carolina, and Georgia, found it at present for their interest to adopt this basis for both houses of the national legislature. It was a consequence of the principle of numerical representation, that the slaves should be included; and it does not appear that at this time any delegate from a Northern State interposed any objection, except Mr. Gerry of Massachusetts, who regarded the slaves as "property," and said that the cattle and horses of the North might as well be included. But the State which he represented was at this time pressing for the rights of population, and for a system in which population should have its due influence; and her vote, as well as that of Pennsylvania, was accordingly given for the principle which involved an admission of the slaves into the basis of representation, and for the proportion which the slave States were willing to take.

[1] By Mr. Sherman and Mr. Ellsworth.

[2] Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, *ay*, 6; Connecticut, New York, New Jersey, Delaware, Maryland, *no*, 5. Elliot, V. 182.

These transactions in the committee of the whole are quite important, because they show that the original line of division between the States, on the subject of representation, was drawn between the States having the preponderance of population and the States that were the smallest in point of numbers. When, and under what circumstances, this line of division changed, what combinations a nearer view of all the consequences of numerical representation may have brought about, and how the conflicting interests were finally reconciled, will be seen hereafter. What we are here to record is the declaration of the important principle, that the legislative branch of the government was to be one in which the free people of the States were to be represented, and to be represented according to the numbers of the inhabitants which their respective States contained, counting those held in servitude in a certain ratio only.

The general principles on which the powers of the national legislature were to be regulated, were declared with a great degree of unanimity. That it ought to be invested with all the legislative powers belonging to the Congress of the Confederation was conceded by all. This was followed by the nearly unanimous declaration of a principle, which was intended as a general description of a class of powers that would require subsequent enumeration, namely, that the legislative power ought to embrace all cases to which the State legislatures were incompetent, or in which the harmony of the United

States would be interrupted by the exercise of State legislation. But the committee also went much farther, and without discussion or dissent declared that there ought also to be a power to negative all laws passed by the several States contravening, in the opinion of the national legislature, the Articles of Union, or any treaties made under the authority of the Union.[1]

The somewhat crude idea of making a negative on State legislation a legislative power of the national government, shows that the admirable discovery had not yet been made of exercising such a control through the judicial department. Without such a control lodged somewhere, the national prerogatives could not be defended, however extensive they might be in theory. There had been, as Mr. Madison well remarked, a constant tendency in the States to encroach on the federal authority, to violate national treaties, to infringe the rights and interests of each other, and to oppress the weaker party within their respective jurisdictions. The expedient that seemed at first to be the proper remedy, and, as was then supposed, the only one that could be employed as a substitute for force, was to give the general government a power similar to that which had been exercised over the legislation of the Colonies by the crown of England, before the Revolution; and there were some important members of the Convention who at this time thought that this

[1] Madison, Elliot, V. 139.

power ought to be universal.[1] They considered it impracticable to draw a line between the cases proper and improper for the exercise of such a negative, and they argued from the correctness of the principle of such a power, that it ought to embrace all cases.

But here the complex nature of the government which they were obliged to establish made it necessary to depart from the theoretical correctness of a general principle. The sovereignty of the States would be entirely inconsistent with a power in the general government to control their whole legislation. As the direct authority of the national legislature was to extend only to certain objects of national concern, or to such as the States were incompetent to provide for, all the political powers of the States, the surrender of which was not involved in the grant of powers to the national head, must remain; and if a general superintendence of State legislation were added to the specific powers to be conferred on the central authority, there would be in reality but one supreme power in all cases in which the general government might see fit to exercise its prerogative. The just and proper sphere of the national government must be the limit of its power over the legislation of the States. In that sphere it must be supreme, as the power of each State within its own sphere must also be supreme. Neither of them should encroach upon the prerog-

[1] Mr. Madison, Mr. Wilson, Mr. C. Pinckney, Mr. Dickinson. On the other hand, Mr. Williamson, Mr. Sherman, Mr. Bedford, and Mr. Butler strenuously opposed this plan.

atives of the other; and while it was undoubtedly necessary to arm the national government with some power to defend itself against such encroachments on the part of the States, there could be no real necessity for making this power extend beyond the exigencies of the case. Those exigencies would be determined by the objects that might be committed to the legislation of the central authority; and if a mode could be devised, by which the States could be restrained from interfering with or interrupting the just exercise of that authority, all that was required would be accomplished.[1]

But to do this by means of a negative that was to be classed among the legislative powers of the new government, was to commit the subject of a supposed conflict between the rights and powers of the State and the national governments to an unfit arbitration. Such a question is of a judicial nature, and belongs properly to a department that has no direct interest in maintaining or enlarging the prerogatives of the government whose powers are involved in it.

But the framers of the Constitution had come fresh from the inconveniences and injustice that had resulted from the unrestrained legislative powers of the States. Some of them believed it, therefore, to be necessary to make the authority of the United States paramount over the authority of each separate State; and a negative upon State legislation, to

[1] Accordingly, a proposition to extend the negative on State legislation to all cases received the votes of three States only, viz. Massachusetts, Pennsylvania, and Virginia.

be exercised by the legislative branch of the national government, seemed to be the readiest way of accomplishing the object. Some of the suggestions of the mode in which this power was to operate strike us, at the present day, as singularly strange. No less a person than Mr. Madison, in answer to the objections arising from the practical difficulties in subjecting all the legislation of all the States to the revision of a central power, thought at this time that something in the nature of a commission might be issued into each State, in order to give a temporary assent to laws of urgent necessity. He suggested also that the negative might be lodged in the Senate, in order to dispense with constant sessions of the more numerous branch.

But the radical objection to any plan of a negative on State legislation, as a legislative power of the general government, was, that it would not in fact dispense with the use of force against a State in the last resort. If, after the exercise of the power, the State whose obnoxious law had been prohibited should see fit to persist in its course, force must be resorted to as the only ultimate remedy. How different, how wise, was the expedient subsequently devised, when the appropriate office of the judicial power was discerned, — a power that waits calmly until the clashing authorities of the State and the nation have led to a conflict of right or duty in some individual case, and then peacefully adjudicates, in a case of private interest, the great question, with which of the two governments resides the power of

prescribing the paramount rule of conduct for the citizen! Disobedience on the part of the State may, it is true, still follow after such an adjudication, and against an open array of force on the one side nothing but force remains to be employed on the other. But the great preventive of this dread necessity is found in the fact, that there has been an adjudication by a tribunal that commands the confidence of all, and in the moral influence of judicial determinations over a people accustomed to submit not only their interests, but their feelings even, to the arbitrament of juridical discussion and decision.

TABLE

EXHIBITING THE POPULATIONS OF THE THIRTEEN STATES, ACCORDING TO THE CENSUS OF 1790.

N. B. — In this abstract Maine is not included in Massachusetts, nor Kentucky and Tennessee in the States from which they were severed.

	Whites.	Free Colored.	Slaves.	Total.
New Hampshire,	141,111	630	158	141,899
Massachusetts,	373,254	5,463	.....	378,717
Rhode Island,	64,689	3,469	952	69,110
Connecticut,	232,581	2,801	2,759	238,141
New York,	314,142	4,654	21,324	340,120
New Jersey,	169,954	2,762	11,423	184,139
Pennsylvania,	424,099	6,537	3,737	434,373
Delaware,	46,310	3,899	8,887	59,096
Maryland,	208,649	8,043	103,036	319,728
Virginia,	442,115	12,765	293,427	748,307
North Carolina,	288,204	4,975	100,572	393,751
South Carolina,	140,178	1,801	107,094	249,073
Georgia,	52,886	398	29,264	82,548
Aggregate,	2,898,172	58,197	682,633	3,639,002

Total population of the eight States in 1790, in which slavery had been or has since been abolished, 1,845,595.

Total population of the five States in 1790, in which slavery existed, and still exists, 1,793,407.

CHAPTER III.

Construction of the Executive and the Judiciary.

The construction of a national executive, although not surrounded by so many inherent practical difficulties as the formation of the legislative department, was likely to give rise to a great many opposite theories. The questions, of how many persons the executive ought to consist, in what mode the appointment should be made, and what were to be its relations to the legislative power, were attended with great diversities of opinion.

The question whether the executive should consist of one, or of more than one person, was likely to be influenced by the nature of the powers to be conferred upon the office. Foreseeing that it must necessarily be an office of great power, some of the members of the Convention thought that a single executive would approach too nearly to the model of the British government. These persons considered that the great requisites for an executive department — vigor, despatch, and responsibility — could be found in three persons as well as in one. Those, on the other hand, who favored the plan of a single magistrate, maintained that the prerogatives

of the British monarchy would not necessarily furnish the model for the executive powers; and that unity in the executive would be the best safeguard against tyranny.

But this point connected itself with the question, whether the executive should be surrounded by a council, and the latter proposition again involved the consideration of the precise relation of the executive to the legislative power. That a negative of some kind upon the acts of the legislature was essential to the independence of the executive, was a truth in political science not likely to escape the attention of many of the members of the Convention. Whether it should be a qualified or an absolute negative was the real, and almost the sole question; for although there were some who held the opinion that no such power ought to be given, it was evident from the first that its necessity was well understood by the larger part of the assembly. In the first discussion of this subject, the negative was generally regarded as a means of defence against encroachments of the legislature on the rights and powers of the other departments. It was supposed that, although the boundaries of the legislative authority might be marked out in the Constitution, the executive would need some check against unconstitutional interference with its own prerogatives; and that, as the judicial department might be exposed to the same dangers, the power of resisting these also could be best exercised by the executive. But an absolute negative for any purpose was fa-

vored by only a very few of the members, and the proposition first adopted was to give the executive alone a revisionary check upon legislation, which should not be absolute if it were afterwards overruled by two thirds of each branch of the legislature.[1]

But inasmuch as this provision would leave the precise purposes of the check undetermined, and in order, as it would seem, to subject the whole of the legislative acts to revision and control by the executive, some of the members desired that the judiciary, or a convenient number of the judges, might be added to the executive as a council of revision. Among these persons were Mr. Madison and Mr. Wilson. The former expressed a very decided opinion, that, whether the object of a revisionary power was to restrain the encroachments of the legislature on the other departments, or on the rights of the people at large, or to prevent the passage of laws unwise in principle or incorrect in form, there would be great utility in annexing the wisdom and weight of the judiciary to the executive. But this proposition was rejected by a large majority of the States, and the power was left by the committee as it had been settled by their former decision. These proceedings, however, do not furnish any decisive evidence of the nature and purpose of the revisionary check.

But before this feature of the Constitution had

[1] Adopted by the votes of eight States against two, — Connecticut and Maryland voting in the negative.

been settled by the committee, they had determined on a mode in which the executive should be appointed. It is singular that the idea of an election of the executive by the people, either mediately or immediately, found so little favor at first, that on its first introduction it received the votes of but two States. Since the executive was to be the agent of the legislative will, it was argued by some members that it ought to be wholly dependent, and ought therefore to be chosen by the legislature. The experience of New York and of Massachusetts, on the other hand, — where the election of the first magistrate by the people had been successfully practised, — and the danger that the legislature and the candidates might play into each other's hands, and thus give rise to constant intrigues for the office, were the arguments employed by others. Upon the introduction of a proposition that the States be divided into districts, for the election by the people of electors of the executive, two States only recorded their votes in its favor, and eight States voted against it.[1] By the vote of eight States it was then determined that the executive should be elected by the national legislature for the term of seven years;[2] and subsequently it was determined that the executive should be ineligible to a second term of office, and should be removable on impeachment and conviction of malpractice or neglect of duty. A single

[1] Pennsylvania, Maryland, *ay*, 2; Massachusetts, Connecticut, New York, Delaware, Virginia, North Carolina, South Carolina, Georgia, *no*, 8.

[2] Pennsylvania and Maryland, *no*.

executive was agreed to by a vote of seven States against three.[1] After the mode in which the negative was to be exercised had been settled, an attempt was made to change the appointment, and vest it in the executives of the States. But this proposal was decisively rejected.[2]

The judiciary was the next department of the proposed plan of government that remained to be provided. Like the executive, it was a branch of sovereign power unknown to the Confederation. The most palpable defect of that government, as I have more than once had occasion to observe, was the entire want of sanction to its laws. It had no judicial system of its own for decree and execution against individuals. All its legislation, both in nature and form, prescribed duties to States. The observance of these duties could only be enforced against the parties on whom they rested, and this could be done only by military power. But it was the peculiar and anomalous situation of the American Confederacy, that the power to employ force against its delinquent members had not been expressly delegated to it by the Articles of Union; and that it could not be implied from the general purposes and provisions of that instrument, without a seeming infraction of the article by which the States had reserved to themselves every power, jurisdiction, and right not "expressly" delegated to the United States. If this objection was well

[1] New York, Delaware, and Maryland, *no*.

[2] Nine States voted against it, and one (Delaware) was divided.

founded, — and it was universally held to be so, — we may well concur in the remark of The Federalist, that "the United States presented the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws."[1]

The Confederation, too, had found it to be entirely impracticable to rely on the tribunals of the States for the execution of its laws. Such a reliance in a confederated government presupposes that the party guilty of an infraction of the laws or ordinances of the confederacy will try, condemn, and punish itself. The whole history of our Confederation evinces the futility of laws requiring the obedience of States, and proceeding upon the expectation that they will enforce that obedience upon themselves.

The necessity for a judicial department in the general government was, therefore, one of the most prominent of those "exigencies of the Union," for which it was the object of the present undertaking to provide. The place which that department was to occupy in a national system could be clearly deduced from the office of the judiciary in all systems of constitutional government. That office is to apply to the subjects of the government the penalties inflicted by the legislative power for disobedience of the laws. Disobedience of the lawful commands of a government may be punished or prevented in two

[1] The Federalist, No. 21.

modes. It may be done by the application of military power, without adjudication; or it may be done through the agency of a tribunal, which adjudicates, ascertains the guilty parties, and applies to them the coercion of the civil power. This last is the peculiar function of a judiciary; and in order that it may be discharged effectually, the judiciary that is to perform this office must be a part of the government whose laws it is to enforce. It is essential to the supremacy of a government, that it should adjudicate on its own powers, and enforce its own laws; for if it devolves this prerogative on another and subordinate authority, the final sanction of its laws can only be by a resort to military power directed against those who have refused to obey its lawful commands.

One of the leading objects in forming the Constitution was to obtain for the United States the means of coercion, without a resort to force against the people of the States collectively. Mr. Madison, at a very early period in the deliberations of the Convention, declared that the use of force against a State would be more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.[1] At his suggestion, a clause in Governor Randolph's plan authorizing the use of force against a delinquent member of the confederacy was laid aside, in

[1] Madison, Elliot, V. p. 140.

order that a system might be framed which would render it unnecessary. This could be done only by making the authority of the government supreme in relation to the rights and powers that might be committed to it; and it could be made so only by applying its legislation to individuals through the intervention of a judiciary. A confederacy whose legislative power operates only upon States, or upon masses of people in a collective capacity, can be supreme only so far as it can employ superior force; and when the issue that is to determine the question of supremacy is once made up in that form, there is an actual civil war.

The introduction, therefore, of a judicial department into the new plan of government, of itself evinces an intention to clothe that government with powers that could be executed peacefully, and without the necessity of putting down the organized opposition of subordinate communities. By their resort to this great instrumentality, we may perceive how much, in this particular, the framers of the Constitution were aided by the spirit and forms of the institutions which the people of these States had already framed for their separate governments. The common law, which the founders of all these States had brought with them to this country, had accustomed them to regard the judiciary as clothed with functions in which two important objects were embraced. By the known course of that jurisprudence the judiciary is, in the first place, the department which declares the construction of the laws;

and, in the second place, when that department has announced the construction of a law, it is not only the particular case that is settled, but the rule is promulgated that is to determine all future cases of the same kind arising under the same law. Thus the judiciary, in governments whose adjudications proceed upon the course of the common law, becomes not merely the arbitrator in a particular controversy, but the department through which the government interprets the rule of action prescribed by the legislature, and by which all its citizens are to be guided. This office of the judicial department had long been known in all the States of the Union at the time of the formation of the national Constitution.

By the introduction of this department into their plan of government, the framers of the Constitution obviously intended that it should perform the same office in their national system which the corresponding department had always fulfilled in the States. No other function of a judiciary was known to the people of the United States, and this function was both known and deemed essential to a well-regulated liberty. It was known that the judicial department of a government is that branch by which the meaning of its laws is ascertained, and applied to the conduct of individuals. To effect this, it was introduced into the system whose gradual formation and development we are now examining.

The committee not only declared that this department, like the legislative and the executive, was to

be "supreme," but they proceeded to make it so. One of the first questions that arose concerning the construction of the judiciary was, whether it should consist solely of one central tribunal, to which appeals might be carried from the State courts, or should also embrace inferior tribunals to be established within the several States. The latter plan was resisted as an innovation, which, it was said, the States would not tolerate. But the necessity for an effective judiciary establishment, commensurate with the legislative authority, was generally admitted, and a large majority of the States were found to be in favor of conferring on the national legislature power to establish inferior tribunals;[1] while the provision for a supreme central tribunal was to be made imperative by the Constitution.

The intention of the committee also to make the judicial coextensive with the legislative authority, appears from the definition which they gave to both. Upon the national legislature they proposed to confer, in addition to the rights vested in Congress by the Confederation, power to legislate in all cases to which the separate States were incompetent, or in which the harmony of the United States might be interrupted by the exercise of individual legislation; and the further power to negative all laws passed by the several States contravening, in the opinion of the national legislature, the Articles of Union, or any treaties subsisting under the authority of the

[1] Eight States in the affirmative, two in the negative, and one divided.

Union. The jurisdiction of the national judiciary it was declared should extend to all cases which respect the collection of the national revenue, and to impeachments of national officers; and then the comprehensive addition was made of "questions which involve the national peace and harmony." This latter provision placed the general objects, which it was declared ought to be embraced by the legislative power, within the cognizance of the judiciary. Those objects were not yet described in detail, the purpose being merely to settle and declare the principles on which the powers of both departments ought to be founded.

But, as we have already had occasion to see, the idea of vesting in the judicial department such control over the legislation of the separate States as might be surrendered by them to the national government, was not yet propounded. The principle which was to ascertain the extent of that control was already introduced and acted upon, namely, that it should embrace all laws of the States which might conflict with the Constitution, or the treaties made under the national authority. The plan at present was, as we have seen, to treat this as a legislative power, to be executed by the direct control of a negative. But a nearer view of the great inconveniences of such an arrangement, and the general basis of the jurisdiction already marked out for the national judiciary, led to the development of the particular feature which was required as a substitute for direct interference with the legislative pow-

ers of the States. In truth, the important principle which proposed to extend the judicial authority to questions involving the national peace and harmony, embraced all the power that was required; and it only remained to be seen that the exercise of that power by the indirect effect of judicial action on the laws of the States after they had been passed, was far preferable to a direct interference with those laws while in the process of enactment.

The committee, with complete unanimity, determined that the judges of the supreme tribunal should hold their offices during good behavior.[1] This tenure of office was taken from the English statutes, and from the constitutions of some of the States which had already adopted it. The commissions of the judges in England, until the year 1700, were prescribed by the crown; and although they were sometimes issued to be held during good behavior, they were generally issued during the pleasure of the crown, and it was always optional with the crown to adopt the one or the other tenure, as it saw fit. But in the statute passed in the thirteenth year of the reign of William III., which finally secured the ascendency of the Protestant religion in that country, and made other provisions for the rights and liberties of the subject, it was enacted that judges' commissions should be made during good behavior, and that their salaries should be ascertained and established; but it was made lawful

[1] This was afterwards applied to the judges of the inferior courts also.

for the crown to remove them upon the address of both houses of Parliament.[1] Still, however, it was always considered that the commissions of the judges expired on the death of the king; and for the purpose of preventing this, and in order to make the judges more effectually independent, a new statute, passed in the first year of the reign of George III., declared that the commissions of the judges should continue in force during their good behavior, notwithstanding the demise of the crown; and that such salaries as had been once granted to them should be paid in all future time, so long as their commissions should remain in force. The provision which made them removable by the crown on the address of both houses of Parliament was retained and re-enacted.[2]

In framing the Constitution of the United States, the objectionable feature of the English system was rejected, and its valuable provisions were retained. No one, at the stage of the proceedings which we are now examining, proposed to make the judges removable on the address of the legislature; and although at a much later period this provision was brought forward, it received the vote of a single State only. The first determination of the Convention, in committee of the whole, was, that the judges should hold their offices during good behavior; that they should receive punctually, at stated times, a fixed compensation for their services, in which no

[1] Act 12 & 13 William III. ch. 2. [2] Act 1 Geo. III. ch. 23.

increase[1] or diminution should be made so as to affect the persons actually in office at the time.

The appointment of the judges was by general consent, at this stage of the proceedings, vested in the Senate.

[1] This was afterwards stricken out.

NOTE ON THE JUDICIAL TENURE.

THE English historians and juridical writers have not given a very satisfactory account of the purpose for which the power of removal on the address of the two Houses of Parliament was incorporated with the provision which gave the judges their commissions during good behavior. It is obvious that, if the power of removal is to be regarded as an unqualified power, to be exercised for any cause, or without the existence of any cause, the office is held during the pleasure of the legislative and executive branches of the government, and not during the official good conduct of the incumbent. In this view of it, therefore, the provision is inconsistent with the declared tenure of the commission. On the other hand, if the *power* of removal is not to be regarded as a limitation upon the tenure of the office, but the *process* of removal is to be considered as a mode in which the unfitness or incapacity of the incumbent is to be ascertained, — treating it as a substitute for impeachment, to be used in cases of palpable official incapacity or unfitness, — then it is not repugnant to the tenure of good behavior. In support of this view of the subject it is to be observed that, in the statute of 1 Geo. III. c. 23, the tenure of good behavior is made the leading and primary object of the enactment. The motives for it are set forth with great point and emphasis. The King is made to declare from the throne to the two houses of Parliament that he looks upon the independency and uprightness of judges as essential to the impartial administration of justice, as one of the best securities to the rights and liberties of the subject, and as most conducive to the honor of the crown. The enacting part of the statute, which follows this recital, provides anew that the judges' commissions shall be and remain in force during their good behavior, notwithstanding a demise of

the crown; and the power of removal by the King, on the address of both houses, follows this enactment as a *proviso*. If, therefore, a not unusual rule of construction is applied, the power embraced in the *proviso* should be so construed as to make its operation consistent with, and not repugnant to, the great purpose of the statute, which was to establish the tenure of good behavior. In this view the rightful exercise of the power may be confined to cases where the individual is no longer within that tenure, or, in other words, where the good behavior has ceased, or become impossible. Upon this construction the power of removal can only be rightfully exercised when a cause exists which touches the official conduct or capacity of the incumbent.

In the Constitution of the State of Massachusetts, formed in 1780, the power of removal by the executive, on the address of both houses of the legislature, was adopted from the English statutes, and it was introduced as a *proviso* after the tenure of good behavior had been emphatically declared for all judicial officers, just as it stands in the act of 1 Geo. III.

An objection which has sometimes been urged against the construction above suggested is, that it is narrower than the terms of the provision, and that it would not include a case where a judge may have discharged all his official duties with propriety and ability, and may yet be personally obnoxious, as, for example, on account of gross immorality. But the answer to this objection is, that the question, whether a case of official good conduct accompanied by personal immorality, or the like defect of character, was intended to be within the power of removal, must be determined on a careful view of the whole provision. The meaning and scope of the qualification of "good behavior" must be first ascertained. If it means simply that the individual is to hold his commission so long as each official duty is discharged in the manner contemplated by law, then a mere personal immorality, which has not affected or influenced the discharge of official duty, is not inconsistent with the good behavior established as the tenure of the office. But if the good behavior means, not merely that the individual shall discharge his official duties in a competent manner, with an average amount of ability, and without corruption, but that he shall so order his life and conversation as not to expose himself to a cessation of the power to act intelligently and uprightly, then there may undoubtedly be a case of personal immorality that would touch the tenure of the office. Still it must be the tenure of the office that is touched, and it must be touched by misconduct or incapacity. The phrase "good behavior" is technical, and has always had a meaning attached to it which confines it to the discharge of official duty. It is, therefore, not what men think of the individual, or how they feel

towards him, or how they regard him, but what he does or omits officially, that is to determine whether he continues to behave well in his office; and unless some conduct, or some bodily or mental condition, is adduced, that shows him to be incapable of fulfilling the duties of his station in the manner in which the law intends they shall be discharged, his tenure of good behavior is not lost.

But the naked power of removal by the other two branches of the government exists in the English constitution, and in that of the State of Massachusetts, without any declaration of the purposes or occasions to which it is to be applied; and it is not easy to reconcile it with the avowed object of judicial independence obviously embraced by the terms of the commission prescribed in both of them. The two most important native writers on the English constitution, Sir William Blackstone and Mr. Hallam, regard the provision as a restraint on the former practice of the crown, of dismissing judges when they were not sufficiently subservient to the views of the government in political prosecutions. Mr. Hallam, after referring to the provisions of the two statutes, lays down the proposition, that "no judge can be dismissed from office, except in consequence of a conviction for some offence, or the address of both houses of Parliament, which is tantamount to an act of the legislature." (Constitutional History, III. 262.) He suggests further, that although the commissions of the judges cannot be vacated by the authority of the crown, yet that they are not wholly out of the reach of its influence. They are accessible to the hope of further promotion, to the zeal of political attachment, to the flattery of princes and ministers, and to the bias of their professional training. He therefore commends the wisdom of subjecting them in some degree to legislative control. (Ibid.) But it is not to be inferred from his remarks that that control can be rightfully exercised without the existence of a cause which affects their good behavior. On the contrary, he appears to consider that the purpose was to prevent a subserviency to the crown in their official conduct, by subjecting *that conduct* to legislative scrutiny. To the honor of England, it is to be remembered that, since this power was recognized, there has never been an instance in which a judge has been removed for political or party purposes.

Mr. Justice Story has taken substantially the same view of the subject. He says: "The object of the act of Parliament was to secure the judges from removal at the mere pleasure of the crown; but not to render them independent of the action of Parliament. By the theory of the British constitution, every act of Parliament is supreme and omnipotent. It may change the succession to the crown, and even the very fundamentals of the constitution. It would have been absurd, therefore, to have exempt-

ed the judges alone from the general jurisdiction of this supreme authority in the realm. The clause was not introduced into the act for the purpose of conferring the power on Parliament, for it could not be taken away or restricted, but simply to recognize it as a qualification of the tenure of office; so that the judges should have no right to complain of any breach of an implied contract with them, and the crown should not be deprived of the means to remove an unfit judge whenever Parliament should, in their discretion, signify their assent." (Commentaries on the Constitution, Vol. II. § 1623.)

By describing it as a "qualification of the tenure of office," the learned commentator probably did not mean that the power was intended to be recognized as a power to remove judges against whom no official misconduct or incapacity could be charged; for the context shows that he was speaking of the removal of "unfit" judges as a power that it was proper to recognize and regulate. If he intended to lay it down as a complete and actual qualification of the tenure of good behavior, it must have been upon the theory to which he refers, upon which an act of Parliament can do anything, either with or without reason. Upon this theory all the commissions of all the judges in the realm may be vacated without inquiry into their fitness or unfitness. But if the true view of the subject is, that the *King's commission*, which runs *quamdiu se bene gesserit*, cannot be determined when the crown alone decides that the good behavior has ceased, or become impracticable, but may be determined when the whole legislative power has so decided, then in one sense it *is* a qualification of the commission; because the latter emanates from the crown, but after it has issued, it is to be superintended by Parliament *and* the crown.

When we turn to our American constitutions, all embarrassment arising from the English theory of the omnipotence of the legislative department vanishes In our systems of government the people alone possess supreme power. The legislature is but the organ of their will for certain specific and limited purposes, which are carefully defined in a written constitution; and no power that is not plainly confided by the constitution to the legislative and executive departments of the government can be exercised by them. Under every American constitution, therefore, which has conferred upon the executive power to remove a judge upon the address of the two houses of the legislature, the question whether that power extends to any cases but those of official misconduct or incapacity must be determined by a careful consideration of the position which that constitution assigns to the judiciary. If, as is the case, for example, under the Constitution of the State of Massachusetts, there is a clear intention manifest to make the judiciary independent of the

other departments, and this intention appears by other provisions, and the enunciation of other principles besides that which in terms establishes the tenure of good behavior, then the power of removal upon address ought to be construed and exercised consistently with the tenure of good behavior, and not in direct repugnance to it. It is plain that, if the power is construed as a naked and unrestrained power, established as a direct qualification of the tenure of office, it may be used for party purposes, and may be exercised for any cause for which a dominant party may see fit to employ it.

The danger of the abuse of this power, arising from the absence of any express restriction upon it, and of any statement of its purpose, in the Constitution of Massachusetts, has led to an unsuccessful effort in that State to make its exercise more difficult than it is under the actual provision. In the Convention held in the year 1820, in which the Constitution was subjected to revision, Mr. Webster, Mr. Justice Story, and others of the eminent jurists of Massachusetts, endeavored to procure an amendment requiring the address to be adopted by a vote of two thirds in both branches, instead of allowing it to be carried, as the Constitution has always stood, and as the rule is in England, by a bare majority. The effort failed; but the result of the whole discussion to which it gave rise shows the general understanding of the people of the State with regard to the rightful extent of this power. The Convention was a very remarkable assembly of the intellect and worth of the State, and both the political parties of the time were fully represented in it, by their most distinguished members. All were agreed that the power was capable of abuse, and that to apply it to any other than cases of official incapacity or unfitness would be an abuse. But those who opposed the adoption of a two-thirds rule were unwilling to anticipate such an abuse of the power, and their arguments prevailed.

The framers of the Constitution of the United States intrusted no such power over the judiciary to the other branches of the government. They regarded the possibility of its being used for improper purposes as a sufficient reason why it should not exist. They thought it, moreover, a contradiction in terms to say that the judges should hold their offices during good behavior, and yet be removable without a trial. But the radical objection was one that does not seem to have been sufficiently attended to in the early formation of some of the State constitutions, but which the peculiar system established by the Constitution of the United States made especially prominent.

That Constitution was designed to be in some respects an abridgment of the previous powers of the States. Like the State constitutions, also,

it embraced a careful distribution of the powers of government between the different departments, and a careful separation of the functions of one department from those of another. Questions must, therefore, necessarily arise in the administration of the government, whether one of these departments had overstepped the limits assigned to it as against the others, and whether the action of the general or the State governments in particular instances is within their appropriate spheres. These, now familiar to us as constitutional questions, were to be subjected to the arbitrament of the national judiciary; and it was almost universally felt that this delicate and important power must be confided to judges whose tenure of office could be touched only by the solemn process of accusation and impeachment. The same necessity exists under a State constitution, but perhaps not in the same degree; for while the judiciary of a State is often called upon to decide finally upon the conformity of acts of legislation with the State constitution, — and ought therefore clearly to be beyond the reach of legislative influence, — yet no State judiciary is the final arbiter between the rights and powers of the national government and the rights and powers of the States. This function belongs to the supreme judiciary of the United States. It was foreseen that it would not infrequently involve the decision of questions in which whole classes of States might have the deepest interest, which would connect themselves with party discussions, and on which the representatives of the States in the national legislature would be likely to share in the feelings, and even in the passions, of their constituents. There could be no security for a judiciary called upon to decide such questions, if they were to be subject to a power of removal by the other two branches of the government. Their commissions might make them theoretically independent, but practically they could be removed at the pleasure of those whom they might have offended. In truth, there is no State in this Union where such a power of removal is vested without qualification in the legislative and executive departments, in which the judges can be said to hold their commissions during good behavior, unless that power is construed to embrace only those cases of palpable incapacity in which an impeachment would be unnecessary or impracticable. As a naked and unqualified power, it is repugnant to the tenure of good behavior. It was so regarded in the Convention which framed the Constitution of the United States, where a proposition to introduce it received the vote of the single State of Connecticut only. (Madison, Elliot, V. 481, 482.)

CHAPTER IV.

ADMISSION OF NEW STATES. — GUARANTY OF REPUBLICAN GOVERNMENT. — POWER OF AMENDMENT. — OATH TO SUPPORT THE NEW SYSTEM. — RATIFICATION.

HAVING settled a general plan for the organization of the three great departments of government, the committee next proceeded to provide for certain other objects of primary importance, the necessity for which had been demonstrated by the past history of the Confederacy. The first of these was the admission of new States into the Union.

It had long been apparent, that the time would sooner or later arrive when the limits of the United States must be extended, and the number of the States increased. Circumstances had made it impossible that the benefits and privileges of the Union should be confined to the original thirteen communities by whom it had been established. Population had begun to press westward from the Atlantic States with the energy and enterprise that have marked the Anglo-American character since the first occupation of the country. Wherever the hardy pioneers of civilization penetrated into the wilderness of the Northwest, they settled upon lands embraced by those shadowy boundaries which

carried the territorial claims of some of the older States into the region beyond the Ohio. Circumstances, already detailed in a former part of this work, had compelled a surrender of these territorial claims to the United States; and in the efforts made by Congress, both before and after the cessions had been completed, to provide for the establishment of new States, and for their admission into the Union, we have already traced one of the great defects of the Confederation, which rendered it incapable of meeting the exigencies created by this inevitable expansion of the country.[1]

In the year 1784, when Mr. Jefferson brought into Congress a measure for the organization and admission of new States, to be formed upon the territories that had been or might thereafter be ceded to the United States, he seems to have considered that the Articles of Confederation authorized the admission of new States formed out of territory that had belonged to a State already in the Union, by a vote of nine States in Congress. But a majority of the States in Congress evidently regarded the power of admission as doubtful; and although they passed the resolves for the admission of new States, — principally because it was extremely important to invite cessions of Western territory, — they left the provision as to the mode of admission so indefinite, that the whole question of power would have to be opened and decided on the first application that

[1] *Ante*, Vol. I. Book III. Chap. V.

might be made by a State to be admitted into the Union.[1]

When the Ordinance of 1787 was formed, it

[1] Mr. Jefferson has very lucidly stated the position of the question in some observations furnished by him, when in Paris, to one of the editors of the *Encyclopédie Méthodique*, in 1786 or 1787, which I here insert entire. "The eleventh Article of Confederation admits Canada to accede to the Confederation at its own will, but adds, 'no other Colony shall be admitted to the same unless such admission be agreed to by nine States.' When the plan of April, 1784, for establishing new States, was on the carpet, the committee who framed the report of that plan had inserted this clause: 'Provided nine States agree to such admission, according to the reservation of the eleventh of the Articles of Confederation.' It was objected, — 1. That the words of the Confederation, 'no other Colony,' could refer only to the residuary possessions of Great Britain, as the two Floridas, Nova Scotia, &c., not being already parts of the Union; that the law for 'admitting' a new member into the Union could not be applied to a territory which was already in the Union, as making part of a State which was a member of it. 2. That it would be improper to allow 'nine' States to receive a new member, because the same reasons which rendered that number proper now would render a greater one proper when the number composing the Union should be increased. They therefore struck out this paragraph, and inserted a proviso, that 'the consent of so many States in Congress shall be first obtained as may at the time be competent'; thus leaving the question whether the eleventh Article applies to the admission of new States to be decided when that admission shall be asked. See the Journal of Congress of April 20, 1784. Another doubt was started in this debate, viz. whether the agreement of the nine States required by the Confederation was to be made by their legislatures, or by their delegates in Congress? The expression adopted, viz. 'so many States in Congress is first obtained,' shows what was their sense of this matter. If it be agreed that the eleventh Article of the Confederation is not to be applied to the admission of these new States, then it is contended that their admission comes within the thirteenth Article, which forbids 'any alteration unless agreed to in a Congress of the United States, and afterwards confirmed by the legislatures of every State.' The independence of the new States of Kentucky and Franklin will soon bring on the ultimate decision of all these questions." (Jefferson's Works, IX. 251.) That the ad-

made provision for the establishment of new States in the territory, and declared that, when any of them should have sixty thousand free inhabitants, it should

mission of a new State into the Union could have been regarded as an alteration of the Articles of Confederation, within the meaning and intention of the thirteenth Article, seems scarcely probable. Such an admission would only have increased the number of the parties to the Union, but it would of itself have made no change in the Articles; and it was against alterations *in the Articles* that the provision of the thirteenth was directed. The objections which Mr. Jefferson informs us were raised in Congress to a deduction of the power from the eleventh Article, appear to be decisive. In truth, when the Articles of Confederation were framed, the subject of the admission of new States, so far as it had been considered at all, was connected with the difficult and delicate controversy respecting the western boundaries of some of the old States, and the equitable claim of the Union to become the proprietor of the unoccupied lands beyond those boundaries. An attempt was made to obtain for Congress, in the Articles of Confederation, power to ascertain and fix the western boundaries of those States, and to lay out the lands beyond them into new States. But it failed (*ante*, Vol. I. 291), and Congress could thereafter be said to possess no power to admit new States, except what depended on a doubtful construction of the Articles of Confederation.

Still, both when they invited the cessions of their territorial claims by the States of Virginia, New York, &c., and after those cessions had been made, Congress acted as if they had constitutional authority to form new States, and to admit them into the Union. (*Ante*, Vol. I. 292–308.) When the Ordinance of 1787, for the regulation and government of the Northwestern Territory, was adopted, the power to admit new States was again assumed. The Convention for forming the Constitution was, however, then sitting, and it may be that the framers of the Ordinance introduced into that instrument the stipulation that the new States should be admitted on an equal footing with the old ones, in the confidence that the constitutional power would be supplied by the Convention. At any rate, the provisions of the Ordinance, as well as those of the previous resolves of Congress on the same subject of the Northwestern Territory, and the position of Kentucky, Vermont, Maine, and Tennessee (then called Franklin), imposed upon the Convention an imperative necessity for some action that would open the door of the Union to new members.

be admitted into Congress on an equal footing with the original States. But the mode of admission was not prescribed. The power to admit was assumed, and no rule of voting on the question of admission was referred to. The probability is, that Congress anticipated at this time that a definite constitutional power would be provided by the Convention that had been summoned to revise the federal system. This power was embraced in the plan adopted in the committee of the whole of that body, by a resolve which declared "that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole." In what mode this provision was made will be seen hereafter, when we come to examine the framework of the Constitution.

Another of the new powers now proposed to be given to the Union was that of protecting and upholding the governments of the States. I have already had occasion to explain the relations of the Confederation to its members in a time of internal disturbance and peril; and have given to the incapacity of that government to afford any aid in such emergencies great prominence among the causes which led to the revision of the federal system.[1] Under that system the States had been so complete-

[1] *Ante*, Vol. I. Book III. Chap. III. pp. 260 – 275.

ly sovereign, and so independent of each other in all that related to their internal concerns, that the government of any one of them might have been subverted without the possibility of an authorized and regulated interference by the rest. The constitutional and republican liberty that had been established in these States after the Revolution had freed them from the dominion of England, was at that period a new and untried experiment; and in order that we of this generation may be able to appreciate the importance of the guaranty proposed to be introduced into the Constitution of the United States, it is necessary for us to look somewhat farther than the particular circumstances of the commotions in New England that marked the year 1787 as an era of especial danger to these republican governments. It is, in fact, necessary for us to remember the contemporaneous history of Europe, and to observe how the events that were taking place in the Old World necessarily acted upon our condition, prospects, and welfare.

The French Revolution, consummated in 1791 by the execution of the King, was already begun when the Constitution of the United States went into operation. No one who has examined the history of the first years of our present national government, can fail to have been impressed with the dangers which the administration of our domestic affairs incurred of becoming complicated with the politics of Europe. As in all other countries, so in America, the events and progress of the Revolution in France

found sympathy or reprobation, according to the natural tendencies, the previous associations, and the political sentiments of individuals. But in the United States there was a peculiar and predisposing cause for the liveliest interest in the success of the principles that were believed, by large masses of the people, to be involved in the French Revolution. Our own struggles for liberty, our bold and successful assertion of the rights of man, and our achievement of the means and opportunity of self-government, had evidently and strikingly acted upon France. The people of the United States were fully sensible of this; and transferring to the French nation the debt of gratitude for the aid which had flowed to us in the first instance from their government without any special influence of their own, large numbers of our people became warmly enlisted in the cause of that Revolution, of which the early promise seemed so encouraging to the best hopes of mankind, and the full development of which first ruined the interests of liberty, in the wanton excesses of anarchy and national ambition, and finally crushed them beneath the usurpations and necessities of military despotism. On the other hand, the more cautious — who, if they had not from the first looked with distrust upon the whole movement of the Revolutionary party in France, very soon believed that it could result in no real benefit to France or to the world — tended strongly and naturally to the side of those governments with which the leaders of the Revolution had to contend. In consequence of this

state of feeling among different portions of the people of the United States, with reference to French affairs, and of the conduct of France and England towards ourselves, the administration of Washington had great difficulty both in preserving the neutrality of the country, and in excluding foreign influence and interference in our domestic affairs.

Had this state of things, which followed immediately after the inauguration of our new government, found us still under the Confederation, there can be no doubt that our condition would have afforded to the Revolutionary party in France the means not only of disseminating their principles among us, but also of overturning any of the institutions of the weaker States which might have stood in the way of their acquiring an influence in America. Yet what form or principle of government is there in the world, that more imperatively requires all foreign or external influence to be repelled, than our own republican system, of which it is a cardinal doctrine that every institution and every law must express the uncontrolled and spontaneous will of a majority of the people who constitute the political society? Other governments may be upheld by the interference of their neighbors; other systems may require, and perhaps rightfully admit, foreign influence. Ours demand an absolute immunity from foreign control, and can exist only when the authority of the people is made absolutely free. That their authority should be made and kept free to act upon the principles that enable it to operate with certainty and safety, it re-

quires the guaranty of a system that rests upon the same principles, is committed to the same destiny, is itself constituted by American power, and is created for the express purpose of preserving the republican form, the theory and the right of self-government.

Such was the purpose of the framers of the Constitution, when, in this early stage of their deliberations, they determined that a republican constitution should be guaranteed by the United States to each of the States.[1] The object of this provision was, to secure to the people of each State the power of governing their own community, through the action of a majority, according to the fundamental rules which they might prescribe for ascertaining the public will. The insurrection in Massachusetts, then just suppressed, had made the dangers that surround this theory of government painfully apparent. It had demonstrated the possibility that a minority might become in reality the ruling power. Fortunately, no foreign interference had then intervened; but a very few years only elapsed, before a crisis occurred, in which the institutions of the States would have been quite unable to withstand the shocks proceeding from the French Revolution, if the government of the Union had not been

[1] As the resolution was originally passed, it declared that "a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States." On account of the ambiguity of the expression "existing laws," and the controversies to which it might give rise, the provision was subsequently changed to a guaranty of "a republican form of government," and of protection against "invasion" and "domestic violence," as it now stands in Art. IV. Sect. 4 of the Constitution.

armed with the power of protecting and upholding them.

The committee also added another new feature to their plan of government, which was a capacity of being amended. The Articles of Confederation admitted of changes only when they had been agreed upon in Congress, and had afterwards been confirmed by the legislatures of all the States. Indeed, it resulted necessarily from the nature of that government, that it could only be altered by the consent of all the parties to it. It was now proposed and declared, that provision ought to be made for the amendment of the Articles of Union, whenever it should seem necessary. This declaration looked to the establishment of some new method of originating improvements in the system of government, and a new rule for their adoption.

It was also determined that the members of the State governments should be bound by oath to support the Articles of Union. The purpose of this provision was to secure the supremacy of the national government, in cases of collision between its authority and the authority of the States. It was a new feature in the national system, and received at first the support of only a bare majority of the States.[1]

Finally, it was provided that the new system, after its approbation by Congress, should be submitted to

[1] Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia voted for it (6); Connecticut, New Jersey, New York, Delaware, and Maryland voted against it (5).

representative assemblies recommended by the State legislatures, to be expressly chosen by the people to consider and decide thereon. The question has often been discussed, whether this mode of ratification marks in any way the character of the government established by the Constitution. At present it is only necessary to observe, that the design of the committee was to substitute the authority of the people of the States in the place of that of the State legislatures, for a threefold purpose. First, it was deemed desirable to resort to the supreme authority of the people, in order to give the new system a higher sanction than could be given to it by the State governments. Secondly, it was thought expedient to get rid of the doctrine often asserted under the Confederation, that the Union was a mere compact or treaty between independent States, and that therefore a breach of its articles by any one State absolved the rest from its obligations. In the third place, it was intended, by this mode of ratification, to enable the people of a less number of the States than the whole to form a new Union, if all should not be willing to adopt the new system.[1] The votes of the States in committee, upon this new mode of ratification, show that on one side were ranged the States that were aiming to change the principle of the government, and on the other the States that sought to preserve the principle of the Confederation.[2]

[1] See Madison, Elliot, V. 157, 158, 183.

[2] Massachusetts, Pennsylvania, Virginia, North Carolina, South

These, together with a provision that the authority of the old Congress should be continued to a given day after the changes should have been adopted, and that their engagements should be completed by the new government, were the great features of the system prepared by the committee of the whole, and reported to the Convention, on the thirteenth of June.[1]

Carolina, Georgia, *ay*, 6; Connecticut, New York, New Jersey, *no*, 3; Delaware, Maryland, divided. See further on the subject of "Ratification," *post*, Index.

[1] The report was in the following words:—

"1. *Resolved*, That it is the opinion of this committee that a national government ought to be established, consisting of a supreme legislative, executive, and judiciary.

"2. *Resolved*, That the national legislature ought to consist of two branches.

"3. *Resolved*, That the members of the first branch of the national legislature ought to be elected by the people of the several States for the term of three years; to receive fixed stipends by which they may be compensated for the devotion of their time to the public service, to be paid out of the national treasury; to be ineligible to any office established by a particular State, or under the authority of the United States, (except those peculiarly belonging to the functions of the first branch,) during the term of service, and under the national government, for the space of one year after its expiration.

"4. *Resolved*, That the members of the second branch of the national legislature ought to be chosen by the individual legislatures; to be of the age of thirty years, at least; to hold their offices for a term sufficient to insure their independence, namely, seven years; to receive fixed stipends, by which they may be compensated for the devotion of their time to the public service, to be paid out of the national treasury; to be ineligible to any office established by a particular State, or under the authority of the United States, (except those peculiarly belonging to the functions of the second branch,) during the term of service, and under the national government, for the space of one year after its expiration.

"5. *Resolved*, That each branch ought to possess the right of originating acts.

"6. *Resolved*, That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases to which the separate States

are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the national legislature, the Articles of Union, or any treaties subsisting under the authority of the Union.

"7. *Resolved*, That the right of suffrage in the first branch of the national legislature ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation; namely, 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.

"8. *Resolved*, That the right of suffrage in the second branch of the national legislature ought to be according to the rule established for the first.

"9. *Resolved*, That a national executive be instituted, to consist of a single person, to be chosen by the national legislature, for the term of seven years, with power to carry into execution the national laws, to appoint to offices in cases not otherwise provided for, to be ineligible a second time, and to be removable on impeachment and conviction of malpractice or neglect of duty; to receive a fixed stipend, by which he may be compensated for the devotion of his time to the public service, to be paid out of the national treasury.

"10. *Resolved*, That the national executive shall have a right to negative any legislative act, which shall not be afterwards passed unless by two thirds of each branch of the national legislature.

"11. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature, to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution.

"12. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

"13. *Resolved*, That the jurisdiction of the national judiciary shall extend to all cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.

"14. *Resolved*, That provision ought to be made for the admission of States lawfully arising without the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.

"15. *Resolved*, That provision ought to be made for the continu-

ance of Congress, and their authorities and privileges, until a given day after the reform of the Articles of Union shall be adopted, and for the completion of all their engagements.

"16. *Resolved*, That a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States.

"17. *Resolved*, That provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.

"18. *Resolved*, That the legislative, executive, and judiciary powers within the several States ought to be bound by oath to support the Articles of Union.

"19. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon."

CHAPTER V.

ISSUE BETWEEN THE VIRGINIA AND THE NEW JERSEY PLANS. — HAMILTON'S PROPOSITIONS. — MADISON'S VIEW OF THE NEW JERSEY PLAN.

THE nature of the plan of government thus proposed — called generally in the proceedings of the Convention the Virginia plan — may be perceived from the descriptions that have now been given of the design and scope of its principal features, and of the circumstances out of which they arose. It purported to be a supreme and a national government; and we are now to inquire in what sense and to what extent it was so.

Its powers, as we have seen, were to be distributed among the three departments of a legislative, an executive, and a judiciary. Its legislative body was to consist of two branches, one of which was to be chosen directly by the people of the States, the other by the State legislatures; but in both, the people of the States were to be represented in proportion to their numbers.

Its legislative powers were to embrace certain objects, to which the legislative powers of the separate States might be incompetent, or where their exercise might be injurious to the national inter-

ests;[1] and it was moreover to have a certain restraining authority over the legislation of the States. This plan necessarily supposed that the residue of the sovereignty and legislative power of the States would remain in them after these objects had been provided for; and it therefore contemplated a system of government, in which the individual citizen might be acted upon by two separate and distinct legislative authorities. But by providing that the legislative power of the national government should be derived from the people inhabiting the several States, and by creating an executive and a judiciary with an authority commensurate with that of the legislature, it sought to make, and did theoretically make, the national government, in its proper sphere, supreme over the governments of the States.

With respect to the element of stability, as depending on the length of the tenure of office, this system was far in advance of any of the republican governments then existing in America; for it contemplated that the members of one branch of the legislature should be elected for three, and those of the other branch, and the executive, for seven years.

If we compare it with the Confederation, which it was designed to supersede, we find greatly enlarged powers, somewhat vaguely defined; the addition of distinct and regular departments, accurately traced; and a totally different basis for the authority and origin of the government itself.

[1] The regulation of commerce was not, any more than other specific powers, otherwise provided for than by these general descriptions.

Such was the nature of the plan of government proposed by a majority of the States in Convention, for the consideration of all. It had to encounter, in the first place, the want of an express authority in the Convention to propose any change in the fundamental principle of the government. The long existence of the distinctions between the different States, the settled habit of the people of the States to act only in their separate capacities, their adherence to State interests, and their strong prejudices against all external power, had prevented them from contemplating a government founded on the principle of a national unity among the populations of their different communities. Hence, it is not surprising that men, who came to the Convention without express powers which they could consider as authority for the introduction of so novel a principle, should have been unwilling to agree to the formation of a government, that was to involve the surrender of a large portion of the sovereignty of each State. They felt a real apprehension lest their separate States should be lost in the comprehensive national power which seemed to be foreshadowed by the plans at which others were aiming. It seemed to them that the consequence, the power, and even the existence, of their separate political corporations, were about to be absorbed into the nation.

In the second place, the mode of reconciling the co-ordinate existence of a national and a State sovereignty had undergone no public discussion. At the same time, almost all the evils, the inconveniences, and the dangers which the country had en-

countered since the peace of 1783, had sprung from the impossibility of uniting the action of the States upon measures of general concern. For this reason, there were men in the Convention who at one time doubted the utility of preserving the States, and who naturally considered that the only mode in which a durable and sufficient government could be established, was to fuse all the elements of political power into a single mass. To those who had this feeling, the Virginia plan was as little acceptable as it was, for the opposite reason, to others.

It was, however, from the party opposed to any departure from the principle of the Confederation, that the first and the chief opposition came. The delegations of Connecticut, New York (with the exception of Hamilton), New Jersey, and Delaware, and one prominent member from Maryland, — Luther Martin, — preferred to add a few new powers to the existing system, rather than to substitute a national government. They were determined not to surrender the present equality of suffrage in Congress; and accordingly the members from the State of New Jersey brought forward a plan of a purely "federal" character.[1]

This plan proposed that the Articles of Confederation should be so revised and enlarged as to give to Congress certain additional powers, including a power to levy duties for purposes of revenue and the regulation of commerce. But it left the con-

[1] This, together with the Virginia plan, which was recommitted along with it, was referred to a second committee of the whole, June 15th.

stitution of Congress as it was under the Confederation, and left also the old mode of discharging the national expenses, by means of requisitions on the States, changing only the rule of proportion from the basis of real property to that of free population. It contemplated an executive, to be elected by Congress, and a supreme judiciary to be appointed by the executive; leaving to the judiciaries of the States original cognizance of all cases arising under the laws of the Union, and confining the national judiciary to an appellate jurisdiction, except in the cases of impeachments of national officers. It proposed to secure obedience to the acts and regulations of Congress, by making them the supreme law of the States, and by authorizing the executive to employ the power of the confederated States against any State or body of men who might oppose or prevent their being carried into execution.

The mover of this system[1] founded his opposition to the plan framed by the committee of the whole chiefly upon the want of power in the Convention to propose a change in the principle of the existing government. He argued, with much acuteness, that there was either a present confederacy of the States, or there was not; that if there was, it was one founded on the equal sovereignties of the States, and that it could be changed only by the consent of all; that as some of the States would not consent to the change proposed, it was necessary to adhere to the system of representation by States; and that a

[1] William Patterson of New Jersey.

system of representation of the people of the States was inconsistent with the preservation of the State sovereignties. The answer made to this objection was, that although the States, in appointing their delegates to the Convention, had given them no express authority to change the principle of the existing constitution, yet that the Convention had been assembled at a great crisis in the affairs of the Union, as an experiment, to remedy the evils under which the country had long suffered from the defects of its general government; that whatever was necessary to the safety of the republic must, under such circumstances, be considered as within the implied powers of the Convention, especially as it was proposed to do nothing more than to recommend the changes which might be found necessary; and that although all might not assent to the changes that would be proposed, the dissentient States could not require the others to remain under a system that had completely failed, when they could form a new confederacy upon wiser and better principles.[1]

It was at this point that Hamilton interposed, with the suggestion of views and opinions that have sometimes subjected him, unjustly, to the charge of anti-republican and monarchical tendencies and designs. These views and opinions should be carefully considered by the reader, not only in justice to this great statesman, but because they had much influence, in an indirect manner, in producing the

[1] See the remarks of Wilson, Pinckney, and Randolph, as given in Madison, Elliot, V. 195-198.

form and tone which the Constitution finally received.

It should be recollected, in making this examination, that, so far as there was at this time a distinct issue before the Convention, it was presented by the New Jersey plan of a system that would leave the sovereignties of the States almost wholly undiminished, on the one hand, and on the other by the Virginia plan of a partial but as yet undefined surrender of powers to a general government. The construction of this proposed government, and the powers that it ought to possess, were the points which Hamilton now dealt with, in the first address which he made to the committee.

He has left it on record, that the views which he announced on this occasion were rested upon the three following positions: — 1. That the political principles of the people of this country would endure nothing but a republican government. 2. That, in the actual situation of the country, it was of itself right and proper that the republican theory should have a full and fair trial. 3. That to such a trial it was essential that the government should be so constructed as to give it all the energy and stability reconcilable with the principles of that republican theory.[1] The opinions advanced by Hamilton at the stage of the proceedings which we are now examining must always be considered with reference to the principles which guided him, in order

[1] See his letter of September 16, 1803, addressed to Timothy Pickering; first published in Niles's Register, November 7, 1812.

that a right estimate may be formed of their influence on the final result of the issue then pending.

After disposing of the objection that the Convention had no power to propose a plan of government differing from the principle of the Confederation, he proceeded to say, that there were three lines of conduct before them: first, to make a league offensive and defensive between the States, treaties of commerce, and an apportionment of the public debt; secondly, to amend the present Confederation by adding such powers as the public mind seemed ready to grant; thirdly, to form a new government, which should pervade the whole, with decisive powers and a complete sovereignty. The practicability of the last course, and the mode in which the object should be accomplished, were the important and the only real questions before them. But the solution of those questions involved an inquiry into the principles of civil obedience, which are the great and essential supports of all government.

The first of these principles, he said, is an active and constant interest in the support of a government. This principle did not then exist in the States, in favor of the general government. They constantly pursued their own particular interests, which were adverse to those of the whole. The second principle is a conviction of the utility and necessity of a government. As the general government might be dissolved and yet the order of society would continue, — so that many of the purposes of government would still be attainable, to a consider-

able degree, within the States themselves, — a conviction of the utility or the necessity of a general government could not at that time be considered as an active principle among the people of the States. The third principle is an habitual sense of obligation; and here the whole force of the tie was on the side of State government. Its sovereignty was immediately before the eyes of the people; its protection they immediately enjoyed; by its hand, private justice was administered. In the existing state of things, the central government was known only by its unwelcome demands of money or service.

The fourth principle on which government must rely is force; by which he meant both the coercion of laws and the coercion of arms. But as to the general government, the coercion of laws did not exist; and to employ the force of arms on the States would amount to a war between the parties to the confederacy. The fifth principle was influence; by which he did not mean corruption, but a dispensation of those regular honors and just emoluments which produce an attachment to government. Almost the whole weight of these was then on the side of the States, and must remain so in any mere confederacy, rendering it in its very nature feeble and precarious.

The lessons afforded by experience led to the evident conclusion that all federal governments were weak and distracted. They were so, because the strong principles which he had enumerated operated on the side of the constituent members of the

confederacy, and against the central authority. In order, therefore, to establish a general and national government, with any hope of its duration, they must avail themselves of these principles. They must interest the wants of men in its support; they must make it useful and necessary; and they must give it the means of coercion. For these purposes, it would be necessary to make it completely sovereign.

The New Jersey plan certainly would not produce this effect. It merely granted the regulation of trade and a more effectual collection of the revenue, and some partial duties, which, at five or ten per cent, would perhaps only amount to a fund to discharge the debt of the corporation. But there were a variety of objects which must necessarily engage the attention of a national government. It would have to protect our rights against Canada on the north, against Spain on the south, and the western frontier against the savages. It would have to adopt necessary plans for the settlement of the frontiers, and to institute the mode in which settlements and good governments were to be made. According to the New Jersey plan, the expense of supporting and regulating these important matters could only be defrayed by requisitions. This mode had already proved, and would always be found, ineffectual. The national revenue must be drawn from commerce, —from imposts, taxes on specific articles, and even from exports, which, notwithstanding the common opinion, he held to be fit objects of moderate taxation.

The radical objections to the New Jersey plan he held to be its equality of suffrage as between the States; its incapacity to raise forces or to levy taxes; and the organization of Congress, which it proposed to leave unchanged. On the other hand, the great extent of the country to be governed, and the difficulty of drawing a suitable representation from such distances, led him to regard the Virginia plan with doubt and hesitation. At the same time, he declared that the system must be a representative and republican government. But representation alone, without the element of a permanent tenure of office in some part of the system, would not, as he believed, answer the purpose. For, as society naturally falls into the political divisions of the few and the many, or the majority and the minority, some part of every good representative government must be so constituted as to furnish a check to the mere democratic element. The Virginia plan, which proposed that both branches of the national legislature should be chosen by the people of the States, and that the executive should be appointed by the legislature, presented a democratic Assembly to be checked by a democratic Senate, and both of them by a democratic chief magistrate. To give a Senate or an executive thus chosen an official term a few years longer than that of the members of the Assembly, would not be sufficient to remove them from the violence and turbulence of the popular passions.

For these reasons, they must go as far, in order to

attain stability and permanency, as republican principles would admit. He would therefore have the Senate and the executive hold their offices during good behavior. Such a system would be strictly republican, so long as these offices remained elective and the incumbents were subject to impeachment. The term *monarchy* could not apply to such a system, for it marks neither the degree nor the duration of power. And in order to obviate the danger of tumults attending the election of an executive who should hold his office during good behavior, he proposed that the election should be made by a body of electors, to be chosen by the people, or by the legislatures of the States. The Assembly he proposed to have chosen by the people of the States for three years. The legislative *powers* of the general government he desired to have extended to all subjects; at the same time, he did not contemplate the total abolition of the State governments, but considered them essential, both as subordinate agents of the general government, and as the administrators of private justice among their own citizens.[1]

His conclusions were, first, that it was impossible to secure the Union by any modification of a federal government; secondly, that a league, offensive and defensive, was full of certain evils and greater dangers; thirdly, that to establish a general government would be very difficult, if not impracticable, and liable to various objections. What then was to

[1] See the note at the end of this chapter.

be done? He answered, that they must balance the inconveniences and the dangers, and choose that system which seemed to have the fewest objections.

The plan which Hamilton then read to the Convention, the principal features of which have thus been stated, was designed to explain his views, but was not intended to be offered as a substitute for either of the two others then under consideration. The issue accordingly remained unchanged; and that issue lay between the Virginia and the New Jersey plans, or between a system of equal representation by States, and a system of proportionate representation of the people of the States. Besides this radical difference, the Virginia plan contemplated two houses, while the New Jersey plan proposed to retain the existing system of a single body.

But in order that a sound judgment may be formed of the correctness of Hamilton's opinions, and of the useful influence which they exerted, it must be remembered that there was an inconsistency in the Virginia plan, which he was then aiming to exhibit. That plan was a purely national system; it drew both branches of the national legislature from the people of the States, in proportion to their numbers, and merely interposed the legislatures of the States as the electors of so many senators as the State might be entitled to have according to the ratio of representation. Its inconsistency lay in the fact, that, while it would have created a government in which the proportionate principle of representation would have obtained in both houses, making a

purely national government, in which the States, as equal political corporations, could have exercised no direct control over its legislation, it left the separate political sovereignties of the States almost wholly unimpaired, taking from them jurisdiction over such subjects only as seemed to require national legislation. The operation of such a system must necessarily have involved perpetual conflicts between national and State power; for the States, possessed of a large part of their original sovereignties, and yet unable to exert an equal control in either branch of Congress, would have been constantly tempted and obliged to exert the indirect power of their separate legislation against the direct and democratic force of a majority of the people of the United States. To such a system, the objection urged by Hamilton, that it presented a democratic House checked by a democratic Senate, was strikingly applicable. This objection, it is true, was not presented by him as a reason for admitting the States to a direct and equal representation in the government; he employed it to enforce the expediency of giving to the Senate a different basis from that of the House, and one farther removed from popular influences. But when, at a subsequent period, the first great compromise of the Constitution — that between a purely national and a purely federal system — took place by the admission of the States to an equal representation in the Senate, the force of Hamilton's reasoning was felt, and the necessity for a check as between the two houses, founded on a difference of origin, which he

had so strenuously maintained, both facilitated and hastened the concession to the demands of the smaller States.

At present, Hamilton's object, in the discussions which we are now considering, was to show that, if the government was to be purely national, — as was the theory of the Virginia plan, and as he undoubtedly preferred, — it must be consistent with that theory and with the situation in which its adoption would leave the country. It must introduce through the Senate a real check upon the democratic power that would act through the House, by a different mode of election and a permanent tenure of office; and in order that the States might not be in a situation to resist the measures of a government designed to be national and supreme, that government must possess complete and universal legislative power.

Surely it can be no impeachment of the wisdom or the statesmanship of this great man, that, at a time when a large majority of the Convention were seeking to establish a purely national system, founded on a proportionate representation of the people of the States, he should have pointed out the inconsistencies of such a plan, and should have endeavored to bring it into a nearer conformity with the theory which so many of the members and so many of the States had determined to adopt. It seems rather to be a proof of the deep sagacity which had always marked his opinions and his conduct, that he should have foreseen the inevitable collisions between the powers of a national government thus constituted

and the powers of the States. The whole experience of the past had taught him to anticipate such conflicts, and the theory of a purely national government, when applied by the arrangement now proposed, rendered it certain that these conflicts must continue and increase. That theory could only be put in practice by transferring the whole legislative powers of the people of the States to the national government. This he would have preferred; and in this, looking from the point of view at which he then stood, and considering the actual position of the subject, he was undoubtedly right.[1]

For it is not to be forgotten, that after the votes which had been taken, and after the position assumed by the States opposed to anything but a federal plan, the choice seemed to lie between a purely national and a purely federal system; that the indications then were, that the Virginia plan would be adopted; and that we owe the present compound character of the Constitution, as a government partly national and partly federal, not to the mere theories proposed on either side, but to the fortunate results of a wise compromise, made necessary by the collision between the opposite purposes and desires of different classes of the States.

At the time when Hamilton laid his views before the Convention, there were two parties in that body, which were coming gradually to a struggle, not yet openly avowed, between the larger and the smaller

[1] See the note at the end of this chapter.

States, on the fundamental principle of the government. The principal question at stake was whether there should be any national popular representation at all. While the Virginia plan carried a popular representation into both branches of the legislature, the New Jersey plan excluded it, and confined the system to a representation of States, in a single body. The larger and more populous States adhered to the former of these two systems, because it involved the only principle upon which they believed they could form a new Union, or enter into new relations with the smaller members of the confederacy; while, on the other hand, the smaller members felt that self-preservation was for them involved in adhering to the old principle of the Confederation. Notwithstanding the defects and imperfections of the Virginia plan, it was deemed necessary by the majority of the Convention to insist upon it, until the principle of popular representation should be conceded by all, as proper to exist in some part of the government; for an admission that it was theoretically incorrect in its application to either branch of the proposed legislature would have applied equally to the other branch; and the admission that would have been involved in the acceptance of Hamilton's propositions, namely, that in a purely national system there must be a Senate permanently in office, and that the legislative powers of the States must be mainly surrendered, would have tended only to confirm the opposition and to swell the numbers of the minority. The contest went on, therefore, as it had

begun, between the opposite principles of popular and State representation, until it resulted in an absolute difference, requiring mutual concessions, or an abandonment of the effort to form a Constitution.

On the day following that on which Hamilton had addressed the committee, Mr. Madison entered into an elaborate examination of the plan proposed by the minority. The previous Congressional experience of this distinguished and sagacious man had well qualified him to detect the imperfections of a system calculated to perpetuate the evils under which the country had long suffered. His object now was to show that a Union founded on the principle of the Confederation, and containing no diminution of the existing powers of the States, could not accomplish even the principal objects of a general government. It would not, he observed, in the first place, prevent the States from violating, as they had all along violated, the obligations of treaties with foreign powers; for it left them as uncontrolled as they had always been. It would not restrain the States from encroaching on the federal authority, or prevent breaches of the federal articles. It would not secure that equality of privileges between the citizens of different States, and that impartial administration of justice, the want of which had threatened both the harmony and the peace of the Union. It would not secure the republican theory, which vested the right and the power of government in the majority; as the case of Massachusetts then demonstrated. It would not secure the Union against the influence

of foreign powers over its members. Whatever might have been the case with ours, all former confederacies had exhibited the effects of intrigues practised upon them by other nations; and as the New Jersey plan gave to the general councils no negative on the will of the particular States, it left us exposed to the same pernicious machinations.

He begged the smaller States, which had brought forward this plan, to consider in what position its adoption would leave them. They would be subject to the whole burden of maintaining their delegates in Congress. They and they alone would feel the power of coercion on which the efficacy of this plan depended, for the larger States would be too powerful for its exercise. On the other hand, if the obstinate adherence of the smaller States to an inadmissible system should prevent the adoption of any, the Union must be dissolved, and the States must remain individually independent and sovereign, or two or more new confederacies must be formed. In the first event, would the small States be more secure against the ambition and power of their larger neighbors, than they would be under a general government pervading with equal energy every part of the empire, and having an equal interest in protecting every part against every other part? In the second event, could the smaller States expect that their larger neighbors would unite with them on the principle of the present confederacy, or that they would exact less severe concessions than were proposed in the Virginia scheme?

The great difficulty, he continued, lay in the affair of representation; and if that could be adjusted, all others would be surmountable. It was admitted by both of the gentlemen from New Jersey,[1] that it would not be just to allow Virginia, which was sixteen times as large as Delaware, an equal vote only. Their language was, that it would not be safe for Delaware to allow Virginia sixteen times as many votes. Their expedient was, that all the States should be thrown into one mass, and a new partition be made into thirteen equal parts. Would such a scheme be practicable? The dissimilarities in the rules of property, as well as in the manners, habits, and prejudices of the different States, amounted to a prohibition of the attempt. It had been impossible for the power of one of the most absolute princes in Europe,[2] directed by the wisdom of one of the most enlightened and patriotic ministers that any age had produced,[3] to equalize in some points only the different usages and regulations of the different provinces. But, admitting a general amalgamation and repartition of the States to be practicable, and the danger apprehended by the smaller States from a proportional representation to be real, would not their special and voluntary coalition with their neighbors be less inconvenient to the whole community and equally effectual for their own safety?[4] If New Jersey or Delaware conceived

[1] Mr. Brearly and Mr. Patterson.

[2] Louis XVI.

[3] Necker.

[4] Mr. Patterson had said, that, if they were to depart from the prin-

that an advantage would accrue to them from an equalization of the States, in which case they would necessarily form a junction with their neighbors, why might not this end be attained by leaving them at liberty to form such a junction whenever they pleased? And why should they wish to obtrude a like arrangement on all the States, when it was, to say the least, extremely difficult, and would be obnoxious to many of the States, — and when neither the inconvenience nor the benefit of the expedient to themselves would be lessened by confining it to themselves? The prospect of many new States to the westward was another consideration of importance. If they should come into the Union at all, they would come when they contained but few inhabitants. If they should be entitled to vote according to their proportion of inhabitants, all would be right and safe. Let them have an equal vote, and a more objectionable minority than ever might give law to the whole.[1]

At the close of Mr. Madison's remarks, the committee decided, by a vote of seven States against three, one State being divided, to report the Virginia plan to the Convention. The delegation of New York (with the exception of Hamilton), and those of New Jersey and Delaware, constituted the negative votes. The vote of Maryland was divided

ciple of equal sovereignty, the only expedient that would cure the difficulty would be to throw the States into hotchpot. To say that this was impracticable, would not make it so. Let it be tried, and they would see whether Massachusetts, Pennsylvania, and Virginia would accede to it. (Madison, Elliot, V. 194.)

[1] Elliot, V. 206 – 211.

by Luther Martin, who had constantly acted with the minority. The vote of Connecticut was given for the report, but she was not long to remain on that side of the question.[1]

[1] Madison, Elliot, V. 212. Journal, Elliot, I. 180. This vote was taken, and the committee of the whole were discharged, on the 19th of June.

NOTE ON THE OPINIONS OF HAMILTON.

The idea has been more or less entertained, from the time of the Convention to the present day, that Hamilton desired the establishment of a *monarchical* government. This impression has arisen partly from the theoretical opinions on government which he undoubtedly held, and which he expressed with entire freedom in the course of the debate, of which an account has been given in the previous chapter; and partly from the nature of some of his propositions, especially that for an executive during good behavior, which has been sometimes assumed to have been the same thing as an executive for life. I believe that the imputation of a purpose on his part to bring about the establishment of any system not essentially republican in its spirit and forms, is unfounded and unjust, and that it can be shown to be so.

Mr. Luther Martin, in his celebrated letter or report to the legislature of Maryland on the doings of the Federal Convention, referred to a distinct monarchical party in that body, "whose object and wish," he said, "it was to abolish and annihilate all State governments, and to bring forward one general government over this whole continent, of a monarchical nature, under certain restrictions and limitations. Those who openly avowed this sentiment," he said, "were, it is true, but few; yet it is equally true, that there was a considerable number who did not openly avow it, who were, by myself and many others of the Convention, considered as being in reality favorers of that sentiment and acting upon those principles, covertly endeavoring to carry into effect what they well knew openly and avowedly could not be accomplished." He then goes on to say, that there was a second party, who were "not for the abolition of the State governments, nor for the introduction of a monarchical government

under any form; but they wished to establish such a system as could give their own States undue power and influence, in the government, over the other States." "A third party," he adds, "was what I considered *truly federal and republican*"; that is to say, it consisted of the delegations from Connecticut, New York, New Jersey, Delaware, and in part from Maryland, and of some members from other States, who were in favor of a federal equality and the old principle of the Confederation.

Upon this rule of classification, the test of republicanism was to be found in the views entertained by members upon the question whether the State governments ought to be abolished. Mr. Martin, indeed, went further, and considered those only as *truly* republican, who were in favor of a purely federal system, and opposed to any plan of popular representation. Now it is quite clear, that the abolition of the State governments, so far as that subject was considered at all, and in the sense in which it was at any time mentioned, did not necessarily lead to *monarchy* as a conclusion. The reduction of the State governments to local corporations and to the position of subordinate agents of the central government, was considered by some as a necessary consequence of a national representative government. This arose from the circumstance that a union of federal and national representation had nowhere been witnessed, and had not therefore been considered. I have already suggested, in the text, that, if the framers of the Constitution had gone on to the adoption of a pure system of popular and proportional representation in all the branches of the government, they must inevitably have bestowed upon that government full legislative power over all subjects; otherwise, they would have left the States, possessed of the sovereign powers of a distinct political organization, to contend with the national government by adverse legislation. The subsequent expedient of a direct and equal representation of the States in one branch of the government has in reality, to a great degree, disarmed State jealousy and opposition, by giving to the States as political bodies an equal voice in the check established by the branch in which they are represented.

So that to argue, that, because there were men who saw the necessity for making a purely national or proportionate system of popular representation consistent with the situation in which it would place the country, they were therefore in favor of a monarchical system, was to argue from premises to a conclusion in no way connected. Had such a plan been carried out, it could have been, and must have been, purely republican in all its details; and it would have been liable to the reproach of being *monarchical* in no other sense than any system which did not yield the point of a full federal equality, for which Mr. Martin and his party contended.

Undoubtedly, Hamilton, as I have said, was in favor of bestowing upon the national government full *power* to legislate upon all subjects; and to this extent, and in this sense, he proposed the abolition of the State governments. But any one who will attend carefully to the course of his argument, — imperfectly as it has been preserved, — will find that it embraces the following course of reasoning. All federal governments are weak and distracted. In order to avoid the evils incident to that form, the government of the American Union must be a national representative system. But no such system can be successful, in the actual situation of this country, unless it is endowed with all the principles and means of influence and power which are the proper supports of government. It must therefore be made completely sovereign, and State power, as a separate legislative authority, must be annihilated; otherwise, the States will be not only able, but will be constantly tempted, to exert their own authority against the authority of the nation. I have already expressed the opinion, that in this view of the subject, assuming that the States were not to be admitted to an equal representation as political corporations in any branch of the government, — as the framers and friends of the Virginia plan had thus far contended, — Hamilton was right. I believe that a constitution, in which the States had not been placed upon an equal footing in one branch of the legislative power, and under which the State sovereignties had been left as they were left by the system actually adopted, if it could have been ratified by all the States, could not have endured to our times. Yet the fortunate result of the mixed system that is embraced in the Constitution of the United States, is the product, not simply of either of the theories of a national or a federal government, but of a compromise between the two.

But the charge of anti-republican tendencies or designs has been most often urged against Hamilton, on account of his theoretical opinions concerning the comparative merits of different governments, and of certain features of the plan of a constitution which he read to the Convention. With respect to these points, I shall state the results of a very careful examination which I have made of all the sources of information as to the views and opinions which he expressed or entertained. Mr. Madison has given us what he probably intended as a full report of at least the substance of Hamilton's great speech addressed to the committee of the whole, and has informed us that his report was submitted to Colonel Hamilton, who approved it, with a few verbal changes. But how meagre a report, which fills but six pages in the octavo edition of Mr. Madison's "Debates," must have been in comparison with the speech actually made by Hamilton, will occur to every reader who notices the fact that the

speech occupied the entire session of one day (June 18), and who examines the brief from which he spoke, and which is still extant. (Hamilton's Works, II. 409.)

He was an earnest, and I am inclined to think a fervid and rapid speaker. Certainly he spoke from a mind full of knowledge of the principles and the working of other systems of polity, and possessed of resources which have never been excelled in any statesman who has been called to aid in the work of creating a government. The topics set down in his brief exhibit a very wide range of thought, enriched by copious illustrations from the history and experience of other countries, and from the views of the most important writers on government; while the whole argument bears logically and closely upon the actual situation of our confederacy and upon the questions at issue. It is not probable, therefore, that Mr. Madison's report gives us an adequate idea of the speech, or fully exhibits its reasoning. I have collated it, sentence by sentence, with the report in Judge Yates's Minutes, and with Hamilton's own brief, and have prepared for my own use a draft containing the substance of what these three sources can give us. The results may be thus given: —

1. That Hamilton, in stating his views of the theoretical value of different systems of government, frankly expressed the opinion that the British constitution was the best form which the world had then produced; — citing the praise bestowed upon it by Necker, that it is the only government "which unites public strength with individual security."

2. That, with equal clearness, he stated it as his opinion that none but a republican form could be attempted in this country, or would be adapted to our situation.

3. That he proposed to look to the British Constitution for nothing but those elements of stability and permanency which a republican system requires, and which may be incorporated into it without changing its characteristic principles.

The only question that remains, in order to form a judgment of his purposes, is, whether there was anything in the plan of a constitution drawn up by him that is inconsistent with the spirit of republican liberty. The answer is, that there was not. There is throughout this plan a constant recognition of the authority of the people, as the source of all political power. It proposed that the members of the Assembly should be elected by the people directly, and the members of the Senate by electors chosen for the purpose by the people. The executive was in like manner to be chosen by electors, appointed by the people or by the State legislatures. So far, therefore, his plan was as strictly republican, as is that of the Constitution under which we are actually living. But he

proposed that the executive and the senators should hold their offices *during good behavior;* and this has been his offence against republicanism, with those who measure the character of a system by the frequency with which it admits of rotation in office. His accusers have failed to notice that he made his executive personally responsible for official misconduct, and provided that both he and the senators should be subject to impeachment and to removal from office. This was a wide departure from the principles of the English constitution, and it constitutes a most important distinction between a republican and a monarchical system, when it is accompanied by the fact that the office of a ruler or legislator is attained, not by hereditary right, or the favor of the crown, but by the favor and choice of the people.

I have thus stated the principal points to which the inquiries of the reader should be directed in investigating the opinions of this great man, because I believe it to be unjust to impute to him any other than a sincere desire for the establishment and success of republican government. That he desired a strong government, that he was little disposed to dogmatize upon abstract theories of liberty, and that he trusted more to experience than to hypothesis, may be safely assumed. But that he ardently desired the success of that republican freedom which is founded on a perfect equality of rights among citizens, exclusive of hereditary distinctions, is as certain as that he labored earnestly throughout his life for the maxims, the doctrines, and the systems which he believed most likely to secure for it a fair trial and ultimate success. (See his description of his own opinions, when writing of himself as a third person in 1792; Works, VII. 52.)

That the system of government sketched by Hamilton was not received by many of those who listened to him with disapprobation on account of what has since been supposed its *monarchical* character, we may safely assume, on the testimony of Dr. Johnson of Connecticut, one of the most moderate men in the Convention. Contrasting the New Jersey and Virginia plans, he is reported (by Yates) to have said: "It appears to me that the Jersey plan has for its principal object the preservation of the State governments. So far it is a departure from the plan of Virginia, which, although it concentrates in a distinct national government, is not totally independent of that of the States. A gentleman from New York, with boldness and decision, proposed a system totally different from both; *and although he has been praised by everybody,* he has been supported by none." (Yates's Minutes, Elliot, I. 431.)

Even Luther Martin did not seem to regard the objects of what he calls the monarchical party as being any worse, or more dangerous to liberty,

than the projects of those whom he represents as aiming to obtain undue power and influence for their own States, and whom at the same time he acquits of monarchical designs or a desire to abolish the State governments. The truth is, that nobody had any improper purposes, or anything at heart but the liberties and happiness of the people of America. We are not to try the speculative views of men engaged in such discussions as these by the charges or complaints elicited in the heats of conflicting opinions and interests, inflamed by a zeal too warm to admit the possibility of its own error, or to perceive the wisdom and purity of an opponent.

CHAPTER VI.

CONFLICT BETWEEN THE NATIONAL AND FEDERAL SYSTEMS. — DIVISION OF THE LEGISLATURE INTO TWO CHAMBERS. — DISAGREEMENT OF THE STATES ON THE NATURE OF REPRESENTATION IN THE TWO BRANCHES. — THREATENED DISSOLUTION OF THE UNION.

WE are now approaching a crisis in the action of the Convention, the history of which is full of instruction for all succeeding generations of the American people. We have witnessed the formation of a minority of the States, whose bond of connection was a common opposition to the establishment of what was regarded as a "national" government. The structure of this minority, as well as that of the majority to which they were opposed, the motives and purposes by which both were animated, and the results to which their conflicts finally led, are extremely important to be understood by the reader.

The relative rank of the different States in point of population, at the time of the formation of the Constitution, was materially different from what it is at the present day. Virginia, then the first State in the Union, is now the fourth. New York, now at the head of the scale, then ranked after North

Carolina and Massachusetts, which occupied the third and fourth positions in the first census, and which now occupy respectively the sixth and tenth. South Carolina, which then had a smaller population than Maryland, now has a much greater. Georgia at that time had not half so many inhabitants as New Jersey, but now has twice as many.

Great inequalities existed, as they still exist, between the different members of the confederacy, not only in the actual numbers of their inhabitants, and their present wealth, but in their capacity and opportunity of growth. Virginia, with a population fourteen times as large, had a territorial extent of thirty times the size of Delaware. Pennsylvania had nearly seven times as many people as Rhode Island, and nearly forty times as much territory. The State of Georgia numbered a little more than a third as many people, but her territory was nearly twelve times as large as the territory of Connecticut.

The four leading States, Virginia, Pennsylvania, North Carolina, and Massachusetts, had an obvious motive for seeking the establishment of a government founded on a proportionate representation of their respective populations. The States of South Carolina and Georgia had generally acted with them in the formation of the Virginia plan; and these six States thus constituted the majority by which the principle of what was called a "national," in distinction from a "federal" government, had been steadily pressed to the conclusions arrived at in the committee of the whole, and now embraced in its

report.[1] All but two of them were certain to remain slaveholding States; but in the adoption of numbers as the basis of representative influence in the government, they all had a common interest, which led them for the present to act together.[2]

At the head of the minority, or the States which desired a government of federal equality, stood the State of New York, then the fifth State in the Union. She was represented by Alexander Hamilton, Robert Yates, and John Lansing, Junior. The two latter uniformly acted together, and of course controlled the vote of the State. Hamilton's vote being thus neutralized, his influence on the action of the Convention extended no farther than the weight and importance attached to his arguments by those who listened to them.

Occupying at that period nearly a middle rank between the largest and the smallest of the States with respect to population, New York had not yet grasped, or even perceived, the wonderful elements of her future imperial greatness. Her commerce was not inconsiderable; but it had hitherto been the disposition of those who ruled her counsels to retain its regulation in their own hands, and to subject it to no imposts in favor of the general interests of the Union. Most of her public men, also,[3] held it to be impracticable to establish a general government of

[1] Rhode Island was never represented in the Convention, and the delegation of New Hampshire had not yet attended.

[2] In all these statements of the relative rank of the States, I compare the census of 1790 and that of 1850.

[3] The two great exceptions of course were Hamilton and Jay.

sufficient energy to pervade every part of the United States, and to carry its appropriate benefits equally to all, without sacrificing the constitutional rights of the States to an extent that would ultimately prove to be dangerous to the liberties of their people. Their view of the subject was, that the uncontrolled powers and sovereignties of the States must be reserved; and that, consistently with the reservation of these, a mode might be devised of granting to the confederacy the moneys arising from a general system of revenue, some power of regulating commerce and enforcing the observance of treaties, and other necessary matters of less moment. This was the opinion of Yates, the Chief Justice of the State, who may be taken as a fair representative of the sentiments of a large part, if not of a majority, of its people at this time.[1] But neither he, nor any of those who concurred with him, succeeded in pointing out the mode in which the power to collect revenues, to regulate commerce, and to enforce the observance of treaties, could be conferred on the confederacy, without impairing the sovereignties of the States. It does not appear whether this class of statesmen contemplated a grant of full and unrestrained power over these subjects to a federal government, or whether they designed only a qualified grant, capable of being recalled or controlled by the parties to the confederacy, for reasons and upon occasions of

[1] See the candid and moderate letter of Messrs. Yates and Lansing to the legislature of the State, giving their reasons for not signing the Constitution. (Elliot, I. 480.)

which those parties were to judge. From the general course of their reasoning on the nature of a federal government, it might seem that the latter was their intention.[1] It is not difficult to understand how these gentlemen may have supposed that an irrevocable grant of powers to a general government might be dangerous to the liberties of the people of the States, because such a grant would involve a surrender of more or less of the original State sovereignties to a legislative body external to the State itself. But if they supposed that a grant of such powers could be made to a "federal" government, or a political league of the States, acting through a single body in the nature of a diet, and to be exercised when necessary by the combined military power of the whole, and yet be any less dangerous to liberty, it is difficult to appreciate their fears or to perceive the consistency of their plan. If the liberties of the people were any the less exposed under their system, than under that of a "national" government, it must have been because their system was understood by them to involve only a qualified and revocable surrender of State sovereignty.

But however this may have been, there was un-

[1] In the New Jersey plan, which the New York gentlemen (Hamilton excepted) supported, although the power to levy duties and the regulation of commerce were to be added to the existing powers of the old Congress, yet as these powers were to be exerted against the States, in the last resort, by force, it would only have been necessary for a State to place itself in an attitude of resistance, by a public act, and then the grant of power might have been considered to be revoked by the very act of resisting its execution.

doubtedly a settled conviction on the part of the two delegates of New York who controlled the vote of the State in the Convention, that they had not received the necessary authority from their own State to go beyond the principle of the Confederation; that it would be impracticable to establish a general government, without impairing the State constitutions and endangering the liberties of the people; and that what they regarded as a "consolidated" government was not in the remotest degree within the contemplation of the legislature of New York when they were sent to take their seats in the Convention.

The same sentiments, with far greater zeal, with intense feeling and some acrimony, were held and acted upon by Luther Martin of Maryland, a very eminent lawyer, and at that time Attorney-General of the State, who sometimes had it in his power, from the absence of his colleagues, to cast the vote of his State with the minority, and who generally divided it on all critical questions that touched the nature of the government. The State itself, with a population but a little less than that of New York, had no great reason to regard itself as peculiarly exposed to the dangers to be apprehended from combinations among the larger States to oppress the smaller; and it does not appear that these apprehensions were strongly felt by any of her representatives excepting Mr. Martin.[1] The great energy and earnestness,

[1] Three of the delegates of the State, James McHenry, Daniel of St. Thomas Jenifer, and Daniel Carroll, signed the Constitution.

however, of that distinguished person, prevented a concurrence of the State with the purposes and objects of the majority.

Connecticut might reasonably consider herself as one of the smaller States, and her vote was steadily given for an equality of suffrage in both branches of the national legislature, down to the time of the final division upon the Senate. The States of New Jersey and Delaware formed the other members of the minority, upon this general question.

On the one side, therefore, of what would have been, but for the great inequalities among the States, almost a purely speculative question, we find a strong determination, the result of an apparent necessity, to establish a government in which the democratic majority of the whole people of the United States should be the ruling power; and in which, so far as State influence was to be felt at all, it should be felt only in proportion to the relative numbers of the people composing each separate community. It was considered by those who embraced this side of the question, that, when the great States were asked to perpetuate the system of federal equality on which the Confederation had been founded, they were asked to submit to mere injustice, on account of an imaginary danger to their smaller confederates. They held it to be manifestly wrong, that a State fourteen times as large as Delaware should have only the same number of votes in the national legislature. Whether the States were now met as

parties to a subsisting confederacy, under which they might be regarded in the same light as the individuals composing the social compact; or whether they were to be looked upon as so many aggregates of individuals for whose personal rights and interests provision was to be made, as if they composed a nation already united, it was believed by the majority that no safe and durable government could be formed, if the democratic element were to be excluded. Pure democracies had undoubtedly been attended with inconveniences. But how could peace and real freedom be preserved, under the republican form, if half a million of people dwelling in one political division of the country possessed only the same suffrage in the enactment of laws as sixty thousand people dwelling in another division? Leave out of view the theory which taught that the States alone, regarded as members of an existing compact, must be considered as the parties to the new system, as they had been to the old, and it would be found that the political equality of the free citizens of the United States could be made a source of that energy and strength so much needed and as yet so little known. With it was connected the idea and the practicability of legislation that would reach and control individuals. Without it, there could be only a system of coercion of the States, whose opposition would be invited, rather than repressed, upon all occasions of importance. Abandon the necessary principle of governing by a democratic majority, said George Mason, and if the

government proceeds to taxation, the States will oppose its powers.[1]

On the other hand, the minority, insisting on a rigid construction of their powers, and planting themselves upon the nature of the compact already formed between the States, contended that these separate and sovereign communities had distinct governments already vested with the whole political power of their respective populations, and therefore that they could not, consistently with the truth of their situation, act as if the whole or any considerable part of that power could be transferred by the people themselves to another government. They said, that whatever power was to be conferred on a central or general government must be granted by the States, as political corporations, and that therefore the principle of the Union could not be changed, whatever addition it might be expedient to make to its authority. They said, that, even if this theory were not strictly true, the smaller States could not safely unite with the larger upon any other; and especially that they could not surrender their liberties to the keeping of a majority of the people inhabiting all the States, for such a power would inevitably destroy the State constitutions. They were willing, they said, to enlarge the powers of the federal government; willing to provide for it the means of compelling obedience to its laws; willing to hazard much for the general welfare. But they could not consent to place the very existence of their local

[1] Yates's Minutes, Elliot, I. 433.

governments, with all their capacity to protect the distinct interests of the people, and all their peculiar fitness for the administration of local concerns, at the mercy of great communities, whose policy might overshadow and whose power might destroy them.

To the claim of political equality as between a citizen of the largest and a citizen of the smallest State in the Union, they opposed the doctrine, that in his own State every citizen is equal with every other, and holds such rights and liberties, and so much political power, as the State may see fit to bestow upon him; but that, when separate States enter into political relations with each other for their common benefit, it is among the States themselves that the equality must prevail, because States can only be parties to a compact upon a footing of natural equality, just as individuals are supposed to enter society with equal natural rights. This doctrine, they said, was especially necessary to be applied between States of very unequal magnitudes. If applied, it would render unnecessary the division of the legislative body into two chambers; would dispense with any but a supreme judicial tribunal; and would admit of a ratification by the States in Congress, without raising the hazardous and doubtful question of a direct resort to the people, whose power to act independently of their State governments was by some strenuously denied.

These, in substance, were the principles now brought into direct collision, urged under a great variety of forms, and recurring upon the successive

details of the Constitution, as its formation proceeded, and pressed with equal earnestness and equally firm convictions of duty on both sides. I confess that it does not seem to me important, if it be practicable, to decide which party was theoretically correct. A great deal of the reasoning on both sides was speculative, and it is not easy to deny some of the chief propositions which were maintained on the one side and the other. We are too apt, perhaps, to judge of the real soundness of the opinions held by opposite parties to the first compromise of the Constitution, by the subsequent history and success of the government, and by the views and feelings which we entertain of that history and that success. Whereas, in truth, if we place ourselves at the point where the framers of the Constitution stood at the time we are examining, we shall find that, with the exception of the influence due to one or two governing facts of previous history, it was theoretically as correct to contend for a purely federal as for a purely national government. Almost everything depends upon the object towards which they were to reason; and therefore the premises were in a considerable degree open to an arbitrary choice. If the object was to establish a government, against the exercise of whose legitimate powers State legislation could not possibly be exerted, some higher authority than that of the State governments must be resorted to; and the reasoning which tended to prove the existence of that authority and the practicability of invoking it, and the danger of any other kind of government,

comes logically and consistently in support of the great purpose to be attained. If, however, from an honest fear for the safety of local interests, the purpose was to have a government that would not seriously diminish the powers of the States, but would leave them with always unimpaired sovereignties, capable of resisting the measures of the central power, then the States were certainly competent and sufficient to the formation of such a system, and the reasoning which placed them in the light of parties to a social compact was theoretically true. On the one side, it was believed that a government formed by the States upon the principle of federal equality would be destructive of the powers of the general government, whatever those powers might be. On the other side, it was considered that the principle of governing by a democratic majority of the people of all the States would make those powers too formidable for the safety of the State constitutions. According to the force we may assign to the one or the other tendency, the reasoning on either side will appear to us to be almost equally correct.

But there were, as I have said, one or two facts of previous history, which gave the advocates of a national government a great advantage over their opponents, and went far towards settling the real merits of the two opposite systems. A federal system had been tried, and had broken down in complete prostration of all the appropriate energies and functions of government. The advocates of the opposite system, therefore, could point to all the fail-

ures and all the defects of the Confederation, in proof of the reasoning which they employed. In addition to this, they could adduce the same general tendency in all former confederacies of the same nature. But no experiment had been made by the people of the American States, of a government founded expressly on the national character and relations of their inhabitants; and if the merits of such a government were now only to be maintained by theoretical reasoning, on the other hand it had not suffered the injury of acknowledged defeat.

The difficulty in the way of its adoption was its supposed tendency to absorb, and perhaps to annihilate, the sovereignties of the States. The advocates of the Virginia plan were called upon to show how the general sovereignty and jurisdiction which they proposed to give to their system could consist with a considerable, though subordinate, jurisdiction in the States. One of its moderate and candid opponents[1] declared that, if this could be shown, the objections to it ought to be surrendered; but if not, he thought that those objections must have their full force. But, from the very nature of the case, that which had not been demonstrated by experience could rest only upon opinion; and while the Virginia system made no other provision for State defence against encroachments of the general government than such as might be found in the election by the State legislatures of the national Senate, the apprehensions of the smaller States could not be

[1] Dr. Johnson of Connecticut.

satisfied, however admirable the theory, and however able might be the reasoning by which it was supported.

Let the reader, then, as he pursues the history of this conflict between the opposing interests of the two classes of States, and observes how strenuously the different theories were maintained, until victory became impossible on either side, note the danger of adhering too firmly to mere theoretical principles, in matters of government. He will see the impressive spectacle of States assembled for the formation of some system capable of answering the exigencies of their situation; he will see how rapidly a difference of local interests developed the most opposite theories, and how profoundly those theories were discussed; and he will see this conflict carried on for days, and even for weeks, with all the sincerity that interest lends to conviction, and all the tenacity that conviction can produce, until at last the whole discussion leads to the probable failure of the purpose for which the assembly had been instituted. He will then see an amalgamation of the two systems, which in their integrity were irreconcilable, and will witness the first introduction of that mode of adjusting opposite interests and conflicting theories of government which lies at the basis of the Constitution of the United States, and which alone can furnish a safe foundation on which to unite the destinies and wants of separate communities possessed of distinct political organizations and rights.

The Convention had received the report of the

committee of the whole on the 19th of June. From that day until the 5th of July the struggle was continued, commencing with the proposition which affirmed the division of the legislative department of the government into two branches. Although such an arrangement did not necessarily involve the principle of national and popular representation, it was opposed as unnecessary by those who desired to retain the system of representation by States, and who therefore intended to preserve the existing organization of the Congress. Still, the needful harmony and completeness of the scheme, according to the genius of the Anglo-American liberty, required this division of the legislature.

Doubtless a single council or chamber can promulgate decrees and enact laws; but it had never been the habit of the people of America, as it never had been the habit of their ancestors for at least a period of somewhat more than five centuries, to regard a single chamber as favorable to liberty, or to wise legislation.[1] The separation into two chambers of the lords spiritual and temporal, and the commons, in the English constitution, does not seem to have originated in a difference of personal rank, so much as in their position as separate estates of the realm. All the orders might have voted promiscuously in one house, and just as effectually signified

[1] Mr. Hallam has traced the present constitution of Parliament to the sanction of a statute in the 15th of Edward II. (1322), which he says recognizes it as already standing upon a custom of some length of time. Const. History, I. 5.

the assent or dissent of Parliament to any measure proposed.[1] But the practice of making the assent of Parliament to consist in the concurrent and separate action of the two estates, though difficult to be traced to its origin in any distinct purpose or cause, became confirmed by the growing importance of the commons, by their jealousy and vigilance, and by the controlling position which they finally assumed. As Parliament gradually proceeded to its present constitution, and the separate rights and privileges of the two houses became established, it was found that the practice of discussing a measure in two assemblies, composed of different persons, holding their seats by a different tenure and representing different orders of the state, was in the highest degree conducive to the security of the subject, and to sound legislation.[2]

So fully was the conviction of the practical con-

[1] Mr. Hallam does not concur in what he says has been a prevailing opinion, that Parliament was not divided into two houses at the first admission of the commons. That they did not sit in separate chambers proves nothing; for one body may have sat at one end of Westminster Hall, and the other at the opposite end. But he thinks that they were never intermingled in voting; and, in proof of this, he adduces the fact that their early grants to the King were separate, and imply distinct grantors, who did not intermeddle with each others' proceedings. He further shows, that in the 11th Edward I. the commons sat in one place and the lords in another; and that in the 8th Edward II. the commons presented a separate petition or complaint to the King, and the same thing occurred in 1 Edward III. He infers from the rolls of Parliament, that the houses were divided as they are at present in the 8th, 9th, and 19th Edward II. (See the very valuable Chapter VIII., on the English Constitution, in Hallam's Middle Ages, III. 342.)

[2] See on this subject Lieber on Civil Liberty, I. 209, edit. 1853.

venience and utility of two chambers established in the Anglican mind, that, when representative government came to be established in the British North American Colonies, although the original reason for the division ceased to be applicable, it was retained for its incidental advantages. In none of these Colonies was there any difference of social condition, or of political privilege or power, recognized in the system of representation; and as there were, therefore, no separate estates or orders among the people, requiring to be protected against each other's encroachments, or holding different relations to the crown, we cannot attribute the adherence to the system of two chambers, on the part of those who solicited and received the privilege of establishing these colonial governments, to anything but their belief in its practical advantages for the purposes of legislation. Still less can we suppose, that after the Revolution, and when there no longer existed any such motive as might have influenced the crown in modelling the colonial after the imperial institutions, to a certain extent, the people of these States should have perpetuated in their constitutions the principle of a division of the legislature into two chambers, for any other purpose than to secure the practical benefits which they and their ancestors had always found to flow from it.

Only three exceptions to this practice existed in America, at the time of the formation of the Constitution. They were the legislatures of the States of Pennsylvania and Georgia, and the Congress of the Confederation.

But the Congress being in fact only an assembly of deputies from confederated States, the means scarcely existed for the application of the principle so familiar in the legislatures of most of the States themselves. As a new government was now to be formed, whose theoretical and actual powers were to be essentially different, an opportunity was afforded for the ancient and favorite construction of the legislative department. The proposal was resisted, not because it was doubted that, in a government of direct legislative authority, in which the people are themselves to be represented, the system of two chambers is practically the best, but because those who opposed its introduction denied the propriety of attempting to establish a government of that kind. The States of New York, New Jersey, and Delaware, therefore, recorded their votes against such a division of the legislature, and the vote of Maryland was divided upon the question.[1]

The reader will observe, however, that, in its present aspect, there was a chasm in the Virginia plan, which to some extent justifies the opposition of the minority to the system of two legislative chambers. According to that plan, the people of the States were to be represented in both chambers in proportion to their numbers. But as there were no distinct orders among the people to furnish a different basis for the two houses, the system must either be a mere duplicate representation of the whole people, as it is in the State constitutions generally, or some arti-

[1] Connecticut upon this question voted with the majority.

ficial basis must be provided for one house, to distinguish it from the other, and to furnish a check as between the two. In a republican government, and in a state of society where property is not entailed and distinctions of personal rank cannot exist, such a basis is not easily found; and if found, is not likely to be stable and effectual. The happy expedient of selecting the States as the basis of representation in the Senate, which had not yet been agreed upon, and which was resorted to as an adjustment of a serious conflict between two opposite principles of government, has furnished a really different foundation for the two branches, as distinct as the separate representation of the different orders in the British constitution. It has thus secured the incidental advantages of two chambers, without resorting to those fluctuating or arbitrary distinctions among the people, which can alone afford, in such a country as ours, even an ostensible difference of origin for legislative bodies.

The same struggle which had been maintained upon this question was continued through all the votes taken upon the mode of electing the members of the two branches, and upon their tenure of office. It is not necessary here to rehearse the details of these proceedings; the result was, that the members of the first branch of the legislature were to be chosen by the people of the States for a period of two years, and to be twenty-five years of age, while the members of the second or senatorial branch were to be chosen by the State legislatures for a period of

six years, and to be thirty years of age. The States of Pennsylvania and Virginia voted against the election of senators by the legislatures of the States, because it was still uncertain whether an equality or a ratio of representation would finally prevail in that branch, and the election by the legislatures was considered to have a tendency to the adoption of an equality.[1]

At length, the sixth resolution, which defined the powers of Congress, and the seventh and eighth, which involved the fundamental point of the suffrage in the two branches, were reached.[2] The subject of the powers of Congress was postponed, and the question was stated on the rule of suffrage for the first branch, which the resolution declared ought to be according to an equitable ratio. In the great debate which ensued, Madison, Hamilton, Gorham, Reed, and Williamson combated the objections of the smaller States, while Luther Martin, with his accustomed warmth, resisted the introduction of the new principle. The discussion involved on both sides a repetition of the arguments previously employed; but some of the views presented are of great importance, especially those taken by Madison and Hamilton, of the situation in which the smaller States must be placed, if a constitution should not be formed and adopted containing a just distribution of political power among the whole people of the country, creating thereby a government of sufficient energy to protect each and all of the States against

[1] Madison, Elliot, V. 240. [2] June 28.

foreign powers, against the influence of the larger members of the confederacy, and against the dangers to be apprehended from their own governments.

Let each State, said Mr. Madison, depend on itself for its security, in a position of independence of the Union, and let apprehensions arise of dangers from distant powers, or from neighboring States, and from their present languishing condition, all the States, large as well as small, would be transformed into vigorous and high-toned governments, with an energy fatal to liberty and peace. The weakness and jealousy of the smaller States would quickly introduce some regular military force, against sudden danger from their powerful neighbors; the example would be followed, would soon become universal, and the means of defence against external danger would become the instruments of tyranny at home. These consequences were to be apprehended, whether the States should run into a total separation from each other, or into partial confederacies. Either event would be truly deplorable, and those who might be accessory to either could never be forgiven by their country, or by themselves.[1]

To these consequences of a dissolution of the Union, Hamilton added another, equally serious. Alliances, he declared, must be formed with different rival and hostile nations of Europe, who would seek to make us parties to their own quarrels. The representatives of foreign nations having American dominions betrayed the utmost anxiety about the

[1] Madison, Elliot, V. 256.

result of that meeting of the States. It had been said that respectability in the eyes of Europe was not the object at which we were to aim; that the proper design of republican government was domestic tranquillity and happiness. This was an ideal distinction. No government could give us tranquillity and happiness at home, which did not possess sufficient stability and strength to make us respectable abroad. This was the critical moment for forming such a government. We should run every risk in trusting to future amendments. As yet, we retain the habits of union. We are weak, and sensible of our weakness. Henceforward the motives would become feeble and the difficulties greater. It was a miracle that they were here, exercising their tranquil and free deliberations on the subject. It would be madness to trust to future miracles.[1]

But these warnings were of no avail against the settled determination of those who saw greater dangers in the establishment of a government which was in their view to approximate the condition of the States to that of counties in a single State. The principle of a proportionate representation of the populations of the State, was just and necessary; but it was now leading to the extreme of an entire separation, because it was carried to the extreme of a full application to every part of the government. In like manner, there was an equally urgent necessity for some provision which should receive the States in their political capacity, and on a footing of

[1] Madison, Elliot, V. 258.

equality, as constituent parts of the system. But this principle was now forcing the majority into the alternative of a partial confederacy, or of none at all, because it was insisted that the government must be exclusively founded on it. Neither party was ready to adopt the suggestion that the two ideas, instead of being opposed, ought to be combined, so that in one branch the people should be represented, and in the other the States.[1] The consequence was that the proportionate rule of suffrage for the first branch was established by a majority of one State only;[2] and the Convention passed on, with a fixed and formidable minority wholly dissatisfied, to consider what rule should be applied to the Senate.

The objects of a Senate were readily apprehended. They were, in the first place, that there might be a second chamber, with a concurrent authority in the enactment of laws; secondly, that a greater degree of stability and wisdom might reside in its deliberations, than would be likely to be found in the other branch of the legislative department; and, thirdly, that there might be some diversity of interest between the two bodies. These objects were to be attained by providing for the Senate a distinct and separate basis of its own. If such a basis is found among the individuals composing a political

[1] It was made at this stage by Dr. Johnson.

[2] The States opposed to an equality of suffrage in the first branch were Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia, 6; those in favor of it were Connecticut, New York, New Jersey, and Delaware. The vote of Maryland was divided.

society, it must consist of the distinctions among them either in respect to social rank or in respect to property. With regard to the first, the absence of all distinctions of rank rendered it impossible to assimilate the Senate of the United States to the aristocratic bodies which were found in other governments possessed of two legislative chambers. Property, as held by individuals, might have been assumed as the basis of a distinct representation, if the laws and customs of the different States had generally admitted of its possession in large masses through successive generations. But they did not admit of it. The general distribution and diffusion of property was the rule; its lineal transmission from the father to the eldest son was the exception. Had the Senate been founded upon property, it must have been upon the ratio of wealth as between the different States, in the same manner in which the senatorial representation of counties was arranged under the first constitution of Massachusetts.[1] It was very soon settled and conceded, that the States, as political societies, must be preserved; and if they were to be represented as corporations, or as so many separate aggregates of individuals, they must be received into the representation on an equal footing, or according to their relative weight. An inquiry into their relative wealth must have involved the question, as to five of them at least, whether their slaves were to be counted as part of that wealth. No satisfactory decision of this naked question could have

[1] Mr. Baldwin of Georgia suggested this model.

been had; and it is to be considered among the most fortunate of the circumstances attending the formation of the Constitution, that this question was not solved, with a view of founding the Senate upon the relative wealth of the States.

Two courses only remained. The basis of representation in the Senate must either be found in the numbers of people inhabiting the States, creating an unequal representation, or the people of each State, regarded as one, and as equal with the people of every other State, must be represented by the same number of voices and votes. The former was the plan insisted on by the friends and advocates of the "national" system; the latter was the great object on which the minority now rallied all their strength.

The debate was not long protracted; but it was marked with an energy, a firmness, and a warmth, on both sides, which reveal the nature of the peril then hanging over the unformed institutions, whose existence now blesses the people of America. As the delegations of the States approached the decision of this critical question, the result of a separation became apparent, and with it phantoms of coming dissension and strife, of foreign alliances and adverse combinations, loomed in the future. Reason and argument became powerless to persuade. Patriotism, for a moment, lost its sway over men who would at any time have died for their common country. Not mutterings only, but threats even were heard of an appeal to some foreign ally, by the smaller States, if the larger ones should dare to dis-

solve the confederacy by insisting on an unjust scheme of government.

Ellsworth, of Connecticut, in behalf of the minority, offered to accept the proportional representation for the first branch, if the equality of the States were admitted in the second, thus making the government partly national and partly federal. It would be vain, he said, to attempt any other than this middle ground. Massachusetts was the only Eastern State that would listen to a proposition for excluding the States, as equal political societies, from an equal voice in both branches. The others would risk every consequence, rather than part with so dear a right. An attempt to deprive them of it was at once cutting the body of America in two.

At this moment, foreseeing the probability of an equal division of the States represented in the Convention, one of the New Jersey members[1] proposed that the President should write to the executive of New Hampshire, to request the attendance of the deputies who had been chosen to represent that State, and who had not yet taken seats. Two States only voted for this motion,[2] and the discussion proceeded. Madison, Wilson, and King, with great earnestness, resisted the compromise proposed by Ellsworth, and when the vote was finally taken, five States were found to be in favor of an equal representation in the Senate, five were opposed to it, and the vote of Georgia was divided.[3]

[1] David Brearly.

[2] New York and New Jersey.

[3] The question was put upon Ellsworth's motion to allow the

Thus was this assembly of great and patriotic men brought finally to a stand, by the singular urgency with which opposite theories, springing from local interests and objects, were sought to be pressed into a constitution of government, that was to be accepted by communities widely differing in extent, in numbers, and in wealth, and in all that constitutes political power, and which were at the same time to remain distinct and separate States. As we look back to the possibility of a failure to create a constitution, and try to divest ourselves of the identity which the success of that experiment has given to our national life, the imagination wanders over a dreary waste of seventy years, which it can only fill with strange images of desolation. That the administration of Washington should never have existed; that Marshall should never have adjudicated, or Jackson conquered; that the arts, the commerce, the letters of America should not have

States an equal representation in the Senate. The vote stood, Connecticut, New York, New Jersey, Delaware, Maryland, *ay*, 5; Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, *no*, 5; Georgia divided. The person who divided the vote of Georgia, and thus prevented a decision which must have resulted in a disruption of the Convention, was Abraham Baldwin. We have no account of the motives with which he cast this vote, except an obscure suggestion by Luther Martin, which is not intelligible. (Elliot, I. 356.) Baldwin was a very wise and a very able man. He was not in favor of Ellsworth's proposition, but he probably saw the consequences of forcing the minority States to the alternatives of receiving what they regarded as an unjust and unsafe system, or of quitting the Union. By dividing the vote of his State he prevented this issue, although he also made it probable that the Convention must be dissolved without the adoption of any plan whatever.

taken the place which they hold in the affairs of the world; that instead of this great Union of prosperous and powerful republics, made one prosperous and powerful nation, history should have had nothing to show and nothing to record but border warfare and the conflicts of worn-out communities, the sport of the old clashing policies of Europe; that self-government should have become one of the exploded delusions with which mankind have successively deceived themselves, and republican institutions have been made only another name for anarchy and social disorder; — all these things seem at once inconceivable and yet probable, — at once the fearful conjurings of fancy, and the inevitable deductions of reason.

We know not what combinations, what efforts, might have followed the separation of that convention of American statesmen, without having accomplished the work for which they had been assembled. We do know, that, if *they* could not have succeeded in framing and agreeing upon a system of government capable of commending itself to the free choice of the people of their respective States, no other body of men in this country could have done it. We know that the Confederation was virtually at an end; that its power was exhausted, although it still held the nominal seat of authority. The Union must therefore have been dissolved into its component parts, but for the wisdom and conciliation of those who, in their original earnestness to secure a perfect theory, had thus encountered an insuperable

obstacle and brought about a great hazard. I have elsewhere said that these men were capable of the highest of the moral virtues, — that their magnanimity was as great as their intellectual acuteness and strength. Let us turn to the proof on which rests their title to this distinction.

CHAPTER VII.

FIRST GRAND COMPROMISES OF THE CONSTITUTION. — POPULATION OF THE STATES ADOPTED AS THE BASIS OF REPRESENTATION IN THE HOUSE. — RULE FOR COMPUTING THE SLAVES. — EQUALITY OF REPRESENTATION OF THE STATES ADOPTED FOR THE SENATE.

As the States were now exactly divided on the question whether there should be an equality of votes in the second branch of the legislature, some compromise seemed to be necessary, or the effort to make a constitution must be abandoned. A conversation as to what was expedient to be done, resulted in the appointment of a committee of one member from each State, to devise and report some mode of adjusting the whole system of representation.[1]

According to the Virginia plan, as it then stood before the Convention, the right of suffrage in both branches was to be upon some equitable ratio, in proportion to the whole number of free inhabitants in each State, to which three fifths of all other persons, except Indians not paying taxes, were to be added. Nothing had been done, to fix the ratio of representation; and although the principle of popular repre-

[1] The committee consisted of Gerry, Ellsworth, Yates, Patterson, Franklin, Bedford, Martin, Mason, Davie, Rutledge, and Baldwin.

sentation had been affirmed by a majority of the Convention as to the first branch, it had been rejected as to the second by an equally divided vote of the States. The whole subject, therefore, was now sent to a committee of compromise, who held it under consideration for three days.[1]

The same struggle which had been carried on in the Convention was renewed in the committee; the one side contending for an inequality of suffrage in both branches, the other for an equality in both. Dr. Franklin at length gave way, and proposed that the representation in the first branch should be according to a fixed ratio of the inhabitants of each State, computed according to the rule already agreed upon, and that in the second branch each State should have an equal vote. The members of the larger States reluctantly acquiesced in this arrangement; the members of the smaller States, with one or two exceptions, considered their point gained. When the report came to be made, it was found that the committee had not only agreed upon this as a compromise, but that they had made a distinction of some importance between the powers of the two branches, by confining to the first branch the power of originating all bills for raising or appropriating money and for fixing the salaries of officers of the government, and by providing that such bills should not be altered or amended in the second

[1] The committee was appointed on the 2d of July, and made their report on the 5th. The Convention in the interval transacted no business.

branch. This was intended for a concession by the smaller States to the larger.[1] The ratio of representation in the House was fixed by the committee at one member for every forty thousand inhabitants, in which three fifths of the slaves were to be computed; each State not possessing that number of inhabitants to be allowed one member. The number of senators was not designated.

This arrangement was, upon the whole, reasonable and equitable. It balanced the equal representation of the States in the Senate against the popular representation in the House, and it gave to the larger States an important influence over the appropriations of money and the levying of taxes. Nor can the admission of the slaves, in some proportion, into the rule of representation, be justly considered as an improper concession, in a system in which the separate organizations of the States were to be retained, and in which the States were to be represented in proportion to their respective populations.

The report of the committee had recommended that this plan should be taken as a whole; but as its several features were distasteful to different sections of the Convention, and almost all parties were disappointed in the result arrived at by the committee, the several parts of the plan became at once separate subjects of discussion. In the first place, the friends of a pure system of popular representation in both branches objected to the provision concerning money and appropriation bills, as being no concession

[1] See further as to this exclusive power of the House, *post*.

on the part of the smaller States, and as a useless restriction.[1] It therefore, in their view, left in force all their objections against allowing each State an equal voice in the Senate. But it was voted to retain it in the report,[2] and the equal vote of the States in the second branch was also retained.[3]

The scale of apportionment of representatives, recommended in the report of the committee, was also objected to on various grounds. It was said that a mere representation of persons was not what the circumstances of the case required; — that property as well as persons ought to be taken into the account in order to obtain a just index of the relative rank of the States. It was also urged, that, if the system of representation were to be settled on a ratio confined to the population alone, the new States in the West would soon equal, and probably outnumber, the Atlantic States, and thus the latter would be in a minority for ever. For these reasons, the subject of apportioning the representatives was recommitted to five members,[4] who subsequently proposed a scheme, by which the first House of Representatives should consist of fifty-six members, distributed among the States upon an estimate of their present condition,[5] and authorizing the legis-

[1] Madison, Butler, Gouverneur Morris, and Wilson.

[2] Five States voted to retain it, three voted against it, and three were divided. This was treated as an affirmative vote. Elliot, V. 255.

[3] Connecticut, New York, New Jersey, Delaware, Maryland, North Carolina, *ay*, 6; Pennsylvania, Virginia, South Carolina, *no*, 3; Massachusetts, Georgia, divided. Ibid. 285, 286.

[4] Gouverneur Morris, Gorham, Randolph, Rutledge, and King.

[5] They gave to New Hampshire, 2; Massachusetts, 7; Rhode Island,

lature, as future circumstances might require, to increase the number of representatives, and to distribute them among the States upon a compound ratio of their wealth and the numbers of their inhabitants.[1] The latter part of this proposition was adopted, but a new and different apportionment, of sixty-five members for the first meeting of the legislature, was sanctioned by a large vote of the States, after a second reference to a committee of one member from each State.[2]

These votes had been taken for the purpose of agreeing upon amendments to the original report of the compromise committee, which they would have so modified as to introduce into it, in place of a ratio of forty thousand inhabitants, including three fifths of the slaves, a fixed number of representatives for the first meeting of the legislature, distributed by estimate among the States, and for all subsequent meetings an apportionment by the legislature itself upon the combined principles of the wealth and numbers of inhabitants of the several States. But in order to understand the objections to the latter part of this proposition, and the modifications that were still to be made in it, it is necessary for us here to recur to that special interest which caused a new

1; Connecticut, 4; New York, 5; New Jersey, 3; Pennsylvania, 8; Delaware, 1; Maryland, 4; Virginia, 9; North Carolina, 5; South Carolina, 5; Georgia, 2.

[1] Elliot, V. 287, 288.

[2] This apportionment gave to New Hampshire, 3; Massachusetts, 8; Rhode Island, 1; Connecticut, 5; New York, 6; New Jersey, 4; Pennsylvania, 8; Delaware, 1; Maryland, 6; Virginia, 10; North Carolina, 5; South Carolina, 5; Georgia, 3.

and most serious difficulty in the subject of representation, and which now began to be distinctly asserted by those whose duty it was to provide for it. There is no part of the history of the Constitution that more requires to be examined with a careful attention to facts, with an unprejudiced consideration of the purposes and motives of those who became the agents of its great compromises and compacts between sovereign States, and with an impartial survey of the difficulties with which they had to contend.

Twice had the Convention affirmed the propriety of counting the slaves, if the States were to be represented according to the numbers of their inhabitants; and on the part of the slaveholding States there had hitherto been no dissatisfaction manifested with the old proportion of three fifths, originally proposed under the Confederation as a rule for including them in the basis of taxable property. But the idea was now advanced, that numbers of inhabitants were not a sufficient measure of the wealth of a State, and that, in adjusting a system of representation between such States as those of the American Union, regard should be had to their relative wealth, since those which were to be the most heavily taxed ought to have a proportionate influence in the government. Hence the plan of combining numbers and wealth in the rule. This was mainly an expedient to prevent the balance of power from passing to the Western from the Atlantic States.[1] It was supposed that the former

[1] See Mr. Gorham's explanation; Madison, Elliot, V. 288.

might in progress of time have the larger amount of population; but that, as the latter would at the commencement of the government have the power in their own hands, they might deal out the right of representation to new States in such proportions as would be most for their own interests. Still there were grave objections to this combined rule of numbers and wealth as applied to the slaveholding States. In the first place, it was extremely vague; it left the question wholly undetermined whether the slaves were to be regarded as persons or as property, and therefore left that question to be settled by the legislature at every revision of the system. Moreover, although this rule might enable the Atlantic States to retain the predominating influence in the government as against the Western interests, it might also enable the Northern to retain the control as against the Southern States, after the former had lost and the latter had gained a majority of population. The proposed conjectural apportionment of members for the first Congress would give thirty-six members to the States that held few or no slaves, and twenty-nine to the States that held many. Mason and Randolph, who represented in a candid manner the objections which Virginia must entertain to such a scheme, did not deny, that, according to the present population of the States, the Northern part had a right to preponderate; but they said that this might not always be the case; and yet that the power might be retained unjustly, if the proportion on which future apportionments were to be made

by the legislature were not ascertained by a definite rule, and peremptorily fixed by the Constitution. Gouverneur Morris, who strenuously maintained the necessity for guarding the interests of the Atlantic against those of the Western States, insisted that the combined principles of numbers and wealth gave a sufficient rule for the legislature; that it was a rule which they could execute; and that it would avoid the necessity of a distinct and special admission of the slaves into the census, — an idea which he was sure the people of Pennsylvania would reject. Mr. Madison argued, forcibly, that unfavorable distinctions against the new States that might be formed in the West would be both unjust and impolitic. He thought that their future contributions to the treasury had been much underrated; that the extent and fertility of the Western soil would create a vast agricultural interest; and that, whether the imposts on the foreign supplies which they would require were levied at the mouth of the Mississippi or in the Atlantic ports, their trade would certainly advance with their population, and would entitle them to a rule which should assume numbers to be a fair index of wealth.

The arguments against the combined principles of numbers and wealth, as a mere general direction to the legislature, and against their joint operation upon the contrasted interests of the Western and the Atlantic States, appear to have prevailed with some of the more prominent of the Northern members.[1]

[1] Sherman and Gorham.

Accordingly, when a counter proposition was brought forward by Williamson,[1] — which contemplated a return to the principle of numbers alone, and was intended to provide for a periodical census of the free white inhabitants and of three fifths of all other persons, and that the representation should be regulated accordingly, — six States on a division of the question voted for a census of the free inhabitants, and four States recorded their votes against it.[2] This result brought the Convention to a direct vote upon the naked question whether the slaves should be included as persons, and in the proportion of three fifths, in the census for the future apportionment of representatives among the States.

Massachusetts and Pennsylvania now, for the first time, separated themselves from Virginia. It was perceived that a system of representation by numbers would draw after it the necessity for an admission of the slaves into the enumeration, unless it were confined to the free inhabitants. On the one hand, the delegates of these two States had to look to the probable encouragement of the slave-trade,

[1] Of North Carolina.

[2] Massachusetts, Connecticut, New Jersey, Pennsylvania, Virginia, North Carolina, *ay*, 6; Delaware, Maryland, South Carolina, Georgia, *no*, 4. The votes of South Carolina and Georgia were given in the negative, because they desired that the blacks should be included in the census equally with the whites. For the same reason, as we shall see presently, those States voted against the other branch of the proposition, which would give but three fifths of the slaves. But upon what principle, unless it was from general opposition to all numerical representation, the State of Delaware should have voted with them on both of these features of the proposed census, is, I confess, to me inexplicable.

that would follow an admission of the blacks into the representation, and to the probable refusal of their constituents to sanction such an admission. On the other hand, they had to encounter the difficulty of arranging a just rule of popular representation between States which would have no slaves, or very few, and States which would have great numbers of persons in that condition, without giving to the latter class of States some weight in the government proportioned to the magnitude of their populations. But they would not directly admit the naked principle that a slave is to be placed in the same category with a freeman for the purpose of representation, when he has no voice in the appointment of the representative; and the proposition was rejected by their votes and those of four other States.[1] Thereupon the whole substitute of Mr. Williamson, which contemplated numerical representation in the place of the combined rule of numbers and wealth, was unanimously rejected.

The report of the committee of compromise still stood, therefore, but modified into the proposition of a fixed number for the first House of Representatives, and a rule to be compounded of the numbers and wealth of the States, to be applied by the legislature in adjusting the representation in future houses. A difficulty, apparently insuperable, had

[1] Connecticut, Virginia, North Carolina, Georgia, *ay*, 4; Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, *no*, 6. South Carolina voted in the negative, for a reason suggested in the previous note, *ante*, p. 153.

defeated the application of the simple and — as it might otherwise appropriately be called — the natural rule of numerical representation. The social and political condition of the slave, so totally unlike that of the freeman, presented a problem hitherto unknown in the voluntary construction of representative government. It was certainly true, that, by the law of the community in which he was found, and by his normal condition, he could have no voice in legislation. It was equally true, that he was no party to the establishment of any State constitution; that nobody proposed to make him a party to the Constitution of the United States, to confer upon him any rights or privileges under it, or to give to the Union any power to affect or influence his *status* in a single particular. It was true also, that the condition in which he was held was looked upon with strong disapprobation and dislike by the people of several of the States, and it was not denied by some of the wisest and best of the Southern statesmen that it was a political and social evil.

Still, there were more than half a million of these people of the African race, distributed among five of the States, performing their labor, constituting their peasantry, and — if the numbers of laborers in a community form any just index of its wealth and importance — forming in each of those States a most important element in its relative magnitude and weight. It should be recollected, that the problem before the framers of the Constitution was, not how to create a system of representation for a

single community possessing in all its parts the same social institutions, but how to create a system in which different communities of mere freemen and other different communities of freemen and slaves could be represented, in a limited government instituted for certain special objects, with a proper regard to the respective rights and interests of those communities, and to the magnitude of the stake which they would respectively have in the legislation by which all were to be affected.[1]

It does not appear, from any records of the discussions that have come down to us, in what way it was supposed the combined rule of numbers and wealth could be applied. If its application were left to Congress, in adjusting the system with reference to slaveholding States, the slaves must be counted as persons or as property; and as the proposed rule did not determine which, they might be treated as persons in one census, and as property in the next, and so on interchangeably. The suggestion of the principle, however, which seemed to be a just one, and which grew out of the conflicting opinions entertained upon the question whether numbers of inhabitants are alone a just index of the wealth of a community, brought into view a very important doctrine, that had long been familiar to the American people; namely, that the right of representation ought to be conceded to every community on which a tax is to be imposed; or, as one of the

[1] See the note on the population of the slaveholding and non-slaveholding States, at the end of this chapter.

maxims of the Revolutionary period expressed it, that "taxation and representation ought to go together." This doctrine was really applicable to the case, and capable of furnishing a principle that would alleviate the difficulty; for if it could be agreed that, in levying taxes upon a slaveholding State, the wealth that consisted in slaves should be included, the maxim itself demonstrated the propriety of giving as large a proportion of representation as the proportion of tax imposed; and if, in order to ascertain the representative right of the State, the slaves were to be counted as persons, and, in ascertaining the tax to be paid, they were to be counted as property, they would not require to be considered in both capacities under either branch of the rule. But in order to give the maxim this application, it would be necessary to concede that the numbers of the slaves and the free persons furnished a fair index of the wealth of one State, as it was necessary to admit that the numbers of its free inhabitants furnished a fair index of the wealth of another State. If the latter were to be assumed, and the taxation imposed upon a State were regulated by its numbers of people, upon the idea that such numbers fairly represented the wealth of the community, it was proper to apply the same principle to the slaves. If this principle were applied to the slaves when ascertaining the amount of taxes to be paid, it ought equally to be applied to them in ascertaining the numbers of representatives to be allowed to the State; otherwise, the value of the slaves must be

ascertained in some other way, for the purposes of taxation; the value or wealth residing in other kinds of property must be ascertained in the same mode, or under the different rule of assuming numbers of inhabitants as its index; and the slaves must be excluded as persons from the representation, which they could only enhance by being treated as taxable property.

These further difficulties will appear, as we follow out the various steps taken for the purpose of applying the maxim which connects taxation with representation. The rule now under consideration, as the means of guiding the legislature in future distributions of the right of representation, was that they were to regulate it upon a ratio compounded of the wealth and numbers of inhabitants of the States. Gouverneur Morris now proposed to add to this, as a proviso, the correlative proposition, "that direct taxation shall be in proportion to representation." This was adopted; and it made the proposed rule of numbers and wealth combined applicable both to taxation and representation.

But in truth it was as difficult to apply the combined rule of wealth and numbers to the subject of taxation, as between the States, as it was to apply it to the right of representation. This was not the first time in the history of the Union that these two subjects had been considered, and had been found to be surrounded with embarrassments. In 1776, when the Articles of Confederation were framed, it became necessary to determine the proportion in

which the quotas of contribution to the general treasury should be assessed upon the States. Two obvious rules presented themselves as alternatives; either to apportion the quotas upon an estimate of the wealth of the States, or to assume that numbers of inhabitants of every condition presented a fair index of the pecuniary ability of a State to sustain public burdens. Here again, however, under either of these plans, the question would arise as to the kind of property to be regarded in the basis of the assessment. Should the slaves be treated as part of the property of a slaveholding State, either by a direct computation, or by counting them as part of the population, which was to be considered as the measure of its wealth? Mr. John Adams forcibly maintained that they ought not to be regarded as subjects of federal taxation, any more than the free laborers of the Northern States; but that numbers of inhabitants ought to be taken, indiscriminately, as the true index of the wealth of each State; and that thus the slave would stand upon the same footing with the free laborer, both being regarded as the producers of wealth, and therefore that both should add to the quota of tax or contribution to be levied upon the State.[1] Mr. Chase,[2] on the other hand, contended that practically this rule would tax the Northern States on numbers only, while it would tax the Southern States on numbers and

[1] See Mr. Jefferson's notes of this debate in the Congress of 1776, Works, Vol. I. pp. 26–30. John Adams's Works, Vol. II. pp. 496–498.

[2] Samuel Chase of Maryland.

wealth conjointly, since the slaves were property as well as persons.

It is probable, however, that the slaveholding States would at that time have agreed to the adoption of numbers as the basis of assessment, if the Northern and Eastern States could have consented to receive the slaves into the enumeration in a smaller ratio than their whole number. But it was insisted that they should be counted equally with the free laborers of the other States; and the result of this attempt to solve a complicated and abstruse question of political economy by a theoretical rule, determining that a slave, as a producer of wealth, stands upon a precise equality with a freeman performing the same species of labor, was, that the Congress of 1776 were driven to the adoption of land as a measure of wealth, instead of the more convenient and practicable rule of numbers.[1]

But the Articles of Confederation had not been in operation for two years, when it was found that the system of obtaining supplies for the general treasury by assessing quotas upon the States according to an estimate of their relative wealth, represented by the value of their lands, was entirely impracticable; that the value of land must constantly be a source of contention and dissatisfaction between the States; and that, if the mode of defraying the expenses of the Union by requisitions were adhered to, some simpler rule must be adopted. Accordingly, in 1783 the Congress were compelled to

[1] See *ante*, Vol. I. pp. 210–213.

return to the rule of numbers; and it was in the effort to agree upon the ratio in which the slaves should enter into that rule, that the proportion of three fifths was fixed upon, as a compromise of different views, in the amendment then proposed to the Articles of Confederation.[1]

Such had been the previous experience of the Union on the subject of taxation; and now, in 1787, when an effort was to be made to establish a government upon a popular representation of the States which had found it so difficult to agree upon a just and practicable rule for determining their proportions of the public burdens, the whole subject became still further complicated with the difficulties attending the adjustment of this new right of proportional representation. The maxim which would regulate it by the same ratio that is applied to the distribution of taxes, contained within itself a just principle; but it went no farther than to assert a principle of justice, and it left the subject of the rule itself surrounded by the same difficulties as before. The Southern States complained that their slaves, if counted as property for the purposes of taxation, were to be so counted upon a ratio left wholly to the discretion of Congress; and if counted as numbers, for the same purpose, that they ought not to be reckoned in their entire number. They professed their readiness to have representation and taxation

[1] See Mr. Madison's notes of the debate in the Congress of 1783, Elliot, V. 78–80. Journals of Congress, VIII. 188 (April 18, 1783). *Ante*, Vol. I. p. 213.

regulated by the same rule, but they insisted on the security of a definite rule, to be established in the Constitution itself; and this security, they said, must embrace an admission of the slaves into the basis of representation, if they were to be included in the basis of direct taxation.[1] Accordingly, before the rule as to taxation had been determined, Randolph submitted a distinct proposition, which contemplated a census of the white inhabitants and of three fifths of all other persons, with a peremptory direction to Congress to arrange the representation accordingly.

The Northern States, on the other hand, resisted the direct introduction of the slaves into the representation, as persons; and it was plain that, if they were to be treated as property, and the representation was to be regulated by a rule of wealth, their value as property must be compared with that of other species of personalty held in the same and in other States, and some principles for computing it must be ascertained. Upon such economical questions as these, the agreement of different minds, under the influence of different interests, was absolutely impossible.

Thus the knot of these complicated difficulties could only be cut by the sword of compromise. In whatever direction a theoretical rule was applied, — whatever view was taken of the slave, as a person or as an article of property; as a productive laborer equally or less valuable to the State when compared

[1] See the remarks of General Pinckney, Mr. Mason, Mr. Butler, and Governor Randolph. Elliot, V. 294–305.

with the freeman, — whatever principles were maintained upon the question whether numbers constitute a proper measure of the wealth of a community, and one that will work out the same result in communities where slavery exists, as well as where it is absent, — absolute truth, or what the whole country would receive as such, was unattainable. But an adjustment of the problem, founded on mutual conciliation and a desire to be just, was not impossible.

The two objects to be accomplished were to avoid the offence that might be given to the Northern States by making the slaves in direct terms an ingredient in the rule of representation, and, on the other hand, to concede to the Southern States the right to have their representation enhanced by the same enumeration of their slaves that might be adopted for the purpose of apportioning direct taxation. These objects were effected by an arrangement proposed by Wilson. It consisted, first, in affirming the maxim that representation ought to be proportioned to direct taxation; and then, by directing a periodical census of the free inhabitants, and three fifths of all other persons, to be taken by the authority of the United States, and that the direct taxation should be apportioned among the States according to this census of persons. The principle was thus established, that, for the purpose of direct taxation, the number of inhabitants in each State should be assumed as the measure of its relative wealth; and that its right of representation should be regulated by the same measure; and as the slaves were to be

admitted into the rule for taxation in the proportion of three fifths of their number only, — apparently upon the supposition that the labor of a slave is less valuable to the State than the labor of a freeman, — so they were in the same proportion only to enhance the representation. This expedient was adopted by the votes of a large majority of the States;[1] but since it had been moved as an amendment to the proposition previously accepted, which affirmed that the representation ought to be regulated by the combined rule of numbers and wealth, it appeared, when brought into that connection, to rest the representation of the slaveholding States in respect to the slaves, in part at least, upon the idea of property. To avoid all discrepancy in the application of the rule to the two subjects of representation and taxation, Governor Randolph proposed to strike the word "wealth" from the resolution; and this, having been done by a vote nearly unanimous,[2] left the enumeration of the slaves for both purposes an enumeration of persons, in less than their whole numbers; placing them in the rule for taxation, not as property and subjects of taxation, but as constituting part of an assumed measure of the wealth of a State, just as the free inhabitants constituted another part of the same measure, and placing them in the same ratio and in the same capacity in the rule for representation.[3]

[1] Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, Georgia, *ay*, 6; New Jersey, Delaware, *no*, 2; Massachusetts, South Carolina, divided.

[2] The only opposition was from Delaware, the vote of which was divided.

[3] See the note at the end of this chapter.

The basis of the House of Representatives having been thus agreed to, the remaining part of the report, which involved the basis of the Senate, was then taken up for consideration. Wilson, King, Madison, and Randolph still opposed the equality of votes in the Senate, upon the ground that the government was to act upon the people and not upon the States, and therefore the people, not the States, should be represented in every branch of it. But the whole plan of representation embraced in the amended report, including the equality of votes in the Senate, was adopted, by a bare majority, however, of the States present.[1]

When this result was announced, Governor Randolph complained of its embarrassing effect on that part of the plan of a constitution which concerned the powers to be vested in the general government; all of which, he said, were predicated upon the idea of a proportionate representation of the States in both branches of the legislature. He desired an opportunity to modify the plan, by providing for certain cases to which the equality of votes should be confined; and in order to enable both parties to

[1] Connecticut, New Jersey, Delaware, Maryland, North Carolina (Mr. Spaight, *no*), *ay*, 5; Pennsylvania, Virginia, South Carolina, Georgia, *no*, 4; Massachusetts divided (Mr. Gerry, Mr. Strong, *ay*, Mr. King, Mr. Gorham, *no*). The delegates of New York were all absent; Messrs. Yates and Lansing left the Convention on the 5th of July, after the principle of popular representation had been adopted. Colonel Hamilton was absent on private business. If the two former had been present, the vote of the State would doubtless have been given in favor of the report, on account of the basis which it gave to the Senate.

consult informally upon some expedient that would bring about a unanimity, he proposed an adjournment. On the following morning, we are told by Mr. Madison, the members opposed to an equality of votes in the Senate became convinced of the impolicy of risking an agreement of the States upon any plan of government by an inflexible opposition to this feature of the scheme proposed, and it was tacitly allowed to stand.[1]

Great praise is due to the moderation of those who made this concession to the fears and jealousies of the smaller States. That it was felt by them to be a great concession, no one can doubt, who considers that the chief cause which had brought about this convention of the States was the inefficiency of the "federal" principle on which the former Union had been established. Looking back to all that had happened since the Confederation was formed, — to the repeated failures of the States to comply with the constitutional demands of the Congress, and to the entire impracticability of a system that had no true legislative basis, and could therefore exert no true legislative power, — we ought not to be surprised that the retention of the principle of an equal State representation in any part of the new government should have been resisted so strenuously and so long.

That the final concession of this point was also a wise and fortunate determination, there can be no doubt. Those who made it probably did not fore-

[1] Elliot, V. 319.

see all its advantages, or comprehend all its manifold relations. They looked to it, in the first instance, as the means of securing the acceptance of the Constitution by all the States, and thus of preventing the evils of a partial confederacy. They probably did not at once anticipate the benefits to be derived from giving to a majority of the States a check upon the legislative power of a majority of the whole people of the United States. Complicated as this check is, it both recognizes and preserves the residuary sovereignty of the States; it enables them to hold the general government within its constitutional sphere of action; and it is in fact the only expedient that could have been successfully adopted, to preserve the State governments, and to avoid the otherwise inevitable alternative of conferring on the general government plenary legislative power upon all subjects. It is a part of the Constitution which it is vain to try by any standard of theory; for it was the result of a mere compromise of opposite theories and conflicting interests. Its best eulogium is to be found in its practical working, and in what it did to produce the acceptance of a constitution believed, at the time of its adoption, to have given an undue share of influence and power to the larger members of the confederacy.[1]

[1] Mr. Madison, who was to the last a strenuous opponent of the equality of votes in the Senate, candidly and truly stated its merits in the 62d number of the Federalist, as they had been disclosed to him by subsequent reflection.

NOTE ON THE POPULATION OF THE SLAVEHOLDING AND NON-SLAVEHOLDING STATES.

Although, at the time of the formation of the Constitution, slavery had been expressly abolished in two of the States only (Massachusetts and New Hampshire), the framers of that instrument practically treated all but the five Southern States as if the institution had been already abolished within their limits, and counted all the colored persons therein, whether bond or free, as part of the free population; assuming that the eight Northern and Middle States would be free States, and that the five Southern States would continue to be slave States. This appears from the whole tenor of the debates, in which the line is constantly drawn, as between slaveholding and non-slaveholding States, so as to throw eight States upon the Northern and five upon the Southern side. I have found also, in a newspaper of that period (New York Daily Advertiser, February 5, 1788), the following

"Estimate of the Population of the States made and used in the Federal Convention, according to the most Accurate Accounts they could obtain."

New Hampshire,				102,000	
Massachusetts,				360,000	
Rhode Island,				58,000	
Connecticut,				202,000	
New York,				238,000	
New Jersey,				138,000	
Pennsylvania,				360,000	
Delaware,				37,000	
					1,495,000
Maryland, including three fifths of			80,000	negroes, 218,000	
Virginia,	"	"	280,000	" 420,000	
North Carolina,	"	"	60,000	" 200,000	
South Carolina,	"	"	80,000	" 150,000	
Georgia,	"	"	20,000	" 90,000	
					1,078,000

The authenticity of this table is established by referring to a speech made by General Pinckney in the legislature of South Carolina, in which he introduced and quoted it at length. (Elliot's Debates, IV. 283.)

From this it appears that the estimated population of the eight Northern and Middle States, adopted in the Convention, was 1,495,000; that

of the five Southern States (including three fifths of an estimated number of negroes) was 1,078,000. Comparing this estimate with the results of the first census, it will be seen that the *total* population of the eight Northern and Middle States exceeds the *federal* population of the five Southern States, in the census of 1790, in about the same ratio as the former exceeds the latter in the estimate employed by the Convention. Thus in 1790 the *total* population of the eight Northern and Middle States, including all slaves, was 1,845,595; the *federal* population of the five Southern States, including three fifths of the slaves, was 1,540,048; — excess 305,547. In the estimate of 1787, the population allotted to the eight Northern and Middle States was 1,495,000; that allotted to the five Southern States, counting only three fifths of the estimated number of slaves, was 1,078,000; — excess in favor of the eight States, 417,000. This calculation shows, therefore, that, in estimating the population of the different States for the purpose of adjusting the first representation in Congress, the Convention applied the rule of three fifths of the slaves to the five Southern States only, and that as to the other eight States no discrimination was made between the different classes of their inhabitants. Other methods of comparing the estimate of 1787 with the census of 1790 will lead to the same conclusion.

CHAPTER VIII.

POWERS OF LEGISLATION. — CONSTITUTION AND CHOICE OF THE EXECUTIVE. — CONSTITUTION OF THE JUDICIARY. — ADMISSION OF NEW STATES. — COMPLETION OF THE ENGAGEMENTS OF CONGRESS. — GUARANTY OF REPUBLICAN CONSTITUTIONS. — OATH TO SUPPORT THE CONSTITUTION. — RATIFICATION. — NUMBER OF SENATORS. — QUALIFICATIONS FOR OFFICE. — SEAT OF GOVERNMENT.

OF the remaining subjects comprehended in the report of the committee of the whole, it will only be necessary here to make a brief statement of the action of the Convention, before we arrive at the stage at which the principles agreed upon were sent to a committee of detail to be cast into the forms of a Constitution.

Recurring to the sixth resolution in the report of the committee of the whole, an addition was made to its provisions, by inserting a power to legislate in all cases for the general interests of the Union; and for the clause giving the legislature power to negative certain laws of the States, the principle was substituted of making the legislative acts and treaties of the United States the supreme law of the land, and binding upon the judiciaries of the several States.

The constitution of the executive department had been provided for, by declaring that it should con-

sist of a single person, to be chosen by the national legislature for a period of seven years, and to be ineligible a second time; to have power to carry into execution the national laws, to appoint to offices not otherwise provided for, to be removable on impeachment, and to be paid for his services by a fixed stipend out of the national treasury. The mode of constituting this department did not, as in the case of the legislative, present the question touching the nature of the government described by the terms "federal" and "national." It was entirely consistent with either plan, — with that of a union formed by the States in their political capacities, or with one formed by the people of the States, or with one partaking of both characters, — that the executive should be chosen mediately or immediately by the people, or by the legislatures or executives of the States, or by the national legislature.

The same contest, therefore, between the friends and opponents of a national system was not obliged to be renewed upon this department. So long as the form to be given to the institution was consistent with a system of republican government, — so long as it provided an elective magistrate, not appointed by an oligarchy, and holding by a responsible and defeasible tenure of office, — whether he should be chosen by the people of the States, or by some of their other public servants, would not affect the principles on which the legislative power of the government was to be founded. But this very latitude of choice, as to the mode of appointment, and

the duration of office, opened the greatest diversity of opinion. In the earlier stages of the formation of a plan of government of three distinct departments, the idea of an election of the executive by the people at large was scarcely entertained at all. It was not supposed to be practicable for the people of the different States to make an intelligent and wise choice of the kind of magistrate then contemplated, — a magistrate whose chief function was to be that of an executive agent of the legislative will. Regarding the office mainly in this light, without having yet had occasion to look at it closely as the source of appointments to other offices and as the depositary of a check on the legislative power itself, the framers of the plan now under consideration had proposed to vest the appointment in the legislature, as the readiest mode of obtaining a suitable incumbent, without the tumults and risks of a popular election. But the power of appointment to other offices and the revisionary check on legislation were no sooner annexed to the executive office, than it was perceived that some provision must be made for obviating the effects of its dependence on the legislative branch. An executive chosen by the legislature must be to a great extent the creature of those from whom his appointment was derived.

To counteract this manifestly great inconvenience and impropriety, the incumbent of the executive office was to be ineligible a second time. This, however, was to encounter one inconvenience by another, since the more faithfully and successfully

the duties of the station might be discharged, the stronger would be the reasons for continuing the individual in office. The ineligibility was accordingly stricken out. Hence it was, that a variety of propositions concerning the length of the term of office were attempted, as expedients to counteract the evils of an election by the legislature of a magistrate who was to be re-eligible; and among them was one which contemplated "good behavior" as the sole tenure of the office.[1] This proposition was much considered; it received the votes of four States out of ten;[2] and it is not at all improbable that it would have received a much larger support, if the supposed disadvantages of an election by the people had led a majority of the States finally to retain the mode of an election by the national legislature.[3] But

[1] Moved by Dr. M'Clurg, one of the Virginia delegates, and the person appointed in the place of Patrick Henry, who declined to attend the Convention.

[2] New Jersey, Pennsylvania, Delaware, Virginia, *ay*, 4; Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, Georgia, *no*, 6.

[3] I understand Mr. Madison to have voted for this proposition, and that his view of it was, that it might be a necessary expedient to prevent a dangerous union of the legislative and executive departments. He said that the propriety of the plan of an executive during good behavior would depend on the practicability of instituting a tribunal for impeachments, as certain and as adequate in the case of the executive as in the case of the judges. His remarks, of course, were predicated upon the idea of a final necessity for retaining the choice of the executive by the legislature. In a note to his "Debates," appended to the vote on this question, it is said: "This vote is not to be considered as any certain index of opinion, as a number in the affirmative probably had it chiefly in view to alarm those attached to a dependence of the executive on the legislature, and thereby to facilitate some final arrangement of a contrary tendency. The avowed friends of an executive 'during good behavior' were

in consequence of the impossibility of agreeing upon a proper length of term for an executive that was to be chosen by the legislature, the majority of the Convention went back to the plan of making the incumbent ineligible a second time, which implied that some definite term was to be adopted. This again compelled them to consider in what other mode the executive could be appointed, so as to avoid the evil of subjecting the office to the unrestrained influence of the legislature, and to remove the restriction upon the eligibility of the officer for a second term.

In an election of the chief executive magistrate by the people, voting directly, the right of suffrage would have to be confined to the free inhabitants of the several States. But even with respect to the free inhabitants, the right of suffrage was differently

not more than three or four, nor is it certain they would have adhered to such a tenure." (Madison, Elliot, V. 327.) By "the avowed friends of an executive during good behavior," I understand Mr. Madison to mean those who would have preferred that tenure, under all forms and modes of election. I can trace in the debates no evidence that any other person except Gouverneur Morris was indifferent to the mode in which the executive should be chosen, provided he held his place by this tenure. Whether Hamilton held this opinion, and adhered to it throughout, is a disputed point. In a letter to Timothy Pickering, written in 1803, he says that his final opinion was against an executive during good behavior, "on account of the increased danger to the public tranquillity incident to the election of a magistrate of this degree of permanency." In proof of this view of the subject, he remarks: "In the plan of a constitution which I drew up while the Convention was sitting, and which I communicated to Mr. Madison about the close of it, perhaps a day or two after, the office of President has no longer duration than for three years." (Niles's Register, November 7, 1812.) In this he was probably mistaken. (See Hamilton's Works, II. 401. Madison, Elliot, V. 584.)

regulated in the different States; and there must either be a uniform and special rule established as to the qualification of voters for the executive of the United States, or the rule of suffrage of each State must be adopted for this as well as other national elections. In the Northern States, too, the right of suffrage was much more diffused than in the Southern, and the question must arise, as it had arisen in the construction of the representative system, whether the States were to possess an influence in the choice of a chief magistrate for the Union in proportion to the number of their inhabitants, or only in proportion to their qualified voters, or their free inhabitants.

The substitution of electors would obviate these difficulties, by affording the means of determining the precise weight in the election that should be allotted to each State, without attempting to prescribe a uniform rule of suffrage in the primary elections, and without being obliged to settle the discrepancies between the election laws of the States. They furnished, also, the means of removing the election from the direct action of the people, by confiding the ultimate selection to a body of men, to be chosen for the express purpose of exercising a real choice among the eminent individuals who might be thought fit for the station. But the mode of choice was complicated with the other questions of re-eligibility, and especially with that of impeachment. If appointed by electors, there would be danger of their being corrupted by the person in office, if he were

eligible a second time, or by a candidate who had not filled the station. Hence there would be a propriety in making the executive subject to impeachment while in office. If chosen by the legislature, it seemed to be generally agreed, that the executive ought not to be eligible a second time; but whether he ought to be subject to impeachment, and by what tribunal, was a subject on which there were great differences of opinion.

The consequence of this great diversity of views was, that the plan embraced in the ninth resolution of the committee of the whole was retained and sent to the committee of detail.

With respect to the judiciary, several important changes were made in the plan of the committee of the whole. The prohibition against any increase of salary of the individuals holding the office was stricken out, and the restriction was made applicable only to a diminution of the salary The cognizance of impeachments of national officers was taken from their jurisdiction, and the principle was adopted which extended that jurisdiction to "all cases arising under the national laws, and to such other questions as may involve the national peace and harmony." The power to appoint inferior tribunals was confirmed to the national legislature.

The fourteenth resolution, providing for the admission of new States, was unanimously agreed to.

The fifteenth resolution, providing for the continuance of Congress and for the completion of their engagements, was rejected.

The principle of the sixteenth resolution, which provided a guaranty by the United States of the institutions of the States, was essentially modified. In the place of a guaranty applicable both to a republican constitution and the "existing laws" of a State, the declaration was adopted, "that a republican form of government shall be guaranteed to each State, and that each State shall be protected against foreign and domestic violence."[1]

The seventeenth resolution, that provision ought to be made for future amendments, was adopted without debate.[2]

The eighteenth resolution, requiring the legislative, executive, and judicial officers of the States to be bound by oath to support the Articles of Union, was then extended to include the officers of the national government.

The next subject that occurred in the order of the resolutions was that of the proposed ratification of the new system by the people of the States, acting through representative bodies to be expressly chosen for this purpose, instead of referring it for adoption to the legislatures of the States.

As this is a subject on which very different theories are maintained, arising partly from different views of the historical facts, and as there are very different degrees of importance attached to the mode in which the framers of the Constitution provided

[1] *Ante*, Chap. V.

[2] At this point (July 23) John Langdon and Nicholas Gilman took their seats as delegates from New Hampshire.

for its establishment, it will be convenient here to state the position in which they found themselves at this period in their deliberations, the purposes which they had in view, and the steps which they took to accomplish their objects.

They were engaged in preparing a new system of government, and in providing for its introduction. When they were first called together, the general purpose of the States may seem to have been confined to a mode of introducing changes in the fundamental compact of the Union, such as was provided for by the Articles of Confederation. But the Convention had found itself obliged, from the sheer necessities of the country, to go far beyond the Confederation, and to make a total change in the principle of the government. It became, therefore, necessary for them to provide a mode of enacting or establishing this change, which would commend itself to the confidence of the people, by its conformity with their previous ideas of constitutional action, and be at the same time consonant with reason and truth.

Again, there was a peculiarity in their situation, which rendered it quite different from that of the delegates of a people who had abolished a pre-existing government, and had assembled a representative body to form a new one. The Confederation still existed. As a compact between sovereign States, providing for a special mode in which alterations of its articles were to be made, and limiting their adoption to the case of unanimous consent, it was still in

force. The States, in their political capacities as sovereign communities, were still the parties to the compact, and their legislatures alone were clothed with the authority to change its provisions. It was necessary, therefore, to encounter and to solve the question, whether a new government, framed upon a principle unlike that of the Confederation, and embracing an entirely different legislative authority, could be established in the mode prescribed by the existing compact of the States; and if it could not, whether there existed any power, apart from the State governments, by which it could be established and be clothed with a paramount authority, resting on a basis of principle, and not upon force, fiction, or fraud.

In the early formation of the Union that took place before the Declaration of Independence, questions of the constitutional power of the Colonies which became members of it could scarcely arise at all, since those who undertook to act for and to represent the people of each Colony were proceeding upon revolutionary principles and rights. But before the Articles of Confederation, which constituted the first union of the States upon ascertained and settled principles of government, had been agreed upon, many of the State constitutions were formed; and when those Articles were entered into, the State governments represented the sovereignty of distinct political communities, and were entirely competent to form such a confederacy as was then established by their joint and unanimous consent. All the

obligations which the Confederation imposed upon its members rested upon the States in their corporate capacities; and the government of each of them was competent to assume, for the State, such obligations, and to enter into such stipulations. In the same way, it was competent to the State governments to make alterations in the Articles of Confederation, by unanimous consent, so long as those alterations did not change the fundamental principle of the Union, which was that of a system of legislation for the States in their corporate capacities.

But when it was proposed to reverse this principle, and to create a government, external to the governments of the States, clothed with authority to exact obedience from the individual inhabitants of the States, and to act upon them directly, the question might well arise, whether the State governments were competent to cede such an authority over their constituents, and whether it could be granted by anybody but the people themselves. It might, it is true, be said, that their constitutions made the governments of the States the depositaries of the sovereignty and political powers of the people inhabiting those States. But if this was true, in a general sense, for the purpose of exercising the political powers of the people, it was not true, in any sense, for the purpose of granting away those powers to other agents. The latter could only be done by those who had constituted the first class of agents, and who were able to say that certain portions of the authority with which they had been clothed should be withdrawn, and be revested in another class.

Undoubtedly it would have been possible to have given the Constitution of the United States a theoretical adoption by the people of the States, by committing its acceptance to the State legislatures, relying on the acquiescence of the people in their acts. But there were two objections to this course. The one was, that the legislatures were believed less likely than the people to favor the establishment of such a government as that now proposed. The other was, that the kind of legal fiction by which the presumed assent of the people must be reached, in this mode, would leave room for doubts and disputes as to the real basis and authority of the government, which ought, if possible, to be avoided.

Another difficulty of a kindred nature rendered it equally inexpedient to rely on the sanction of the State legislatures. The States, in their corporate capacities, and through the agency of their respective governments, were parties to a federal system, which they had stipulated with each other should be changed only by unanimous consent. The Constitution, which was now in the process of formation, was a system designed for the acceptance of the people of all the States, if the assent of all could be obtained; but it was also designed for the acceptance of a less number than the whole of the States, in case of a refusal of some of them; and it was at this time highly probable that at least two of them would not adopt it. Rhode Island had never been represented in the Convention; and the whole course of her past history, with reference to

enlargements of the powers of the Union, made it quite improbable that she would ratify such a plan of government as was now to be presented to her. The State of New York had, through her delegates, taken part in the proceedings, until the final decision, which introduced into the government a system of popular representation; but two of those delegates, entirely dissatisfied with that decision, had withdrawn from the Convention, and had gone home to prepare the State for the rejection of the scheme.[1] The previous conduct of the State had made it not at all unlikely that their efforts would be successful. Nor were there wanting other indications of the most serious dissatisfaction, on the part of men of great influence in some of the other States. Unanimity had already become hopeless, if not impracticable; and it was necessary, therefore, to look forward to the event of an adoption of the system by a less number than the whole of the States, and to make it practicable for a less number to form the new Union for which it provided. This could only be done by presenting it for ratification to the people of each State, who possessed authority to withdraw the State government from the Confederation, and to enter into new relations with the people of such other States as might also withdraw from the old and accept the new system.

There was another and more special reason for resorting to the direct sanction of the people of the

[1] See the letter of Messrs. Yates and Lansing to Governor Clinton, Elliot, I. 480.

States, which has already been referred to in general terms, but for which we must look still more closely into the nature of the system proposed. In that system, the legislative authority was to reside in the concurrent action of a majority of the people and a majority of the States. How could the State government of Delaware, for example, confer upon a majority of the representatives of the people of all the States, and a majority of the representatives of all the States, that might adopt the new Constitution, power to bind the people of Delaware by a legislative act, to which their own representatives might have refused their assent? The State government was appointed and established for the purpose of binding the people of the State by legislative acts of their own servants and immediate representatives; but not for the purpose of consenting that legislative power over the people of that State should be exercised by agents not delegated by themselves. Yet such a consent was involved in the new system now to be proposed, and was, in some way — by some safe and competent method — to be obtained. A legislative power was to be created by the assembling in one branch of the representatives of the people of all the States, in proportion to their numbers, and in the other branch by assembling an equal number of representatives of each State, without regard to its numbers of people. The authority of law, upon all subjects that might be committed to this legislative power, was to attend the acts of concurring majorities in both branches, even against the separate and adverse

will of the minority. It was impossible to rest this authority upon any other basis than that of the ratification of the system by the people of each State, to be given by themselves in primary assemblies, or by delegates expressly chosen in such assemblies, and appointed to give it, if they should see fit. A system founded on the consent of the legislatures would be a treaty between sovereign States; a system founded on the consent of the people would be a constitution of government, ordained by those who hold and exercise all political power.[1]

There were not wanting, however, strong advocates of a reference to the State legislatures; and the votes of three of the States were at first given for that mode of ratifying the Constitution; but the other plan was finally adopted with nearly unanimous consent.[2]

[1] There seems to be a sound distinction between the two, which was pointed out by Mr. Madison. He said that "he considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a *league*, or treaty, and a *constitution*. The former, in point of *moral obligation*, might be as inviolable as the latter. In point of *political operation*, there were two important distinctions in favor of the latter. First, a [State] law violating a treaty ratified by a pre-existing [State] law might be respected by the judges as a law, though an unwise or perfidious one. A [State] law violating a constitution established by the people themselves would be considered by the judges as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties was, that a breach of any one article by any of the parties freed the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact had always been understood to exclude such an interpretation." Elliot, V. 355, 356.

[2] Connecticut, Delaware, and Maryland voted for an amendment to the original resolution, which, if adopted, would have submitted the Constitution to the State

Still, the resolution under consideration contained a feature which wisely provided for the assent of the existing Congress to the changes that were to be made by the establishment of the new system. It proposed that the plan of the new Constitution should be first submitted to Congress for its approbation, and that the legislatures of the States should then recommend to the people to institute assemblies to consider and decide on its adoption. These steps were to be taken, in pursuance of the course marked out when the Convention was called. The resolution of Congress, which recommended the Convention, required that the alterations which it might propose should be "agreed to in Congress and confirmed by the States"; and such was the tenor of the instructions given to the delegates of most of the States. This direction would be substantially complied with, if the legislatures, on receiving and considering the system, should recommend to the people to appoint representative bodies to consider and decide on its adoption, and the people should so adopt and ratify it.[1]

The topics covered by the report of the committee of the whole had thus been passed upon in the Convention, and the outline of the Constitution had been framed. There remained only three subjects on which it would be necessary to act in order to

legislatures. The resolution to refer it to assemblies chosen for the purpose by the people, was subsequently adopted, with the dissent of one State only, Delaware.

[1] For the history of the proceedings relating to the institution of the national Convention, see *Ante*, Vol. I. Book III. Chap. VI.

provide for a complete scheme of government. It was necessary to determine the number of senators to which each State should be entitled; to ascertain the qualifications of members of the government; and to determine at what place the government should be seated.

The number of senators was not agreed upon at the time when the principle of an equal representation of the States in the Senate was adopted; and it had not been determined in what method they were to vote. It was now settled that the Senate should consist of two members from each branch, and that they should vote *per capita*. To this arrangement one State only dissented. The vote of Maryland was given against it, through the influence of Luther Martin, who considered this method of voting a departure from the idea of the States being represented in the Senate. But this objection was obviously unsound; for although, by this method of voting, the influence of a State *may* be divided, its members have the *power* to concur, and to make the vote of the State more effectual than it would be if it had only a single suffrage.

The subject of the qualifications to be required of the executive, the judiciary, and the members of both branches of the legislature, went to the committee of detail in a form which was subsequently modified in a very important particular It was at first proposed,[1] that landed property, as well as citizenship in the United States, should be embraced in

[1] By Mason.

the qualifications. But there were solid objections to this requirement, founded on the circumstances of the country and the nature of a republican constitution. So far as the people of the United States could be said to be divided into classes, the principal divisions related to the three occupations of agriculture, commerce, and manufactures of all kinds, including in the latter all who exercised the mechanic arts. As a general rule, it was supposed at that time to be true, that the commercial and manufacturing classes held very little landed property; and that although they were much less numerous than the agricultural class, yet that they were likely to increase in a far greater ratio than they had hitherto. Practically, therefore, to require a qualification of landed property, would be to give the offices of the general government to the agricultural interest. These considerations led the Convention, by a nearly unanimous vote, to reject the proposition for a landed qualification.[1]

Very serious doubts were also entertained, whether, in constructing a republican constitution, it was proper to pay so much deference to distinctions of wealth as would be implied by the adoption of any property qualification for office. There are two methods in which the interests of property may be secured, in the organization of a representative government. It may be required as a qualification, either of the elector or the elected, that the individual shall possess a certain amount of property. But

[1] Maryland alone voted to retain it.

it seems scarcely consistent with the spirit of a republican constitution, that this should be made a qualification for holding office, although it may be quite proper to require some degree of property, or its equivalent evidence of moral fitness, as a qualification for the right of choosing to office. The solid reason for a distinction is, that, in order to have a property qualification for office at all efficient, or even of any perceptible operation, it must be made so large that it will tend to exclude persons of real talent, or even the highest capacity for the public service. Whereas, a property qualification may be applied to the exercise of the elective franchise, by requiring so small an amount that it will practically exclude but few who possess the moral requisites for its intelligent and honest use; and even to this extent the operation of such a rule may be, as it is in some well-governed communities, greatly relieved, by substituting for the positive possession of any amount of property, that species of evidence of moral fitness for the right of voting that is implied by the capacity to pay a very small portion of the public burdens.[1]

At the present stage, however, of the formation of the Constitution of the United States, the opinions of a majority of the States were in favor of a property qualification for office, as well as a requirement of citizenship; and the committee of detail

[1] As in the State of Massachusetts; where the sole money qualification required of a voter is the payment of an annual poll-tax of $1.25, or about five shillings *sterling*.

were instructed accordingly, with the dissent of only three of the States.[1] But, as we shall afterwards find, another view of the subject finally prevailed.[2]

No definite action was had, at this stage, upon the subject of a seat of the national government; but it was almost unanimously agreed to be the general sense of the country, that it ought not to be placed at the seat of any State government, or in any large commercial city; and that provision ought to be made by Congress, as speedily as possible, for the establishment of a national seat and the erection of suitable public buildings.

Such was the character of the system sent to a committee of detail, to be put into the form of a constitution.[3] Before it was sent to them, however, a notice was given by an eminent Southern member, which looked to the introduction of provisions not yet contemplated or discussed. According to Mr. Madison's minutes, General Pinckney rose and 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 by duty to his State to vote against their report.[4]

[1] Connecticut, Pennsylvania, and Delaware.

[2] See the title "Qualifications" in the Index.

[3] The committee of detail, appointed July 24, consisted of Messrs. Rutledge, Randolph, Gorham, Ellsworth, and Wilson. Elliot, V. 357.

[4] By a security against an emancipation of slaves, General Pinckney meant some provision for their extradition in cases of escape into the free States. This is apparent from the history of the extradition clause; and it is upon the notice thus given by him, and the action had upon this clause, that the state-

The resolutions as adopted by the Convention, together with the propositions offered by Mr. Charles Pinckney on the 29th of May, and those offered by Mr. Patterson on the 15th of June, were then referred to a committee of detail.[1]

ment often made, which assumes that the Constitution could not have been established without some provision on this subject — as well as upon general reasoning from the circumstances of the case — rests for its proof. See as to the origin and history of the extradition clause, *post*, p. 450.

[1] The resolutions, as referred, were as follows: —

"1. *Resolved*, That the government of the United States ought to consist of a supreme legislative, judiciary, and executive.

"2. *Resolved*, That the legislature consist of two branches.

"3. *Resolved*, That the members of the first branch of the legislature ought to be elected by the people of the several States for the term of two years; to be paid out of the public treasury; to receive an adequate compensation for their services; to be of the age of twenty-five years at least; to be ineligible to, and incapable of holding, any office under the authority of the United States, (except those peculiarly belonging to the functions of the first branch,) during the term of service of the first branch.

"4. *Resolved*, That the members of the second branch of the legislature of the United States ought to be chosen by the individual legislatures; to be of the age of thirty years at least; to hold their offices for six years, one third to go out biennially; to receive a compensation for the devotion of their time to the public service; to be ineligible to, and incapable of holding, any office under the authority of the United States, (except those peculiarly belonging to the functions of the second branch,) during the term for which they are elected, and for one year thereafter.

"5. *Resolved*, that each branch ought to possess the right of originating acts.

"6. *Resolved*, That the national legislature ought to possess the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

"7. *Resolved*, That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States,

or their citizens and inhabitants; and that the judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding.

"8. *Resolved*, That, in the original formation of the legislature of the United States, the first branch thereof shall consist of sixty-five members; of which number, New Hampshire shall send three; Massachusetts, eight; Rhode Island, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five: Georgia, three. But as the present situation of the States may probably alter in the number of their inhabitants, the legislature of the United States shall be authorized, from time to time, to apportion the number of representatives; and in case any of the States shall hereafter be divided, or enlarged by addition of territory, or any two or more States united, or any new States created within the limits of the United States, the legislature of the United States shall possess authority to regulate the number of representatives, in any of the foregoing cases, upon the principle of their number of inhabitants, according to the provisions hereafter mentioned, namely: Provided always, that representation ought to be proportioned to direct taxation. And in order to ascertain the alteration in the direct taxation which may be required from time to time by the changes in the relative circumstances of the States,—

"9. *Resolved*, That a census be taken within six years from the first meeting of the legislature of the United States, and once within the term of every ten years afterwards, of all the inhabitants of the United States, in the manner and according to the ratio recommended by Congress in their resolution of the 18th of April, 1783; and that the legislature of the United States shall proportion the direct taxation accordingly.

"10. *Resolved*, That all bills for raising or appropriating money, and for fixing the salaries of the officers of the government of the United States, shall originate in the first branch of the legislature of the United States, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated by the first branch.

"11. *Resolved*, That, in the second branch of the legislature of the United States, each State shall have an equal vote.

"12. *Resolved*, That a national executive be instituted, to consist of a single person; to be chosen by the national legislature, for the term of seven years; to be ineligible a second time; with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; to be removable on impeachment, and conviction of malepractice or neglect of duty; to receive a fixed compensation for the devotion of his time to the public service, to be paid out of the public treasury.

"13. *Resolved*, That the national executive shall have a right to negative any legislative act; which shall not be afterwards passed, unless by two third parts of each branch of the national legislature.

"14. *Resolved*, That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature; to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made so as to affect the persons actually in office at the time of such diminution.

"15. *Resolved*, That the national legislature be empowered to appoint inferior tribunals.

"16. *Resolved*, That the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature; and to such other questions as involve the national peace and harmony.

"17. *Resolved*, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.

"18. *Resolved*, That a republican form of government shall be guaranteed to each State; and that each State shall be protected against foreign and domestic violence.

"19. *Resolved*, That provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.

"20. *Resolved*, That the legislative, executive, and judiciary powers, within the several States, and of the national government, ought to be bound, by oath, to support the Articles of Union.

"21. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon.

"22. *Resolved*, That the representation in the second branch of the legislature of the United States shall consist of two members from each State, who shall vote *per capita*.

"23. *Resolved*, That it be an instruction to the committee to whom were referred the proceedings of the Convention for the establishment of a national government, to receive a clause, or clauses, requiring certain qualifications of property and citizenship in the United States, for the executive, the judiciary, and the members of both branches of the legislature of the United States."

CHAPTER IX.

REPORT OF THE COMMITTEE OF DETAIL. — CONSTRUCTION OF THE LEGISLATURE. — TIME AND PLACE OF ITS MEETING.

HAVING now reached that stage in the process of framing the Constitution at which certain principles were confided to a committee of detail, the reader will now have an opportunity to observe the farther development and application of those principles, the mode in which certain chasms in the system were supplied, and the final arrangements which produced the complete instrument that was submitted to the people of the United States for their adoption.

Great power was necessarily confided to a committee, to whom was intrusted the first choice of means and of terms that were to give practical effect to the principles embraced in the resolutions of the Convention. There might be a substantial compliance with the intentions previously indicated by the debates and votes of the Convention, and at the same time the mode in which those intentions should be carried out by the committee might require a new consideration of the subjects involved. Hence it is important to pursue the growth of the Constitution through the entire proceedings.

The committee of detail presented their report on the 6th of August, in the shape of a Constitution divided into three-and-twenty Articles. It is not my purpose to examine this instrument in the precise order of its various provisions, or to describe all the discussions which took place upon its minute details. It is more consonant with the general purpose of this history, to group together the different features of the Constitution which relate to the structure and powers of the different departments and to the fundamental purposes of the new government.[1]

In accordance with the previous decisions of the Convention, the committee of detail had provided that the legislative power of the United States should be vested in a Congress, to consist of two branches, a House of Representatives and a Senate, each of which should have a negative on the other. But as to the persons by whom the members of the national legislature were to be appointed, no decision had been made in the Convention, excepting that the members of the House were to be chosen by the people of the States, and the members of the Senate by their legislatures. Nothing had been settled respecting the qualifications of the electors of representatives; nor had the qualifications of the members of either branch been determined.[2] Two

[1] The first draft of the Constitution, reported by the committee of detail, will be found in the Appendix.

[2] A general instruction had been given to report "certain qualifications of property and citizenship," for the executive, the judiciary, and the members of both houses of Congress.

Die Presse über Aldermen-Candidaten at large.

Das Amt der Alderman at large ist, wenn auch ohne den äußerlichen Glanz des Namens, nichtsdestoweniger eines der wichtigsten Aemter in der Stadtverwaltung, dasselbe hat eine politische Bedeutung ersten Ranges. Wir erinnern die Bürger im Vorübergehen beispielsweise an die enormen Leistungen des Herrn Vance bei Gelegenheit der Feststellung des städtischen Budgets als Mitglied des Vertheilungsraths, als derselbe in diesem Frühjahr gegen die Herren Havemeyer und Green energisch opponirte, und diese Herren durch sein unerschütterliches Auftreten zwang, die Details des städtischen Haushalts zu einer eingehenden Prüfung zu unterbreiten. Die Macht, welche der neue Stadtcharter in die Hände des Mayors und Comptrollers gelegt hat, findet ihren natürlichen Damm in der Controlle und den Verwaltungsbefugnissen der Aldermen. Es ist daher vor Allem erforderlich, Männer von unbestrittenem Charakter und zweifelloser Fähigkeit als Aldermen at large zu haben. Die republikanischen Nominationen für die genannten Aemter verdienen in der That als vorzüglich bezeichnet zu werden, und es ist erfreulich, wahrzunehmen, daß, obwohl die anderen Parteien ihre eigenen Nominationen gemacht haben, dennoch keine Stimme der Anklage oder der Schmäßung sich gegen irgend einen der republikanischen Candidaten erheben kann. Die Namen der Herren Friedrich Kühne, Samuel B. H. Vance, O. B. C. Billings und G. Foster bürgen in hohem Maße für Alles, was zur Durchführung einer guten, strengen und gewissenhaften Verwaltung nöthig ist. Die amtliche Vergangenheit des Herrn Vance und Billings ist ein beredtes Zeugniß für die Fähigkeit dieser Männer. Neu für das fragliche Amt sind die Herren Foster und Kühne. Was Herrn Foster betrifft, so ist er ein verhältnißmäßig junger Mann, von anerkannter juristischer Bildung und allgemeiner Tüchtigkeit, und im Besitz genügender administrativer Befähigung. Mit ganz besonderer Genugthuung verweisen wir die Bürger hiesiger Stadt auf die Nomination des in den weitesten Kreisen bekannten Herrn Friedrich Kühne, dessen Carriere in diesem Lande die Deutschen berechtigt, mit Stolz auf einen Mitbürger zu blicken, der lediglich durch eigene Energie, Takt und Geschicklichkeit sich aus kleinen Anfängen zu höchst prominenter Stellung emporarbeitete. Herr Kühne kam im Jahre 1850, im Alter von 26 Jahren, nach den Vereinigten Staaten, und etablirte gleich in den ersten Monaten nach seiner Uebersiedelung ein Zweighaus der bekannten Leipziger Firma Knauth, Nachod & Kühne, dessen alleiniger diesseitiger Chef Hr. Kühne bisher gewesen ist. Unter seiner Leitung gelangte das Haus zu einer höchst achtunggebietenden Stellung in der amerikanischen Handelswelt. Die persönlichen Eigenschaften des Herrn Kühne dienten ihm als Empfehlung bei 14 deutschen Regierungen, die er 10 Jahre lang, bis zur Gründung des Norddeutschen Bundes, als Consul vertrat. Ohne daß Herr Kühne eine eigentlich öffentliche Persönlichkeit war, betheiligte er sich in hervorragender Weise an manchen deutschen Bewegungen von Bedeutung. Wir erinnern nur an die Thatsache, daß derselbe Schatzmeister der Humboldt Monuments-Unternehmung war, und daß er die Enthüllung jenes Monumentes vornahm, daß er ferner Schatzmeister des großen Frauenbazars für die Wittwen und Waisen der in dem deutsch-französischen Kriege gefallenen Soldaten, sowie Schatzmeister der großen Friedensfeier war. Herr Kühne, bisher einer der Direktoren der German American Bank, ist jetzt Vice-Präsident der Bank. Wir finden Herrn Kühne in Verbindung mit einer großartigen, blühenden, deutschen Handelsunternehmung, der neuen Hamburger Adlerlinie, deren Generalagent er ist. — Die entschiedene Haltung des Herrn Kühne auf politischem Gebiete, auf welchem er die republikanischen Prinzipien mit Enthusiasmus befürwortete, brachte ihn im Jahre 1872 in die prominente Stellung eines Präsidential-Electors. Für die letzten Tage erst war ihm die Ehre vorbehalten, die Nomination für die Mayorscandidatur angetragen zu erhalten, die derselbe aber mit Hinweisung auf seine ausgedehnte geschäftliche Thätigkeit ablehnte. Heute steht derselbe vor den Bürgern New York's als Candidat für das Amt eines Alderman at large, eine Stelle, für die der Genannte in jeder Hinsicht qualificirt ist. Wir entwerfen das Bild der Carriere des Herrn Kühne in der Absicht, um denjenigen Deutschen, welche möglicherweise die Personalien des Herrn Kühne nicht kennen sollten, mit um so stärkerem Rechte die Wahl des deutschen Candidaten an's Herz zu legen.

great questions, therefore, remained open; first, with what class of persons was the election of members of the popular branch of the legislature to be lodged; secondly, what persons were to be eligible to that and to the other branch. In substance, these questions resolved themselves into the inquiry, in whom was the power of governing America to be vested; for it is to be remembered that, according to a decision of the Convention not yet reversed, the national executive was to be chosen by the national legislature.

So far as the people of the United States had evinced any distinct purpose, at the time when this Convention was assembled, it appeared to be well settled that the new system of government, whatever else it might be, should be republican in its form and spirit. When the States had assembled in Convention, it became the result of a necessary compromise between them, that the appointment of one branch of the legislature should be vested in the people of the several States. But who were to be regarded as the people of a State, for this purpose, was a question of great magnitude, now to be considered.

The situation of the country, in reference to this as well as to many other important questions, was peculiar. The streams of emigration, which began to flow into it from Europe at the first settlement of the different Colonies, had been interrupted only by the war of the Revolution. On the return of peace, the tide of emigration again began to set towards the new States, which had risen into independent

existence on the western shores of the Atlantic by a struggle for freedom that had attracted the attention of the whole civilized world; and when the Constitution of the United States was about to be framed, large and various classes of individuals in the different countries of Europe were eagerly watching the result of the experiment. It appeared quite certain that great accessions of population would follow the establishment of free institutions in America, if they should be framed in a liberal and comprehensive spirit. It became necessary, therefore, to meet and provide for the presence in the country of great masses of persons not born upon the soil, who had not participated in the efforts by which its freedom had been acquired, and who would bring with them widely differing degrees of intelligence and of fitness to take part in the administration of a free government. The place that was to be assigned to these persons in the political system of the country was a subject of much solicitude to its best and most thoughtful statesmen.

On the one hand, all were aware that there existed among the native populations of the States a very strong American feeling, engendered by the war, and by the circumstances attending its commencement, its progress, and its results. It was a war begun and prosecuted for the express purpose of obtaining and securing, for the people who undertook it, the right of self-government. It necessarily created a great jealousy of foreign influence, whether exerted by governments or individuals, and a strong

fear that individuals would be made the agents of governments in the exercise of such influence. The political situation of the country under the Confederation had increased rather than diminished these apprehensions. The relations of the States with each other and with foreign nations, under a system which admitted of no efficient national legislation binding upon all alike, afforded, or were believed to afford, means by which the policy of other countries could operate on our interests with irresistible force.

There was, therefore, among the people of the United States, and among their statesmen who were intrusted with the formation of the Constitution, a firmly settled determination, that the institutions and legislation of the country should be effectually guarded against foreign control or interference.

On the other hand, it was extremely important that nothing should be done to prevent the immigration from Europe of any classes of men who were likely to become useful citizens. The States which had most encouraged such immigration had advanced most rapidly in population, in agriculture, and the arts. There were, too, already in the country many persons of foreign birth, who had thoroughly identified themselves with its interests and its fate, who had fought in its battles, or contributed of their means to the cause of its freedom; and some of these men were at this very period high in the councils of the nation, and even occupied places of great importance in the Convention itself.[1] They

[1] It is only necessary to mention the names of Hamilton, Wilson, Rob-

had been made citizens of the States in which they resided, by the State power of naturalization; and they were in every important sense Americans. It was impossible, therefore, to adopt a rule that would confine the elective franchise, or the right to be elected to office, to the native citizens of the States. The States themselves had not done this; and the institutions of the United States could not rest on a narrower basis than the institutions of the States.

Another difficulty which attended the adjustment of the right of suffrage grew out of the widely differing qualifications annexed to that right under the State constitutions, and the consequent dissatisfaction that must follow any effort to establish distinct or special qualifications under the national Constitution. In some of the States, the right of voting was confined to "freeholders"; in others, — and by far the greater number, — it was extended beyond the holders of landed property, and included many other classes of the adult male population; while in a few, it embraced every male citizen of full age who was raised at all above the level of the pauper by the smallest evidence of contribution to the public burdens. The consequence, therefore, of adopting any separate system of qualifications for the right of voting under the Constitution of the United States would have been, that, in some of the States, there would be persons capable of voting for the

ert Morris, and Fitzsimmons, to show the entire impracticability of a rule that would have excluded all persons of *foreign birth* from being electors, or from being elected to office.

highest State officers, and yet not permitted to vote for any officer of the United States; and that in the other States persons not admitted to the exercise of the right under the State constitution might have enjoyed it in national elections.

This embarrassment, however, did not extend to the qualifications which it might be thought necessary to establish for the right of being elected to office under the general government. As the State and the national governments were to be distinct systems, and the officers of each were to exercise very different functions, it was both practicable and expedient for the Constitution of the United States to define the persons who should be eligible to the offices which it created.

At the same time, in relation to both of these rights — that of electing and that of being elected to national offices — it was highly necessary that the national authority, either by direct provision of the Constitution, or by a legislative power to be exercised under it, should determine the period when the rights of citizenship could be acquired by persons of foreign birth. From the first establishment of the State governments down to the present period, those governments had possessed the power of naturalization. Their rules for the admission of foreigners to the privileges of citizenship were extremely unlike; and if the power of prescribing the rule were to be left to them, and the Constitution of the United States were to adopt the qualifications of voters fixed by the laws of the States, or were to be

silent with respect to the qualifications of its own officers, the rights both of electing and of being elected to national office would, in respect to citizenship, be regulated by no uniform principle. If, therefore, the right of voting for any class of federal officers were to be in each State the same as that given by the State laws for the election of any class of State officers, it was quite essential that the States should surrender to the general government the power to determine, as to persons of foreign birth, what period of residence in the country should be required for the rights of citizenship. It was equally necessary that the national government should possess this power, if it was intended that citizenship should be regarded at all in the selection of those who were to fill the national offices.

The committee of detail, after a review of all these considerations, presented a scheme that was well adapted to meet the difficulties of the case. They proposed that the same persons who, by the laws of the several States, were admitted to vote for members of the most numerous branch of their own legislatures, should have the right to vote for the representatives in Congress. The adoption of this principle avoided the necessity of disfranchising any portion of the people of a State by a system of qualifications unknown to their laws. As the States were the best judges of the circumstances and temper of their own people, it was certainly best to conciliate them to the support of the new Constitution by this concession. It was possible, indeed, but not

very probable, that they might admit foreigners to the right of voting without the previous qualification of citizenship. It was possible, too, that they might establish universal suffrage in its most unrestricted sense. But against all these evils there existed one great security; namely, that the mischiefs of an absolutely free suffrage would be felt most severely by themselves in their domestic concerns; and against the special danger to be apprehended from the indiscriminate admission of foreigners to the right of voting, another feature of the proposed plan gave the national legislature power to withhold from persons of foreign birth the privileges of general citizenship, although a State might confer upon them the power of voting without previous naturalization.

This part of the scheme consisted in the transfer of the power of naturalization to the general government; a power that was necessarily made exclusive, by being made a power to establish a *uniform* rule on the subject.

These provisions were not only necessary in the actual situation of the States, but they were also in harmony with the great purpose of the representative system that had been agreed upon as the basis of one branch of the legislative power. In that branch the people of each State were to be represented; but they were to remain the people of a distinct community, whose modes of exercising the right of self-government would be peculiar to themselves; and that would obviously be the most suc-

cessful representation of such a people in a national assembly, which most conformed itself to their habits and customs in the organization of their own legislative bodies. Accordingly, although very strenuous efforts were made to introduce into the Constitution of the United States particular theories with regard to popular suffrage, — some of the members being in favor of one restriction and some of another, — the rule which referred the right in each State to its domestic law was sustained by a large majority of the Convention. But the power that was given, by unanimous consent, over the subject of naturalization, shows the strong purpose that was entertained of vesting in the national authority an efficient practical control over the States in respect to the political rights to be conceded to persons not natives of the country.[1]

As we have already seen, the committee of detail had been instructed to report qualifications of property and citizenship for the members of every department of the government. But they found the subject so embarrassing, that they contented themselves with providing that the legislature of the United States should have authority to establish such uniform qualifications for the members of each house, with regard to property, as they might deem expedient.[2]

[1] I have called the naturalization power a *practical* control upon the States in the matter of suffrage. It is indirect, but it is effectual; for I believe that no State has ever gone so far as, by express statutory or constitutional provision, to admit to the right of voting persons of foreign birth who are not naturalized citizens of the United States.

[2] Art. VI. Sect. 2 of the reported draft.

They introduced, however, into their draft of a Constitution, an express provision that every member of the House of Representatives should be of the age of twenty-five years at least, should have been a citizen of the United States for at least three years before his election, and should be, at the time of his election, a resident in the State in which he might be chosen.[1]

A property qualification for the members of the House of Representatives was a thing of far less consequence than the fact of citizenship. Indeed, there might well be a doubt, whether a requisition of this kind would not be in some degree inconsistent with the character that had already been impressed upon the government, by the compromise which had settled the nature of the representation in the popular branch. It was to be a representation of the people of the States; and as soon as it was determined that the right of suffrage in each State should be just as broad as the legislative authority of the State might see fit to make it, the basis of the representation became a democracy, without any restrictions save those which the people of each State might impose upon it for themselves. If then the Constitution were to refrain from imposing on the electors a property qualification, for the very purpose of including all to whom the States might concede the right of voting within their respective limits, thus excluding the idea of a special representation of property, it was certainly not neces-

[1] Art. IV. Sect. 2 of the reported draft.

sary to require the possession of property by the representatives, or to clothe the national legislature with power to establish such a qualification. The clause reported by the committee of detail for this purpose was accordingly left out of the Constitution.[1]

But with respect to citizenship, as a requisite for the office of a representative or a senator, very different considerations applied. With whatever degree of safety the States might be permitted to determine who should vote for a representative in the national legislature, it was necessary that the Constitution itself should meet and decide the grave questions, whether persons of foreign birth should be eligible at all, and if so, at what period after they had acquired the general rights of citizens. It seems highly probable, from the known jealousies and fears that were entertained of foreign influence, that the eligibility to office would have been strictly confined to natives, but for a circumstance to which allusion has already been made. The presence of large numbers of persons of foreign birth, who had adopted, and been adopted by, some one of the States, who stood on a footing of equality with the native inhabitants, and some of whom had served the country of their adoption with great distinction and unsuspected fidelity, was the insuperable obstacle to such a provision. The objection arising from the impolicy of discouraging future immigration had

[1] New Hampshire, Massachusetts, and Georgia alone voted to retain it. Elliot, V. 404.

its weight; but it had not the decisive influence which was conceded to the position of those foreigners already in the country and already enjoying the rights of citizenship under the laws and constitutions of the several States. That men should be perpetually ineligible to office under a constitution which they had assisted in making, could not be said to be demanded by the people of America.

The subject, therefore, was found of necessity to resolve itself into the question, what period of previous citizenship should be required. The committee of detail proposed three years. Other members desired a much longer period. Hamilton, on the other hand, supported by Madison, proposed that no definite time should be established by the Constitution, and that nothing more should be required than citizenship and inhabitancy. He thought that the discretionary power of determining the rule of naturalization would afford the necessary means of control over the whole subject. But this plan did not meet the assent of a majority of the States, and, after various periods had been successively rejected, the term of seven years' citizenship as a qualification of members of the House of Representatives was finally established.

But was this qualification to apply to those foreigners who were then citizens of the States, and who, as such, would have the right to vote on the acceptance of the Constitution? Were they to be told that, although they could ratify the Constitution, they could not be eligible to office under it,

until they had enjoyed the privileges of citizenship for seven years? They had been invited hither by the liberal provisions of the State institutions; they had been made citizens by the laws of the State where they resided; the Articles of Confederation gave them the privileges of citizens in every other State; and thus the very communities by which this Convention had been instituted were said to have pledged their public faith to these persons, that they should stand upon an equality with all other citizens. It is a proof that their case was thought to be a strong one, and it is a striking evidence of the importance attached to the principles involved, that an effort was made to exempt them from the operation of the rule requiring a citizenship of seven years, and that it was unsuccessful.[1]

It is impossible now to determine how numerous this body of persons were, in whose favor the attempt was made to establish an exception to the rule; and their numbers constitute a fact that is now historically important only in its bearing upon a principle of the Constitution. From the arguments of those who sought to introduce the exception, it appears that fears were entertained that the retrospective operation of the rule would expose the acceptance of the Constitution to great hazards; for the States, it was said, would be reduced to the dilemma of rejecting it, or of violating the faith

[1] The Constitution of Pennsylvania had given to foreigners, after two years' residence, all the rights of citizens. There were similar provisions in nearly all of the States.

pledged to a part of their citizens. Accordingly, the implied obligation of the States to secure to their citizens of foreign birth the same privileges with natives was urged with great force, and it was inferred from the notorious inducements that had been held out to foreigners to emigrate to America, and to avail themselves of the easy privileges of citizenship. Whether the United States were in any way bound to redeem these alleged pledges of the States, was a nice question of casuistry, that was a good deal debated in the discussion. But in truth there was no obligation of public faith in the case, the disregard of which could be justly made a matter of complaint by anybody. When the States had made these persons citizens, and through the Articles of Confederation had conferred upon them the privileges of citizens in every State in the Union, they did not thereby declare that such adopted citizens should be immediately eligible to any or all of the offices under any new government which the American people might see fit to establish at any future time. To have said that they never should be eligible, would have been to establish a rule that would have excluded some of the most eminent statesmen in the country. But the period in their citizenship when they should be made eligible, was just as much an open question of public policy, as the period of life at which all native and all adopted citizens should be deemed fit to exercise the functions of legislators. If the citizen of foreign birth was disfranchised by the one requirement, the native

citizen was equally disfranchised by the other, until the disability had ceased. The question was decided, therefore, and rightly so, upon large considerations of public policy; and the principal reasons that exercised a controlling influence upon the decision, and caused the refusal to establish any exception to the rule, afford an interesting proof of the national tone and spirit that were intended to be impressed upon the government at the beginning of its history.

It was quite possible, as all were ready to concede, that the time might arrive, when the qualification of so extended a period of citizenship as seven years might not be practically very important; since the people, after having been long accustomed to the duty of selecting their representatives, would not often be induced to confer their suffrages upon a foreigner recently admitted to the position of a citizen. The mischiefs, too, that might be apprehended from such appointments would be far less, after the policy of the government had been settled and the fundamental legislation necessary to put the Constitution into activity had been accomplished. But the first Congress that might be assembled under the Constitution would have a work of great magnitude and importance to perform. Indeed, the character which the government was to assume would depend upon the legislation of the few first years of its existence. Its commercial regulations would then be mainly determined. The relations of the country with foreign nations, its position towards Europe, its rights and duties of neutrality, its power

to maintain a policy of its own, would all then be ascertained and settled. Nothing, therefore, could be more important, than to prevent persons having foreign attachments from insinuating themselves into the public councils; and with this great leading object in view, the Convention refused, though by a mere majority only of the States, to exempt from the rule those foreigners who had been made citizens under the naturalization laws of the States.[1]

Thus it appears that the Constitution of the United States discloses certain distinct purposes with reference to the participation of foreigners in the political concerns of the country. In the first place, it was clearly intended that there should be no real discouragement to immigration. The position and history of the country from its first settlement, its present and prospective need of labor and capital, its territorial extent, and the nature of its free institutions, were all inconsistent with any policy that would prevent the redundant population of Europe from finding in it an asylum. Accordingly, the emigrant from foreign lands was placed under no perpetual disqualifications. The power of naturalization that was conferred upon the general gov-

[1] The members who advocated the exemption were G. Morris, Mercer, Gorham, Madison, and Wilson; those who opposed it were Rutledge, Sherman, General Pinckney, Mason, and Baldwin. The States voting for it were Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, 5; the States voting against it were New Hampshire, Massachusetts, Delaware, North Carolina, South Carolina, Georgia, 6. The question elicited a good deal of feeling, and was debated with some warmth.

ernment, and the accompanying circumstances attending its transfer by the States, show an intention that some provision should be made for the admission of emigrants to the privileges of citizenship, and that in this respect the inducements to a particular residence should be precisely equal throughout the whole of the States. The power was not to remain dormant, under ordinary circumstances, although there might undoubtedly be occasions when its exercise should be suspended. The intention was, that the legislature of the United States should always exercise its discretion on the subject; but the existence of the power, and the reasons for which it was conferred, made it the duty of the legislature to exercise that discretion according to the wants of the country and the requirements of public policy.

In the second place, it is equally clear that the founders of the government intended that there should be a real, as well as formal, renunciation of allegiance to the former sovereign of the emigrant, — a real adoption, in principle and feeling, of the new country to which he had transferred himself, — an actual amalgamation of his interests and affections with the interests and affections of the native population, — before he should have the power of acting on public affairs. This is manifest, from the discretionary authority given to Congress to vary the rule of naturalization from time to time as circumstances might require, — an authority that places the States under the necessity of restricting their

right of suffrage to citizens, if they would avoid the evils to themselves of an indiscriminate exercise of that right by all who might choose to claim it. The period of citizenship, too, that was required as a qualification for a seat in the popular branch of the government, and which was extended to nine years for the office of senator, was placed out of the discretionary power of change by the legislature, in order that an additional term, beyond that required for the general rights of citizenship, might for ever operate to exclude the dangers of foreign predilections and an insufficient knowledge of the duties of the station.

No one who candidly studies the institutions of America, and considers what it was necessary for the founders of our government to foresee and provide for, can hesitate to recognize the wisdom and the necessity of these provisions. A country of vast extent opened to a boundless immigration, which nature invited and which man could scarcely repel, — a country, too, which must be governed by popular suffrage, — could not permit its legislative halls to be invaded by foreign influence. The independence of the country would have been a vain and useless achievement, if it had not been followed by the practical establishment of the right of self-government by the native population; and that right could be secured for their posterity only by requiring that foreigners, who claimed to be regarded as a part of the people of the country, should be first amalgamated in spirit and interest with the mass of the nation.

No other changes were made in the proposed qualifications for the representatives, excepting to require that the person elected should be an *inhabitant* of the State for which he might be chosen, at the time of election, instead of being a *resident.* This change of phraseology was adopted to avoid ambiguity; the object of the provision being simply to make the representation of the State a real one.

The Convention, as we have seen, had settled the rule for computing the number of inhabitants of a State, for the purposes of representation, and had made it the same with that for apportioning direct taxes among the States.[1] The committee of detail provided that there should be one representative for every forty thousand inhabitants, when Congress should find it necessary to make a new apportionment of representatives; a ratio that had not been previously sanctioned by a direct vote of the Convention, but which had been recommended by the committee of compromise, at the time when the nature of the representation in both houses was adjusted.[2] This ratio was now adopted in the article relating to the House of Representatives; but not before an effort was made to exclude the slaves from the enumeration.[3] The renewed discussion of this exciting topic probably withdrew the attention of members from the consideration of the numbers of the representatives, and nothing more was done, at the time we are now examining, than to make a

[1] *Ante*, Chap. VII.

[2] See *ante*, Chap. VIII.

[3] See *post*, as to the compromise on this subject.

provision that the number should not exceed one for every forty thousand inhabitants. But at a subsequent stage of the proceeedings,[1] before the Constitution was sent to the committee of revision, Wilson, Madison, and Hamilton endeavored to procure a reconsideration of this clause, for the purpose of establishing a more numerous representation of the people. Hamilton, who had always and earnestly advocated the introduction of a strong democratic element into the Constitution, although he desired an equally strong check to that element in the construction of the Senate, is represented to have expressed himself with great emphasis and anxiety respecting the representation in the popular branch. He avowed himself, says Mr. Madison, a friend to vigorous government, but at the same time he held it to be essential that the popular branch of it should rest on a broad foundation. He was seriously of opinion, that the House of Representatives was on so narrow a scale as to be really dangerous, and to warrant a jealousy in the people for their liberties.[2]

But the motion to reconsider was lost,[3] and it was not until the Constitution had been engrossed, and was about to be signed, that an alteration was agreed to, at the suggestion of Washington. This was the only occasion on which he appears to have expressed an opinion upon any question depending in the Convention. With the habitual delicacy and reserve of his character, he had confined himself strictly to the

[1] September 8.
[2] Elliot, V. 530.
[3] By a majority of one State. Ibid.

duties of a presiding officer, throughout the proceedings. But now, as the Constitution was likely to go forth with a feature that would expose it to a serious objection, he felt it to be his duty to interpose. But it was done with great gentleness. As he was about to put the question, he said that he could not forbear expressing his wish that the proposed alteration might take place. The smallness of the proportion of representatives had been considered by many members, and was regarded by him, as an insufficient security for the rights and interests of the people. Late as the moment was, it would give him much satisfaction to see an amendment of this part of the plan adopted. The intimation was enough; no further opposition was offered, and the ratio was changed to one representative for thirty thousand inhabitants.[1]

It is now necessary to trace the origin of a peculiar power of the House of Representatives, that is intimately connected with the practical compromises on which the government was founded, although the circumstances and reasons of its introduction into the Constitution are not generally understood. I refer to the exclusive power of originating what are sometimes called "money bills." In making this provision, the framers of our government are commonly supposed to have been guided wholly by the example of the British constitution, upon an

[1] That is to say, Congress were authorized to apportion one representative to thirty thousand inhabitants, but not to exceed that number. Constitution, Art. I. § 2.

assumed analogy between the relations of the respective houses in the two countries to the people and to each other. This view of the subject is not wholly correct.

At an early period in the deliberations, when the outline of the Constitution was prepared in a committee of the whole, a proposition was brought forward to restrain the Senate from originating money bills, upon the ground that the House would be the body in which the people would be the most directly represented, and in order to give effect to the maxim which declares that the people should hold the purse-strings. The suggestion was immediately encountered by a general denial of all analogy between the English House of Lords and the body proposed to be established as the American Senate. In truth, as the construction of the Senate then stood in the resolutions agreed to in the committee of the whole, the supposed reason for the restriction in England would have been inapplicable; for it had been voted that the representation in the Senate should be upon the same proportionate rule as that of the House, although the members of the former were to be chosen by the legislatures, and the members of the latter by the people, of the States. It was rightly said, therefore, at this time, that the Senate would represent the people as well as the House; and that if the reason in England for confining the power to originate money bills to the House of Commons was that they were the immediate representatives of the people, the reason had no application to the two

branches proposed for the Congress of the United States.[1] It was however admitted, that, if the representation in the Senate should not finally be made a proportionate representation of the people of the several States, there might be a cause for introducing this restriction.[2] This intimation referred to a reason that subsequently became very prominent. But when first proposed, the restriction was rejected in the committee by a vote of seven States against three; there being nothing involved in the question at that time excepting the theoretical merits of such a distinction between the powers of the two houses.[3]

But other considerations afterwards arose. When the final struggle came on between the larger and the smaller States, upon the character of the repre-

[1] Let the reader consult Mr. Hallam's acute and learned discussion of this exclusive privilege of the House of Commons, (Const. Hist., III. 37–46,) and he will probably be satisfied, that, whatever theoretical reasons different writers may have assigned for it, its origin is so obscure, and its precise limits and purposes, deduced from the precedents, are so uncertain, that it can now be said to rest on no positive principles. Its basis is custom; which, having no definite beginning, is now necessarily immemorial. It would not be quite safe, therefore, to reason upon the well-defined provision of our Constitution, as if there were a close analogy between the situation of the two houses of Congress and the two branches of the British legislature. The English example certainly had an influence, in suggesting the plan of such a restriction; but care must be taken not to overlook the peculiar arrangements which made it so highly expedient, that it may be said to have been a necessity, even if there had been no British example.

[2] C. Pinckney. Elliot, V. 189. June 13.

[3] On the question for restraining the Senate from originating money bills, New York, Delaware, Virginia, *ay*, 3; Massachusetts, Connecticut, New Jersey, Maryland, North Carolina, South Carolina, Georgia, *no*, 7. Ibid.

sentation in the two branches, the plan of restricting the origin of money bills to the House of Representatives presented itself in a new aspect. The larger States were required to concede an equality of representation in the Senate; and it was supposed, therefore, that they would desire to increase the relative power of the branch in which they would have the greatest numerical strength. The five States of Massachusetts, Pennsylvania, Virginia, North Carolina, and South Carolina had steadily resisted the equality of votes in the Senate. When it was at length found that the States were equally divided on this question, and it became necessary to appoint the first committee of compromise, the smaller States tendered to the five larger ones the exclusive money power of the House, as a compensation for the sacrifice required of them. It was so reported by the committee of compromise; and although it met with resistance in the Convention, and was denied to be a concession of any importance to the larger States, it was retained in the report,[1] and thus formed a special feature of the resolutions sent to the committee of detail. But those resolutions had also established the equality of representation in the Senate, and the whole compromise, with its several features, had therefore been once fully ascertained and settled. A strong opposition, nevertheless, continued to be made to the exclusive money power of the House, by those who disapproved of it on its merits; and when the article by

[1] Elliot, V. 285. *Ante*, Chap. VIII.

which it was given in the reported draft prepared by the committee of detail was reached, it was stricken out by a very large vote of the States.[1] In this vote there was a concurrence of very opposite purposes on the part of the different States composing the majority. New Jersey, Delaware, and Maryland, for example, feeling secure of their equality in the Senate, were not unwilling to allow theoretical objections to prevail, against the restriction of money bills to the branch in which they would necessarily be outnumbered. On the other hand, some of the delegates of Pennsylvania, Virginia, and South Carolina, still unwilling to acquiesce in the equality of representation in the Senate, may have hoped to unhinge the whole compromise. There was still a third party among the members, who insisted on maintaining the compromise in all its integrity, and who considered that the nature of the represention in the Senate, conceded to the wishes of the smaller States, rendered it eminently fit that the House alone should have the exclusive power to originate money bills.[2]

This party finally prevailed. They rested their

[1] August 8. For striking out, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, Georgia, *ay*, 7; New Hampshire, Massachusetts, Connecticut, North Carolina, *no*, 4.

[2] Dr. Franklin, Mason, Williamson, and Randolph (Elliot, V. 395–397.) It would be endless to cite the observations of different members, to show the purposes which they entertained. The reader, who desires to test the accuracy of my inferences in any of these descriptions, must study the debates, and compare, as I have done, the different *phases* which the subject assumed from time to time.

first efforts chiefly upon the fact that the Senate was to represent the States in their political character. Although it might be proper to give such a body a negative upon the appropriations to be made by the representatives of the people, it was not proper that it should tax the people. They first procured a reconsideration of the vote which had stricken out this part of the compromise. They then proposed, in order to avoid an alleged ambiguity, that bills for raising money for the purpose of *revenue*, or appropriating money, should originate in the House, and should not be so amended or altered in the Senate as to increase or diminish the sum to be raised, or change the mode of levying it, or the object of its appropriation.[1] An earnest and somewhat excited debate followed this proposition, but it was lost.[2]

In a day or two, however, another effort was made, conceding to the Senate the power to amend, as in other cases, but confining the right to the House of originating bills for raising money for the purpose of revenue, or for appropriating the same, and for fixing the salaries of officers of the government.[3]

This new proposition was postponed for a long time, until it became necessary to refer several topics not finally acted upon to a committee of one

[1] Moved by Randolph, August 13 Elliot, V. 414.

[2] Ibid. 420

[3] Moved by Mr. Strong, August 15. Ibid. 427. This was brought forward as an amendment, to the article (Art. VI. § 12) which was to define the powers of the two houses.

member from each State.[1] Among these subjects there was one that gave rise to protracted conflicts of opinion, which will be examined hereafter. It related to the mode of choosing the executive. In the plan reported by the committee of detail, pursuant to the instructions of the Convention, the executive was to be chosen by the national legislature, for a period of seven years, and was to be ineligible a second time. Great efforts were subsequently made to change both the mode of appointment and the tenure of the office, and the whole subject was finally referred with others to a committee. In this committee, a new compromise, which has attracted but little attention, embraced the long-contested point concerning the origin of money bills. In this compromise, as in so many of the others on which the Constitution was founded, two influences are to be traced. There were in the first place what may be called the merits of a proposition, without regard to its bearing on the interests of particular States; and in the second place there were the local or State interests, which entered into the treatment of every question by which they could be affected. In studying the compromises of the Constitution, it is constantly necessary to observe how the arrangement finally made was arrived at by the concurrence of votes given from these various motives.

It was now proposed in the new committee, that the executive should be chosen by electors, appointed

[1] August 31. Elliot, V. 503.

by each State in such manner as its legislature might direct, each State to have a number of electors equal to the whole number of its senators and representatives in Congress; that the person having the greatest number of votes, provided it were a majority of the electors, should be declared elected; that if there should be more than one having such a majority, the Senate should immediately choose one of them by ballot; and that if no person had a majority, the Senate should immediately choose by ballot from the five highest candidates on the list returned by the electors. This plan of vesting the election in the Senate, in case there should be no choice by the electors, was eagerly embraced by the smaller States, because it was calculated to restore to them the equilibrium which they would lose in the primary election, by the preponderance of votes held by the larger States. At the same time, it gave to the larger States great influence in bringing forward the candidates, from whom the ultimate choice must be made, when no choice had been effected by the electors; and it put it in their power, by a combination of their interests against those of the smaller States, to choose their candidate at the first election. To this great influence, many members from the larger States desired, naturally, to add the privilege of confining the origin of revenue bills to the House of Representatives. They found in the committee some members from the smaller States willing to concede this privilege, as the price of an ultimate election of the executive by the Senate, and of other

arrangements which tended to elevate the tone of the government, by increasing the power and influence of the Senate. They found others also who approved of it upon principle. The compromise was accordingly effected in the committee, and in this attitude the question concerning revenue bills again came before the Convention.[1]

But there, a scheme that seemed likely to elevate the Senate into a powerful oligarchy, and that would certainly put it in the power of seven States, not containing a third of the people, to elect the executive, when there failed to be a choice by the electors, met with strenuous resistance. For these and other reasons, not necessary to be recounted here, the ultimate choice of the executive was transferred from the Senate to the House of Representatives.[2] This change, if coupled with the concession of revenue bills to the House, without the right to amend in the Senate, would have thrown a large balance of power into the former assembly; and in order to prevent this inequality, a provision was made, in the words used in the Constitution of Massachusetts, that the Senate might propose or concur with amendments, as on other bills. With this addition, the restriction of the origin of bills for raising revenue to the House of Representatives finally passed, with but two dissentient votes.[3]

[1] Elliot, V. 506, 510, 511, 514. The privilege, as it came from this committee, was confined to "bills for raising revenue"; and these were made subject to "alterations and amendments by the Senate."

[2] Ibid. 519.

[3] The history of this provision shows clearly that a bill for appropriating money may originate in the Senate.

The qualifications of the Senators had been made superior in some respects to those of the members of the House of Representatives, on account of the peculiar duties which it was intended they should discharge, and the length of their term of office. They were to be of the age of thirty years; to be inhabitants of the States for which they might be chosen; and in the report of the committee of detail the period of four years' citizenship was made one of the requirements. But so great was the jealousy of foreign influence, and so important was the position of a senator likely to become, that, when this particular qualification came to be considered, it was found to be altogether impossible to make so short a period of citizenship acceptable to a majority. According to the plan then contemplated, the Senate was to be a body of great power. Its legislative duties were to form but a part of its functions. It was to have the making of treaties, and the appointment of ambassadors and judges of the Supreme Court, without the concurrent action of any other department of the government. In addition to these special powers, it was to have a concurrent vote with the House of Representatives in the election of the executive. It was also to exercise the judicial function of hearing and determining questions of boundary between the States.

This formidable array of powers, which were subsequently much modified or entirely taken away, but which no one could then be sure would not be retained as they had been proposed, rendered it

necessary to guard the Senate with peculiar care. A very animated discussion, in which the same reasons were urged on both sides which had entered into the debate on the qualifications of the representatives, enforced by the peculiar dangers to which the Senate might be exposed, at length resulted in a vote establishing the period of nine years' citizenship as a qualification for the office of a senator.[1]

The origin of the number of senators and of the method of voting forms an interesting and important topic, to which our inquiries should now be directed. We have already seen that, in the formation of the Virginia plan of government, as it was digested in the committee of the whole, the purpose was entertained, and was once sanctioned by a bare majority of the States, of giving to both branches of the legislature a proportional representation of the respective populations of the States; and that the sole difference between the two chambers then contemplated was to be in the mode of election. But in the actual situation of the different members of the confederacy, it was a necessary consequence of such a representation, that the Senate would be made by it inconveniently large, whether the members were to be elected by the legislatures, the executives, or the people of the States. It would, in fact, have made the first Senate to consist of eighty or a hundred persons, in order to have entitled the State of

[1] August 9. Elliot, V. 398 – 401. Massachusetts, Connecticut, Pennsylvania, and Maryland voted in the negative, and the vote of North Carolina was divided.

Delaware to a single member. This inconvenience was pointed out at an early period, by Rufus King;[1] but it did not prevent the adoption of this mode of representation. On the one side of that long contested question were those who desired to found the whole system of representation, as between the States, upon their relative numbers of inhabitants. On the other side were those who insisted upon an absolute equality between the States. But among the former there was a great difference of opinion as to the best mode of choosing the senators, — whether they should be elected by the people in districts, by the legislatures or the executives of the States, or by the other branch of the national legislature. So strongly, however, were some of the members even from the most populous States impressed with the necessity of preserving the State governments in some connection with the national system, that, while they insisted on a proportional representation in the Senate, they were ready to concede to the State legislatures the choice of its members, leaving the difficulty arising from the magnitude of the body to be encountered as it might be.[2] The delegates of the smaller States accepted this concession, in the belief that the impracticability of constructing a convenient Senate in this mode would compel an abandonment of the principle of unequal representation, and would require the substitution of the equality for which they contended.

In this expectation they were not disappointed;

[1] May 31. Elliot, V. 133.

[2] Dickinson, Gerry, Mason.

for when the system framed in the committee came under revision in the Convention, and the severe and protracted contest ended at last in the compromise described in a previous chapter, the States were not only permitted to choose the members of the Senate, but they were admitted to an equality of representation in that branch, and the subject was freed from the embarrassment arising from the numbers that must have been introduced into it by the opposite plan. From this point, the sole questions that required to be determined related to the number of members to be assigned to each State, and the method of voting. The first was a question of expediency only; the last was a question both of expediency and of principle.

The constant aim of the States, which had from the first opposed a radical change in the structure of the government, was to frame the legislature as nearly as possible upon the model of the Congress of the Confederation. In that assembly, each State was allowed not more than seven, and not less than two members; but in practice, the delegations of the States perpetually varied between these two numbers, or fell below the lowest, and in the latter case the State was not considered as represented. The method of voting, however, rendered it unimportant how many members were present from a State, provided they were enough to cast the vote of the State at all; for all questions were decided by the votes of a majority of the States, and not of a majority of the members voting. I have already had occasion more

than once to notice the fact, — and it is one of no inconsiderable importance, — that the first Continental Congress, assembled in 1774, adopted the plan of giving to each Colony one vote, because it was impossible to ascertain the relative importance of the different Colonies. The record that was then made of this reason for a method of voting that would have been otherwise essentially unjust, shows quite clearly that a purpose was then entertained of adopting some other method at a future time. But when the Articles of Confederation were framed, in 1781, it appears as clearly from the discussions in Congress, not only that the same difficulty of obtaining the information necessary for a different system continued, but that some of the States were absolutely unwilling to enter the Confederation upon any other terms than a full federal equality. In this way the practice of voting by States in Congress was perpetuated down to the year 1787. It had come to be regarded by some of the smaller States, notwithstanding the injustice and inconvenience which it constantly produced, as a kind of birthright; and when the Senate of the United States came to be framed, and an equality of representation in it was conceded, some of the members of those States still considered it necessary to preserve this method of voting, in order to complete the idea of State representation, and to enable the States to protect their individual rights.[1] But it is obvious that, for this purpose, the

[1] Sherman, Luther Martin, Ellsworth. On the naked proposition, moved by Ellsworth, July 2, to allow each State one vote in the

question had lost its real importance, when an equal number of Senators was assigned to each State; since, upon every measure that can touch the separate rights and interests of a State, the unanimity which is certain to prevail among its representatives makes the vote of the State as efficient as it could be if it were required to be cast as a unit, while the chances for its protection are increased by the opportunity of gaining single votes from the delegations of other States.

These and similar considerations ultimately led a large majority of the States to prefer a union of the plan of an equal number of senators from each State with that which would allow them to vote *per capita*.[1] The number of two was adopted as the most convenient, under all the circumstances, because most likely to unite the despatch of business with the constant presence of an equal number from every State.

With this peculiar character, the outline of the institution went to the committee of detail. On the consideration of their report, these provisions, as we have seen, became complicated with the restriction of "money bills" to the House of Representatives, and the choice of the executive. The mode in which those controversies were finally settled being elsewhere stated, it only remains here to record the

Senate, Connecticut, New York, New Jersey, Delaware, Maryland, *ay*, 5; Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, *no*, 5; Georgia divided.

[1] Maryland alone voted against it.

fact that the particular nature and form of the representation in the Senate was generally acquiesced in, when its relations to the other branches of the government had been determined.

The difference of origin of the two branches of the legislature made it necessary to provide for different modes of supplying the vacancies that might occur in them. The obvious way of effecting this in the case of a vacancy in the office of a representative was to order a new election by the people, who can readily assemble for such a purpose; and the duty of ordering such elections was imposed on the executives of the States, because those functionaries would be best informed as to the convenience of their meeting. But the State legislatures, to whom the choice of senators was to be confided, would be in session for only a part of the year; and to summon them for the special purpose of filling a vacancy in the Senate might occasion great inconvenience. The committee of detail, therefore, provided that vacancies in the Senate might be supplied by the executive of the State until the next meeting of its legislature.

It is now time to turn to the examination of that great scheme of separate and concurrent powers, which it had been proposed to confer upon the Senate, and the suggestion of which influenced to a great degree the qualifications of the members, their term of office, and indeed the entire construction of this branch of the legislature. The primary purpose of a Senate was that of a second legislative

chamber, having equal authority in all acts of legislation with the first, the action of both being necessary to the passage of a law. As the formation of the Constitution proceeded, from the single idea of such a second chamber, without any special character of representation to distinguish it from the first, up to the plan of an equal representation of the States, there was a strong disposition manifested to accumulate power in the body for which this peculiar character had been gained. It had been made the depositary of a direct and equal State influence; and this feature of the system had become fixed and irrevocable before the powers of the other departments, or their origin or relations, had been finally settled. The consequence was, that for a time, wherever jealousy was felt with regard to the executive or the judiciary, — wherever there was a doubt about confiding in the direct action of the people, — wherever a chasm presented itself, and the right mode of filling it did not occur, — there was a tendency to resort to the Senate.

Thus, when the committee of detail were charged with the duty of preparing the Constitution according to the resolutions agreed upon in the Convention, the Senate had not only been made a legislative body, with authority co-ordinate to that of the House, but it had received the separate power of appointing the judges, and the power to give a separate vote in the election of the executive. The power to make war and treaties, the appointment of ambassadors, and the trial of impeachments, had not

been distinctly given to any department; but the general intention to be inferred from the resolutions was, that these matters should be vested in one or both of the two branches of the legislature. To the executive, the duty had been assigned, which the name of the office implies, of executing the laws; to which had been added a revisionary check upon legislation, and the appointment to offices in cases not otherwise provided for. The judicial power had been described in general and comprehensive terms, which required a particular enumeration of the cases embraced by the principles laid down; but it had not been distinctly foreseen, that one of the cases to which those principles must lead would be an alleged conflict between an act of legislation and the fundamental law of the Constitution. The system thus marked out was carried into detail by the committee, by vesting in the Senate the power to make treaties, to appoint ambassadors and judges of the Supreme Court, and to adjudicate questions of boundary between the States; by giving to the two branches of the legislature the power to declare war; by assigning the trial of impeachments to the Supreme Court, and enumerating the other cases of which it was to have cognizance; and by providing for the election of the executive by the legislature, and confining its powers and duties to those prescribed for it by the resolutions.

It is scarcely necessary to pause for the purpose of commenting on the practical inconveniences of some of these arrangements. However proper it

may be, in a limited and republican government, to vest the power of declaring war in the legislative department, the negotiation of treaties by a numerous body had been found, in our own experience, and in that of other republics, extremely embarrassing. However wise may be a jealousy of the executive department, it is difficult to say that the same authority that is intrusted with the appointment to all other offices should not be permitted to make an ambassador or a judge. However august may be a proceeding that is to determine a boundary between sovereign States, it is nothing more and nothing less than a strictly judicial controversy, capable of trial in the ordinary forms and tribunals of judicature, besides being one that ought to be safely removed from all political influences. However necessary it may be that an impeachment should be conducted with the solemnities and safeguards of allegation and proof, it is not always to be decided by the rules with which judges are most familiar, or to be determined by that body of law which it is their special duty to administer. However desirable it may be, that an elective chief magistracy should be filled with the highest capacity and fitness, and that popular tumults should be avoided, no government has yet existed, in which the election of such a magistrate by the legislative department has afforded any decided advantage over an election directly or indirectly by the people; and to give a body constituted as the American Senate is a negative in the choice of the executive, would be certainly inconvenient, probably dangerous.

But the position of the Senate as an assembly of the States, and certain opinions of its superior fitness for the discharge of some of these duties, had united to make it far too powerful for a safe and satisfactory operation of the government. It was found to be impossible to adjust the whole machine to the quantity of power that had been given to one of its parts. It was eminently just and necessary that the States should have an equal and direct representation in some branch of the government; but that a majority of the States, containing a minority of the people, should possess a negative in the appointment of the executive, and in the question of peace or war, and the sole voice in the appointment of judges and ambassadors, was neither necessary nor proper. Theoretically, it might seem appropriate that a question of boundary between any two of the States represented in it should be committed to the Senate, as a court of the peers of the sovereign parties to the dispute; but practically, this would be a tribunal not well fitted to try a purely judicial question. It became necessary, therefore, to discover the true limit of that control which the nature of the representation in the Senate was to be allowed to give to a majority of the States. There had been some effort, in the progress of the controversy respecting the representative system, to confine the equal power of the States, in matters of legislation, to particular questions or occasions; but it had turned out to be impracticable thus to divide or limit the ordinary legislative authority of the same

body. If the Senate, as an equal assembly of the States, was to legislate at all, it must legislate upon all subjects by the same rule and method of suffrage. But when the question presented itself as to the separate action of this assembly, — how far it should be invested with the appointment of other functionaries, how far it should control the relations of the country with foreign nations, how far it should partake both of executive and judicial powers, — it was much less difficult to draw the line, and to establish proper limits to the direct agency of the States. Those limits could not indeed be ascertained by the mere application of theoretical principles. They were to be found in the primary necessity for reposing greater powers in other departments, for adjusting the relations of the system by a wider distribution of authority, and for confiding more and more in the intelligence and virtue of the people; and therefore it is, that, in these as in other details of the Constitution, we are to look for the clew that is to give us the purpose and design, quite as much to the practical compromises which constantly took place between opposite interests, as to any triumph of any one of opposite theories.

The first experiment that was made towards a restriction of the power of the Senate, and an adjustment of its relations to the other departments, was the preparation of a plan, by which the President was to have the making of treaties, and the appointment of ambassadors, judges of the Supreme Court, and all other officers not otherwise provided for, by

and with the advice and consent of the Senate. The trial of impeachments, of the President included, was transferred to the Senate, and the trial of questions of boundary was placed, like other controversies between States, within the scope of the judicial power. The choice of the President was to be made in the first instance by electors appointed by each State, in such manner as its legislature might direct, each State to have a number of electors equal to the whole number of its senators and representatives in Congress; but if no one of the persons voted for should have a majority of all the electors, or if more than one person should have both a majority and an equal number of votes, the Senate were to choose the President from the five highest candidates voted for by the electors. In this plan, there was certainly a considerable increase of the power of the President; but there was not a sufficient diminution of the power of the Senate. The President could nominate officers and negotiate treaties; but he must obtain the consent of the body by whom he might have been elected, and by whom his re-election might be determined, if he were again to become a candidate. It appeared, therefore, to be quite necessary, either to take away the revisionary control of the Senate over treaties and appointments, or to devise some mode by which the President could be made personally independent of that assembly. He could be made independent only by taking away all agency of the Senate in his election, or by making him ineligible to the office a second time. There were two

serious objections to the last of these remedies, — the country might lose the services of a faithful and experienced magistrate, whose continuance in office would be highly important; and even in a case where no pre-eminent merit had challenged a re-election, the effect of an election by the Senate would always be pernicious, and must be visible throughout the whole term of the incumbent who had been successful over four other competitors.

And after all, what necessity was there for confiding this vast power to the Senate, opening the door of a small body to the corruption and intrigue for which the magnitude of the prize to be gained and to be given, and the facility for their exercise, would furnish an enormous temptation? Was it so necessary that the States should force their equality of privilege and of power into every department of the Constitution, making it felt not only in all acts of legislation, but in the whole administration of the executive and judicial duties? Was nothing due to the virtue and sense and patriotism of a majority of the people of the United States? Might they not reasonably be expected to constitute a body of electors, who, chosen for the express purpose, and dissolved as soon as their function had been discharged, would be able to make an upright and intelligent choice of a chief magistrate from among the eminent citizens of the Union?

Questions like these, posterity would easily believe, without the clear record that has descended to them, must have anxiously and deeply employed the fram-

ers of the Constitution. They were to consider, not only what was theoretically fit and what would practically work with safety and success, but what would be accepted by the people for whom they were forming these great institutions. That people undoubtedly detested everything in the nature of a monarchy. But there was another thing which they hated with equal intensity, and that was an oligarchy. Their experience had given them quite as much reason for abhorring the one as the other. Such, at least, was their view of that experience. A king, it is true, was the chief magistrate of the mother country against which they had rebelled, against which they had fought successfully for their independence. The measures that drove them into that resistance were executed by the monarch; but those measures were planned, as they believed, by a ministry determined to enslave them, and were sanctioned by a Parliament in which even the so-called popular branch was then but another phase of the aristocracy which ruled the empire. The worst enemy our grandfathers supposed they had in England, throughout their Revolution, was the ministerial majority of that House of Commons, made up of placemen sitting for rotten boroughs, the sons of peers, and the country gentlemen, who belonged to a caste as much as their first-cousins who sat by titles in the House of Lords. Our ancestors did not know — they went to their graves without knowing — that in the hard, implacable temper of the king, made harder and more implacable by a narrow and bigoted conscien-

tiousness, was the real cause for the persistency in that fatal policy which severed these Colonies from his crown.

That long struggle had been over for several years, and its result was certainly not to be regretted by the people of America. But it had left them, as it naturally must have left them, with as strong prejudices and jealousies against every aristocratic, as against every monarchical institution. Public liberty in England they knew might consist with an hereditary throne, and with a privileged and powerful aristocracy. But public liberty in America could consist with neither. The people of the United States could submit to restraints; they could recognize the necessity for checks and balances in the distribution of authority; and they understood as much of the science of government as any people then alive. But an institution, — however originating and however apparently necessary its peculiar construction might be, — embracing but a small number of persons, with power to elect the chief magistrate, with power to revise every appointment from a chief justice down to a tidewaiter, with power to control the President through his subordinate agents, with power to reject every treaty that he might negotiate, and with power to sit in judgment on his impeachment, they would not endure. "We have, in some revolutions of this plan of government," said Randolph, "made a bold stroke for monarchy. We are now doing the same for an aristocracy."

How to attain the true intermediate ground, to

avoid the substance of a monarchy and the substance of an aristocracy, and yet not to found the system on a mere democracy, was a problem not easy of solution. All could see, that a government extended over a country so large, which was to have the regulation of its commerce, the collection of great revenues, the care of a vast public domain, the superintendence of intercourse with hordes of savage tribes, the control of relations with all the nations of the world, the administration of a peculiar jurisprudence, and the protection of the local constitutions from violence, must have an army and a navy, and great fiscal, administrative, and judicial establishments, embracing a very numerous body of public officers. To give the appointment of such a multitude of public servants, invested with such functions, to the unchecked authority of the President, would be to create an executive with power not less formidable and real than that of some monarchs, and far greater than that of others. No one desired that a sole power of appointment should be vested in the President alone; it was universally conceded that there must be a revisionary control lodged somewhere, and the only question was where it should be placed. That it ought to be in a body independent of the executive, and not in any council of ministers that might be assigned to him, was apparent; and there was no such body, excepting the Senate, which united the necessary independence with the other qualities needful for a right exercise of this power.

The negotiation of treaties was obviously a function that should be committed to the executive alone. But a treaty might undertake to dismember a State of part of its territory, or might otherwise affect its individual interests; and even where it concerned only the general interests of all the States, there was a great unwillingness to intrust the treaty-making power exclusively to the President. Here, the States, as equal political sovereignties, were unwilling to relax their hold upon the general government; and the result was that provision of the Constitution which makes the consent of two thirds of the Senators present necessary to the ratification of a treaty.

But if it was to have these great overruling powers, the Senate must have no voice in the appointment of the executive. There were two modes in which the election might be arranged, so as to prevent a mutual connection and influence between the Senate and the President. The one was, to allow the highest number of electoral votes to appoint the President;[1] the other was, to place the eventual election — no person having received a majority of all the electoral votes — in the House of Representatives. The latter plan was finally adopted, and the Senate was thus effectually severed from a dangerous connection with the executive.

This separation having been effected, the objections which had been urged against the length of the senatorial term became of little consequence.

[1] This suggestion was made by Hamilton. Elliot, V. 517.

In the preparation of the plan marked out in the resolutions sent to the committee of detail, the Senate had been considered chiefly with reference to its legislative function; and the purpose of those who advocated a long term of office was to establish a body in the government of sufficient wisdom and firmness to interpose against the impetuous counsels and levelling tendencies of the democratic branch.[1] Six years was adopted as an intermediate period between the longest and the shortest of the terms proposed; and in order that there might be an infusion of different views and tendencies from time to time, it was provided that one third of the members should go out of office biennially.[2] Still, in the case of each individual senator, the period of six years was the longest of the limited terms of office created by the Constitution. Under the Confederation, the members of the Congress had been chosen annually, and were always liable to recall. The people of the United States were in general strongly disposed to a frequency of elections. A term of office for six years would be that feature of the proposed Senate most likely, in the popular mind, to be regarded as of an aristocratic tendency. If united with the powers that have just passed under our review, and if to those powers it could be said that an improper influence over the executive had been added, the system would in all probability be rejected by the people. But if the Senate were deprived of all agency

[1] Madison, Hamilton, Wilson, and Read. Elliot, V. 241 – 245. June 26.

[2] Ibid.

in the appointment of the President, it would be mere declamation to complain of their term of office; for undoubtedly the peculiar duties assigned to the Senate could be best discharged by those who had had the longest experience in them The solid objection to such a term being removed, the complaint of aristocratic tendencies would be confined to those who might wish to find plausible reasons for opposition, and might not wish to be satisfied with the true reasons for the provision.

Having now described the formation and the special powers of the two branches of the legislature, I proceed to inquire into the origin and history of the disqualifications to which the members were subjected.

The Constitution of the United States was framed and established by a generation of men, who had observed the operation upon the English legislature of that species of influence, by the crown or its servants, which, from the mode of its exercise, not seldom amounting to actual bribery, has received the appropriate name of parliamentary corruption. That generation of the American people knew but little — they cared less — about the origin of a method of governing the legislative body, which implies an open or a secret venality on the part of its members, and a willingness on the part of the administration to purchase their consent to its measures. What they did know and what they did regard was, that for a long succession of years the votes of members of Parliament had been bought, with money or office,

by nearly every minister who had been at the head of affairs; that, if this practice had not been introduced under the prince who was placed upon the throne by the revolution of 1688, it had certainly grown to a kind of system in the hands of the statesmen by whom that revolution was effected, and had attained its greatest height under the first two princes of the house of Hanover; that it was freely and sometimes shamefully applied throughout the American war; and that, down to that day, no British statesman had had the sagacity to discover, and the virtue to adopt, a purer system of administration.[1] Whether this was a necessary vice of the English constitution; whether it was inherent or temporary; or whether it was only a stage in the development of parliamentary government, destined to pass away when the relations of the representative body to the people had become better settled, — could not then be seen even in England. But to our ancestors, when framing their Constitution, it presented itself as a momentous fact; whose warning was not the

[1] In Horace Walpole's Memoirs of the Reign of George II., there is an amusing parallel — gravely drawn, however — between the mode in which his father, Sir Robert, "traded for members," and the manner in which Mr. Pelham carried on *his* corruption. Lord Mahon has called Sir Robert Walpole "the patron and parent of parliamentary corruption." (Hist. of England, I. 268.) But both Mr. Hallam and Mr. Macaulay say that it originated under Charles II., and both admit that it was practised down to the close of the American war. (Hallam's Const. Hist., III. 255, 256, 351 – 356. Macaulay's Hist. of England, III. 541 – 549.) The latter, in a very masterly analysis of its origin and history, treats it as a local disease, incident to the growth of the English constitution. It must be confessed, that it had become *chronic*.

less powerful, because it came from the centre of institutions with which they had been most familiar, and from the country to which they traced their origin, — a country in which parliamentary government had had the fairest chances for success that the world had witnessed.

Yet it would not have been easy at that time, as it is not at the present, and as it may never be, to define with absolute precision the true limits which executive influence with the legislative body should not be suffered to pass. Still less is it easy to say that such influence ought not to exist at all;[1] although it is not difficult to say that there are methods in which it should not be suffered to be exercised. The more elevated and more clear-sighted public morality of the present age, in England and in America, condemns with equal severity and equal justice both the giver and the receiver in every transaction that can be regarded as a purchase of votes upon particular measures or occasions, whatever may have been

[1] I am quite aware of the danger of reasoning from the circumstances of one country to those of another, even in the case of England and the United States. But I avail myself, in support of the text, of the authority of a writer, whose high moral tone, and whose profound knowledge of the constitution on which he has written, unite to make it unnecessary that its history should be written again; — I mean, of course, Mr. Hallam. He pronounces it an extreme supposition, and not to be pretended, that Parliament was ever "absolutely, and in all conceivable circumstances, under the control of the sovereign, whether through intimidation or corrupt subservience." "But," he adds, "as it would equally contradict notorious truth to assert that every vote has been disinterested and independent, *the degree of influence which ought to be permitted*, or which has at any time existed, *becomes one of the most important subjects in our constitutional policy.*" (Const. Hist., III. 351.)

the consideration or motive of the bargain. But whether that morality goes, or ought to go, farther, — whether it includes, or ought to include, in the same condemnation, every form of influence by which an administration can add extrinsic weight to the merits of its measures, — is a question that admits of discussion.

It may be said, assuming the good intentions of an administration, and the correctness of its policy and measures, that its policy and its measures should address themselves solely to the patriotism and sense of right of the members of the legislative department. But an ever active patriotism and a never failing sense of right are not always, if often, to be found; the members of a legislative body are men, with the imperfections, the failings, and the passions of men; and if pure patriotism and right perceptions of duty are alone relied upon, they may, and sometimes inevitably will be, found wanting. On the other hand, it is just as true, that the persons composing every administration are mere men, and that it will not do to assume their wisdom and good intentions as the sole foundations on which to rest the public security, leaving them at liberty to use all the appliances that may be found effectual for gaining right ends, and overlooking the character of the means. One of the principal reasons for the establishment of different departments, in the class of governments to which ours belongs, is, that perfect virtue and unerring wisdom are not to be predicated of any man in any station. If they were, a simple despotism

would be the best and the only necessary form of government.

All correct reasoning on this subject, and all true construction of governments like ours, must commence with two propositions, one of which embraces a truth of political science, and the other a truth of general morals. The first is, that, while the different functions of government are to be distributed among different persons, and to be kept distinctly separated, in order that there may be both division of labor and checks against the abuse of power, it is occasionally necessary that some room should be allowed for supplying the want of wisdom or virtue in one department by the wisdom or virtue of another. In matters of government depending on mere discretion, unlimited confidence cannot with safety be placed anywhere.[1] The other proposition is the very plain axiom in morals, that, while in all human transactions there may be bad means employed to effect a worthy object, the character of those means can never be altered, nor their use justified, by the

[1] The position and functions of the judiciary, after proper measures have been taken to secure individual capacity and integrity, do admit and require what may be called absolute confidence. That is to say, their action is not only final and conclusive, but it is never legitimately open to the influence of any other department. The reason is, that their action does not proceed from individual discretion, but is regulated by the principles of a moral science, whose existence is wholly independent of the will of the particular judge. Whereas the action of both the executive and the legislative departments, within the limits prescribed to it by the fundamental law, involves the exercise, to a wide extent, of mere individual discretion. The remedy for a failure in the judge to justify the confidence reposed in him is, therefore, only by impeachment.

character of the end. With these two propositions admitted, what is to be done is to discover that arrangement of the powers and relations of the different departments whose acts involve, more or less, the exercise of pure discretion, which will give the best effect to both of these truths; and as all government and all details of government, to be useful, must be practically adapted to the nature of man, it will be found that an approximation in practice to a perfect theory is all that can be attained.

Thus the general duties and powers of the legislative and the executive departments are capable of distinct separation. The one is to make, the other is to execute the laws. But execution of the laws of necessity involves administration, and administration makes it necessary that there should be an executive policy. To carry out that policy requires new laws; authority must be obtained to do acts not before authorized; and supplies must be perpetually renewed. The executive stands therefore in a close relation to the legislative department; — a relation which makes it necessary for the one to appeal frequently, and indeed constantly, to the discretion of the other. If the executive is left at liberty to purchase what it believes or alleges to be the right exercise of that discretion, by the inducements of money or office applied to a particular case, the rule of common morals is violated; conscience becomes false to duty, and corruption, having once entered the body politic, may be employed to effect bad ends as well as good. Nay, as bad ends will stand most in need

of its influence, it will be applied the most grossly where the object to be attained is the most culpable. On the other hand, if the members of the legislative body, by being made incapable of accepting the higher or more lucrative offices of state, are cut off from those inducements to right conduct and a true ambition which the imperfections of our nature have made not only powerful, but sometimes necessary, aids to virtue, the public service may have no other security than their uncertain impulses or imperfect judgments. In the midst of such tendencies to opposite mischiefs, all that human wisdom and foresight can do is, to anticipate and prevent the evils of both extremes, by provisions which will guard both the interests of morality and the interests of political expediency as completely as circumstances will allow.

I am persuaded it was upon such principles as I have thus endeavored to state, that the framers of our national Constitution intended to regulate this very difficult part of the relations between the executive and the legislature. During a considerable period, however, of their deliberations on the disabilities to which it would be proper to subject the members of the latter department, they had another example before them besides that afforded by the history of parliamentary corruption in England. The Congress of the Confederation had of course the sole power of appointment to offices under the authority of the United States; and although there is no reason to suppose that body at any time to

have been justly chargeable with corrupt motives, there were complaints of the frequency with which it had filled the offices which it had created with its own members. In these complaints, the people overlooked the justification. They forgot that the nature of the government, and the circumstances of the country, rendered it difficult for an assembly which both made and filled the offices, and which exercised its functions at a time when the State governments absorbed by far the greater part of the interests and attention of their citizens, to find suitable men out of its own ranks. In that condition of things, it might have been expected, — and it implies no improper purpose, — that offices would be sometimes framed or regulated with a view to their being filled by particular persons. But the complaints existed;[1] the evil was one that tended constantly to become worse; and, in framing the new government, this was the first aspect in which the influence of office and its emoluments presented itself to the Convention.

For when the Virginia members, through Edmund Randolph, brought forward their scheme of

[1] The legislature of Massachusetts had, before Congress recommended the national Convention, instructed its delegates in Congress not to agree to any modification of the fifth Article of the Confederation, which prohibited the members of Congress from *holding* any office under the United States, for which they or any other person for their benefit could receive any salary, fee, or emolument. This instruction was repealed, by the unqualified manner in which the State accepted the recommendation for a national Convention. But it shows the sentiment of the State on this point, and it also shows the jealousy that was felt.

government, they not only gave the executive no power of appointment to any office, but they proposed to vest the appointment of both the executive and the judiciary in the legislature. Hence they felt the necessity of guarding against the abuse that might follow, if the members of the legislature were to be left at liberty to appoint each other to office, — an abuse which they knew had been imputed to the Congress, and which they declared had been grossly practised by their own legislature.[1] They proposed, therefore, to go beyond the Confederation, and to make the members of both branches ineligible to any office established under the authority of the United States, (excepting those peculiarly belonging to their own functions,) during their term of service and for one year after its expiration. This provision passed the committee of the whole; but in the Convention, on a motion made by Mr. Gorham to strike it out, the votes of the States were divided. An effort was then made by Mr. Madison to find a middle ground, between an eligibility in all cases and an absolute disqualification. If the unnecessary creation of offices and the increase of salaries was the principal evil to be anticipated, he believed that the door might be shut against that abuse, and might properly be left open for the appointment of members to places not affected by their own votes, as an encouragement to the legislative service. But there were several of the

[1] See the assertion by Mr. Mason, and the admission by Mr. Madison, Elliot, V. 230, 232.

stern patriots of the Convention who insisted on a total exclusion, and who denied that there was any such necessity for holding out inducements to enter the legislature.[1] This was a question on which different minds, of equal sagacity and equal purity, would naturally arrive at different conclusions. Still, it is apparent that the mischiefs most apprehended at the time of Mr. Madison's proposition would be in a great degree prevented, by taking from the legislature the power of appointing to office; and that this modification of the system was what was needed, to make his plan a true remedy for the abuses that had been displayed in our own experience. The stigma of venality cannot properly be applied to the laudable ambition of rising into the honorable offices of a free government; and if the opportunity to create places, or to increase their emoluments, and then to secure those places, is taken away, by vesting the appointment in the executive, the question turns mainly on the relations that ought to exist between that department and the legislature. But Mr. Madison's suggestion was made before it was ascertained that the executive would have any power of appoinment, and it was accordingly rejected; — a majority of the delegations considering it best to retain the ineligibility in all cases, as proposed by the Virginia plan.[2] In this way, the disqualification became incorporated into

[1] Butler, Mason, and Rutledge.

[2] Two States only, Connecticut and New Jersey, voted for Madison's amendment. June 23. Elliot, V. 230–233.

the first draft of the Constitution, prepared by the committee of detail.[1]

But by this time it was known that a large part of the patronage of the government must be placed in the hands of the President; for it had been settled that he was to appoint to all offices not otherwise provided for, and the cases thus excepted were those of judges and ambassadors, which stood, in this draft of the Constitution, vested in the Senate. A strong opposition to this arrangement, however, had already manifested itself, and the result was very likely to be, — as it in fact turned out, — that nearly the whole of the appointments would be made on the nomination of the President, even if the Senate were to be empowered to confirm or reject them. Accordingly, when this clause came under consideration, the principle of an absolute disqualification for office was vigorously attacked, and as vigorously defended. The inconvenience and impolicy of excluding officers of the army and navy from the legislature; of rendering it impossible for the executive to select a commander-in-chief from among the members, in cases of pre-eminent fitness; of refusing seats to the heads of executive departments; and of closing the legislature as an avenue to other branches of the public service, — were all strenuously urged and denied.[2] At length, a middle course became necessary,

[1] The disqualification, as applied to members of both houses, was incorporated into one clause. Art. VI. § 9 of the draft of the committee of detail. Elliot, V. 377.

[2] See the debate, August 14. Elliot, V. 420–425.

to reconcile all opinions. By a very close vote, the ineligibility was restrained to cases in which the office had been created, or the emolument of it increased, during the term of membership;[1] and a seat in the legislature was made incompatible with any other office under the United States.[2]

Some at least of the probable sources of corruption were cut off by these provisions. The executive can make no bargain for a vote, by the promise of an office which has been acted upon by the member whose vote is sought for; and there can be no body of placemen, ready at all times to sell their votes as the price for which they are permitted to retain their places. At the same time, the executive is not deprived of the influence which attends the power of appointing to offices not created, or the emoluments of which have not been increased, by any Congress of which the person appointed has been a member. This influence is capable of abuse; it is also capable of being honorably and beneficially exerted. Whether it shall be employed corruptly or honestly, for good or for bad purposes, is left by the Constitution to the restraints of personal virtue and the chastisements of public opinion.

A serious question, however, has been made, whether the interests of the public service, involved in the relations of the two departments, would not have been placed upon a better footing, if some of

[1] There was a majority of only one State in favor of this principle. Elliot, V. 506.

[2] This provision received a unanimous vote. Ibid.

the higher officers of state had been admitted to hold seats in the legislature. Under the English constitution, there is no practical difficulty, at least in modern times, in determining the general principle that is to distinguish between the class of officers who can, and those who cannot, be usefully allowed to have seats in the House of Commons. The principle which, after much inconsistent legislation and many abortive attempts to legislate, has generally been acted on since the reign of George II., is, that it is both necessary and useful to have in that House some of the higher functionaries of the administration; but that it is not at all necessary, and not useful, to allow the privilege of sitting in Parliament to subordinate officers.[1] The necessity of the case arises altogether from the peculiar relations of the ministry to the crown, and of the latter to the Commons. If the executive government were not admitted, through any of its members, to explain and vindicate its measures, to advocate new grants of authority, or to defend the prerogatives of the crown, the popular branch of the legislature would either become the predominant power in the state, or sink into insignificance. This is conceded by the severest writers on the English government.

But when we pass from a civil polity which it has taken centuries to produce, and which has had its departments adjusted much less by reference to

[1] For the history of what have been called place-bills, see Hallam's Const. Hist., III. 255, 256, 351. Macaulay, IV. 336 – 338, 339, 341, 342, 479, 480, 528.

exact principles than by the results of their successive struggles for supremacy over each other, and when we come to an original distribution of powers, in the arrangements of a constitution made entire and at once by a single act of the national will, we must not give too much effect to analogies which after all are far from being complete. In preparing the Constitution of the United States, its framers had no prerogative, in any way resembling that of the crown of England, to consider and provide for. The separate powers to be conferred on the chief magistracy — aside from its concurrence in legislation — were simply executive and administrative; the office was to be elective, and not hereditary; and its functions, like those of the legislature, were to be prescribed with all the exactness of which a written instrument is capable. There was, therefore, little of such danger that the one department would silently or openly encroach on the rights or usurp the powers of the other, as there is where there exists hereditary right on the one side and customary right on the other, and where the boundaries between the two departments are to be traced by the aid of ancient traditions, or collected from numerous and perhaps conflicting precedents. There was no such necessity, therefore, as there is in England, for placing members of the administration in the legislature, in order to preserve the balance of the Constitution. The sole question with us was, whether the public convenience required that the administration should be able to act directly upon the course of legislation.

The prevailing opinion was that this was not required. This opinion was undoubtedly formed under the fear of corruption and the jealousy of executive power, chiefly produced — and justly produced — by the example of what had long existed in England. That the error, if any was committed, lay on the safer side, none can doubt. It is possible that the chances of a corrupt influence would not have been increased, and that the opportunities for a salutary influence might have been enlarged, — as it is highly probable that the convenience of communication would have been promoted, — if some of the higher officers of state could have been allowed to hold seats in either house of Congess. But it is difficult to see how this could have been successfully practised, under the system of representation and election which the framers of the Constitution were obliged to establish: and perhaps this is a decisive answer to the objection.[1]

[1] Mr. Justice Story has suggested, that, "if it would not have been safe to trust the heads of departments, as representatives, to the choice of the people, as their constituents, it would have been at least some gain to have allowed them a seat, like territorial delegates, in the House of Representatives, where they might freely debate without a title to vote." (Commentaries on the Constitution, I. § 869.) An officer of an executive department, thus admitted to a seat in Congress, must have been placed there merely in virtue of his office, by a special provision. He could have represented no real constituency, and must therefore have had an anomalous position. A territorial delegate is admitted as the representative of a dependency, somewhat colonial in its nature, whose inhabitants are not on an equal footing with the constituencies of the States. He has therefore no vote. When speaking for the interests of those whom he represents, he is in somewhat the same attitude as counsel admitted to be heard at the bar of the House. Whether the head of

Among the powers conceded by the Constitution to the legislature of each State is that of prescribing the time, place, and manner of holding the elections of its senators and representatives in Congress. This provision[1] originated with the committee of detail; but, as it was reported by them, there was no other authority reserved to Congress itself than that of altering the regulations of the States; and this authority extended as well to the place of choosing the senators, as to all the other circumstances of the election.[2] In the Convention, however, the authority of Congress was extended beyond the alteration of State regulations, so as to embrace a power to make rules, as well as to alter those made by the States. But the place of choosing the senators was excepted altogether from this restraining authority, and left to the States.[3] Mr. Madison, in his minutes, adds the explanation, that the power of Congress to *make* regulations was supplied, in order to enable them to regulate the elections, if the States should fail or refuse to do so.[4] But the text of the Constitution, as finally settled, gives authority to Congress at "any time" to "make or alter such regulations"; and this would seem to confer a power, which, when exercised, must be paramount, whether a State regulation exists at the time or not.

There is one other peculiarity of the American

an executive department could with dignity and convenience be placed in a similar position, admits at least of grave doubt.

[1] Art. I. § 4 of the Constitution.

[2] Art. VI. § 1 of the first draft.

[3] Madison, Elliot, V. 401, 402. Journal, Elliot, I. 309.

[4] Elliot, V. 402.

legislature, of which it is proper in this connection to give a brief account; namely, the compensation of its members for their public services. In the plan presented by the Virginia delegation, it was proposed that the members of both branches should receive "liberal stipends"; but it was not suggested whether they were to be paid by the States, or from the national treasury. The committee of the whole determined to adopt the latter mode of payment; and as the representation in both branches, according to the first decision, was to be of the same character, no reason was then suggested for making a difference in the source of their compensation. But when the construction of the Senate was considered in the Convention, the idea was suggested that this body ought in some way to represent wealth; and it was apparently under the influence of this suggestion, that, after a refusal to provide for a payment of the senators by their States, payment out of the national treasury was stricken from the resolution under debate.[1] There was thus introduced into the resolutions sent to the committee of detail, a discrepancy between the modes of compensating the members of the two branches; for while the members of the House were to be paid "an adequate compensation" out of "the public treasury," the Senate were to receive "a compensation for the devotion of their time to the public service," but the source of payment was not designated. But when the whole body of those resolutions had been acted on, the character of the

[1] Elliot, V. 247.

representation in the Senate had been settled, and the idea of its being made a representation of wealth, in any sense, had been rejected. The committee of detail had, therefore, in giving effect to the decisions of the Convention, to consider merely whether the members of the two branches should be paid by their States, or from the national treasury; and for the purpose of making the same provision as to both, and in order to avoid the question whether the Constitution should establish the amount, or should leave it to be regulated by the Congress itself, they provided that the members of each house should receive a compensation for their services, to be ascertained and paid by the State in which they should be chosen.[1]

This, however, was to encounter far greater evils than it avoided. If paid by their States, the members of the national legislature would not only receive different compensations, but they would be directly subjected to the prejudices, caprices, and political purposes of the State legislatures. Whatever theory might be maintained with respect to the relations between the representatives, in either branch, and the State in which they were chosen, or the people of the States, to subject one class of public servants to the power of another class could not fail to produce the most mischievous consequences. A large majority of the States, therefore, decided upon payment out of the national treasury,[2]

[1] Art. VI. § 10 of the first draft. Elliot, V. 378.

[2] Massachusetts and South Carolina in the negative.

and it was finally determined that the rate of compensation should not be fixed by the Constitution, but should be left to be ascertained by law.[1]

Among the separate functions assigned by the Constitution to the houses of Congress are those of presenting and trying impeachments. An impeachment, in the report of the committee of detail, was treated as an ordinary judicial proceeding, and was placed within the jurisdiction of the Supreme Court. That this was not in all respects a suitable provision, will appear from the following considerations. Although an impeachment may involve an inquiry whether a crime against any positive law has been committed, yet it is not necessarily a trial for crime; nor is there any necessity, in the case of crimes committed by public officers, for the institution of any special proceeding for the infliction of the punishment prescribed by the laws, since they, like all other persons, are amenable to the ordinary jurisdiction of the courts of justice, in respect of offences against positive law. The purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law. The object of the proceeding is to ascertain whether cause exists for removing a public officer from office. Such a cause may be found in the fact, that, either in the discharge of his office, or aside from its functions, he has violated a law, or committed what is technically denominated a crime. But a cause for removal from office may

[1] See the discussion on Art. VI. § 10 of the first draft. Elliot, V. 425–427.

exist, where no offence against positive law has been committed, as where the individual has, from immorality or imbecility or maladministration, become unfit to exercise the office. The rules by which an impeachment is to be determined are therefore peculiar, and are not fully embraced by those principles or provisions of law which courts of ordinary jurisdiction are required to administer.

From considerations of this kind, especially when applied to the impeachment of a President of the United States, the Convention found it expedient to place the trial in the Senate. In fact, the whole subject of impeachments, as finally settled in the Constitution, received its impress in a great degree from the attention that was paid to the bearing of this power upon the executive. Few members of the Convention were willing to constitute a single executive, with such powers as were proposed to be given to the President, without subjecting him to removal from office on impeachment; and when it was perceived to be necessary to confer upon him the appointment of the judges, it became equally necessary to provide some other tribunal than the Supreme Court for the trial of his impeachment. There was no other body already provided for in the government, with whom this jurisdiction could be lodged, excepting the Senate; and the only alternative to this plan was to create a special tribunal for the sole purpose of trying impeachments of the President and other officers. This was justly deemed a manifest inconvenience; and although there were

various theoretical objections suggested against placing the trial in the Senate, on the question being stated there were found to be but two dissentient States.[1] This point having been settled, in relation to impeachments of the President, the trial of impeachments of all other civil officers of the United States was, for the sake of uniformity, also confided to the Senate.[2] The power of impeachment was confined, as originally proposed, to the House of Representatives.[3]

The number of members of each house that should be made a *quorum* for the transaction of business gave rise to a good deal of difference of opinion. The controlling reason why a smaller number than a majority of the members of each house should not be permitted to make laws, was to be found in the extent of the country and the diversity of its interests. The central States, it was said, could always have their members present with more convenience than the distant States; and after some discussion, it was determined to establish a majority of each house as its quorum for the transaction of business, giving to a smaller number power to adjourn from day to day, and to compel the attendance of absent members.[4]

Provisions making each house the judge of the elections, returns, and qualifications of its own mem-

[1] Pennsylvania and Virginia.

[2] See Elliot, V. 507, 528, 529.

[3] As to the other provisions of the Constitution on this subject, see the Index, *verb.* Impeachment.

[4] Elliot, V. 405, 406. Art. I. § 5 of the Constitution.

bers; that for any speech or debate in either house no member shall be questioned in any other place; and that in all cases, except treason, felony, or breach of the peace, the members shall be privileged from arrest during their attendance at, and in going to and returning from, the sessions of their respective houses, — were agreed to without any dissent.[1]

The power of each house to determine the rules of its proceedings, to punish its members for disorderly behavior, and to expel with the concurrence of two thirds, was agreed to with general assent.[2] Each house was also directed 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; and one fifth of the members present in either house were empowered to require the yeas and nays to be entered on its journal.[3]

The report of the committee of detail had made no provision for such an officer as the Vice-President of the United States, and had therefore declared that the Senate, as well as the House, should choose its own presiding officer. This feature of their report received the sanction of the Convention; but subsequently, when it became necessary to create an officer to succeed the President of the United States, in case of death, resignation, or removal from office, the plan was adopted of making the former

[1] Elliot, V. 406. Constitution, Art. I. §§ 5, 6.

[2] Elliot, V. 407. Constitution, Art. I. § 5.

[3] Elliot, V. 407. Constitution, Art. I. § 5.

ex officio the presiding officer of the Senate, giving him a vote only in cases where the votes of the members are equally divided.[1] To this was added the further provision, that the Senate shall choose, besides all its other officers, a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.[2] The House of Representatives were empowered to choose their own Speaker, and other officers, as originally proposed.[3]

The mode in which laws were to be enacted was the last topic concerning the action of the legislature which required to be dealt with in the Constitution. The principle had been already settled, that the negative of the President should arrest the passage of a law, unless, after he had refused his concurrence, it should be passed by two thirds of the members of each house. In order to give effect to this principle, the committee of detail made the following regulations, which were adopted into the Constitution; — that every bill, which shall have passed the two houses, shall, before it become a law, be presented to the President of the United States; that, if he approve, he shall sign it, but if not, he shall return it, with his objections, to the house in which it originated, who shall enter the objections at large on their journal, and proceed to reconsider it; that if, after such reconsideration, two thirds of that house agree to pass the bill, it is to be sent with

[1] Elliot, V. 507, 520. Constitution, Art. I. § 3.

[2] Ibid.

[3] Art. I. § 2.

the objections to the other house, by which it is likewise to be reconsidered, and, if approved by two thirds of that house, it is to become a law; but in all such cases, the votes of both houses are to be determined by yeas and nays entered upon the journal. If any bill be not returned by the President within ten days (Sundays excepted) after it has been presented to him, it is to become a law, in like manner as if he had signed it, unless the Congress by adjourning prevent its return, in which case it is not to become a law. All orders, resolutions, and votes to which the concurrence of both houses is necessary, (except on a question of adjournment,) are subject to these provisions.[1]

The two important differences between the negative thus vested in the President of the United States and that which belongs to the King of England are, that the former is a qualified, while the latter is an absolute, power to arrest the passage of a law; and that the one is required to render to the legislature the reasons for his refusal to approve a bill, while the latter renders no reasons, but simply answers that he will advise of the matter, which is the parliamentary form of signifying a refusal to approve. The provision in our Constitution which requires the President to communicate to the legislature his objections to a bill, was rendered necessary by the power conferred upon two thirds of both houses to make it a law, notwithstanding his refusal to sign it. By this power, which makes the negative

[1] Constitution, Art. I. § 7.

of the President a qualified one only, the framers of the Constitution intended that the two houses should take into consideration the objections which may have led the President to withhold his assent, and that his assent should be dispensed with, if, notwithstanding those objections, two thirds of both houses should still approve of the measure. These provisions, therefore, on the one hand, give to the President a real participation in acts of legislation, and impose upon him a real responsibility for the measures to which he gives his official approval, while they give him an important influence over the final action of the legislature upon those which he refuses to sanction; and, on the other hand, they establish a wide distinction between his negative and that of the King in England. The latter has none but an absolute "veto"; if he refuse to sign a bill, it cannot become a law; and it is well understood, that it is on account of this absolute effect of the refusal, that this prerogative has been wholly disused since the reign of William III., and that the practice has grown up of signifying, through the ministry, the previous opposition of the executive, if any exists, while the measure is under discussion in Parliament. It is not needful to consider here which mode of legislation is theoretically or practically the best. It is sufficient to notice the fact, that the absence from our system of official and responsible advisers of the President, having seats in the legislature, renders it impracticable to signify

his views of a measure, while it is under the consideration of either house. For this reason, and because the President himself is responsible to the people for his official acts, and in order to accompany that responsibility with the requisite power both to act upon reasons and to render them, our Constitution has vested in him this peculiar and qualified negative.[1]

[1] A question has been made, whether it is competent to two thirds of the members *present* in each house to pass a bill notwithstanding the President's objections, or whether the Constitution means that it shall be passed by two thirds of all the members of each branch of the legislature. The history of the "veto" in the Convention seems to me to settle this question. There was a change of phraseology, in the course of the proceedings on this subject, which indicates very clearly a change of intention. The language employed in the resolutions, in all the stages through which they passed, was, that "The national executive shall have a right to negative any legislative act, which shall not be afterwards passed by *two third parts of each branch of the national legislature.*" This was the form of expression contained in the resolutions sent to the committee of detail; and if it had been incorporated into the Constitution, there could have been no question but that its meaning would have been, that the bill must be afterwards passed by two thirds of all the members to which each branch is constitutionally entitled. But the committee of detail changed this expression, and employed one which has a technical meaning, that meaning being made technical by the Constitution itself. Before the committee came to carry out the resolution relating to the President's negative, they had occasion to define what should constitute a "*house*" in each branch of the legislature; and they did so by the provision that a majority of each *house* shall constitute a quorum to do business. This expression, a "house," or "each house," is several times employed in the Constitution, with reference to the faculties and powers of the two chambers respectively, and it always means, when so used, the constitutional quorum, assembled for the transaction of business, and capable of transacting business. This same expression was employed by the committee when they provided for the mode in which a bill, once rejected by the President, should be again brought before the legislative bodies. They directed it to be returned "*to that* HOUSE *in which it shall have origi-*

The remaining topic that demands our inquiries, respecting the legislature, relates to the place of its meeting. The Confederation was a government without a capitol, or a seat; a want which seriously impaired its dignity and its efficiency, and subjected it to great inconveniences; at the same time, it was unable to supply the defect. Its Congress, following the example of their predecessors, had continued to assemble at Philadelphia, until June, 1783; when, as we have already seen, in consequence of a mutiny by some of the federal troops stationed in that neigh-

nated," — that is to say, to a constitutional quorum, a majority of which passed it in the first instance; and they then provided, that, if "*two thirds* of that HOUSE shall agree to pass the bill, it shall be sent, together with the objections, to the other HOUSE, ... and if approved by *two thirds* of that HOUSE, it shall become a law." This change of phraseology, taken in connection with the obvious meaning of the term "house," as used in the Constitution when it speaks of a chamber competent to do business, shows the intention very clearly. It is a very different provision from what would have existed, if the phrase "two third parts of each branch of the national legislature" had been retained. (See Elliot, V. 349, 376, 378, 431 536.)

This view will be sustained by an examination of all the instances in which the votes of "two thirds" in either body are required. Thus, "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." (Art. I. § 5.) The context of the same article defines what is to constitute a "house," and makes it clear that two thirds of a "house" may expel. That this was the intention is also clear from what took place in the Convention. Mr. Madison objected to the provision as it stood on the report of the committee, by which a mere *majority* of a quorum was empowered to expel, and, on his motion, the words "with the concurrence of two thirds" were inserted. (Elliot, V. 406, 407.) In like manner, the fifth Article of the Constitution empowers Congress, "*whenever two thirds of both* HOUSES *shall deem it necessary*," to propose amendments to the Constitution. The term "house" is here used as synonymous with a quorum.

It has been suggested, however, that the use of a positive expres-

borhood, against which the local authorities failed to protect them, they left that city, and reassembled at Princeton, in the State of New Jersey, in the halls of a college.[1] There, in the following October, a resolution was passed, directing that buildings for the use of Congress should be erected at some suitable place near the falls of the Delaware; for which the right of soil and an exclusive jurisdiction should be obtained.[2] But this was entirely unsatisfactory to the Southern States. They complained that the place selected was not central, was unfavorable to

sion, in relation to the action of the Senate upon treaties, throws some doubt upon the meaning of the term "two thirds," as used in other parts of the Constitution. A treaty requires the concurrence of "two thirds of the senators *present*"; and it has been argued that the omission of this term in the other cases shows that two thirds of all the members are required in those cases. But it is to be remembered, that the Constitution makes a general provision as to what shall constitute a house for the transaction of business; that when it means that a particular function shall not be performed by such a house, or quorum, it establishes the exception by a particular provision, as when it requires two thirds of all the States to be present in the House of Representatives on the choice of a President, and makes a majority of all the States necessary to a choice; and that whether the function of the Senate in approving treaties is or is not a part of the business which under the general provision is required to be done in a "house" or quorum consisting of a majority of all the members, the Constitution does not speak of this function as being done by a "house," but it speaks of the "advice and consent of the *Senate*," to be given "by two thirds of the senators *present*." The use of the term "present" was necessary, therefore, in this connection, because no term had preceded it which would guide the construction to the conclusion intended; but in the other cases, the previous use of the term "house," defined to be a majority of all the members, determines the sense in which the term "two thirds" is to be understood, and makes it, as I humbly conceive, two thirds of a constitutional quorum.

[1] *Ante*, Vol. I. 220, note, 226, note.

[2] October 6, 1783, Journals, VIII. 423.

the Union, and unjust to them. They endeavored to procure a reconsideration of the vote, but without success.[1] Several days were then consumed in fruitless efforts to agree on a temporary residence; and at length it became apparent that there was no prospect of a general assent to any one place, either for a temporary or for a permanent seat. The plan of a single residence was then changed, and a resolution was passed, providing for an alternate residence at two places, by directing that buildings for the use of Congress, and a federal town, should also be erected at or near the lower falls of the Potomac, or Georgetown; and that until both places, that on the Delaware and that on the Potomac, were ready for their reception, Congress should sit alternately, for equal periods of not more than one year and not less than six months, at Trenton, the capital of the State of New Jersey, and at Annapolis, the capital of the State of Maryland. The President was thereupon directed to adjourn the Congress, on the 12th of the following November, to meet at Annapolis on the 26th, for the despatch of business. Thither they accordingly repaired, and there they continued to sit until June 3, 1784. A recess followed, during which a committee of the States sat, until Congress reassembled at Trenton, on the 30th of the following October.

At Trenton, the accommodations appear to have been altogether insufficient, and the States of South Carolina and Pennsylvania proposed to adjourn from

[1] October 8. Ibid. 424, 425.

that place.[1] The plan of two capitols in different places was then rescinded,[2] and an ordinance was passed, for the appointment of commissioners to establish a seat of government on the banks of the Delaware, at some point within eight miles above or below the lower falls of that river. Until the necessary buildings should be ready for their reception, the ordinance provided that Congress should sit at the city of New York.[3] When assembled there in January, 1785, they received and accepted from the corporation an offer of the use of the City Hall; and in that building they continued to hold their sessions until after the adoption of the Constitution.[4]

It does not appear that any steps were taken under the ordinance of 1784, or under any of the previous resolutions, for the establishment of a federal town and a seat of government at any of the places designated. Whether the Congress felt the want of constitutional power to carry out their project, or whether the want of means, or a difficulty in obtaining a suitable grant of the soil and jurisdiction, was the real impediment, there are now no means of determining. It seems quite probable, however, that, after their removal to the city of New York, they found themselves much better placed than they or their predecessors had ever been elsewhere; and

[1] December 10, 11, 1784. Journals, X. 16 – 18.

[2] December 20, 21. Ibid. 23, 24.

[3] Passed December 23. Ibid. 29.

[4] They removed from it October 2, 1788, on a notice from the Mayor of the city that repairs were to be made.

as the discussions respecting a total revision of the federal system soon afterwards began to agitate the public mind, the plan of establishing a seat for the accommodation of the old government was naturally postponed.

The plan itself, on paper, was a bold and magnificent one. It contemplated a district not less than two and not more than three miles square, with a "federal house" for the use of Congress; suitable buildings for the executive departments; official residences for the president and secretary of Congress, and the secretaries of foreign affairs, of war, of the marine, and the officers of the treasury; besides hotels to be erected and owned by the States as residences for their delegates. But, for this fine scheme of a federal metropolis, an appropriation was made, which, even in those days, one might suppose, would scarcely have paid for the land required. The commissioners who were to purchase the site, lay out the town, and contract for the erection and completion of all the public edifices, — excepting those which were to belong to the States, — "in an elegant manner," were authorized to draw on the federal treasury for a sum not exceeding one hundred thousand dollars, for the whole of these purposes. If we are to understand it to have been really expected and intended that this sum should defray the cost of this undertaking, we must either be amused by the modest requirements of the Union at that day, or stand amazed at the strides it has since taken in its onward career of prosperity and power.

From the porticos of that magnificent Capitol whose domes overhang the Potomac, the eye now looks down upon a city, in which, at a cost of many millions, provision has been made for the central functions of a government, whose daily expenditure exceeds the entire sum appropriated for the establishment of the necessary public buildings and official residences seventy years ago.

In truth, however, there is not much reason to suppose that the Congress of the Confederation seriously contemplated the establishment of a federal city. They were too feeble for such an undertaking. They could pass resolutions and ordinances for the purpose, and send them to the authorities of the States; — and if a more decent attention to the wants and dignity of the federal body was excited, it was well, and was probably the effect principally intended. If they had actually proceeded to do what their resolution of 1783 proposed, — to acquire the jurisdiction, as well as the right of soil, over a tract of land, — they must have encountered a serious obstacle in the want of constitutional power. This difficulty seems to have been felt at a later period; for the ordinance of 1784 only directs a purchase of the land, and is silent upon the subject of municipal jurisdiction. It is fortunate, too, on all accounts, that the design was never executed, if it was seriously entertained. The presence of Congress in the city of New York, where the legislature of the State was also sitting, in the winter of 1787, enabled Hamilton to carry those measures in both bodies, which led im-

mediately to the summoning of the national Convention.[1] And it was especially fortunate that this whole subject came before the Convention unembarrassed with a previous choice of place by the old Congress, or with any steps concerning municipal jurisdiction which they might have taken, or omitted.

For it was no easy matter, in the temper of the public mind existing from 1783 to 1788, to determine where the seat of the federal, or that of the national government, ought to be placed. The Convention found this an unsettled question, and they wisely determined to leave it so. The cities of New York and Philadelphia had wishes and expectations, and it was quite expedient that the Constitution should neither decide between them, nor decide against both of them. It was equally important that it should not direct whether the seat of the national government should be placed at any of the other commercial cities, or at the capital or within the jurisdiction of any State, or in a district to be exclusively under the jurisdiction of the United States. These were grave questions, which involved the general interests of the Union; but however settled, they would cost the Constitution, in some quarter or other, a great deal of the support that it required, if determined before it went into operation.[2] Temporarily, however, the new government must be placed somewhere within the limits of a State, and

[1] See *ante*, Vol. I. pp. 358-361.

[2] See the conversation reported by Madison, Elliot, V. 374.

at one of the principal cities; and as the Congress then sitting at New York would probably invite their successors to assemble there, it became necessary to provide for a future removal, when the time should arrive for a general agreement on the various and delicate questions involved. The difference of structure, however, between the two branches of the proposed Congress, and the difference of interests that might predominate in each, made a disagreement on these questions probable, if not inevitable; and a disagreement on the place of their future sessions, if accompanied by power to sit in separate places, would be fatal to the peace of the Union and the operation of the government.

The committee of detail, therefore, inserted in their draft a clause prohibiting either house, without the consent of the other, from adjourning for more than three days, or to any other place than that at which the Congress might be sitting. Mr. King expressed an apprehension that this implied an authority in both houses to adjourn to any place; and as a frequent change of place had dishonored the federal government, he thought that a law, at least, should be made necessary for a removal. Mr. Madison considered a central position would be so necessary, and that it would be so strongly demanded by the House of Representatives, that a removal from the place of their first session would be extorted, even if a law were required for it. But there was a fear that, if the government were once established at the city of New York, it would never

be removed if a law were made necessary. The provision reported by the committee was therefore retained, and it was left in the power of the two houses alone, during a session of Congress, to adjourn to any place, or to any time, on which they might agree.[1]

Still it was needful that the Constitution should empower the legislature to establish a seat of government out of the jurisdiction of any of the States, and away from any of their cities. The time might come when this question could be satisfactorily met. The time would certainly come, when the people of the whole Union could see that the dignity, the independence, and the purity of the government would require that it should be under no local influences; when every citizen of the United States, called to take part in the functions of that government, ought to be able to feel that he and his would owe their protection to no power, save that of the Union itself. Some disadvantage, doubtless, might be experienced, in placing the government away from the great centres of commerce. But neither of the principal seats of wealth and refinement was very near to the centre of the Union; and if either of them had been, the necessity for an exclusive local jurisdiction would probably be found, after the adoption of the Constitution, to outweigh all other considerations. Accordingly, when the Constitution was revised for the purpose of supplying the needful provisions omitted

[1] Elliot, V. 409, 410. See *post*, as to the power of the President to assemble and adjourn Congress.

in its preparation, it was determined that no peremptory direction on the subject of a seat of government should be given to the legislature; but that power should be conferred on Congress to exercise an exclusive legislation, in all cases, over such district, not exceeding ten miles square, as might, by cession of particular States and the acceptance of Congress, become the seat of government of the United States. This provision has made the Congress of the United States the exclusive sovereign of the District of Columbia, which it governs in its capacity of the legislature of the Union. It enabled Washington to found the city which bears his name; towards which, whatever may be the claims of local attachment, every American who can discern the connection between the honor, the renown, and the welfare of his country, and the dignity, convenience, and safety of its government, must turn with affection and pride.

With respect to a regular time of meeting, no instructions had been given to the committee of detail; but they inserted in their draft of the Constitution a clause which required the legislature to assemble on the first Monday of December in every year. There was, however, a great difference of opinion as to the expediency of designating any time in the Constitution, and as to the particular period adopted in the report. But as it was generally agreed that Congress ought to assemble annually, the provision which now stands in the Constitution, which requires annual sessions, and establishes the first Monday in Decem-

ber as the time of their commencement, unless a different day shall be appointed by law, was adopted as a compromise of different views.[1]

[1] Mr. Justice Story has stated in his Commentaries (§ 829), that this clause came into the Constitution in the *revised* draft, near the close of the Convention, and was silently adopted, without opposition. This is a mistake. The clause was contained in the draft of the committee of detail, and was modified as stated in the text, on the 7th of August, after a full debate. Elliot, V. 377, 383 – 385.

CHAPTER X.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED.—THE POWERS OF CONGRESS.—THE GRAND COMPROMISES OF THE CONSTITUTION RESPECTING COMMERCE, EXPORTS, AND THE SLAVE-TRADE.

IN the examination which has thus far been made of the process of forming the Constitution, the reader will have noticed the absence of any express provisions concerning the regulation of commerce, and the obtaining of revenues. A system of government had been framed, embracing a national legislature, in which the mode of representation alone had been determined with precision. The powers of this legislature had been described only in very general terms. It was to have "the legislative rights vested in Congress by the Confederation," and the power "to legislate in all cases for the general interests of the Union, and also in those to which the States were separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

It might undoubtedly have been considered that, as the want of a power in the Confederation to make uniform commercial regulations affecting the foreign

and domestic relations of the States was one of the principal causes of the assembling of this Convention, such a power was implied in the terms of the resolution, which had declared the general principles on which the authority of the national legislature ought to be regulated. Still, it remained to be determined what kind of regulation of commerce was required by "the general interests of the Union," or how far the States were incompetent, by their separate legislation, to deal with the interests of commerce so as to promote "the harmony of the United States." In the same way, a power to obtain revenues might be implied on the same general principles. But whether the commercial power foreshadowed in these broad declarations was to be limited or unlimited; whether there were any special objects or interests to which it was not to extend; and whether the revenues of the government were to be derived from imposts laid at pleasure upon imports or exports, or both; whether they might be derived from excises on the manufactures or produce of the country; whether its power of direct taxation was to be exercised under further limitations than those already agreed upon for the apportionment of direct taxes among the States; — all these details were as yet entirely unsettled.

Two subjects, one of which might fall within a general commercial power, and the other within a general power to raise revenues, had already been incidentally alluded to, and both were likely to create great embarrassment. General Pinckney had

twice given notice that South Carolina could not accede to the new Union proposed, if it possessed a power to tax exports.[1] It had also become apparent, in the discussions and arrangements respecting the apportionment of representatives, that the possible encouragement of the slave-trade, which might follow an admission of the blacks into the rule of representation, was one great obstacle, in the view of the Northern States, to such an admission; and at the same time, that it was very doubtful whether all the Southern States would surrender to the general government the power to prohibit that trade.[2] The compromise which had already taken place on the subject of representation had settled the principles on which that difficult matter was to be arranged. But the power to increase the slave populations by continued importation had not been agreed to be surrendered; and unless some satisfactory and reasonable adjustment could be made on this subject, there could be no probability that the Constitution would be finally ratified by the people of the Northern States.[3] It is necessary, therefore, to look carefully at these two subjects,

[1] See Madison, Elliot, V. 302, 357.

[2] See the remarks of Gouverneur Morris in the debate on the apportionment of representatives, in which he stated the dilemma precisely in this way. Elliot, V. 301.

[3] No candid man, said Rufus King, could undertake to justify to them a system under which slaves were to continue to be imported, and to be represented, while the exports produced by their labor were not to pay any part of the expenses of the government which would be obliged to defend their masters against domestic insurrections or foreign attacks. Elliot, V. 391.

namely, the taxation of exports and the prohibition of the slave-trade.

That a power to lay taxes or duties on exported products belongs to every government possessing a general authority to select the objects from which its revenues are to be derived, is a proposition which admits of little doubt. It is not to be doubted, either, that it is a power which may be attended with great benefit, not only for purposes of revenue, but for the encouragement of manufactures; and it is clear that it may often be used as a means of controlling the commercial policy of other countries, when applied to articles which they cannot produce, but which they must consume. A government that is destitute of this power is not armed with the most complete and effectual means for counteracting the regulations of foreign countries that bear heavily upon the industrial pursuits of its people, although it may have other and sufficient sources of revenue; and therefore, until an unrestricted commercial intercourse and a free exchange of commodities become the general policy of the world, to deny to any government a power over the exported products of its own country, is to place it at some disadvantage with all commercial nations that possess the power to enhance the price of commodities which they themselves produce.

But, on the other hand, the practice of taxing the products of a country, as they pass out of its limits to enter into the consumption of other nations, can be beneficially exercised only by a government that

can select and arrange the objects of such taxation so as to do nearly equal justice to all its producing interests. If, for example, the article of wine were produced only by a single province of France, and all the other provinces produced no commodities sought for by other nations, an export duty upon wine would fall wholly upon the single province where it was produced, and would place its production at an unequal competition with the wines of other countries. But France produces a variety of wines, the growth of many different provinces; and therefore, in the adjustment of an export duty upon wines, the government of that country, after a due regard to the demand for each kind or class of this commodity, has chiefly to consider the effect of such a tax in the competition with the same commodity produced by other nations.

At the time of the formation of the Constitution of the United States, there was not a single production, common to all the States, of sufficient importance to become an article of general exportation. Indeed, there were no commodities produced for exportation by so many of the States, that a tax or duty imposed upon them on leaving the country would operate with anything like equality even in different sections of the Union. In fact, from the extreme northern to the extreme southern boundary of the Union, the exports were so various, both in kind and amount, that a tax imposed on an article the produce of the South could not be balanced by a tax imposed upon an article pro-

duced or manufactured at the North. How, for example, could the burden of an export duty on the tobacco of Virginia, or the rice or indigo of South Carolina, be equalized by a similar duty on the lumber or fish or flour of other States? Possibly, after long experience and the accumulation of the necessary statistics, an approach towards an equality of such burdens might have been made; but it could never have become more than an unsatisfactory approximation; and while the effect of such a tax at one end of the Union on the demand for the commodity subjected to it might be estimated, — because the opportunity for other nations to supply themselves elsewhere might be so precise as to be easily measured, — its effect at the other end of the Union, on another commodity, might be wholly uncertain, because the demand from abroad might be influenced by new sources of supply, or might from accidental causes continue to be nearly the same as before.

However theoretically correct it might have been, therefore, to confer on the general government the same authority to tax exports as to impose duties on imported commodities, — and the argument for it drawn from the necessities for revenue and protection of manufactures was exceedingly strong, — the actual situation of the country made it quite impracticable to obtain the consent of some of the States to a full and complete revenue power Several of the most important persons in the Convention were strongly in favor of it. Washington, Madison, Wilson, Gouverneur Morris, and Dickinson are known to have

held the opinion, that the government would be incomplete, without a power to tax exports as well as imports. But the decided stand taken by South Carolina, whose exports for a single year were said by General Pinckney to have amounted to £600,000, the fruit of the labor of her slaves, probably led the committee of detail to insert in their report of a draft of the Constitution a distinct prohibition against laying any tax or duty on articles exported from any State.

A similar question, in relation to the extent of the commercial power, was destined to arise out of the relations of the different States to the slave-trade. If the power to regulate commerce, that might be conferred upon the general government, was to be universal and unlimited, it must include the right to prohibit the importation of slaves. If the right to sanction or tolerate the importation of slaves, which, like all other political rights, belonged to the people of the several States as sovereign communities, was to be retained by them as an exception from the commercial power which they might confer upon the national legislature, that exception must be clearly and definitely established. For several reasons, the question was necessarily to be met, as soon as the character and extent of the commercial power should come into discussion. While the trade had been prohibited by all the other States, including Virginia and Maryland, it had only been subjected to a duty by North Carolina, and was subjected to a similar discouragement by South

Carolina and Georgia. The basis of representation in the national legislature, in which it had been agreed that the slaves should be included in a certain ratio, created a strong political motive with the Northern States to obtain for the general government a power to prevent further importations. It was fortunate that this motive existed; for the honor and reputation of the country were concerned to put an end to this traffic. No other nation, it was true, had at that time abolished it; but here were the assembled States of America, engaged in framing a Constitution of government, that ought, if the American character was to be consistent with the principles of the American Revolution, to go as far in the recognition of human rights as the circumstances of their actual situation would admit. What was practicable to be done, from considerations of humanity, and all that could be successfully done, was the measure of their duty as statesmen, admitted and acted upon by the framers of the Constitution, including many of those who represented slaveholding constituencies, as well as the representatives of States that had either abolished both the traffic in slaves and the institution itself, or were obviously destined to do it.

This just and necessary rule of action, however, which limited their efforts to what the actual circumstances of the country would permit, made a clear distinction between a prohibition of the future importation of slaves, and the manumission of those already in the country. The former could be ac-

complished, if the consent of the people of the States could be obtained, without trenching on their sovereign control over the condition of all persons within their respective limits. It involved only the surrender of a right to add to the numbers of their slaves by continued importations. But the power to determine whether the slaves then within their limits should remain in that condition, could not be surrendered by the people of the States, without overturning every principle on which the system of the new government had been rested, and which had thus far been justly regarded as essential to its establishment and to its future successful operation.

It is not, therefore, to be inferred, because a large majority of the Convention sought for a power to prohibit the increase of slaves by further importation, that they intended by means of it to extinguish the institution of slavery within the States. So far as they acted from a political motive, they designed to take away the power of a State to increase its congressional representation by bringing slaves from Africa; and so far as they acted from motives of general justice and humanity, they designed to terminate a traffic which never has been and never can be carried on without infinite cruelty and national dishonor. That the individuals of an inferior race already placed in the condition of servitude to a superior one may, by the force of necessity, be rightfully left in the care and dominion of those on whom they have been cast, is a proposition of morals entirely fit to be admitted by a Christian statesman.

That new individuals may rightfully be placed in the same condition, not by the act of Providence through the natural increase of the species, but by the act of man in transferring them from distant lands, is quite another proposition. The distinction between the two, so far as a moral judgment is concerned with the acts of the framers of the Constitution upon the circumstances before them, defines the limits of duty which they intended to recognize.

No satisfactory means exist for determining to what extent a continuance of the importation of slaves was necessary, in an economical point of view, to the States of North Carolina, South Carolina, and Georgia. There is some reason to suppose that the natural increase of the slave population in Virginia at that period more than supplied her wants; and perhaps the less healthy regions of the more southern States may have still required foreign supplies in order to keep the lands already occupied under cultivation, or to make new lands productive.[1] All that is historically certain on this subject is, that the representatives of the three most southerly States acted upon the belief, that their constituents would not surrender the right to continue the importation of slaves, although they might, if left to themselves, discontinue the practice at some future time.

These declarations, however, had not been made at the time when the principles on which the Constitution was to be framed were sent to the commit-

[1] See the remarks of Mr. Ellsworth and General Pinckney, as reported by Mr. Madison, Elliot, V. 458, 459.

tee of detail. Nothing had yet occurred in the Convention, to make it certain that the power to import would be retained by any of the States. The committee of detail had, therefore, so far as the action of the Convention had gone, an unrestricted choice between a full and a limited commercial power. They consisted of three members from non-slaveholding and two from slaveholding States;[1] but as one of them, Mr. Rutledge of South Carolina, was one of the persons who subsequently announced to the Convention the position that would be taken by his own State and by North Carolina and Georgia, there can be no doubt that he announced the same determination in the committee. In their report, they shaped the commercial power accordingly. They provided that the legislature of the United States should have power to lay and collect taxes, duties, imposts, and excises; and to regulate commerce with foreign nations, and among the several States.

But they also reported several restrictions upon both the revenue and commercial powers. Besides providing, in accordance with the ninth resolution

[1] They were Messrs. Rutledge, Randolph, Gorham, Ellsworth, and Wilson. I have classed Mr. Ellsworth among the representatives of non-slaveholding States; for although there were between two and three thousand slaves in Connecticut at this time, provision had already been made for its prospective and gradual abolition. It was not finally extinct in that State until after the year 1840. The United States census for 1790 returned 2,759 slaves for Connecticut; the census for 1840 returned 17; in the census for 1850 none were returned. A like gradual abolition took place in New Hampshire, Rhode Island, Vermont, New York, and Pennsylvania. In Massachusetts, slavery was abolished by the State Constitution of 1780.

adopted by the Convention, that direct taxation should be proportioned among the States according to the census, to be taken by a particular rule, they added the further restrictions, that no tax or duty should be laid by the national legislature on articles exported from any State, nor on the migration or importation of such persons as the several States might think proper to admit; that such migration or importation should not be prohibited; that no capitation tax should be laid, unless in proportion to the census; and that no navigation act should be passed without the assent of two thirds of the members present in each house.

That the new government must have a direct revenue power, was generally conceded; and it was also generally admitted that it must have a power to regulate commerce with foreign countries. But the idea was more or less prevalent among the Southern statesmen, that the interest of their own States, considered as a distinct and separate interest from that of the commercial States, did not require a regulation of commerce by the general government. It is not easy to determine to what extent these views were correct. Taking into consideration nothing more than the fact, that the staple production of Virginia was tobacco, as it was also partly that of North Carolina; that rice and indigo were the great products of South Carolina and Georgia; and that neither of these four States possessed a large amount of shipping; — it might certainly be considered that an unrestricted foreign intercourse was important to them.

But, on the other hand, if those States, by clothing the Union with a power to regulate commerce, were likely to subject themselves to a temporary rise of freights, the measures which might have that effect would also tend directly to increase Southern as well as Northern shipping, to augment the commercial marine of the whole country, and thus to increase its general maritime strength. The general security thus promoted was as important to one class of States as to another. The increase of the coasting trade would also increase the consumption of the produce of all the States. The great benefit, however, to be derived from a national regulation of commerce, — a benefit in which all the States would equally share, whatever might be their productions, — was undoubtedly the removal of the existing and injurious retaliations which the States had hitherto practised against each other.[1]

Still, these advantages were indirect or incidental. The immediate and palpable commercial interests of different portions of the Union, regarded in the mass, were not identical; and it was in one sense true, that the power of regulating commerce was a concession on the part of the Southern States to the Northern, for which they might reasonably expect equivalent advantages, or which they might reasonably desire to qualify by some restriction.

On the reception of the report of the committee of detail, and when the article relating to representation was reached, the consequences of agreeing that

[1] See the remarks of Mr. Madison, Elliot, V. 490.

the slaves should be computed in the rule, taken in connection with an unrestrained power in the States to increase the slave populations by further importation, and with the exemption of exports from taxation, became more prominent, and more likely to produce serious dissatisfaction. The concession of the slave representation had been made by some of the Northern members, in the hope that it might be the means of strengthening the plan of government, and of procuring for it full powers both of revenue and of commercial regulation. But now, it appeared that, as to two very important points, the hands of the national legislature were to be absolutely tied. The importation of slaves could not be prohibited; exports could not be taxed. These restrictions seemed to many to have an inevitable tendency to defeat the great primary purposes of a national government. All must agree, that defence against foreign invasion and against internal sedition was one of the principal objects for which such a government was to be established. Were all the States then to be bound to defend each, and was each to be at liberty to introduce a weakness which would increase both its own and the general danger, and at the same time to withhold the compensation for the burden? If slaves were to be imported, why should not the exports produced by their labor supply a revenue, that would enable the general government to defend their masters? To refuse it, was so inequitable and unreasonable, said Rufus King, that he could not assent to the representation of the slaves, unless

exports should be taxable; — perhaps he could not finally consent to it, under any circumstances.[1]

Gouverneur Morris, with his accustomed ardor, went further still, and insisted on re-opening the subject of representation, now that the other features of the system were to be made to favor the increase of slaves, and to throw the burdens of maintaining the government chiefly upon the Northern States. It was idle, he declared, to say that direct taxation might be levied upon the slave-holding States in proportion to their representative population: for the general government could never stretch out its hand, and put it directly into the pockets of the people, over so vast a country. Its revenues must be derived from exports, imports, and excises. He therefore would not consent to the sacrifices demanded, and moved the insertion of the word "free" before the word "inhabitants," in the article regulating the basis of representation.[2]

But there were few men in the Convention bold enough to hazard the consequences of unsettling an arrangement, which had cost so much labor and anxiety; which had been made as nearly correct in theory as the circumstances of the case would allow; and which was, in truth, the best practical solution of a great difficulty. Mr. Morris's motion received the vote of a single State only.[3] The great majority of the delegations considered it wiser to go on to the discussion of the proposed

[1] Madison, Elliot, V. 391, 392.
[2] Ibid. 392, 393.
[3] New Jersey.

restrictions upon the revenue and commercial powers, in the hope that each of them might be considered and acted upon with reference to the true principles applicable to the subject, or that the whole might be adjusted by some agreement that would not disturb what had been settled with so much difficulty.

The great embarrassment attending the proposed restriction upon the taxation of exports was, that, however the question might be decided, it would probably lose for the new government the support of some important members of the Convention. Those who regarded it as right that the government should have a complete revenue power, contended for the convenience with which a large staple production, in which America was not rivalled in foreign markets, could be made the subject of an export tax, that would in reality be paid by the foreign consumer. On the other side, the very facility with which such objects could be selected for taxation alarmed the States whose products presented the best opportunity for exercising this power. They did not deny the obvious truth, that the tax must ultimately fall on the consumer; but they considered it enough to surrender the power of levying duties upon imports, without giving up the control which each State now had over its own productions.[1]

[1] The opposition to a power to tax exports was not confined to the members from North and South Carolina and Georgia. Ellsworth and Sherman of Connecticut, Mason of Virginia, and Gerry of Mas-

But there was also another question involved in the form in which the proposed restriction had been presented. It prohibited the national government from taxing exports, but imposed no restraint in this respect upon the power of the States. If they were to retain the power over their own exports, they would have the same right to tax the products of other States exported through their maritime towns. This power had been used to a great extent, and always oppressively. Virginia had taxed the tobacco of North Carolina; Pennsylvania had taxed the products of Maryland, of New Jersey, and of Delaware; and it was apparent, that every State, not possessed of convenient and accessible seaports, must hereafter submit to the same exactions, if this power were left unrestrained. Give it to the general government, said the advocates for a full revenue power, and the inconveniences attending its exercise by the separate States will be avoided. But those who were opposed to the possession of such a power by the general government, apprehended greater oppression by a majority of the States acting through the national legislature, than they could suffer at the hands of individual States. The eight Northern States, they said, had an interest different from the five Southern States, and in one branch of the legislature the former were to have thirty-six votes, and the latter twenty-nine.

From considerations like these, united with others

sachusetts considered such a power wrong in principle, and incapable of being exercised with equality and justice.

which would render it nearly impracticable to select the objects of such taxation so as to make it operate equally, the restriction prevailed.[1] The revenue power was thus shorn of one great branch of taxation, which, however difficult it might be to practise it throughout such a country as this, is part of the prerogatives of every complete government, which was believed by many to be essential to the success of the proposed Constitution, but which was resisted successfully by others, as oppressive to their local and peculiar interests.

Was the commercial power to experience a like diminution from the full proportions of a just authority over the external trade of the States? Were the States, whose great homogeneous products, derived from the labor of slaves, would supply no revenue to the national treasury, to be left at liberty to import all the slaves that Africa could furnish? Were the commercial States to see the carrying trade of the country — embracing the very exports thus exempted from burdens of every kind, and thus stimulated by new accessions of slaves — pass

[1] The vote was taken (August 21) upon so much of the fourth section of the seventh article of the reported draft, as affirmed that "no tax or duty shall be laid by the legislature on articles exported from any State." Massachusetts, Connecticut, Maryland, Virginia (General Washington and Mr. Madison *no*), North Carolina, South Carolina, Georgia, *ay*, 7; New Hampshire, New Jersey, Pennsylvania, Delaware, *no*, 4. — If the subject had been left in this position, exports would have been taxable by the States. The plan of restraining the power of the States over exports was subsequently adopted, after the compromise involving the revenue and commercial powers of the general government had been settled.

into foreign bottoms, and be unable to protect their interests by a majority of votes in the national legislature? Was there to be no advantageous commercial treaty obtained from any foreign power, unless the measures needful to compel it could gain the assent of two thirds of Congress? Was the North to be shut out for ever from the West India trade, and was it at the same time to see the traffic in slaves prosecuted without restraint, and without the prospect or the hope of a final termination?

These were grave and searching questions. The vote exempting exports from the revenue power could not be recalled. It had passed by a decided majority of the States; and many suffrages had been given for the exemption, not from motives of a sectional nature, but on account of the difficulty that must attend the exercise of the power, and from the conviction that such taxation is incorrect in principle. So far, therefore, the Southern States had gained all that they desired in respect to the revenue power, and now three of them, with great firmness, declared that the question in relation to the commercial power was, whether they should or should not be parties to the Union. If required to surrender their right to import slaves, North Carolina, South Carolina, and Georgia would not accept the Constitution, although they were willing to make slaves liable to an equal tax with other imports.[1] It was also manifest, that the clause which required a navigation act to be passed by two thirds of each

[1] Elliot, V. 457–461.

house, was to be insisted on by some, although not by all, of the Southern membe

Thus was a dark and gloomy prospect a second time presented to the framers of the Constitution. If, on the one side, there were States feeling themselves bound as a class to insist on certain concessions, on the other side were those by whom such concessions could not be made. The chief motive with the Eastern, and with most of the Northern States, in seeking a new union under a new frame of government, was a commercial one. They had suffered so severely from the effects of the commercial policy of England and other European nations, and from the incapacity of Congress to control that policy, that it had become indispensable to them to secure a national power which could dictate the terms and vehicles of commercial intercourse with the whole country. Cut off from the British West India trade by the English Orders in Council, the Eastern and Middle States required other means of counteracting those oppressive regulations than could be found in their separate State legislation, which furnished no power whatever for obtaining a single commercial treaty.[1] Besides these considerations, which related to the special interests of the commercial States, the want of a navy, which could only be built up by measures that would encourage the growth of the mercantile marine, and which, although needed for the protection of commerce, was

[1] See *ante*, Vol. I. Book III. Chap. IV., on the origin and necessity of the commercial power.

also required for the defence of the whole country, made it necessary that the power to pass a navigation act should be burdened with no serious restrictions.

The idea of requiring a vote of two thirds in Congress for the passage of a navigation act, founded on the assumed diversity of Northern and Southern, or the commercial and the planting interests, proceeded upon the necessity for a distinct protection of the latter against the former, by means of a special legislative check. To a certain extent, as I have already said, these interests, when regarded in their aggregates, offered a real diversity But it did not follow that this peculiar check upon the power of a majority was either a necessary or an expedient mode of providing against oppressive legislation. In every system of popular government, there are great disadvantages in departing from the simple rule of a majority; and perhaps the principle which requires the assent of more than a majority ought never to be extended to mere matters of legislation, but should be confined to treaty stipulations, and to those fundamental changes which affect the nature of the government and involve the terms on which the different portions of society are associated together.

It was undoubtedly the purpose of those who sought for this particular restriction, to qualify the nature of the government, in its relation to the interests of commerce. But the real question was, whether there existed any necessary reason for pla-

cing those interests upon a different footing from that of all other subjects of national legislation. The operation of the old rule of the Confederation, which required the assent of nine States in Congress to almost all the important measures of government, many of which involved no fundamental right of separate States, had revealed the inconveniences of lodging in the hands of a minority the power to obstruct just and necessary legislation. If, indeed, it was highly probable that the power, by being left with a majority, would be abused, — if the interests of the Eastern and Middle States were purely and wholly commercial, and would be likely so to shape the legislation of the country as to encourage the growth of its mercantile marine, at the expense of other forms of industry and enterprise, and no other suitable and efficient checks could be found, — then the restriction proposed might be proper and necessary.

But in truth the separate interests of the Eastern and Middle States, when closely viewed, were not in all respects the same. Connecticut and New Jersey were agricultural States. New York and Pennsylvania, although interested in maritime commerce, were destined to be great producers of the most important grains. Maryland, although a commercial, was also an agricultural State. The new States likely to be formed in the West would be almost wholly agricultural, and would have no more shipping than might be required to move the surplus products of their soil upon their great inland lakes towards the

shores of the Atlantic. All these States, existing and expectant, were interested to obtain commercial treaties with foreign countries; all needed the benefits of uniform commercial regulations; but they were not all equally interested in a high degree of encouragement to the growth of American shipping, by means of a stringent navigation act, that would bear heavily upon the Southern planter.

Not only was there a very considerable protection against the abuse of its power by a sectional majority, in these more minute diversities of interest, but there were also two very efficient legislative checks upon that power already introduced into the government. If an unjust and oppressive measure had commanded a majority in the House, it might be defeated in the Senate, or, if that check should fail, it might be arrested by the executive.

It had, nevertheless, been made part of the limitations upon the commercial power, embraced in the report of the committee of detail, that a navigation act should require a vote of two thirds of both branches of the legislature. The vote which adopted the prohibition against taxes on exports, taken on the 21st of August, was followed, on that day and the next, by an excited debate on the taxation of the slave-trade, in which the three States of Georgia, North Carolina, and South Carolina made the limitation upon the power of the Union over this traffic the condition of their accepting the Constitution. This debate was closed by the proposition of Gouverneur Morris, to refer the whole subject to a com-

mittee of one from each State, in order that the three matters of exports, the slave-trade, and a navigation act might form a bargain or compromise between the Northern and the Southern States.[1] But the prohibition against taxing exports had already been agreed to, and there remained to be committed only the proposed restriction against taxing or prohibiting the migration or importation of such persons as the States might see fit to admit, the restriction which required a capitation tax to conform to the census, and the proposed limitation upon the power to pass a navigation act. Thus, in effect, the questions to come before this committee were, whether the slave-trade should be excepted from both the commercial and revenue powers of the general government, and whether the commercial power should be subjected to a restriction which required a vote of two thirds in dealing with the commercial interests of the Union.

We know very little of the deliberations of this committee; but as each State was equally represented in it, and as the position of the different sectional objects is quite clear, we can have no difficulty in forming an opinion as to the motives and purposes of the settlement which resulted from their action, or in obtaining a right estimate of the result itself.

In the first place, then, we are to remember the previous concessions already made by the Northern States, and the advantages resulting from them.

[1] Elliot, V. 460.

These concessions were the representation of the slaves and the exemption of exports from taxation. If the slaves had not been included in the system of representation, the Northern States could have had no political motive for acquiring the power to put an end to the slave-trade. If the exports of their staple productions had not been withdrawn from the revenue power, the Southern States could have had no very strong or special motive to draw them into the new Union; but with such an exemption, they could derive benefits from the Constitution as great as those likely to be enjoyed by their Northern confederates. Both parties, therefore, entered the final committee of compromise with a strong desire to complete the Union and to establish the new government. The Northern States wished for a full commercial power, including the slave-trade and navigation laws, to be dependent on the voices of a majority in Congress. The Southern States struggled to retain the right to import slaves, and to limit the enactment of navigation laws to a vote of two thirds. Both parties could be gratified only by conceding some portion of their respective demands.

If the Northern States could accept a future, instead of an immediate, prohibition of the slave-trade, they could gain ultimately a full commercial power over all subjects, to be exercised by a national majority. If the Southern States could confide in a national majority, so far as to clothe them with full ultimate power to regulate commerce, they could

obtain the continuance of the slave-trade for a limited period.

Such was in reality the adjustment made and recommended by the committee. They proposed that the migration or importation of such persons as the several States then existing might think proper to admit, should not be prohibited by the national legislature before the year 1800, but that a tax or duty might be imposed on such persons, at a rate not exceeding the average of the duties laid on imports; that the clause relating to a capitation tax should remain; and that the provision requiring a navigation act to be passed by a vote of two thirds, should be stricken out.[1]

No change was made in this arrangement, when it came before the Convention, except to substitute the year 1808 as the period at which the restriction on the commercial power was to terminate, and to provide for a specific tax on the importation of slaves, not exceeding ten dollars on each person.[2] The remaining features of this set-

[1] Elliot, V. 470, 471.

[2] Two grave objections were made to this settlement respecting the importation of slaves. Mr. Madison records himself as saying, in answer to the motion of General Pinckney to adopt the year 1808, that twenty years would produce all the mischief that could be apprehended from the slave-trade, and that so long a term would be more dishonorable to the American character, than to say nothing about it in the Constitution. But the real question was, whether the power to prohibit the importation at any time could be acquired for the Constitution; and the facts show that it could have been obtained only by the arrangement proposed and carried. The votes of seven States against four, given for General Pinckney's motion, show the convictions then entertained. The other objection (urged by Roger Sherman and Mr. Madison) was,

tlement, relating to a capitation tax and a navigation act, were sanctioned by a large majority of the States.[1]

Thus, by timely and well-considered concessions on each side, was the slave-trade brought immediately within the revenue power of the general government, and also, at the expiration of twenty years, within its power to regulate commerce. By the same means, the commercial power, without any other restriction than that relating to the temporary toleration of the importation of slaves, was vested in

that to lay a tax upon imported slaves implied an acknowledgment that men could be articles of property. But it appears from the statements of other members, also recorded by Madison, that it was part of the compromise agreed upon in committee, that the slave-trade should be placed under the revenue power, in consideration of its not being placed at once within the commercial power. It also appears that the tax was made to apply to the "*importation* of such persons as the States might see fit to admit," until the year 1808, in order to include and to discourage the introduction of convicts.

But the principal object was undoubtedly the slave-trade; and this particular phraseology was employed, instead of speaking directly of the importation of *slaves* into the States of North Carolina, South Carolina, and Georgia, in order, on the one hand, not to give offence to those States, and on the other, to avoid offending those who objected to the use of the word "slaves" in the Constitution. Elliot, V. 477, 478.

[1] That part of the compromise relating to the slave-trade, &c. was adopted in Convention by the votes of New Hampshire, Massachusetts, Connecticut, Maryland, North Carolina, South Carolina, Georgia, *ay*, 7; New Jersey, Pennsylvania, Delaware, Virginia, *no*, 4. Maryland, Virginia, North Carolina, and Georgia voted for a proposition made by C. Pinckney, to postpone the report, in order to take up a clause requiring all commercial regulations to be passed by two thirds of each house. But on the rejection of this motion, the report of the compromise committee, recommending that a two-thirds vote for a navigation act be stricken out, was agreed to, *nem. con.*; as was also the clause relating to a capitation tax.

a national majority. This result at once placed the foreign slave-trade by American vessels or citizens within the control of the national legislature, and enabled Congress to forbid the carrying of slaves to foreign countries; and at the end of the year 1808, it brought the whole traffic within the reach of a national prohibition.[1]

Too high an estimate cannot well be formed, of the importance and value of this final settlement of conflicting sectional interests and demands. History has to thank the patriotism and liberality of the Northern States, for having acquired, for the government of the Union, by reasonable concessions, the power to terminate the African slave-trade. We know, from almost every day's experience since the founding of the government, that individual cupidity, which knows no geographical limits, which defies public opinion whether in the North or in the South, required and still requires the restraint and chastisement of national power. The separate authority of the States would have been wholly unequal to the suppression of the slave-trade: for even if they had all finally adopted the policy of a stringent prohibition, without a navy, and without treaties, they could never have contended against the bold artifice and desperate cunning of avarice, stimulated by the enormous gains which have always been reaped in this inhuman trade.

The just and candid voice of History has also to

[1] See the note on the American abolition of the slave-trade, *ante*, Vol. I. p. 460.

thank the Southern statesmen who consented to this arrangement, for having clothed a majority of the two houses of Congress with a full commercial power. They felt, and truly felt, that this was a great concession. But they looked at what they had gained. They had gained the exemption of their staple productions from taxation as objects of foreign commerce; the enumeration of their slaves in the basis of Congressional representation; and the settlement of the slave-trade upon terms not offensive to State pride. They had also gained the Union, with its power to maintain an army and a navy, — with its power and duty to protect them against foreign invasion and domestic insurrection, and to secure their republican constitutions. They looked, therefore, upon the grant of the power to regulate commerce by the ordinary modes of legislation, in its relations to the interests of a great empire, whose foundations ought to be laid broadly and deeply on the national welfare.[1] They saw that the Revolution had cost the Eastern States enormous sacrifices of commercial wealth, and that the weakness of the Confederation had destroyed the little remnant of their trade.[2] They saw and admitted the necessity for an unrestrained control over the foreign commerce of the country, if it was ever to rise from the prostrate condition in which it had been placed by foreign powers. They acted accordingly; and by their ac-

[1] See the remarks of John Rutledge. Madison, Elliot, V. 491.

[2] General Pinckney. Ibid. 489.

tion, they enabled the States of North Carolina, South Carolina, and Georgia to enter the new Union without humiliation and without loss.[1]

[1] The point respecting the slave-trade was insisted upon by the delegates of those three States, both as a matter of State pride and a matter of practical interest. They regarded the increase of their slave population by new importations as a thing of peculiarly domestic concern, the control of which they were unwilling to transfer to the general government. But they also contended for a political right which their States intended to exercise. The following table, taken from the United States Census, shows that in the twenty years which elapsed from 1790 to 1810 during eighteen of which the importation of slaves could not be prohibited by Congress, the slaves of those three States increased in a ratio so much larger than the rate of increase after the year 1808, as to make it apparent that it was not a mere abstraction on which they insisted. The right to admit the importation of slaves was exercised, and was intended to be exercised; — as some of the delegates of the three States declared in the Convention.

Progress of the Slave Population from 1790 to 1850, showing the Increase per Cent in each Period of Ten Years.

	North Carolina.	South Carolina.	Georgia.
1790 to 1800	32.53	36.46	102.99
1800 to 1810 *	26.65	34.35	77.12
1810 to 1820	21.43	31.62	42.23
1820 to 1830	19.79	22.62	45.35
1830 to 1840 †	0.08	3.68	29.15
1840 to 1850	17.38	17.71	35.85

But while the census shows that the power to admit slaves was exercised freely during the twenty years that followed the adoption of the Constitution of the United States, it also shows that the States which insisted on retaining it for that period could well afford to surrender it at the stipulated time. In 1810, the proportion of the blacks of North Carolina to the whole population was 32.24 per cent, and in 1850 it was 36.36; in South Carolina the proportion in

* The constitutional power of Congress to prohibit the importation took effect and was exercised in 1808.

† The great diminution in the rates of increase during this period is probably due to the removal of slaves into Alabama, Arkansas, Louisiana, and Texas.

Thus was accomplished, so far as depended on the action of this Convention, that memorable compromise, which gave to the Union its control over the commercial relations of the States with foreign nations and with each other. An event so fraught with consequences of the utmost importance cannot be dismissed without some of the reflections appropriate to its consideration.

Nature had marked America for a great commercial nation. The sweep of the Atlantic coast, from the Bay of Fundy to the Gulf of Florida, comprehending twenty degrees of latitude, broken into capacious bays and convenient harbors, and receiving the inward flow of the sea into great navigable rivers that stretched far into the interior, presented an access to the ocean not surpassed by that of any large portion of the globe. This long range of sea-coast embraced all the varieties of climate that are found between a hard and sterile region, where summer is but the breath of a few fervid weeks, and the ever blooming tropics, where winter is unknown. The products of the different regions, already entering, or fit to enter, into foreign commerce, attested as great a variety of soils. The proximity of the country to the West Indies, where the Eastern and the Middle

1810 was 48.4, and in 1850, 58.93; in Georgia, in 1810 it was 42.4, and in 1850, 42.44. It is not probable, therefore, that the prosperity of those States has been diminished by the discontinuance of the slave-trade; for it is not likely that they could well sustain a much larger ratio of the blacks to the whites than that which now exists, and which will probably continue to be maintained at about the same point for a long period of time.

States could find the best markets for some of their most important exports, afforded the promise of a highly lucrative trade; while the voyage to the East Indies from any American port could be performed in as short a time as from England or Holland or France. In the South, there were great staples already largely demanded by the consumption of Europe. In the North, there were fisheries of singular importance, capable of furnishing enormous additions to the wealth of the country. Beyond the Alleghanies, the West, with its vast internal waters and its almost unequalled fertility, had been opened to a rapid emigration, which was soon to lay the foundation of new States, destined to be the abodes of millions of men.

The very variety and extent of these interests had for many years occasioned a struggle for some mode of reconciling and harmonizing them all. But divided into separate governments, the commercial legislation of the States could produce nothing but the confusion and uncertainty which retaliation necessarily engenders. Different systems and rates of revenue were in force in seaports not a hundred miles apart, through which the inhabitants of other jurisdictions were obliged to draw their supplies of foreign commodities, and to export their own productions. The paper-money systems of the several States made the commercial value of coin quite different in different places, and gave an entirely insecure basis to trade.

The reader, who has followed me through the pre-

ceding volume, has seen how the people of the United States, from the earliest stages of the Revolution, struggled to free themselves from these embarrassments; — how they commenced with a jealous reservation of State authority over all matters of commerce and revenue; how they undertook to supply the necessities of a central government by contributions which they had not the power to make good, because their commercial condition did not admit of heavy taxation; how they endeavored to pass from this system to a grant of temporary revenues and temporary commercial regulation, to be vested in the federal Union; how they found it impracticable to agree upon the principles and details of a temporary power; how they turned to separate commercial leagues, each with its immediate neighbors, and were disappointed in the result or frustrated in the effort; and how at last they came to the conception of a full and irrevocable surrender of commercial and fiscal regulations to a central legislature, that could grasp the interests of the whole country and combine them in one harmonious system.

The influence of the commercial and revenue powers, thus obtained by the general government, on the condition of this country, has far exceeded the most sanguine hopes which the framers of the Constitution could have indulged. No one can doubt that the people of America owe to it both the nature and the degree of their actual prosperity; — and as the national prosperity has given them importance in the world, it is just and accurate to say, that commerce

and its effects have elevated republican institutions to a dignity and influence which they have attained through no other of the forms or the spirit of society. Let the reader consider the interests of commerce, in their widest relations with all that they comprehend, — the interests of the merchant, the artisan, and the tiller of the soil being alike involved, — as the chief purpose of the new government given to this Union; let him contemplate this as the central object around which are arranged almost all the great provisions of the Constitution of the United States; — and he will see in it a wonderfully harmonious and powerful system, created for the security of property, and the promotion of the material welfare and prosperity of individuals, whatever their occupation, employment, or condition. That such a code of civil government should have sprung from the necessities of commerce, is surely one of the triumphs of modern civilization.

It is not to be denied, that the sedulous care with which this great provision was made for the general prosperity has had the effect of impressing on the national character a strong spirit of acquisition. The character of a people, however, is to be judged not merely by the pursuit or the possession of wealth, but chiefly by the use which they make of it. If the inhabitants of the United States can justly claim distinction for the benevolent virtues; if the wealth that is eagerly sought and rapidly acquired is freely used for the relief of human suffering; if learning, science, and the arts are duly cultivated; if popular

education is an object of lavish expenditure; if the institutions of religion, though depending on a purely voluntary support, are provided for liberally, and from conscientious motives; — then is the national spirit of acquisition not without fruits, of which it has no need to be ashamed.

The objection, that the Constitution of the United States, and the immense prosperity which has flowed from it, were obtained by certain concessions in favor of the institution of slavery, results from a merely superficial view of the subject. If we would form a right estimate of the gain or loss to human nature effected by any given political arrangement, we must take into consideration the antecedent facts, and endeavor to judge whether a better result could have been obtained by a different mode of dealing with them. We shall then be able to appreciate the positive good that has been gained, or the positive loss that has been suffered.

The prominent facts to be considered in this connection are, in the first place, that slavery existed, and would long exist, in certain of the States; and that the condition of the African race in those States was universally regarded as a matter of purely local concern. It could not in fact have been otherwise; for there were slaves in every State excepting Massachusetts and New Hampshire; and among the other States in which measures had been, or were likely to be, taken for the removal of slavery, there was a great variety of circumstances affecting the time and mode in which it should be finally extinguished.

As soon as the point was settled, in the formation of the Constitution of the United States, that the State governments were to be preserved, with all their powers unimpaired which were not required by the objects of the national government to be surrendered to the Union, the domestic relations of their inhabitants with each other necessarily remained under their exclusive control. Those relations were not involved in the purposes of the Federal Union.

So soon, also, as this was perceived and admitted, it became a necessary consequence of the admission, that the national authority should guarantee to the people of each State the right to shape and modify their own social institutions; for without this principle laid at the foundation of the Union, there could be no peace or security for such a mixed system of government.

In the second place, we have to consider the fact, that, among the political rights of the States anterior to the national Constitution, was the right to admit or to prohibit the further importation of slaves; — a traffic not then forbidden by any European nation to its Colonies, but which had been interdicted by ten of the American States. The transfer of this right to the Federal Union was a purely voluntary act; it was not strictly necessary for the purposes for which it was proposed to establish the Constitution of the United States; although there were political reasons for which a part of the States might wish to acquire control over this subject, as well as moral reasons why all the States should have desired to vest that

control in the general government. Three of the States, however, as we have seen, took a different view of their interest and duty, and declined to enter the new Union unless this traffic should be excepted from the power over commerce for a period of twenty years.

It is quite plain, that, if these facts had been met and dealt with in a manner different from the settlement that was actually made, one of two consequences must have ensued; — either no Constitution at all could have been adopted, or there would have been a Union of some kind, from which three at least of the States must have been excluded. If the first, by far the most probable contingency, had happened, a great feebleness and poverty of society must have continued to be the lot of all these States; there must have been perpetual collisions and rival confederacies; there certainly would have been an indefinite continuance of the slave-trade, accompanied and followed by a great external pressure upon the States which permitted it, which would have led to a war of races, or to a frightful oppression of the slaves. Most of these evils would have followed the establishment of a partial confederacy.

On the other hand, we are to consider what has been gained to humanity by the establishment of the Constitution. The extinction of the slave-trade, followed by a public opinion with reference to it that is as strong and reliable in the Southern as in the Northern States, was purchased at a price by no means unreasonable, when compared with the mag-

nitude of the acquisition. The great prosperity and high civilization which are due to the commercial power of the Constitution have been a vast benefit to both races; — to the whites by the superior refinement they have created, and to the blacks by the gradual but certain amelioration of their condition. The social strength and security occasioned by constantly increasing wealth, combined with the acknowledgment and establishment of the doctrine which makes every State the uncontrolled arbiter of the domestic condition of its inhabitants, has put it in the power of those who have charge of the negro to deal prudently and wisely with their great problem, without the interference of those who could benefit neither race by their intervention. This, in every rational view of the subject, cannot but be regarded as one of the chief blessings conferred by the Constitution of the United States.

It has made emancipation possible, where otherwise it would have been impossible, or where it could have been obtained only through the horrors of both servile and civil war. It has enabled local authorities to adapt changes to local circumstances. Its beneficent influences may be traced in the laws of the States, in the records of their jurisprudence, and in the advanced and advancing condition of their public sentiment; and he who should follow those influences in all their details, and count the sum of what it has effected for the moral and physical well-being of the subjected race, would find cause for devout gratitude to the Ruler of the Universe. Great

as has been the increase of slaves in the United States during the last seventy years, there can be no question that the general improvement of their condition has been equally great, and that it has kept pace with the increasing prosperity of the country. That prosperity has enabled individual enterprise and benevolence to plant a colony upon the coast of Africa, which, after centuries of discipline and education, may yet be the means of restoring to its native soil, as civilized and Christian men, a race that came to us as heathens and barbarians.

Surely, then, with such results to look back upon, with such hopes in the future, the patriot and the Christian can have no real cause for regret or complaint, that in a system of representative government, made necessary by controlling circumstances, the unimportant anomaly should be found, of a representation of men without political rights or social privileges; or that the question of emancipation, either for the mass or the individual, should be carefully secured to local authority; or even that the slave-trade should have been prosecuted for a few years, to be extinguished by America first of all the nations of the world.

CHAPTER XI.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — THE REMAINING POWERS OF CONGRESS. — RESTRAINTS UPON CONGRESS AND UPON THE STATES.

IN the last preceding chapter, the reader has traced the origin of the revenue and commercial powers, and of certain restrictions applied to them in the progress of those great compacts, by means of which they became incorporated into the Constitution. We have now to examine some other qualifications which were annexed to those powers after the first draft of the instrument had been prepared and reported by the committee of detail.

That committee had presented a naked power to lay and collect taxes, duties, imposts, and excises,[1] with a certain restriction as to the taxation of exports, the final disposition of which has been already described; but they had designated no particular objects to which the revenues thus derived were to be applied. The general clause embracing the revenue power was affirmed unanimously by the Convention, on the 16th of August, leaving the exception of exports for future action. At a subsequent period we find the words, "to pay the debts and provide for

[1] Art. VII. § 1 of the first draft of the Constitution. Elliot, V. 378.

the common defence and general welfare of the United States," added to the clause which empowers Congress to levy taxes and duties; and it is a somewhat important inquiry, how and with what purpose they were placed there.

While the powers proposed by the committee of detail were under consideration, Mr. Charles Pinckney introduced several topics designed to supply omissions in their report, which were thereupon referred to that committee. The purpose of one of his suggestions was to provide, on the one hand, that funds appropriated for the payment of public creditors should not, during the time of such appropriation, be diverted to any other purpose; and, on the other hand, that Congress should be restrained from establishing perpetual revenues. Another of his suggestions contemplated a power to secure the payment of the public debt, and still another to prevent a violation of the public faith when once pledged to any public creditor.[1] Immediately after this reference, Mr. Rutledge moved for what was called a grand committee,[2] to consider the expediency of an assumption by the United States of the State debts; and after some discussion of the subject, such a committee was raised, and Mr. Rutledge's motion was referred to them, together with a proposition introduced by Mr. Mason for restraining grants of perpetual revenue.[3] Thus it appears that the principal subject

[1] August 18. Elliot, V. 440.

[2] A committee of one member from each State.

[3] Elliot, V. 441. To the same grand committee was afterwards referred the subject of the militia. See *infra*.

involved in the latter reference was the propriety of inserting in the Constitution a specific power to make special appropriations for the payment of debts of the United States and of the several States, incurred during the late war for the common defence and general welfare; and not to make a declaration of the general purposes for which revenues were to be raised. Both committees, however, seemed to have been charged with the consideration of some restraint on the revenue power, with a view to prevent perpetual taxes of any kind. The grand committee reported first, presenting the following special provision: — "The legislature of the United States shall have power to fulfil the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts incurred by the several States during the late war for the common defence and general welfare."[1] On the following day, the committee of detail presented a report, recommending that at the end of the clause already adopted, which contained the grant of the revenue power, the following words should be added: "for payment of the debts and necessary expenses of the United States; provided that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than —— years."[2]

Two distinct propositions were thus before the Convention. One of them contemplated a qualifica-

[1] August 21. Elliot, V. 451. [2] August 22. Ibid. 462.

tion of the revenue power, the other did not. One was to give authority to Congress to pay the revolutionary debt, both of the United States and of the States, and to fulfil all the engagements of the Confederation; the other was to declare that revenues were to be raised and taxes levied for the purpose of paying the debts and necessary expenses of the United States, limiting all revenue laws, excepting those which were to appropriate specific funds to the payment of interest on debts or loans, to a term of years. When these propositions came to be acted upon, that reported by the grand committee was modified into the declaration that "all debts contracted and engagements entered into, by or under the authority of Congress, shall be as valid against the United States, under this Constitution, as under the Confederation." The State debts were thus left out; the declaration was prefixed, as an amendment, to the clause which granted the revenue power, and was thus obviously no qualification of that power.[1]

But it was thought by Mr. Sherman, that the clause for laying taxes and duties ought to have connected with it an express provision for the payment of the old debts; and he accordingly moved to add to that clause the words, "for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defence and general welfare." This was regarded by the Convention as

[1] See the proceedings which took place, August 22, 24, and 25. Elliot, V. 462, 463, 464, 471, 475–477.

unnecessary, and was therefore not adopted.[1] But the provision reported by the committee of detail, which was intended as a qualification of the revenue power, by declaring the objects for which taxes and duties were to be levied, had not yet been acted upon, and on the 31st of August, this, with all other matters not disposed of, was referred to a new grand committee, who, on the 4th of September, introduced an amendment to the revenue clause, which made it read as follows: — "The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States." This amendment was unanimously adopted;[2] and when the Constitution was revised, at the close of the proceedings, the declaration which made the debts and engagements of the Confederation obligatory upon the new Congress, was separated from the context of the revenue clause, and placed by itself in the *sixth* article.

There is one other restraint upon the revenue, as well as upon the commercial power, the history of which now demands our inquiries. But in order to understand it correctly, it will be necessary for the reader to recur to the position in which the revenue and commercial powers were left by the sectional compromises described in the last chapter. The

[1] Elliot, V. 476, 477. Mr. Madison says, "This proposition, as being unnecessary, was disagreed to"; that is, unnecessary as a security of the *old debts* of the United States.

[2] Ibid. 506, 507.

struggle between the Northern and the Southern States concerning the limitations of those powers turned, as we have seen, on certain restrictions desired by the latter. They wished to have exports excepted out of the revenue power; they wished to have a vote of two thirds made necessary to the passage of any commercial regulation; and three of them wished to have the slave-trade excepted from both the revenue and the commercial powers. We have seen that the result of the sectional compromises was to leave the commercial and revenue powers unlimited, excepting by the saving in relation to the slave-trade; that they left the revenue power unlimited, excepting by the restriction concerning exports and a capitation tax; and that the commercial power was to be exercised, like other legislative powers, by a majority in Congress. General commercial and revenue powers, then, without other restrictions than these, would enable Congress to collect their revenues where they should see fit, without obliging them to adopt the old ports of entry of the States, or to consider the place where a cargo was to be unladen. They might have custom-houses in only one place in each State, or in only such States as they might choose to select, and might thus compel vessels bound from or to all the other States to clear or enter at those places. But, on the other hand, a constitutional provision which would require them to establish custom-houses at the old ports of entry of the States, without leaving them at liberty to establish

other ports of entry, or to compel vessels to receive on board revenue officers before they had reached their ports of destination, would create opportunities and facilities for smuggling.

It appears that the people of Maryland felt some apprehension that an unrestricted power to make commercial and fiscal regulations might result in compelling vessels bound to or from Baltimore to enter or clear at Norfolk, or some other port in Virginia. The delegates of Maryland accordingly introduced a proposition, which embraced two ideas; first, that Congress shall not oblige vessels, domestic or foreign, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear from any other State than that in which their cargoes may be laden; secondly, that Congress shall not induce vessels to enter or clear in one State in preference to another, by any privileges or immunities.[1] This proposition became the basis of that clause of the Constitution, which declares that "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."[2]

It was while this subject of the equal operation of the commercial and revenue powers upon the different States was under consideration, that the

[1] Elliot, V. 478, 479.

[2] Constitution, Art. I. § 9. See the proceedings which took place on the proposition of the Maryland delegates. Elliot, V. 478, 479, 483, 502, 545.

further provision was devised and incorporated into the Constitution, which requires all duties, imposts, and excises to be uniform throughout the United States. This clause, in the final revision of the instrument, was annexed to the power of taxation.[1]

The commercial power, besides being subjected to the restrictions which have been thus described, was extended to a subject not embraced in it by the report of the committee of detail. They had included in it "commerce with foreign nations, and among the several States"; — meaning, by the former term, not to include the Indian tribes upon this continent, but all other communities, civilized and barbarian, foreign to the people of the United States. By the system which had always prevailed in the relations of Europeans and their descendants with the Indians of America, those tribes had constantly been regarded as distinct and independent political communities, retaining their original rights, and among them the undisputed possession of the soil; subject to the exclusive right of the European nation making the first discovery of their territory to purchase it. This principle, incorporated into the public law of Europe at the time of the discovery and settlement of the New World, and practised by general consent of the nations of Europe, was the basis of all the relations maintained with the Indian tribes by the imperial government, in the time of our colonial state, by our Revolutionary

[1] Elliot, V. 543. Constitution, Art. I. § 8, clause 1.

Congress, and by the United States under the Confederation. It recognized the Indian tribes as nations, but as nations peculiarly situated, inasmuch as their intercourse and their power to dispose of their landed possessions were restricted to the first discoverers of their territory. This peculiar condition drew after it two consequences; — first, that, as they were distinct nations, they could not be treated as part of the subjects of any one of the States, or of the United States; and secondly, that, as their intercourse and trade were subjected to restraint, that restraint would be most appropriately exercised by the federal power. So general was the acquiescence in these necessities imposed by the principle of public law which defined the condition of the Indian tribes, that during the whole of the thirteen years which elapsed from the commencement of the Revolution to the adoption of the Constitution, the regulation of intercourse with those tribes was left to the federal authority. It was tacitly assumed by the Revolutionary Congress, and it was expressly conferred by the Articles of Confederation.

The provision of the Confederation on this subject gave to the United States the exclusive right and power "of regulating the trade and managing all affairs with the Indians not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." The exception of such Indians as were members of any State, referred to those broken

members of tribes who had lost their nationality, and had become absorbed as individuals into the political community of the whites. With all other Indians, remaining as distinct and self-governing communities, trade and intercourse were subject to the regulation of Congress; while at the same time each State retained to itself the regulation of its commerce with all other nations. The broad distinction thus early established, and thus perpetuated in the Confederation, between commerce with the Indian tribes, and commerce with "foreign nations," explains the origin and introduction of a special provision for the former, as distinguished from the latter, in the Constitution of the United States.

For although there might have been some reason to contend that commerce with "foreign nations"—if the grant of the commercial power had not expressly embraced the Indian tribes—would have extended to those tribes, as nations foreign to the United States, yet the entire history of the country, and the peculiarity of the intercourse needful for their security, made it eminently expedient that there should be a distinct recognition of the Indian communities, in order that the power of Congress to regulate all commerce with them might not only be as ample as that relating to foreign nations, but might stand upon a distinct assertion of their condition as *tribes*. Accordingly, Mr. Madison introduced the separate proposition "to regulate affairs with the Indians, as well within as without the

limits of the United States";[1] and the committee to whom it was referred gave effect to it, by adding the words, "and with the Indian tribes," to the end of the clause containing the grant of the commercial power.[2]

The remaining powers of Congress may be considered in the order in which they were acted upon by the Convention. The powers to establish a uniform rule of naturalization, to coin money and regulate the value thereof and of foreign coin, and fix the standard of weights and measures, were adopted without discussion and with entire unanimity, as they had been proposed in the draft prepared by the committee of detail. The power to establish post-offices was extended to embrace post-roads.[3]

These were succeeded by the subject of borrowing money and emitting bills on the credit of the United States; a power that was proposed to be given by the committee of detail, while they at the same time proposed to restrain the States from emitting bills of credit. I have not been able to discover upon what ground it was supposed to be proper or expedient to confer a power of emitting bills of credit on the United States, and to prohibit the States from doing the same thing. That the same thing was in contemplation in the two provisions reported by the committee, sufficiently appears from the debates and from the history of the times. The object of the

[1] Elliot, V. 439.
[2] Ibid. 506, 507.
[3] Ibid. 434. Journal, Elliot, I. 245.

prohibition on the States was to prevent the issue and circulation of paper money; the object of the proposed grant of power to the United States was to enable the government to employ a paper currency, when it should have occasion to do so. But the records of the discussions that have come down to us do not disclose the reasons which may have led to the supposition that a paper currency could be used by the United States with any more propriety or safety than by a State. One of the principal causes which had led to the experiment of making a national government with power to prevent such abuses, had been the frauds and injustice perpetrated by the States in their issues of paper money; and there was at this very time a loud and general outcry against the conduct of the people of Rhode Island, who had kept themselves aloof from the national Convention, for the express purpose, among others, of retaining to themselves the power to issue such a currency.

It is possible that the phrase "emit bills on the credit of the United States" might have been left in the Constitution, without any other danger than the hazards of a doubtful construction, which would have confined its meaning to the issuing of certificates of debt under the power to "borrow money." But this was not the sense in which the term "bills of credit" was generally received throughout the country, nor the sense intended to be given to it in the clause which contained the prohibition on the States. The well-understood meaning of the term had reference

to paper issues, intended to circulate as currency, and bearing the public promise to pay a sum of money at a future time, whether made or not made a legal tender in payment of debts. It would have been of no avail, therefore, to have added a prohibition against making such bills a legal tender. If a power to issue them should once be seen in the Constitution, or should be suspected by the people to be there, wrapt in the power of borrowing money, the instrument would array against itself a formidable and probably a fatal opposition. It was deemed wiser, therefore, even if unforeseen emergencies might in some cases make the exercise of such a power useful, to withhold it altogether. It was accordingly stricken out, by a vote of nine States against two, and the authority of Congress was thus confined to borrowing money on the credit of the United States, which appears to have been intended to include the issuing of government notes not transferable as currency.[1]

The clauses which authorize Congress to constitute tribunals inferior to the Supreme Court,[2] and to make rules as to captures on land and water,[3] — the latter comprehending the grant of the entire prize jurisdiction, — were assented to without discussion.[4] Then came the consideration of the criminal jurisdiction in admiralty, and that over offences

[1] See the debate, and Mr. Madison's explanation of his vote, Elliot, V. 434, 435, and the note on the latter page.

[2] Constitution, Art. I. § 8, clause 9.

[3] Ibid., clause 11.

[4] Elliot, V. 436.

against the law of nations. The committee of detail had authorized Congress "to declare the law and punishment of piracies and felonies committed on the high seas, ... and of offences against the law of nations." The expression to "declare the law," &c. was changed to the words "define and punish," for the following reason. Piracy is an offence defined by the law of nations, and also by the common law of England. But in those codes a single crime only is designated by that term.[1] It was necessary that Congress should have the power to declare whether this definition was to be adopted, and also to determine whether any other crimes should constitute piracy. In the same way, the term "felony" has a particular meaning in the common law, and it had in the laws of the different States of the Union a somewhat various meaning. It was necessary that Congress should have the power to adopt any definition of this term, and also to determine what other crimes should be deemed felonies. So also there were various offences known to the law of nations, and generally regarded as such by civilized States. But before Congress could have power to punish for any of those offences, it would be necessary that they, as the legislative organ of the nation, should determine and make known what acts were to be regarded as offences against the law of nations; and that the power to do this should include both the power to adopt from the

[1] That is to say, it is the same crime, committed on the high seas, that is denominated robbery when committed on the land.

code of public law offences already defined by that code, and to extend the definition to other acts. The term "declare" was therefore adopted expressly with a view to the ascertaining and creating of offences, which were to be treated as piracies and felonies committed on the high seas, and as offences against the law of nations.[1]

The same necessity for an authority to prescribe a previous definition of the crime of counterfeiting the securities and current coin of the United States would seem to have been felt; and it was probably intended to be given by the terms "to provide for the punishment of" such counterfeiting.[2]

The power to "declare" war had been reported by the committee as a power to "make" war. There was a very general acquiescence in the propriety of vesting the war power in the legislature rather than the executive; but the former expression was substituted in place of the latter, in order, as it would seem, to signify that the legislature alone were to determine formally the state of war, but that the executive might be able to repel sudden attacks.[3] The clause which enables Congress to grant "letters of marque and reprisal" was added to the war power, at a subsequent period, on the recommendation of a committee to whom were re-

[1] Madison, Elliot, V. 436, 437.

[2] In the clause as it passed the Convention, the offence of *counterfeiting* was placed with the other crimes which Congress was to "define" and "punish"; but, on the revision of the Constitution, counterfeiting was placed in a separate clause, under the term "to provide for the punishment of," &c. See Art. I. § 8, clauses 6, 10.

[3] Elliot, V. 438, 439.

ferred sundry propositions introduced by Charles Pinckney, of which this was one.[1]

In addition to the war power, which would seem to involve of itself the authority to raise all the necessary forces required by the exigencies of a war, the committee of detail had given the separate power "to raise armies," which the Convention enlarged by adding the term to "support."[2] This embraced standing armies in time of peace, and, as the clause thus amended would obviously allow, such armies might be enlarged to any extent and continued for any time. The nature of the government, and the liberties and the very prejudices of the people, required that some check should be introduced, to prevent an abuse of this power. A limitation of the number of troops that Congress might keep up in time of peace was proposed, but it was rejected by all the States as inexpedient and impracticable.[3] Another check, capable of being adapted to the proper exercise of the power itself, was to be found in an idea suggested by Mr. Mason, of preventing a perpetual revenue.[4] The application of this principle to the power of raising and supporting armies would furnish a salutary limitation, by requiring the appropriations for this purpose to pass frequently under the review of the representatives of the people, without embarrassing the exercise of the power itself. Accordingly, the clause now in the Constitution, which restricts the appropriation of

[1] Elliot, V. 440, 510, 511.
[2] Ibid. 442.
[3] Ibid. 443.
[4] Ibid. 440.

money to the support of the army to a term not longer than two years, was added to the power of raising and supporting armies.[1]

Authority "to provide and maintain a navy" was unanimously agreed as the most convenient definition of the power, and to this was added, from the Articles of Confederation, the power "to make rules for the government and regulation of the land and naval forces."[2]

The next subject which required consideration was the power of the general government over the militia of the States. There were few subjects dealt with by the framers of the Constitution exceeding this in magnitude, in importance, and delicacy. It involved not only the relations of the general government to the States and the people of the States, but the question whether and how far the whole effective force of the nation could be employed for national purposes and directed to the accomplishment of objects of national concern. The mode in which this question should be settled would determine, in a great degree, and for all time, whether the national power was to depend, for the discharge of its various duties in peace and in war, upon standing armies, or whether it could also employ and rely upon that great reservation of force that exists in all countries accustomed to enroll and train their private citizens to the use of arms.

The American Revolution had displayed nothing

[1] Elliot, V. 510, 511. Constitution, Art. I. § 8, clause 12.

[2] Elliot, V. 443.

more conspicuously than the fact, that, while the militia of the States were in general neither deficient in personal courage, nor incapable of being made soldiers, they were inefficient and unreliable as troops. One of the principal reasons for this was, that, when called into the field in the service of the federal power, the different corps of the several States looked up to their own local government as their sovereign; and being amenable to no law but that of their own State, they were frequently indisposed to recognize any other authority. But a far more powerful cause of their inefficiency lay in the fact that they were not disciplined or organized or armed upon any uniform system. A regiment of militia drawn from New Hampshire was a very different body from one drawn from New York, or Pennsylvania, or New Jersey, or South Carolina. The consequence was, that when these different forces were brought to act together, there were often found in the same campaign, and sometimes in the same engagement, portions of them in a very respectable state of discipline and equipment, and others in no state of discipline or equipment at all.

The necessity, therefore, for a uniform system of disciplining and arming the militia was a thing well ascertained and understood, at the time of the formation of the Constitution. But the control of this whole subject was a part of the sovereignty of each State, not likely to be surrendered without great jealousy and distrust; and one of the most delicate of the tasks imposed upon the Convention was that

of determining how far and for what purposes the people of the several States should be asked to confer upon the general government this very important part of their political sovereignty. One thing, however, was clear; — that, if the general government was to be charged with the duty of undertaking the common defence against an external enemy, or of suppressing insurrection, or of protecting the republican character of the State constitutions, it must either maintain at all times a regular army suitable for any such emergency, or it must have some power to employ the militia. The latter, when compared with the resource of standing armies, is, as was said of the institution of chivalry, "the cheap defence of nations"; and although no nation has found, or will be likely to find, it sufficient, without the maintenance of some regular troops, the nature of the liberties inherent in the construction of the American governments, and the whole current of the feelings of the American people, would lead them to the adoption of a policy that might restrain, rather than encourage, the growth of a permanent army. So far, therefore, it seemed manifest, from the duties which were to be imposed on the government of the Union, that it must have a power to employ the militia of the States; and this would of necessity draw after it, if it was to be capable of a beneficial exercise, the power to regulate, to some extent, their organization, armament, and discipline.

But the first draft of the Constitution, prepared by the committee of detail, contained no express

power on this subject, excepting "to call forth the aid of the militia in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions."[1] Possibly it might have been contended, after the Constitution had gone into operation, that the general power to make all laws necessary and proper for the execution of the powers specially enumerated, would enable Congress to prescribe regulations of the force which they were authorized to employ, since the authority to employ would seem to involve the right to have the force kept in a fit state to be employed. But this would have been a remote implication of power, too hazardous to be trusted; and it at once occurred to one of the wisest and most sagacious of the statesmen composing the Convention, who, though he never signed the Constitution, exercised a great and salutary influence in its preparation, — Mr. Mason of Virginia, — that an express and unequivocal power of regulating the militia must be conferred. He stated the obvious truth, that, if the disciplining of the militia were left in the hands of the States, they never would concur in any one system; and as it might be difficult to persuade them to give up their power over the whole, he was at first disposed to adopt the plan of placing a part of the militia under the control of the general government, as a select force.[2] But he, as well as others, became satisfied that this plan would not produce a uniformity of discipline throughout

[1] Art. VII. § 1 of the first draft. [2] Ibid. 440.
Elliot, V. 379.

the entire mass of the militia. The question, therefore, resolved itself practically into this, — what should be the nature and extent of the control to be given to the general government, assuming that its control was to be applicable to the entire militia of the several States. This important question, involved in several distinct propositions, was referred to a grand committee of the States.[1] It was by them that the plan was digested and arranged by which Congress now has the power 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 the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;[2] — a provision that was adopted by a large majority of the States. The clause reported by the committee of detail was also adopted, by which Congress is enabled to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.[3]

The next subject in the order of the report made by the committee of detail was that general clause now found at the close of the enumeration of the express powers of Congress, which authorizes them "to make all laws which may 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 depart-

[1] August 18. Elliot, V. 445.

[2] Constitution, Art. I. § 8, cl. 16. Ibid. p. 467.

[3] Art. I. § 8, cl. 15.

ment or officer thereof."[1] Nothing occurred in the proceedings on this provision which throws any particular light upon its meaning, excepting a proposition to include in it, expressly, the power to "establish all offices" necessary to execute the powers of the Constitution; an addition which was not made, because it was considered to be already implied in the terms of the clause.[2]

The subjects of patents for useful inventions and of copyrights of authors appear to have been brought forward by Mr. Charles Pinckney. They gave rise to no discussion in the Convention, but were considered in a grand committee, with other matters, and there is no account of the views which they took of this interesting branch of the powers of Congress. We know, however, historically, that these were powers not only possessed by all the States, but exercised by some of them, before the Constitution of the United States was formed. Some of the States had general copyright laws, not unlike those which have since been enacted by Congress;[3] but patents for useful inventions were granted by special acts of legislation in each case. When the power to legislate on these subjects was surrendered by the States to the general government, it was surrendered as a power to legislate for the purpose of securing a natural right to the fruits of mental labor. This was the view of it taken in the previous legislation

[1] Constitution, Art. I. § 8, cl. 18.
[2] Elliot, V. 447.
[3] See the statutes of Massachusetts and Connecticut, &c. cited in Curtis on Copyright, pp. 77, 78, 79.

of the States, by which the power conferred upon Congress must of course, to a large extent, be construed.

Such are the legislative powers of Congress, which are to be exercised within the States themselves; — and it is at once obvious, that they constitute a government of limited authority. The question arises, then, whether that authority is anywhere full and complete, embracing all the powers of government and extending to all the objects of which it can take cognizance. It has already been seen, that, when provision was made for the future acquisition of a seat of government, exclusive legislation over the district that might be acquired for that purpose was conferred upon Congress.[1] In the same clause, the like authority was given over all places that might be purchased, with the consent of any State legislature, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.[2] All the other places to which the authority of the United States can extend are included under the term "territories," which are out of the limits and jurisdiction of any State. As this is a subject which is intimately connected with the power to admit new States into the Union, we are now to consider the origin and history of the authority given to Congress for that purpose.

In examining the powers of Congress contained in the first article of the Constitution, the reader will not find any power to admit new States into the Union;

[1] *Ante*, Chap. IX.

[2] Elliot, V. 510, 511, 512.

and while he will find there the full legislative authority to govern the District of Columbia and certain other places ceded to the United States for particular purposes, of which I have already spoken, he will find no such authority there conferred in relation to the territory which had become the property of the United States by the cession of certain of the States before and after the adoption of the Articles of Confederation. If this power of legislation exists as to the territories, it is to be looked for in another connection; and although it is not the special province of this work to discuss questions of construction, it is proper here to state the history of those portions of the Constitution which relate to this branch of the authority of Congress.

In the first volume of this work, I have given an account of the origin of the Northwestern Territory, of its relations to the Union, and of the mode in which the federal Congress had dealt with it down to the time when the national Convention was assembled.[1] From the sources there referred to, and from others to which reference will now be made, it may be convenient to recapitulate what had been done or attempted by the Congress of the Confederation.

It appears that during the preparation of the Articles of Confederation an effort was made to include in them a grant of express power to the United States in Congress to ascertain and fix the western boundaries of the existing States, and to lay out the

[1] *Ante*, Vol. I. Book III. ch. 5, p. 291 *et seq.*

territory beyond the boundaries that were to be thus ascertained into new States. This effort totally failed. It was founded upon the idea that the land beyond the rightful boundaries of the old States was already, or would by the proposed grant of power to ascertain those boundaries become, the common property of the Union. But the States, which then claimed an uncertain extension westward from their actual settlements, were not prepared for such an admission, or such a grant; and accordingly the Articles of Confederation, which were issued in 1777 and took effect in 1781, contained no express power to deal with landed property of the United States, and no provision which could safely be construed into a power to form and admit new States out of then unoccupied lands anywhere upon the continent. Still, the Articles were successively ratified by some of the States, and finally became established, in the express contemplation that the United States should be made the proprietor of such lands, by the cession of the States which claimed to hold them. In order to procure such cessions, as the means of inducing a unanimous accession to the confederacy, the Congress in 1780 passed a resolve, in which they promised to dispose of the lands for the common benefit of the United States, to settle and form them into distinct republican States, and to admit such States into the Union on an equal footing with its present members.[1] The great cession by Virginia, made in 1784, was immediately

[1] Resolve of October 10, 1780. Journals, VI. 325.

followed by another resolve, for the regulation of the territory thus acquired.[1]

This resolve, as originally reported by Mr. Jefferson, embraced a plan for the organization of temporary governments in certain States which it undertook to describe and lay out in the Western territory, and for the admission of those States into the Union. In one particular, also, it undertook, as it was first reported, to regulate the personal rights or relations of the settlers, by providing that, after the year 1800, slavery, or involuntary servitude except for crime, should not exist in any of the States to be formed in the territory. But this clause was stricken out before the resolve was passed, and its removal left the measure a mere provision for the political organization of temporary and permanent governments of States, and for the admission of such States into the Union. So far as personal rights or relations were involved in it, the settlers were authorized to adopt, for a temporary government, the constitution and laws of any one of the original States, but the laws were to be subject to alteration by their ordinary legislature. The conditions of their admission into the Union referred solely to their political relations to the United States, or to the rights of the latter as the proprietor of the ungranted lands.

In about a year from the passage of this measure introduced by Mr. Jefferson, and after he had gone on his mission to France, an effort was made by Mr. King to legislate on the subject of the immediate and

[1] Resolve of April 23, 1784. Journals, IX. 153.

perpetual exclusion of slavery from the States described in Mr. Jefferson's resolve. Mr. King's proposition was referred to a committee, but it does not appear that it was ever acted upon.[1] The cessions of Massachusetts and Connecticut followed, in 1785 and 1786. Within two years from this period, such had been the rapidity of emigration and settlement, and so inconvenient had become the plan of 1784, that Congress felt obliged to legislate anew on the whole subject of the Northwestern Territory, and proceeded to frame and adopt the Ordinance of July 13, 1787. This instrument not only undertook to make political organizations, and to provide for the admission of new States into the Union, but it also dealt directly with the rights of individuals. Its exclusion of slavery from the territory is well known as one of its fundamental articles, not subject to alteration by the people of the territory, or their legislature.[2]

The power of Congress to deal with the admission of new States was not only denied at the time, but its alleged want of such power was one of the principal reasons which were said to require a revision of the federal system. It does not appear that the subject of legislation on the rights or condition of persons attracted particular attention; nor do we know, from anything that has come down to us, that the clause relating to slavery was stricken from Mr. Jef-

[1] March 16, 1785. Journals, X. 79. See *ante*, Vol. I. p. 299.

[2] See the note on the authorship of the Ordinance of 1787, in the Appendix to this volume.

ferson's resolve in 1784, upon the special ground of a want of constitutional power to legislate on such a question. But Mr. Jefferson has himself informed us, that a majority of the States in Congress would not consent to construe the Articles of Confederation as if they had reserved to nine States in Congress power to admit new States into the Union from the territorial possessions of the United States; and that they so shaped his measure, as to leave the question of power and the rule for voting to be determined when a new State formed in the territory should apply for admission.[1] It seems, also, that although the power to frame territorial governments, to organize States and admit them into the Union, was assumed in the Ordinance of 1787, the Congress of the Confederation never acted upon the power so far as to admit a State.[2] Finally, we are told by Mr. Madison, in the Federalist, that all that had been done in the Ordinance by the Congress of the Confederation, including the sale of lands, the organization of governments, and the prescribing of conditions of admission into the Union, had been done "without the least color of constitutional authority";[3] — an assertion which, whether justifiable or not, shows that the power of legislation was by some persons strenuously denied.[4]

[1] *Ante*, Chap. IV. p. 77, note.

[2] See the proceedings concerning Kentucky, in 1788. Journals, XIII. 16, 32, 51, 52, 55.

[3] The Federalist, No. 38.

[4] The passage quoted from Mr. Jefferson, *ante*, p. 77, also shows that strong doubts were felt in Congress, in 1784, respecting their power to admit new States formed out of unoccupied territory. Indeed, the whole of the proceedings upon

With regard to the powers of Congress, under the Confederation, to erect new States in the Northwestern Territory, and to admit them into the Union, the truth seems to be this. There is no part of the Articles of Confederation which can be said to confer such a power; and, in fact, when the Articles were framed, the Union, although it then existed by an imperfect bond, not only possessed no such territory, but it did not then appear likely to become the proprietor of lands, claimed by certain of the States as the successors of the crown of Great Britain, and lying within what they regarded as their original chartered limits. The refusal of those States to allow the United States to determine their boundaries, made it unnecessary to provide for the exercise of authority over a public domain. But in the interval between the preparation of the Articles and their final ratification, a great change took place in the position of the Union. It was found that certain of the smaller States would not become parties to the Confederation, if the great States were to persist in their refusal to cede to the Union their claims to the unoccupied Western lands; and although the States which thus held themselves back, for a long time, from the ratification of the Articles, finally adopted them, before the cessions of Western territory were

Mr. Jefferson's measure of April 23, 1784, show that the powers of Congress over the territory that had been acquired under the cession of Virginia were very variously regarded by the different delegates. See Journals, IX. 138-156. The State of South Carolina voted against the resolve on its final passage, and after it had been modified to meet some of the objections raised.

made, they did so upon the most solemn assertion that they expected and confided in a future relinquishment of their claims by the other States. Those just expectations were fulfilled. By the acts of cession, and by the proceedings of Congress which invited them, the United States not only became the proprietors of a great public domain, but they received that domain upon the express trust that its lands should be disposed of for the common benefit, and that the country should be settled and formed into republican States, and that those States should be admitted into the Union. In these conveyances, made and accepted upon these trusts, there was a unanimous acquiescence by the States.

While, therefore, in the formal instrument under which the Congress was organized, and by which the United States became a corporate body, there was no article which looked to the admission of new States into that body, formed out of territory thus acquired, and no power was conferred to dispose of such lands or govern such territory, there were, outside of that instrument, and closely collateral to it, certain great compacts between the States, arising out of deeds of cession and the formal guaranties by which those cessions had been invited, and with which they had been received, which proceeded as if there were a competent authority in the United States in Congress to provide for the formation of the States contemplated, and for their admission into the Union. Strictly speaking, however, there was no such authority. It was to be gathered, if at all, from public

acts and general acquiescence, and could not be found in the instrument that formed the charter and established the powers of the Congress. It was an authority, therefore, liable to be doubted and denied; it was one for the exercise of which the Congress was neither well fitted nor well situated; and it was moreover so delicate, so extensive, and so different from all the other powers and duties of the government, as to make it eminently necessary to have it expressly stated and conferred in the instrument under which all the other functions of the government were to be exercised.[1]

Such was the state of things at the period of the formation of the Constitution; and as we are to look for the germ of every power embraced in that instru-

[1] I think we are to understand Mr. Madison's assertion in the Federalist, — that what had been done by Congress in relation to the Northwestern Territory was without constitutional authority, — to mean, that it had been done without the authority of any proper constitutional provision. Mr. Madison himself, being a member of Congress in 1783, voted for the acceptance of a report, by the adoption of which Congress settled the conditions on which the cession of Virginia was to be received by the United States. These conditions embraced the whole of the three fundamental points, that the territory should be held and disposed of for the common benefit of the United States, that it should be divided into States, and that those States should be admitted into the Union. So that Mr. Madison was a party to the arrangement by which Congress undertook to hold out these promises to the States. (Journals of Congress for September 13, 1783, VIII. 355 – 359.) But he was not a member of Congress in 1784, when Mr. Jefferson's measure was adopted; and although he was a member in 1787, when the Ordinance was adopted, he was at that time in attendance upon the national Convention, and consequently never voted upon the Ordinance. His participation in the proceedings of the Convention, by which the necessary power was created, shows his sense of its necessity.

ment in some stage of the proceedings which took place in the course of its preparation, it is important at once to resort to the first suggestion of any authority over these subjects. In doing so, we are to remember that the United States had accepted cessions of the Northwestern Territory, impressed with two distinct trusts: first, that the country should be settled and formed into distinct republican States, which should be admitted into the Union; secondly, that the lands should be disposed of for the common benefit of all the States.[1]

Accordingly, we find in the plan of government presented by Governor Randolph at the opening of the Convention, a resolution declaring "that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory or otherwise, with the consent of a number of voices in the national legislature less than the whole."[2] This resolution remained the same in phraseology and in purpose through all the stages to which the several propositions that formed the outline of the new government were subjected, down to the time when they were sent to the committee of detail for the purpose of having the Constitution drawn out. Looking to the manifest want of power

[1] See especially the cession by Virginia, of March 1, 1784. Journals of Congress, IX. 67. Cession by Massachusetts, April 19, 1785. Journals, X. 128. Cession by Connecticut, September 13, 1786. Journals, XI. 221. Also the resolve of Congress passed, in anticipation of these cessions, October 10, 1780. Journals, VI. 325.

[2] Resolution 10. Madison, Elliot, V. 128.

in the Confederation to admit new States into the Union; to the probability that Vermont, Kentucky, Tennessee (then called Franklin), and Maine, — none of which were embraced in any cessions that had then been made to the United States, — might become separate States; and to the prospective legislation of the Ordinance of 1787 concerning the admission of States that were to be formed in the territory northwest of the Ohio, which had been ceded to the Union; — it seems quite certain that the purpose of the resolution was to supply a power to admit new States, whether formed from the territory of one of the existing States, or from territory that had become the exclusive property of the United States. The resolution contained, however, no positive restriction, which would require the assent of any existing State to the separation of a part of its territory; but as the States to be admitted were to be those "lawfully arising," it is apparent that the original intention was that no present State should be dismembered without its consent. But in order to make this the more certain, the committee of detail, in the article in which they carried out the resolution, gave effect to its provisions in these words: — "New States lawfully constituted or established within the limits of the United States may be admitted, by the legislature, into this government; but to such admission the consent of two thirds of the members present in each house shall be necessary. If a new State shall arise within the limits of any of the present States, the consent of the legislatures of such

States shall be also necessary to its admission. If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the legislature may make conditions with the new States concerning the public debt which shall be then subsisting."[1]

In the first draft of the Constitution, therefore, there was contained a qualified power to admit new States, whether arising within the limits of any of the old States, or within the territory of the United States. But in this proposition there was a great omission; for although the States to be admitted were to be those lawfully arising, and such a State might be formed out of the territory of an existing State by the legislative power of the latter, yet it was not ascertained how a State was "lawfully to arise" in the territory of the United States. Nor was there, at present, any provision introduced into the Constitution by which Congress could dispose of the soil of the national domain. These as well as other omissions at once attracted the attention of Mr. Madison, who, as we have seen, held the opinion that the entire legislation of the old Congress in reference to the Northwestern Territory was without constitutional authority. Before the article which embraced the admission of new States was reached, he moved the following among other powers:[2] "to dispose of the unappropriated lands of the United States"; and "to institute temporary governments for new States aris-

[1] Art. XVII. of the draft prepared by the committee of detail. Elliot, V. 381.

[2] August 18. Elliot, Vol. V. p. 439.

ing therein." These propositions were referred to the committee of detail, but before any action upon them, the article previously reported by that committee was reached and taken up, and there ensued upon it a course of proceeding which resulted in the provisions that now stand in the third section of the fourth article of the Constitution.[1]

The first alteration made in the article reported by the committee was to strike out the clause which declared that the new States should be admitted on an equal footing with the old ones. The reason assigned for this change was, that the legislature ought not to be tied down to such an admission, as it might throw the balance of power into the Western States.[2] The next modification was to strike out the clause which required a vote of two thirds of the members present for the admission of a State.[3] This left the proposed article a mere grant of power to admit new States, requiring the consent of the legislature of any State that might be dismembered, as well as the consent of Congress. An earnest effort was then made, by some of the members from the smaller States, to remove this restriction, upon the ground that the United States, by the treaty of peace with England, had become the proprietor of the crown lands which were situated within the limits claimed by some of the States that would be likely to be divided; and it was urged, that to require the consent of Virginia, North Carolina, and Georgia to the separation of

[1] August 29. Elliot, V. 492–497.

[2] Ibid. 492, 493.

[3] Ibid. 493.

their Western settlements, might give those States an improper control over the title of the United States to the vacant lands lying within the jurisdiction claimed by those States, and would enable them to retain the jurisdiction unjustly, against the wish of the settlers. But a large majority of the States refused to concede a power to dismember a State, without its consent, by taking away even its claims to jurisdiction. It was considered by them, that as to municipal jurisdiction over settlements already made within limits claimed by Virginia, North Carolina, and Georgia, the Constitution ought not to interfere, without the joint consent of the settlers and the State exercising such jurisdiction; that if the title to lands unoccupied at the treaty of peace, lying within the originally chartered limits of any of the States, was in dispute between them and the United States, that controversy would be within the reach of the judicial power, as one between a State and the United States, or it might be terminated by a voluntary cession of the State claim to the Union.[1]

The next step taken in the settlement of this subject was to provide for the case of Vermont, which was then in the exercise of an independent sovereignty, although it was within the asserted limits of New York. It was thought proper, in this particular case, not to make the State of Vermont, already

[1] See the vote on a proposition moved by Mr. Carroll for a recommitment for the purpose of asserting in the Constitution the right of the United States to the lands ceded by Great Britain in the treaty of peace. New Jersey, Delaware, and Maryland alone voted for the recommitment. Elliot, V. 493, 494.

formed, dependent for her admission into the Union on the consent of New York. For this reason, the words "hereafter formed" were inserted in the article under consideration, and the word "jurisdiction" was substituted for "limits."[1] Thus modified, the article stood as follows: —

"New States may be admitted by the legislature into the Union; but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States, without the consent of the legislature of such State, as well as of the general legislature."

This provision was quite unsatisfactory to the minority. They wished to have the Constitution assert a distinct power in Congress to erect new States within, as well as without, the territory claimed by any of the States, and to admit such new States into the Union; and they also wished for a saving clause to protect the title of the United States to vacant lands ceded by the treaty of peace. Luther Martin accordingly moved a substitute article, embracing these two objects, but it was rejected.[2] A clause was then added to the article pending, which declared that no State should be formed by the junction of two or more States, or parts of States, without the consent of the States concerned, as well as the consent of Congress. This completed the substance of what is now the first clause of the third section of the fourth article of the Constitution.[3]

[1] Elliot, V. 495.

[2] Ibid. 496. New Jersey, Delaware, and Maryland, *ay*.

[3] When the Constitution was finally revised, the word "hereafter" was left out of the first clause

Mr. Carroll thereupon renewed the effort to introduce a clause saving the rights of the United States to vacant lands; and after some modification, he finally submitted it in these words: "Nothing in this Constitution shall be construed to alter the claims of the United States, or of the individual States, to the Western territory; but all such claims shall be examined into, and decided upon, by the Supreme Court of the United States." Before any vote was taken upon this proposition, however, Gouverneur Morris moved to postpone it, and brought forward as a substitute the very provision which now forms the second clause of the third section of article fourth, which he presented as follows: "The legislature 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 contained shall be so construed as to prejudice any claims, either of the United States or of any particular State." This provision was adopted, without any other dissenting vote than that of the State of Maryland.[1]

The purpose of this provision, as it existed at the time in the minds of the framers of the Constitution, must be gathered from the whole course of their proceedings with respect to it, and from the surrounding facts, which exhibit what was then, and what

of the third section of article fourth, apparently because the phraseology of the clause was sufficient, without it, to save the case of Vermont, which was regarded as not being within the "*jurisdiction*," although it was within the asserted *limits*, of the State of New York.

[1] Elliot, V. 496, 497.

was afterwards likely to become, the situation of the United States in reference to the acquisition of territory and the admission of new States. There were, then, at the time when this provision was made, four classes of cases in the contemplation of the Convention. The first consisted of the Northwestern Territorry, in which the title to the soil and the political jurisdiction were already vested in the United States. The second embraced the case of Vermont, which was then exercising an independent jurisdiction adversely to the State of New York, and the case of Kentucky, then a district under the jurisdiction of Virginia; in both of which the United States neither claimed nor sought to acquire either the title to the vacant lands or the rights of political sovereignty, but which would both require to be received as new and separate States, the former without the consent of New York, the latter with the consent of Virginia. The third class comprehended the cessions which the United States in Congress were then endeavoring to obtain from the States of North Carolina, South Carolina, and Georgia, and in which were afterwards established the States of Tennessee, Mississippi, and Alabama.[1] These cessions, as it then appeared,

[1] The cession by South Carolina of all its "right, title, interest, jurisdiction, and claim" to the "territory or tract of country" lying, within certain northern and southern limits, between the western boundary of that State and the river Mississippi, was in fact made and accepted in Congress, August 9 – 10, 1787, twenty days before the territorial clause was finally settled in the Convention, which took place August 30. (Journals of the Old Congress, XII. 129 – 139. Madison, Elliot, V. 494 – 497.) On the 20th of October of the same year, the Congress passed a resolution urging the States of North Carolina

might or might not all be made. If made, the title of the United States to the unoccupied lands would be complete, resting both upon the cessions and upon the treaty of peace with England; and the political jurisdiction over the existing settlements, as well as over the whole territory, would be transferred with the cessions, subject to any conditions which the ceding States might annex to their grants. If the cessions should not be made, the claims of the United States to the unoccupied lands would stand upon the treaty of peace, and would require to be saved by some clause in the Constitution which should signify that they were not surrendered; while the claims of the respective States would require to be protected in like manner.

The reader will now be prepared to understand the following explanation of the third section of the fourth article of the Constitution. First, with reference to the Northwestern Territory, the soil and jurisdiction of which was already completely vested in the United States, it was necessary that the Constitution should confer upon Congress power to exercise the political jurisdiction of the United States, power to dispose of the soil, and power to admit new States that might be formed there into the Union. Secondly, with reference to such cases as that of Vermont, it was necessary that there should be a

and Georgia to cede their Western claims. This request was not complied with until after the Constitution had gone into operation. The cession of North Carolina was made February 25, 1790; that of Georgia, April 24, 1802.

power to admit new States into the Union without requiring the assent of any other State, when such new States were not formed within the actual jurisdiction of any other State. Thirdly, with reference to such cases as that of Kentucky, which would be formed within the actual jurisdiction of another State, it was necessary that the power to admit should be qualified by the condition of the consent of that State. Fourthly, with reference to such cessions as were expected to be made by North Carolina, South Carolina, and Georgia, it was necessary to provide the power of political government, the power to admit into the Union, and the power to dispose of the soil, if the cessions should be made; and at the same time to save the claims of the United States and of the respective States as they then stood, if the cessions anticipated should not be made. None of these cases, however, were specifically mentioned in the Constitution, but general provisions were made, which were adapted to meet the several aspects of these cases. From the generality of these provisions, it is held by some that the clause which relates to "the territory or other property of the United States," was intended to be applied to all cessions of territory that might ever be made to the United States, as well as to those which had been made, or which were then specially anticipated; while others give to the clause a much narrower application.[1]

[1] It is not my purpose to enter into the argument on this question. I have recently had occasion professionally to maintain that the territorial clause is applicable to all territorial cessions made to the United

There now remain to be considered the restraints imposed upon the exercise of the powers of Congress, both within the States and in all other places; both where the authority of the United States is limited to certain special objects, and where it is unlimited and universal, excepting so far as it is narrowed by these constitutional restraints. Some of them I have already described, in tracing the manner in which they were introduced into the Constitution. We have seen how far the commercial and revenue powers became limited in respect to the slave-trade, to taxes on exports, to preferences between the ports of different States, and to the levying of capitation or other direct taxes. These restrictions were applicable to these special powers. But others were introduced, which apply to the exercise of all the powers of Congress, and are in the nature of limitations upon its general authority as a government.

One of these is embraced in the provision, "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."[1] The common law of England, which recognizes the right to the writ of habeas corpus for the purpose of deliv-

States, whether by States of the Union or by foreign States, and that it clothes the government with a full legislative power over such territories and their inhabitants, which is subject only to the particular restrictions enumerated in the Constitution, or provided for in the cessions. Perhaps it is needless for me to add that I entertain this opinion. But it is rejected by others, and, in the present state of judicial interpretation of this part of the Constitution, by the supreme tribunal, it is not easy to determine what will finally become the settled construction.

[1] Constitution, Art. I. § 9, cl. 2.

ery from illegal imprisonment or restraint, was the law of each of the American States; and it appears from the proceedings of the Convention to have been the purpose of this provision to recognize this right, in the relations of the people of the States to the general government, and to secure and regulate it. The choice lay between a declaration of the existence of the right, making it inviolable and absolute, under all circumstances, and a recognition of its existence by a provision which would admit of its being suspended in certain emergencies. The latter course was adopted, although three of the States recorded their votes against the exception of cases of rebellion or invasion.[1]

The prohibition upon Congress to pass bills of attainder, or *ex post facto* laws, came into the Constitution at a late period, and while the first draft of it was under consideration. Bills of attainder, in the jurisprudence of the common law, are acts of legislation inflicting punishment without a judicial trial. The proposal to prohibit them was received in the Convention with unanimous assent. With regard to the other class of legislative acts, described as "*ex post facto* laws," there was some difference of opinion, in consequence probably of different views of the extent of the term. In the common law, this expression included only, then and since, laws which punish as crimes acts which were not punishable as crimes when they were committed. Laws of a civil nature,

[1] See Elliot, V. 484. The three States were North Carolina, South Carolina, and Georgia.

retrospective in their operation upon the civil rights and relations of parties, were not embraced by this term, according to the definition of English jurists. But it is manifest from what was said by different members, that, at the time when the vote was taken which introduced this clause into the Constitution, the expression "*ex post facto* laws" was taken in its widest sense, embracing all laws retrospective in their operation. It was objected, therefore, that the prohibition was unnecessary, since, upon the first principles of legislation, such laws are void of themselves, without any constitutional declaration that they are so. But experience had proved that, whatever might be the principles of civilians respecting such laws, the State legislatures had passed them, and they had been acted on. A large majority of the Convention determined, therefore, to place this restraint upon the national legislature, and at the time of the vote I think it evident that all retrospective laws, civil as well as criminal, were understood to be included.[1] But when the same restraint came afterwards to be imposed upon the State legislatures, the attention of the assembly was drawn to the distinction between criminal laws and laws relating to civil interests. In order to reach and control retrospective laws operating upon the civil rights of parties, when passed by a State, a special description was employed to designate them, as "laws impairing the obligation of contracts," and the term "*ex post facto* laws" was thus confined to laws creating and punishing criminal offences after

[1] Elliot, V. 462, 463.

the acts had been committed.[1] What is now the settled construction of this term, therefore, is in accordance with the sense in which it was finally intended to be used by the framers of the Constitution before the instrument passed from their hands.

The committee of detail had reported in their draft of the Constitution a clause which restrained the United States from granting any title of nobility. The Convention, for the purpose of preserving all officers of the United States independent of external influence, added to this a provision that no person holding an office of profit or trust under the United States shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.[2]

In addition to the special powers conferred by the Constitution upon the national government, it has imposed certain restraints on the political power of the States, which qualify and diminish what would otherwise be the unlimited sovereignty of each of them. These restraints are of two classes; — a part of them being designed to remove all obstructions that might be placed by State legislation or action in the way of the appropriate exercise of the powers vested in the United States, and a part of them being intended to assimilate the nature of the State governments to that of the Union, by the application of certain maxims or rules of public policy. These restraints may now be briefly examined, with reference to this classification.

[1] Elliot, V. 488. [2] Ibid. 467. Constitution, Art. I. § 9, cl. 8.

The idea of imposing special restrictions upon the power of the separate States was not expressly embraced in the plan of government described by the resolutions on which the committee of detail were instructed to prepare the instrument of government. Such restrictions, however, were not unknown to the previous theory of the Union. They existed in the Articles of Confederation, where they had been introduced with the same general purpose of withdrawing from the action of the States those objects, which, by the stipulations of that instrument, had been committed to the authority of the United States in Congress. But the inefficacy of those provisions lay in the fact, that they were the mere provisions of a theory. The step now proposed to be taken was to superadd to the prohibitions themselves the principle of their supremacy as matters of fundamental law, and to enable the national judiciary to make that supremacy effectual.

Almost all the restraints imposed by the Articles of Confederation upon the States could be removed or relaxed by the consent of the Congress to the doing of what was otherwise prohibited. In the first draught of the Constitution, the committee of detail inserted four absolute prohibitions, which could not be removed by Congress itself. These related to the coining of money, the granting of letters of marque and reprisal, the making of treaties, alliances, and confederations, and the granting of titles of nobility. All the other restraints on the States were to be operative or inoperative, according to

the pleasure of Congress.[1] Among these were included bills of credit; laws making other things than specie a tender in payment of debts; the laying of imposts or duties on imports; the keeping of troops or ships of war in time of peace; the entering into agreements or compacts with other States, or with foreign powers; and the engaging in war, when not invaded, or in danger of invasion before Congress could be consulted. The enactment of attainder and *ex post facto* laws, and of laws impairing the obligation of contracts, was not prohibited at all.

But when these various subjects came to be regarded more closely, it was perceived that the list of absolute prohibitions must be considerably enlarged. Thus the power of emitting bills of credit, which had been the fruitful source of great evils, must either be taken away entirely, or the contest between the friends and the opponents of paper money would be transferred from the State legislatures to Congress, if Congress should be authorized to sanction the exercise of the power. Fears were entertained that an absolute prohibition of paper money would excite the strenuous opposition of its partisans against the Constitution; but it was thought best to take this opportunity to crush it entirely; and accordingly the votes of all the States but two were given to a proposition to prohibit absolutely the issuing of bills of credit.[2] To the same

[1] Articles XII., XIII. of the first draft, Elliot, V. 381.

[2] Elliot, V. 484, 485.

class of legislation belonged the whole of that system of laws by which the States had made a tender of certain other things than coin legal satisfaction of a debt. By placing this class of laws under the ban of a strict prohibition, not to be removed by the consent of Congress in any case, the mischiefs of which they had been a fruitful source would be at once extinguished. This was accordingly done, by unanimous consent.[1]

At this point, the kindred topic of the obligation of contracts presented itself to the mind of Rufus King, suggested doubtless by a provision in the Ordinance then recently passed by Congress for the government of the Northwestern Territory.[2] The idea of a special restraint on legislative power, for the purpose of rendering inviolate the obligation of contracts, appears to have originated with Nathan Dane, the author of that Ordinance. It was not embraced in the resolve of 1784, reported by Mr. Jefferson, which contained the first scheme adopted by Congress for the establishment of new States in the Northwestern Territory; and it first appears in our national legislation in the Ordinance of 1787. Its transfer thence into the Constitution of the United States was a measure of obvious ex-

[1] Elliot, V. 484, 485.

[2] The Ordinance, which was passed July 13, was published at length in "The Pennsylvania Herald," a newspaper printed at Philadelphia, on the 25th of July (1787). Mr. King's motion was made August 28, and is described by Mr. Madison as a motion "to add, in the words used in the Ordinance of Congress establishing new States, a prohibition on the States to interfere in private contracts." Elliot, V. 485.

pediency, and indeed of clear necessity. In the Ordinance, Congress had provided a system of fundamental law, intended to be of perpetual obligation, for new communities, whose legislative power was to be moulded by certain original maxims of assumed justice and right. The opportunity thus afforded for shaping the limits of political sovereignty according to the requirements of a preconceived policy, enabled the framers of the Ordinance to introduce a limitation, which is not only peculiar to American constitutional law, but which, like many features of our institutions, grew out of previous abuses.

In the old States of the Confederacy, from the time when they became self-governing communities, the power of a mere majority had been repeatedly exercised in legislation, without any regard to its effect on the civil rights and remedies of parties to existing contracts. The law of debtor and creditor was not only subjected to constant changes, but the nature of the change depended in many of the States upon the will of the debtor class, who formed the governing majority. So pressing were the evils thus engendered, that, when the framers of the Ordinance came to provide for the political existence of communities whose institutions they were to dictate, they determined to impose an effectual restraint on legislative power; and they accordingly provided, in terms much more stringent than were afterwards employed in the Constitution, that no law should have effect in the Territory which should

in any manner whatever interfere with or affect private contracts or engagements previously made.[1]

The framers of the Constitution were not engaged in the same work of creating new political societies, but they were to provide for such surrenders by existing States of their present unquestioned legislative authority, as the dictates of sound policy and the evils of past experience seemed to require. When this subject was first brought forward in the Convention, the restriction was made to embrace all retrospective laws bearing upon contracts, which were supposed to be included in the term "*ex post facto* laws." It being ascertained, however, that the latter phrase would not, in its usual acceptation, extend to civil cases, it became necessary to consider how such cases were to be provided for, and how far the prohibition should extend. The provision of the Ordinance was regarded as too sweeping; no legislature, it was said, ever did or can altogether avoid some retrospective action upon the civil relations of parties to existing contracts, and to require it would be extremely inconvenient. At length, a description was found, which embodied the extent to which the prohibition could with propriety be carried. The legislatures of the States were restrained from passing any "law impairing the obligation of contracts"; —a provision that has been found amply sufficient, and attended with the most salutary consequences, under the interpretation that has been given to it.[2]

[1] See the clause of the Ordinance, cited *ante*, Vol. I. p. 452, note 2.

[2] Elliot, V. 485, 488, 545, 546.

Bills of attainder and *ex post facto* laws, which had not been included in the prohibitions on the States by the committee of detail, were added by the Convention to the list of positive restrictions, which was thus completed.

In the class of conditional prohibitions, or those acts which might be done by the States with the consent of Congress, the committee of detail had placed the laying of "imposts or duties on imports." To this the Convention added "exports," in order to make the restriction applicable both to commodities carried out of and those brought into a State. But this provision, as thus arranged, would obviously make the commercial system extremely complex and inconvenient. On the one hand, the power to lay duties on imports had been conferred upon the general government, for the purposes of revenue, and to leave the States at liberty, with the consent of Congress, to lay additional duties, would subject the same merchandise to separate taxation by two distinct governments. On the other hand, if the States should be deprived of all power to lay duties on exports, they would have no means of defraying the charges of inspecting their own productions. At the same time, it was apparent that, under the guise of inspection laws, if such laws were not to be subject to the revision of Congress, a State situated on the Atlantic, with convenient seaports, could lay heavy burdens upon the productions of other States that might be obliged to pass through those ports to foreign markets. Again, if the States should be de-

prived of all power to lay duties on imports, they could not encourage their own manufactures; and if allowed to encourage their own manufactures by such State legislation, it must operate not only upon imports from foreign countries, but upon imports from other States of the Union, which would revive all the evils that had flowed from the want of general commercial regulations. To prevent these various mischiefs, the Convention adopted three distinct safeguards. They provided, first, by an exception, that the States might, without the consent of Congress, lay such duties and imposts as "may be absolutely necessary for executing their inspection laws"; second, that the net produce of all duties and imposts laid by any State, whether with or without the consent of Congress, shall be for the use of the Treasury of the United States; third, that all such State laws, whether passed with or without the previous consent of Congress, shall be subject to the revision and control of Congress.[1] There is, therefore, a twofold remedy against any oppressive exercise of the State power to lay duties for purposes of inspection. The question whether the particular duties exceed what is absolutely necessary for the execution of an inspection law, may be made a judicial question; and in addition to this, the law imposing the inspection duty is at all times subject to the revision and control of Congress. Any tendency to lay duties or imposts for purposes of revenue or protection, is checked by the requirement that the net produce

[1] Elliot, V. 479, 484, 486, 502, 538, 539, 540, 545, 548.

of all duties or imposts laid by any State on imports or exports shall be paid over to the United States, and such tendency may moreover be suppressed by Congress at any time, by the exercise of its power of revision and control.

In order to vest the supervision and control of the whole subject of navigation in Congress, it was further provided that no State, without the consent of Congress, shall lay any duty of tonnage. An exception, proposed by some of the Maryland and Virginia members, with a view to the situation of the Chesapeake Bay, illustrates the object of this provision. They desired that the States might not be restrained from laying duties of tonnage "for the purpose of clearing harbors and erecting light-houses." It was perhaps capable of being contended, that, as the regulation of commerce was already agreed to be vested in the general government, the States were restrained by that general provision from laying tonnage duties. The object of the special restriction was, to make this point entirely certain; and the object of the proposed exception was to divide the commercial power, and to give the States a concurrent authority to regulate tonnage for a particular purpose. But a majority of the States considered the regulation of tonnage an essential part of the regulation of trade. They adopted the suggestion of Mr. Madison, that the regulation of commerce was, in its nature, indivisible, and ought to be wholly under one authority. The exception was accordingly rejected.[1]

[1] By a vote of six States against four. Elliot, V. 548.

The same restriction, with the like qualification of the consent of Congress, was applied to the keeping of troops or ships of war in time of peace, entering into agreements or compacts with another State or a foreign power, or engaging in war, unless actually invaded or in such imminent danger as will not admit of delay.[1]

[1] Elliot, V. 548.

CHAPTER XII.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — SUPREMACY OF THE NATIONAL GOVERNMENT. — DEFINITION AND PUNISHMENT OF TREASON.

AMONG the resolutions sent to the committee, there were four which had reference to the supremacy of the government of the United States. They declared that it ought to consist of a supreme legislative, executive, and judiciary; — that its laws and treaties should be the supreme law of the several States, so far as they related to the States or their citizens and inhabitants, and that the judiciaries of the States should be bound by them, even against their own laws; — that the officers of the States, as well as of the United States, should be bound by oath to support the Articles of Union; — and that the question of their adoption should be submitted to assemblies of representatives to be expressly chosen by the people of each State under the recommendation of its legislature.[1]

In order to give effect to these precise and stringent directions, the committee of detail introduced into their draft of a constitution a preamble; two

[1] These were the 1st, 7th, 20th, and 21st of the resolutions. *Ante*, p. 190 *et seq.*, note.

articles asserting and providing for the supremacy of the national government; a provision for the oath of officers; and a declaration of the mode in which the instrument was intended to be ratified.

The preamble of the Constitution, as originally reported by this committee, differed materially from that subsequently framed and adopted. It spoke in the name of the people of the States of New Hampshire, Massachusetts, &c., who were said "to ordain, declare, and establish this Constitution for the government of ourselves and our posterity"; and it stated no special motives for its establishment. In this form it was unanimously adopted on the 7th of August. But when, at a subsequent period, the instrument was sent to another committee, whose duty it was to revise its style and arrangement, this phraseology was changed, and the preamble was made to speak in the name of the people of the United States, and to declare the purposes for which *they* ordained and established the Constitution.[1] The language thus employed in the preamble has justly been considered as having an important connection with the provisions made for the ratification of the instrument to which it was prefixed.

The articles specially designed to assert and carry out the supremacy of the national government, as they came from the committee, embodied the resolu-

[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 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."

tions on the same subject which had passed the Convention. The only material addition consisted in the qualification, that the legislative acts of the United States, which were to be the supreme law, were such as should be made in pursuance of the Constitution. Subsequently, the article was so amended as to make the Constitution, the laws passed in pursuance of it, and the treaties of the United States, the supreme law of the land, binding upon all judicial officers.[1]

It is a remarkable circumstance, that this provision was originally proposed by a very earnest advocate of the rights of the States, — Luther Martin. His design, however, was to supply a substitute for a power over State legislation, which had been embraced in the Virginia plan, and which was to be exercised through a negative by the national legislature upon all laws of the States contravening in their opinion the Articles of Union, or the treaties subsisting under the authority of the Union.[2] The purpose of the substitute was to change a legislative into a judicial power, by transferring from the national legislature to the judiciary the right of determining whether a State law, supposed to be in conflict with the Constitution, laws, or treaties of the Union, should be inoperative or valid. By extending the obligation to regard the requirements of the national Constitution and laws to the judges of the State tribunals, their supremacy in all the judicatures of the country was secured. This obligation was

[1] The Constitution, Art. VI. [2] July 17. Elliot, V. 322. (See Appendix.)

enforced by the oath or affirmation to support the Constitution of the United States;[1] and, as we shall see hereafter, lest this security should fail, the final determination of questions of this kind was drawn to the national judiciary, even when they might have originated in a State tribunal.[2]

Closely connected in purpose with these careful provisions was the mode in which the Constitution was to be ratified. The committtee of detail had made this the subject of certain articles in the Constitution itself.[3] But the committee of revision afterwards presented certain resolutions in the place of two of those articles, which were adopted by the Convention after the Constitution had been signed; leaving in the instrument itself nothing but the article which determined the number of States whose adoption should be sufficient for establishing it.[4] These resolutions pursued substantially the mode previously agreed upon, of a transmission of the instrument to Congress, a recommendation by the State legislatures to the people to institute representative assemblies to consider and decide on its adoption, and a notice of their action to Congress by each State assembly so adopting it. The purpose of this form of proceeding, so far as it was connected with the primary authority by which the Constitution was to be enacted, has been already explained.[5]

[1] The Constitution. Art. VI.

[2] Ibid. Art. III. § 2.

[3] Articles XXI., XXII., XXIII. of their draft. Elliot, V. 381.

[4] The Constitution, Art. VII.

[5] *Ante*, p. 177, *et seq.* The resolutions may be found in Elliot, V. 541 (Sept. 13). But the pro-

What then were the meaning and scope of that supremacy which the framers of the Constitution designed to give to the acts of the government which they constructed?

In seeking an answer to this question, it is necessary to recur, as we have constantly been obliged to do, to the nature of the government which the Constitution was made to supersede. In that system, the experiment had been tried of a union of States, — each possessed of a complete government of its own, — which was intended to combine their several energies for the common defence and the promotion of the general welfare. But this combined will of distinct communities, expressed through the action of a common agent, was wholly unable to overcome the adverse will of any of them expressed by another and separate agent, although the objects of the powers bestowed on the confederacy were carefully stated and sufficiently defined in a public compact. Thus, for example, the treaty-making power was expressly vested in the United States in Congress assembled; but when a treaty had been made, it depended entirely upon the separate pleasure of each State whether it should be executed. If the State govern-

ceedings on them are not found in Mr. Madison's Minutes, or in the Journal of the Convention. The official record of their unanimous adoption was laid before Congress on the 28th of September, 1787, and it bears date September 17th. It recites the presence in Convention of all the States that attended excepting New York, and in the place of that *State* stands "Mr. Hamilton *from* New York." This record precedes the official letter addressed by the Convention to Congress. See Journals of Congress for September 28, 1787, Vol. XII. pp. 149 – 165.

ments did not see fit to enforce its provisions upon their own citizens, or thought proper to act against them, there was no remedy, both because the Congress could not legislate to control individuals, and because there was no department clothed with authority to compel individuals to conform their conduct to the requirements of the treaty, and to disregard the opposing will of the State.

This defect was now to be supplied, by giving to the national authority, not only theoretically but practically, a supremacy over the authority of each State. But this was not to be done by annihilating the State governments. The government of every State was to be preserved; and so far as its original powers were not to be transferred to the general government, its authority over its own citizens and within its own territory must, from the nature of political sovereignty, be supreme. There were, therefore, to be two supreme powers in the same country, operating upon the same individuals, and both possessed of the general attributes of sovereignty. In what way, and in what sense, could one of them be made paramount over the other?

It is manifest that there cannot be two supreme powers in the same community, if both are to operate upon the same objects. But there is nothing in the nature of political sovereignty to prevent its powers from being distributed among different agents for different purposes. This is constantly seen under the same government, when its legislative, executive, and judicial powers are exercised through different

officers; and in truth, when we come to the law-giving power alone, as soon as we separate its objects into different classes, it is obvious that there may be several enacting authorities, and yet each may be supreme over the particular subject committed to it by the fundamental arrangements of society. Supreme laws, emanating from separate authorities, may and do act on different objects without clashing, or they may act on different parts of the same object with perfect harmony. They are inconsistent when they are aimed at each other, or at the same indivisible object.[1] When this takes place, one or the other must yield; or, in other terms, one of them ceases to be supreme on the particular occasion. It was the purpose of the framers of the Constitution of the United States to provide a paramount rule, that would determine the occasions on which the authority of a State should cease to be supreme, leaving that of the United States unobstructed. Certain conditions were made necessary to the operation of this rule. The State law must conflict with some provision of the Constitution of the United States, or with a law of the United States enacted in pursuance of the constitutional authority of Congress, or with a treaty duly made by the authority of the Union. The operation of this rule constitutes the supremacy of the national government. It was supposed that, by a careful enumeration of the objects to which the national authority was to extend, there would be no

[1] See a speech made by Hamilton in the Convention of New York. Works, II. 462.

uncertainty as to the occasions on which the rule was to apply; and as all other objects were to remain exclusively subject to the authority of the States within their respective territorial limits, the operation of the rule was carefully limited to those occasions.

The highly complex character of a system in which the duties and rights of the citizen are thus governed by distinct sovereignties, would seem to render the administration of the central power — surrounded as it is by jealous and vigilant local governments — an exceedingly difficult and delicate task. Its situation is without an exact parallel in any other country in the world. But it possesses the means which no government of a purely federal character has ever enjoyed, of an exact determination by itself of its own powers; because every conflict between its authority and the authority of a State may be made a judicial question, and as such is to be solved by the judicial department of the nation. This peculiar device has enabled the government of the United States to act successfully and safely. Without it, each State must have been left to determine for itself the boundaries between its own powers and those of the Union; and thus there might have been as many different determinations on the same question as the number of the States. At the same time, this very diversity of interpretation would have deprived the general government of all power to enforce, or even to have, an interpretation of its own. Such a confused and chaotic condition had marked the entire history of the Con-

federation. It was terminated with the existence of that political system, by the establishment of the rule which provides for the supremacy of the Constitution of the United States, and by making one final arbiter of all questions arising under it.

By means of this skilful arrangement, a government, in which the singular condition is found of separate duties prescribed to the citizen by two distinct sovereignties, has operated with success. That success is to be measured not wholly, or chiefly, by the diversities of opinion on constitutional questions that may from time to time prevail; nor by the means, aside from the Constitution, that may sometimes have been thought of for counteracting its declared interpretation; but by the practical efficiency with which the powers of the Union have operated, and the general readiness to acquiesce in the limitations given to those powers by the department in which their construction is vested. This general acquiescence has steadily increased, from the period when the government was founded until the present day; and it has now come to be well understood, that there is no alternative to take the place of a ready submission to the national will, as expressed by or under the Constitution interpreted by the proper national organ, excepting a resort to methods that lie wholly without the Constitution, and that would completely subvert the principles on which it was founded. For while it is true that the people of each State constitute the sovereign power by which the rights and duties of its

inhabitants not involved in the Constitution of the United States are to be exclusively governed, it is equally true that they do not constitute the whole of the sovereign power which governs those relations of its inhabitants that are committed to the national legislature. The framers of the Constitution resorted to an enactment of that instrument by the people of the United States, and employed language which speaks in their name, for the express purpose, among other things, of bringing into action a national authority, on certain subjects. The organs of the general government, therefore, are not the agents of the separate will of the people of each State, for certain specified purposes, as its State government is the agent of their separate will for all other purposes; but they are the agents of the will of a collective people, of which the inhabitants of a State are only a part. That the will of the whole should not be defeated by the will of a part, was the purpose of the supremacy assigned to the Constitution of the United States; and that the rights and liberties of each part, not subject to the will of the whole, should not be invaded, was the purpose of the careful enumeration of the objects to which that supremacy was to extend.

In this supremacy of the national government within its proper sphere, and in the means which were devised for giving it practical efficiency, we are to look for the chief cause that has given to our system a capacity of great territorial extension. It is a system in which a few relations of the inhabitants

of distinct States are confided to the care of a central authority; while, for the purpose of securing the uniform operation of certain principles of justice and equality throughout the land, particular restraints are imposed on the power of the States. With these exceptions, the several States remain free to pursue such systems of legislation as in their own judgment will best promote the interest and welfare of their inhabitants. Such a division of the political powers of society admits of the union of far greater numbers of people and communities, than could be provided for by a single representative government, or by any other system than a vigorous despotism. Many of the wisest of the statesmen of that period, as we now know, entertained serious doubts whether the country embraced by the thirteen original States would not be too large for the successful operation of a republican government, having even so few objects committed to it as were proposed to be given to the Constitution of the United States. If those objects had been made to embrace all the relations of social life, it is extremely probable that the original limits of the Union would have far exceeded the capacities of a republican and representative government, even if the first difficulties arising from the differences of manners, institutions, and local laws could have been overcome.

But these very differences may be, and in fact have been, made a means of vast territorial expansion, by the aid of a principle which has been placed at the

foundation of the American Union. Let a number of communities be united under a system which embraces the national relations of their inhabitants, and commits a limited number of the objects of legislation to the central organs of a national will, leaving their local and domestic concerns to separate and local authority, and the growth of such a nation may be limited only by its position on the surface of the earth. The ordinary obstacles arising from distance, and the physical features of the country, may be at once overcome for a large part of the purposes of government, by this division of its authority. The wants and interests of civilized life, modified into almost endless varieties, by climate, by geographical position, by national descent, by occupation, by hereditary customs, and by the accidental relations of different races, may in such a state of things be governed by legislation capable of exact adaptation to the facts with which it has to deal. In this way, separate States under the republican form may be multiplied indefinitely.

Now what is required in order to make such a multiplication of distinct States at the same time a national growth, is the operation of some principle that will preserve their national relations to the control of a central authority. This is effected by the supremacy of the Constitution of the United States, against which no separate State power can be exerted. This supremacy secures the republican form of government, the same general principles and maxims of justice, and the same limitations between

State and national authority, throughout all the particular communities; while, at the same time, it regulates by the same system of legislation, applied throughout the whole, the rights and duties of individuals that are committed to the national authority. It was for the want of this supremacy and of the means of enforcing it, that the Confederation, and all the other federal systems of free government known in history, had failed to create a powerful and effective nationality; and it is precisely this, which has enabled the Constitution of the United States to do for the nation what all other systems of free government had failed to accomplish.

In this connection, it seems proper to state the origin and purpose of that definition of treason which is found in the Constitution, and which was placed there in order, on the one hand, to defend the supremacy of the national government, and on the other, to guard the liberty of the citizen against the mischiefs of constructive definitions of that crime. No instructions had been given to the committee of detail on this subject. They, however, deemed it necessary to make some provision that would ascertain what should constitute treason against the United States. They resorted to the great English statute of the 25th Edward III.; and from it they selected two of the offences there defined as treason, which were alone applicable to the nature of the sovereignty of the United States. The statute, among a variety of other offences, denominates as treason the levying of war against the king in his

realm, and the adhering to the king's enemies in his realm, giving them aid and comfort in the realm, or elsewhere.[1] The levying of war against the government, and the adhering to the public enemy, giving him aid and comfort, were crimes to which the government of the United States would be as likely to be exposed as any other sovereignty; and these offences would tend directly to subvert the government itself. But to compass the death of the chief magistrate, to counterfeit the great seal or the coin, or to kill a judge when in the exercise of his office, however necessary to be regarded as treason in England, were crimes which would have no necessary tendency to subvert the government of the United States, and which could therefore be left out of the definition of treason, to be punished according to the separate nature and effects of each of them. The committee accordingly provided that "treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them."[2]

But here, it will be perceived, two errors were committed. The first was, that the levying of war against a State was declared to be treason against the United States. This opened a very intricate question, and loaded the definition with embarrassment; for, however true it might be, in some cases, that an attack on the sovereignty of a State might

[1] 4 Blackstone's Com., Book IV. ch. 6.

[2] Art. VI. § 2 of the first draft of the Constitution. Elliot, V. 379.

tend to subvert or endanger the government of the United States, yet a concerted resistance to the laws of a State, which is one of the forms of "levying war" within the meaning of that phrase, might have in it no element of an offence against the United States, and might have no tendency to injure their sovereignty. Besides, if resistance to the government of a State were to be made treason against the United States, the offender, as was well said by Mr. Madison, might be subject to trial and punishment under both jurisdictions.[1] In order, therefore, to free the definition of treason of all complexity, and to leave the power of the States to defend their respective sovereignties without embarrassment, the Convention wisely determined to make the crime of treason against the United States to consist solely in acts directed against the United States themselves.

The other error of the committee consisted in omitting from the definition the qualifying words of the statute of Edward III., "giving them aid and comfort," which determine the meaning of "adhering" to the public enemy.[2] These words were added by the Convention, and the crime of treason against the United States was thus made to consist in levying war against the United States, or in adhering to *their* enemies by the giving of aid and comfort.[3]

With respect to the nature of the evidence of this

[1] Elliot, V. 450.

[2] The effect of these words is as if the statute read "adhering to the enemy *by* giving him aid and comfort," and not as if they were two separate offences.

[3] See the debate, Elliot, V. 447–451.

crime, the committee provided that no person should be convicted of treason unless on the testimony of two witnesses. But to make this more definite, it was provided by an amendment, that the testimony of the two witnesses should be to the same overt act; and also that a conviction might take place on a confession made in open court. The punishment of treason was not prescribed by the Constitution, but was left to be declared by the Congress; with the limitation, however, that no attainder of treason should work corruption of blood, or forfeiture, except during the life of the person attainted.[1]

[1] Ibid. Art. III. § 3 of the Constitution.

CHAPTER XIII.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — ELECTION AND POWERS OF THE PRESIDENT.

IN describing the manner in which the Constitution and powers of the Senate were finally arranged, I have already had occasion to state, that, after the report of the committee of detail came in, — vesting the appointment of the President in the national legislature, creating a term of seven years, and making the incumbent ineligible a second time, — a direct election by the people was negatived by a large majority. This mode of election, as a means of removing the appointment from the legislature, would have been successful, but it was inadmissible on other accounts. In the first place, it would have given to the government a character of complete consolidation, so far as the executive department was concerned, to have vested the election in the people of the United States as one community. In the second place, not only would the States, as sovereignties, have been excluded from representation in this department, but the slaveholding States would have had a relative weight in the election only in the proportion of their free inhabitants. On the other hand, to provide that the executive should be appointed by

electors, to be chosen by the people of the States, involved the necessity of prescribing some rule of suffrage for the people of all the States, or of adopting the existing rules of the States themselves. Probably it was on account of this embarrassment, that a proposition for electors to be chosen in this mode was negatived, by a bare majority, soon after the vote rejecting a direct election of the President by the people.[1] There remained the alternatives of an election by one or both of the houses of Congress, or by electors appointed by the States in a certain ratio, or by electors appointed by Congress. The difficulty of selecting from these various modes led the Convention to adhere to an election by the two houses; and when the disadvantages of this plan, already described, had developed the necessity for some other mode of appointment, the relations between the Senate and the executive were, as we have seen, sent to a grand committee, who devised a scheme for their adjustment.

In this plan it was proposed that each State should appoint, in such manner as its legislature might direct, a number of electors equal to the whole number of senators and representatives in Congress to which the State might be entitled under the provisions of the Constitution already agreed upon. The advantages of this plan were, that it referred the mode of appointing the electors to the States themselves, so that they could adopt a popular election, or an election by their legislatures, as they might prefer; and

[1] August 24. Elliot, V. 472, 473.

that it would give to each State the same weight in the choice of the President that it was to have in the two houses of Congress, provided a majority or a plurality of the electoral votes were to determine the appointment. The committee recommended that the electors should meet in their respective States, on the same day, and vote by ballot for two persons, one of whom, at least, should not be an inhabitant of the same State with themselves; and that the person having the greatest number of votes, if such number were a majority of all the electoral votes, should be the President. To this part of the plan, there was likely to be little objection. But the mode of electing the President in case of a failure to concentrate a majority of the electoral votes upon one person, or in case more than one person should have such a majority, was the most difficult part of the whole scheme. The object of the committee was to devise a process which should result in the election both of a President and a Vice-President; and they proposed to make the person having the next largest number of electoral votes the Vice-President. If two of the persons voted for should have a majority of all the votes, and the same number of votes, then the Senate were immediately to choose one of them, by ballot, as the President; if no person should have such a majority, then the Senate were to choose the President by ballot from the five highest on the list of candidates returned by the electors. If a choice of the President had been effected by the electoral votes, the person having the next highest number of electoral votes

was to be the Vice-President; and if there were two or more having an equal number of electoral votes, the Senate were to choose one of them as Vice-President.

From the proceedings which took place upon this plan, it appears that what many of the framers of the Constitution most apprehended was, that the votes in the electoral bodies would not be sufficiently concentrated to effect a choice, from want of the requisite general knowledge of the persons who might be considered in different parts of the Union as fit candidates for these high offices; and consequently that the election would be thrown into such other body as might be directed to make it after a failure in the action of the electors. It is a remarkable proof of their wisdom, that, although intimations began to appear in the public prints, as soon as the Constitution was published, that Washington would be the first President of the United States, — an expectation that must, therefore, have been entertained by the members of the Convention before they had finished their labors, — they were at no time under the influence of this pleasing anticipation.[1] They kept steadily in view a state of things in which, from the absence of statesmen of national reputation and influence, and from the effect of local preferences, no choice would be made by the electors. Hence their solicitude to provide for the secondary election, in

[1] The Constitution was published in the Pennsylvania Journal, Sept. 19th. On the 27th, another Philadelphia paper suggested, or, as we should now say, "nominated" General Washington for the Presidency.

such a way as to admit of a re-election of the incumbent. It was soon found that between the President and the Senate there would be a mutual connection and influence, which would be productive of serious evils, whether he were to be made eligible or ineligible a second time, if the Senate were to have the appointment after the electors had failed to make a choice. To remedy this, many of the members, among whom was Hamilton, preferred to let the highest number of electoral votes, whether a majority or not, appoint the President. As the grand committee had proposed to reduce the term of office from seven to four years, and to strike out the clause making the incumbent ineligible, — a change which met the approbation of a large majority of the States, — it became still more necessary to prevent any resort to the Senate for a secondary election. But an appointment by less than a majority of the electoral votes presented, on the other hand, the serious objection that the President might owe his appointment to a minority of the States. To preserve, as far as possible, a federal character for the government, in some of its departments, was justly regarded as a point of great importance. One branch of the legislature had become a depositary of the democratic power of a majority of the people of the United States; — the other branch was the representative of the States in their corporate capacities; — the President was to be in some sense a third branch of the legislative power, by means of his limited control over the enactment of laws; — and it was, therefore,

something more than a mere question of convenience, whether he should, at the final stage of the process, be elected by a less number than a majority of all the States. That part of the plan which proposed to elect him by a majority of all the electoral votes, giving to each State as many votes as it was to have in both houses of Congress, might make the individual, when so elected, theoretically the choice of a majority of the people of the United States, although not necessarily the choice of a majority of the States. But there was a peculiar feature of this plan,—afterwards, in the year 1804, changed to a more direct method,—by which the electors were required to return their votes for two persons, without designating which of them was their choice for President, and which for Vice-President, the designation being determined by the numbers of votes found to be given for each person. This method of voting increased the chances of a failure to choose the President by the electoral votes. It is not easy to understand why the framers of the Constitution adhered to it; although it is probable that its original design was to prevent corruption and intrigue. Whatever its purpose may have been, it served to make still more prominent the expediency, not only of removing the ultimate election from the Senate, but of providing some mode of conducting that election by which an appointment by a minority of the States would be prevented, when a majority of the electoral votes had not united upon any one individual, or had united upon two.

The plan which had been prepared by the grand committee, and which adjusted the relations between the executive and the Senate respecting appointments and treaties, had left no body in the government so likely to be free from intimate relations with the President, and at the same time so capable of being made the instrument of an election, as the House of Representatives. By the fundamental principle on which that body had been agreed to be organized,—in direct contrast to the basis of the Senate,—its members were the representatives of the people inhabiting the several States, and in the business of legislation a majority of their votes was to express the will of a majority of the people of the United States. But the representatives were to be chosen in the separate States; and nothing was more easy, therefore, than to provide that, in any other function, they should act as the agents of their States, making the States themselves the real parties to the act, without doing any violence to the principle on which they were assembled for the purposes of legislation. Accordingly, as soon as a transfer of the ultimate election from the Senate to the House of Representatives was proposed, the method of voting by States was adopted, with only a single dissent.[1] The establishment of two thirds as a quorum of the States for this purpose, and the provision that a majority of all the States should be necessary to a choice, followed naturally as the proper safeguards against corruption, and were adopted unanimously.

[1] Delaware. Elliot, V. 519.

The principal office of the executive department was thus provided for; but the ultimate choice of the Vice-President remained to be regulated. This office was unknown to the draft of the Constitution prepared by the committee of detail, and was suggested only when the mode of organizing the executive, and of providing for some of the separate functions of the Senate, came to be closely considered together. We are to look for its purposes, therefore, in the provisions specially devised for the settlement of these relations. In the first place, it was apparent that the executive would be a branch of the government that ought never to be vacant. The principle which, in hereditary monarchies, on the death of the sovereign, instantly devolves the executive power upon him who stands next in a fixed order of succession, must in some degree be imitated in purely elective governments, if great mischiefs are to be avoided. The difficulty which attends its application to such governments consists not in the nature of the principle itself, but in finding a number of public functionaries who can be placed in a certain order of succession, without creating mere heirs to the succession, for that purpose alone. In hereditary governments, the members of a family, in a designated order, stand as the successive recipients of the executive office; and each of them, until he reaches the throne, may have no other function in the state than that of an heir, near or remote, to the crown, and may, without inconvenience to the public welfare, occupy

that position alone. But in elective, and especially in republican governments, the succession must be devolved on some person already filling some other office; for to designate as a successor to the chief magistrate a person who has no public employment, and no other public position than that of an heir apparent, would be attended with many obvious disadvantages, in such a government.

Fortunately, the peculiar construction of the Senate was found to require a presiding officer who should not be a member of the body itself. As each State was to be represented by two delegates, and as it would be important not to withdraw either of them from active participation in the business of the chamber, a presiding officer was needed who would represent neither of the States. By placing the Vice-President of the United States in this position, he would have a place of dignity and importance, would be at all times conversant with the public interests, and might pass to the chief magistracy, on the occurrence of a vacancy, attended with the public confidence and respect. This arrangement was devised by the grand committee, and was adopted with general consent. It contemplated, also, that the Vice-President, as President of the Senate, should have no vote, unless upon questions on which the Senate should be equally divided; and on account of his relation to this branch of the legislature, the ultimate election of the Vice-President, when the electors had failed to appoint him under the rule prescribed, was retained in the hands of the Senate.

The rule that was to determine when the Vice-President was to succeed to the functions of the chief magistrate, was also embraced in the plan of the grand committee. It was apparent that a vacancy in the principal office might occur by death, by resignation, by the effect of inability to discharge its powers and duties, and by the consequences of an impeachment. When either of these events should occur, it was provided that the office should devolve on the Vice-President. In the case of death or resignation of the President, no uncertainty can arise. In a case of impeachment, a judgment of conviction operates as a removal from office. But the grand committee did not provide, and the Constitution does not contain any provision or direction, for ascertaining the case of an inability to discharge the powers and duties of the office. When such an inability is supposed to have occurred, and is not made known by the President himself, how is it to be ascertained? Is there any department of the government that can, with or without a provision of law, proceed to inquire into the capacity of the President, and to pronounce him unable to discharge his powers and duties? What is meant by the Constitution as *inability* is a case which does not fall within the power of impeachment, for that is confined to treason, bribery, and other high crimes and misdemeanors. It is the case of a simple incapacity, arising from insanity, or ill health, or, as might possibly occur, from restraint of the person of the President by a public enemy. But in the

former case, how shadowy are the lines which often separate the sound mind or body from the unsound! Society has had one memorable example, in modern times and in constitutional monarchy, of the delicacy and difficulty of such an inquiry; — an instance in which all the appliances of science and all the fixed rules of succession were found scarcely sufficient to prevent the rage of party, and the struggles of personal ambition, from putting the state in jeopardy.[1] With us, should such a calamity ever happen, there must be a similar effort to meet it as nearly as possible upon the principles of the Constitution, and consequently there must be a similar strain on the Constitution itself.

In order to make still further provision for the succession, Congress were authorized to declare by law what officer should act as President, in case of the removal, death, resignation, or inability of both the President and the Vice-President, until the disability should be removed, or a new President should be elected.

The mode of choosing the electors was, as we have

[1] I allude, of course, to the case of King George III., which had not happened when our Constitution was framed. To ascertain the sanity of a private person is certainly often no less delicate and difficult, than to inquire into the sanity of a person in a high public position. But there is a legal process for determining the capacity of every person to discharge private duties or to exercise private rights. In the case of the President of the United States, there is no mode provided by the Constitution for ascertaining his inability to discharge his public functions, and no authority seems to have been given to Congress to provide for such an inquiry. Perhaps the authority could not have been given, with safety and propriety.

seen, left to the legislatures of the States. Uniformity, in this respect, was not essential to the success of this plan for the appointment of the executive, and it was important to leave to the people of the States all the freedom of action that would be consistent with the free working of the Constitution. But it was necessary that the time of choosing the electors, and the day on which they were to give their votes, should be prescribed for all the States alike. These particulars were, therefore, placed under the direction of Congress, with the single restriction, that the day of voting in the electoral colleges should be the same throughout the United States. In order to make the electors a distinct and independent body of persons, appointed for the sole function of choosing the President and Vice-President, it was provided further, that no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.[1]

The electors were required to meet in their respective States, and to vote by ballot for two persons, one of whom at least should not be an inhabitant of the same State with themselves. Having made a list of all the persons voted for, and of the number of votes given for each, they were to sign and certify it, and to transmit it sealed to the seat of government of the United States, directed to the President of the Senate, who, in the presence of the

[1] This clause was inserted, by unanimous consent, on the motion of Mr. King and Mr. Gerry, September 6. Elliot, V. 515.

Senate and the House of Representatives, was to open all the certificates, and the votes were then to be counted.

Such was the method devised by the framers of the Constitution for filling the executive office. Experience has required some changes to be made in it. It has been found that to require the electors to designate the persons for whom they vote as the President and Vice-President, respectively, has a tendency to secure a choice by the electoral votes, and therefore to prevent the election from being thrown into the House of Representatives; and it has also been deemed expedient, when the election has devolved on the House of Representatives, to confine the choice of the States to the three highest candidates on the list returned by the electors. These changes were made by the twelfth of the amendments to the Constitution, adopted in the year 1804, which also provides that the person having the greatest number of the electoral votes for President shall be deemed to be chosen by the electors, if such number be a majority of the whole number of electors appointed. If a choice is not made by the electors, or by the House of Representatives, before the fourth day of March next following the election, the amendment declares that the Vice-President shall act as President, "as in the case" (provided by the Constitution) "of the death or other constitutional disability of the President."

In the appointment of the Vice-President, the amendment has also introduced some changes. The

person having the greatest number of the electoral votes as Vice-President, if the number is a majority of all the electors appointed, is to be the Vice-President; but if no choice is thus effected, the Senate are to choose the Vice-President from the two highest candidates on the list returned by the electors; but a quorum for this purpose is to consist of two thirds of the whole number of senators, and a majority of the whole number is made necessary to a choice. The amendment further adopts the same qualifications for the office of Vice-President as had been established by the Constitution for the office of President.[1]

Thus it appears, from an examination of the original Constitution and the amendment, that the most ample provision is made for filling the executive office, in all contingencies but one. If the electors fail to choose according to the rule prescribed for them, the election devolves on the House of Representatives. If that body does not choose a President before the fourth day of March next ensuing, the office devolves on the Vice-President elect, whether he has been chosen by the electors or by the Senate. But if the House of Representatives fail to choose a President, and the Senate make no choice of a Vice-President, or the Vice-President elect dies before the next fourth day of March, the Constitution makes no express provision for filling the office, nor is it easy to discover in it how such a vacancy is to be met. The Constitution, it is true, confers upon Con-

[1] See *post*, p. 621.

gress authority to provide by law for the case of removal, death, resignation, or inability of *both* the President and Vice-President, and to declare what officer shall then act as President; and it provides that the officer so designated by a law of Congress shall act accordingly, until the disability be removed, or a President shall be elected. But there is every reason to believe that this provision embraces the case of a vacancy in both offices occasioned by removal, death, resignation, or inability, not of the President and Vice-President elect, but of the President and Vice-President in office. It may be doubted whether the framers of the original Constitution intended to provide for a vacancy in both offices occasioned by the failure of the House of Representatives to elect a President and the death of the Vice-President elect, or a non-election of a Vice-President by the Senate, before the fourth day of March. Their plan was in the first instance studiously framed for the purpose of impressing on the electors the duty of concentrating their votes; and although they saw and provided for the evident necessity of an election of a President by the House of Representatives, when the electoral votes had not produced a choice, they omitted all express provision for a failure of the House to choose a President, apparently for the purpose of making the States in that body feel the importance of the secondary election, and the duty of uniting their votes. This omission was supplied by the amendment, which authorizes the Vice-President elect to act as President, when the House of Repre-

sentatives have failed to choose a President, "as in the case of the death or other constitutional disability of the President." This adoption, for the case of a non-election by the House, of the mode of succession previously established by the Constitution, shows that the authority which the Constitution gave to Congress to declare by law what officer shall act as President, in case of a vacancy in both offices, was confined to the removal, death, resignation, or inability of the President and Vice-President in office, and does not refer to the President and Vice-President elect, whose term of office has not commenced.[1]

[1] Congress, however, have not only provided that the President *pro tempore* of the Senate and the Speaker of the House of Representatives shall successively act as President, in case of the removal, death, resignation, or inability both of the President and Vice-President, until the disability be removed or a President shall be elected, but also that, whenever the offices of President and Vice-President *shall both become vacant*, a new appointment of electors shall be ordered, and a new election made. The constitutional authority for this latter provision is at least doubtful. (Act of March 1, 1792.) I have discovered no evidence that the framers of the Constitution contemplated an intermediate election of President and Vice-President, excepting an amendment moved by Mr. Madison. The clause which enables Congress to declare what officer shall act as President, on the death, &c. of both the President and Vice-President, was introduced by Governor Randolph, and terminated thus: "And such officer shall act accordingly, until the time of electing a President shall arrive." Mr. Madison moved to substitute for this the words, "until such disability be removed, or a President shall be elected"; and he has recorded in his Minutes, that he remarked, on moving this amendment, that the phraseology of Governor Randolph "would prevent a supply of the vacancy by an intermediate election." This amendment was adopted. (Elliot, V. 520, 521.) But the difficulty in the way of construing the clause so as to give effect to this suggestion is, that the terms employed by Mr. Madison do not of themselves necessarily import an authority to Congress to order an intermediate election, any more than those used

The committee of detail made no provision respecting the qualifications of the President. But the grand committee, to whom the construction of the office was referred, recommended the qualifications which are to be found in the Constitution; namely, that no person shall be eligible to the office who was not born a citizen of the United States, or was not a citizen at the time of the adoption of the Constitution, and who had not attained the age of thirty-five years, and been fourteen years a resident within the United States. These requirements were adopted with unanimous assent.[1]

That the executive should receive a stipend, or pecuniary compensation, was a point which had been settled in the earliest stage of the proceedings,

by Governor Randolph. Either of these expressions, when incorporated into the Constitution, would have to be construed with reference to the whole system prescribed by the Constitution for filling the executive branch of the government. Taking all the provisions together, it appears that the executive power is to be vested in a President, who is to hold his office for a term of four years; that Congress shall fix the day on which he is to be chosen by the electors; that, when so chosen, he is to hold the executive power for four years; that if he dies, or is disabled, within that term, and there is no Vice-President to succeed him, Congress shall declare by law what officer shall then *act as President*, that is, shall hold and exercise the executive power, and such officer is to *act accordingly*, until the disability be removed, or a President shall be elected. It would seem, therefore, that when the officer designated by Congress is required to *act as President*, the powers and duties of the office are devolved upon him for the residue of the term of four years, in a case of vacancy by death, removal, or resignation; for the terms "until a President shall be elected" certainly do not import any express authority to order a new election; and although there is a general authority in Congress to fix the day for the election of a President, it must be a President chosen for the term of four years.

[1] Elliot, V. 462, 507, 521, 522.

otwithstanding the grave authority of Franklin, ho was opposed to it. The speech which he de-vered on this subject was based upon the maxim, at, in all cases of public service, the less profit, the reater honor. He seems to have been actuated iefly by the fear that the government would in me be resolved into a monarchy; and he thought is catastrophe would be longer delayed, if the eds of contention, faction, and tumult were not wn in the system, by making the places of honor aces of profit. He maintained this opinion for e case even of a plural executive, which he de-ledly advocated; and he instanced the example Washington, who had led the armies of the evolution for eight years without receiving the allest compensation for his services, to prove e practicability of "finding three or four men, in the United States, with public spirit enough to ar sitting in peaceful council for perhaps an equal m, merely to preside over our civil concerns, and that our laws are duly executed." His plan was ated with the respect due to his illustrious char-er, but no one failed to see that it was a "Utopian a."[1] The example of Washington was, in truth, pplicable to the question. A patriotic Virginia ntleman, of ample fortune, was called upon, in day of his country's greatest trial, to take the d in a desperate struggle for independence. The

He anticipated that it would so regarded. Hamilton, who in all his views, as unlike Franklin as any man could be, seconded the motion, out of respect for the mover.

nature of the war, his own eminence, his character and feelings, the poverty of a country which he foresaw would often be unable to pay even the common soldier, and his motives for embarking in the contest, all united to make the idea of compensation inadmissible to a man whose fortune made it unnecessary. Such a combination of circumstances could scarcely ever occur in the case of a chief magistrate of a regular and established government. If an individual should happen to be placed in the office, who possessed private means enough to render a salary unnecessary to his own wants, or to the dignity of the position, the duty of his example might point in precisely the opposite direction, and make it expedient that he should receive what his successors would be unable to decline. But the real question which the framers of the Constitution had to decide was, in what way could the office be constituted so as to give the people of the United States the widest range of choice among the public men fit to be placed in it. To attach no salary to the chief executive office, in a republican government, would practically confine the office to men who had inherited or accumulated wealth. The Convention determined that this mischief should be excluded. They adopted the principle of compensation for the office of chief magistrate, and when the committee of detail came to give effect to this decision, they added the provision, that the compensation shall neither be increased nor diminished during the period for which a President has

been elected.[1] The limitation which confines the President to his stated compensation, and forbids him to receive any other emolument from the United States, or from any State, was subsequently introduced, but not by unanimous consent.[2]

The question whether the single person in whom the executive power was to be vested should exercise it with or without the aid or control of any council of state, was one that in various ways ran through the several stages of the proceedings. As soon as it was settled that the executive should consist of a single person, the nature and degree of his responsibility, and the extent to which it might be shared by or imposed upon any other officers, became matters of great practical moment. What was called at one time a council of revision was a body distinct from a cabinet council, and was proposed for a different purpose. The function intended for it by its advocates related exclusively to the exercise of the revisionary check upon legislation. But we have seen that the nature of this check, the purposes for which it was to be established, and the practical success with which it could be introduced into the legislative system, required that the power and the responsibility should rest with the President alone. There remained, however, the further question concerning a cabinet, or council of state; an advisory body, with which some of the most important persons in the Convention desired to sur-

[1] Elliot, V. 380.

[2] Connecticut, New Jersey, Delaware, and North Carolina voted against it.

round the President, to assist him in the discharge of his duties, without the power of controlling his actions, and without diminishing his legal responsibility. Such a plan not having received the sanction of the Convention, the draft of the Constitution reported by the committee of detail of course contained no provision for it. It was subsequently brought forward, and received the recommendation of a committee;[1] but the grand committee, who were charged with the adjustment of the executive office, substituted for it a different provision, which gave the President power to "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." The friends of a council[2] regarded this arrangement of the executive office, especially with regard to the power of appointment, as entirely defective.[3] But the reason on which it was rested by the grand committee, and on which the plan of a council of state was rejected, was, that the President of the United States, unlike the executive in mixed governments of the monarchical form, was to be personally responsible for his official conduct, and that the Constitution should do nothing to diminish that responsibility, even in appearance. If it had not been intended to make the President liable to impeachment, a cabinet might have been useful, and would certainly have been necessary, if

[1] Elliot, V. 446, 462.

[2] Mason, Franklin, Wilson, Dickinson, and Madison.

[3] Elliot, V. 525.

there was to be any responsibility anywhere for executive acts. But a large majority of the States preferred to interpose no shield between the President and a public accusation. He might derive any assistance from the great officers of the executive departments which Congress might see fit to establish, that he could obtain from their opinions or advice; but the powers which the Constitution was to confer on him must be exercised by himself, and every official act must be performed as his own.[1]

What those powers were to be, had not been fully

[1] Those who are not familiar with the precise structure of the American government will probably be surprised to learn that what is in practice sometimes called the "Cabinet" has no constitutional existence as a directory body, or one that can decide anything. The theory of our government is, that what belongs to the executive power is to be exercised by the uncontrolled will of the President. Acting upon the clause of the Constitution which empowers the President to call for the opinions in writing of the heads of departments, Washington, the first President, commenced the practice of taking their opinions in separate consultation; and he also, upon important occasions, assembled them for oral discussion, in the form of a council. After having heard the reasons and opinions of each, he decided the course to be pursued. The second President, Mr. John Adams, followed substantially the same practice. The third President, Mr. Jefferson, adopted a somewhat different practice. When a question occurred of sufficient magnitude to require the opinions of all the heads of departments, he called them together, had the subject discussed, and a vote taken, in which he counted himself but as one. But he always seems to have considered that he had the *power* to decide against the opinion of his cabinet. That he never, or rarely, exercised it, was owing partly to the unanimity in sentiment that prevailed in his cabinet, and to his desire to preserve that unanimity, and partly to his disinclination to the exercise of personal power. When there were differences of opinion, he aimed to produce a unanimous result by discussion, and almost always succeeded. But he admits that this practice made the executive, in fact, a directory. Jefferson's Works, V. 94, 568, 569.

settled when the first draft of the Constitution came from the committee of detail. The executive function, or the power and duty of causing the laws to be duly and faithfully executed; authority to give information to Congress on the state of the Union, and to recommend measures for their consideration; power in certain cases to convene and to adjourn the two houses; the commissioning of all officers, and the appointing to office in cases not otherwise provided for by the Constitution; the receiving of ambassadors; the granting of reprieves and pardons; the chief command of the army and navy of the United States and of the militia of the several States, — were all provided for. But the foreign relations of the country were committed wholly to the Senate, as was also the appointment of ambassadors and of judges of the Supreme Court. It is not necessary to explain again the grounds on which the Convention were finally obliged to alter this arrangement. It will be convenient, however, to take up the several powers and functions of the executive, and to describe briefly the scope and purpose ultimately given to each of them.

In the plan of government originally proposed by Governor Randolph, the division into the three departments of an executive, a legislative, and a judiciary, implied, for the first of these departments, according to the theory of all governments which are thus separated, power to carry into execution the existing laws. This government, however, was to succeed one that had regulated the affairs of the

Union for several years, in which all the powers vested in the confederacy of the States were held and exercised by the Congress of their deputies; and among those powers was that of declaring war and making peace. This function is, moreover, embraced in the general powers of the executive department, in most governments in which there is a regular separation of that department from the legislative and the judiciary. But it became apparent at the very commencement of the process of forming the Constitution of the United States, that the question whether the executive should be intrusted with the power of war and peace would not only be made, but that the system would have to be so arranged as to make the government, in this particular, an exception to the general rule. This was partly owing to an unwillingness to intrust such a power to one person; — or even to a plurality of persons, if the executive should be so constituted. If to the general powers of executing the laws, and of appointing to office, there were to be added the power to make war and peace, and the whole were to be vested in a single magistrate, it was rightly said that the government would be in substance an elective monarchy. The power of the executive, over the external relations of the country at least, would be the same, in kind and in extent, as it is in constitutional monarchies, and the sole difference would be that the supreme magistrate would be elective. This was not intended, and was not admissible. Still another reason for making the government of the United States, in this

feature, an exception to the general rule, was the necessity for giving to the States, in their corporate capacities, some control over the foreign relations of the country.

Our further inquiries concerning this part of the powers and functions of the chief magistrate will only need to extend so far as to ascertain what is the "executive power," which the Constitution declares shall be "vested" in the President. In the resolutions, which at different stages had previously passed in the Convention, this had been described as a "power to carry into execution the national laws"; and this description was regarded as including such other powers, not legislative or judicial in their nature, as might from time to time be delegated to the President by Congress.[1] The committee of detail, in drafting the Constitution, employed the phrase "executive power" to describe what had thus been designated by the resolutions sent to them; and as the plan of government which they presented proposed to make the declaration of a state of war a legislative act, the prosecution of a war, when declared, was left to fall within the executive duties as part of the "executive power." In order, moreover, that the executive duties might be still more clearly defined, the committee provided that the President "shall take care that the laws be faithfully executed," and imposed upon him the same obligation by the force of his oath of office. The committee having been directed to provide for the end in view, it was consid-

[1] Elliot, V. 141, 142.

ered that they were also to provide the means by which the end was to be obtained.[1] Accordingly, they made the President commander-in-chief of the army and navy, and of the militia of the States when called into the service of the United States. The President appears, therefore, to have been placed in the same position with reference to the means to be employed in the discharge of all his executive duties, when force may in his judgment be necessary. The declaration of a state of war is an enactment by the legislative branch of the government; the creation of laws is a function that belongs exclusively to the same department; — but when a law exists, or the state of war exists, it is for the President, by virtue of his executive office, and of his position as commander-in-chief, to employ the army and navy, and the militia actually called into the service of the United States, in the execution of the law, or the prosecution of hostilities, in such a manner as he may think proper.[2]

Closely allied to the power of executing the laws is that of pardoning offences, and relieving against judicial sentences. This power was originally ex-

[1] Elliot, V. 343, 344.

[2] The Constitution having vested in Congress power to provide for calling the militia into the service of the United States, to execute the laws, suppress insurrections, and repel invasions, the President cannot call out the militia unless authorized to do so by Congress. But with respect to the employment of the army and navy for any executive purpose, it may be doubted whether any authority from Congress is necessary; as it may also be doubted whether Congress can exercise any control over the President in the use of the land or naval forces, either in the execution of the laws, or in the discharge of any other executive duty.

tended by the committee of detail to all offences against the United States, excepting cases of impeachment, in which they provided that the pardon of the President should not be pleaded in bar. This would have made the power precisely like that of the king of England; since, by the English law, although the king's pardon cannot be pleaded in bar of an impeachment, he may, after conviction, pardon the offender. But as it was intended in the Constitution of the United States to limit the judgment in an impeachment to a removal from office, and to subsequent disqualification for office, there would not be the same reason for extending to it the executive power of pardon that there is in England, where the judgment is not so limited. The Convention, therefore, took from the President all power of pardon in cases of impeachment, making them the sole exception to the power.[1] A strong effort was indeed made to establish another exception in cases of treason, upon the ground, chiefly, that the criminal might be the President's own instrument in an attempt to subvert the Constitution. But since all agreed that a power of pardon was as necessary in cases of treason as in all other offences, and as it must be given to the legislature, or to one branch of it, if not lodged with the executive, a very large majority of the States preferred to place it in the hands of the President, especially as he would be subject to impeachment for any participation in the guilt of the party accused.[2]

The power to make treaties, which had been given

[1] Elliot, V. 480. [2] Ibid. 549.

to the Senate by the committee of detail, and which was afterwards transferred to the President, to be exercised with the advice and consent of two thirds of the senators present, was thus modified on account of the changes which the plan of government had undergone, and which have been previously explained. The power to declare war having been vested in the whole legislature, it was necessary to provide the mode in which a war was to be terminated. As the President was to be the organ of communication with other governments,[1] and as he would be the general guardian of the national interests, the negotiation of a treaty of peace, and of all other treaties, was necessarily confided to him. But as treaties would not only involve the general interests of the nation, but might touch the particular interests of individual States, and, whatever their effect, were to be part of the supreme law of the land, it was necessary to give to the senators, as the direct representatives of the States, a concurrent authority with the President over the relations to be affected by them. The rule of ratification suggested by the committee to whom this subject was last confided was, that a treaty might be sanctioned by two thirds of the senators present, but not by a smaller number. A question was made, however, and much considered, whether treaties of peace ought not to be subjected to a different rule. One suggestion was, that the Senate ought to have power to make treaties of

[1] It was to be one of the distinct functions of the President "to receive ambassadors and other public ministers."

peace without the concurrence of the President, on account of his possible interest in the continuance of a war from which he might derive power and importance.[1] But an objection, strenuously urged, was, that, if the power to make a treaty of peace were confided to the Senate alone, and a majority or two thirds of the whole Senate were to be required to make such a treaty, the difficulty of obtaining peace would be so great, that the legislature would be unwilling to make war on account of the fisheries, the navigation of the Mississippi, and other important objects of the Union.[2] On the other hand, it was said that a majority of the States might be a minority of the people of the United States, and that the representatives of a minority of the nation ought not to have power to decide the conditions of peace.

The result of these various objections was a determination on the part of a large majority of the States not to make treaties of peace an exception to the rule, but to provide a uniform rule for the ratification of all treaties. The rule of the Confederation, which had required the assent of nine States in Congress to every treaty or alliance, had been found to work great inconvenience; as any rule must do, which should give to a minority of States power to control the foreign relations of the country. The rule established by the Constitution, while it gives to every State an opportunity to be present and to vote, requires no positive quorum of the Senate for the ratification of a treaty; it simply demands

[1] Mr. Madison so thought. Elliot, V. 524. [2] Ibid.

that the treaty shall receive the assent of two thirds of all the members who may be present. The theory of the Constitution undoubtedly is, that the President represents the people of the United States generally, and the senators represent their respective States; so that, by the concurrence which the rule thus requires, the necessity for a fixed quorum of the States is avoided, and the operations of this function of the government are greatly facilitated and simplified.[1] The adoption, also, of that part of the rule which provides that the Senate may either "advise or consent," enables that body so far to initiate a treaty, as to propose one for the consideration of the President; — although such is not the general practice.

Having already described the changes which took from the Senate alone the appointment of the judges of the Supreme Court and ambassadors, it is only necessary in this connection to notice the manner in which the power of appointment to all offices received its final scope and limitations. The plan reported by the committee of detail had, as we have repeatedly seen, vested the appointment of ambassadors and judges of the Supreme Court in the Senate, and had given to the President the sole voice in the appointment of all other officers of the United States. The adjustment afterwards made gave the nomination

[1] The several votes taken upon different aspects of the rule for the ratification of treaties make the theory quite clearly what is stated in the text. See the proceedings, September 7, 8. Elliot, V. 524, 526.

of all officers to the President, but required the advice and consent of the Senate to complete an appointment. Two inconveniences were likely to be experienced under this arrangement. Many inferior offices might be created, which it would be unnecessary and inexpedient to fill by this process of nomination by the President and confirmation by the Senate; and vacancies might occur in all offices, which would require to be filled while the Senate was not in session. To obviate these inconveniences, the Congress were authorized to vest the appointment of such inferior officers as they might think proper in the President alone, in the courts of law, or in the heads of departments; and power was given to the President to fill up all vacancies that might happen during the recess of the Senate, by granting commissions which should expire at the end of their next session.[1] In order to restrain the President from practically creating offices by the power of appointment, his power was limited to "offices created by law," and to those specially enumerated in the Constitution.[2]

[1] This power embraces of course only those offices the appointment to which is vested in the President and Senate.

[2] The Constitution (Art. II. § 2) seems to contemplate ambassadors, other public ministers and consuls, and judges of the Supreme Court, as officers to exist under the Constitution, whether provision is or is not made by law for their appointment and functions. It is made the imperative duty of the President to nominate, and with the consent of the Senate to appoint them. Hence it has been supposed that the President can appoint a foreign minister without waiting to have his particular office regulated or established by law; and as the President conducts the foreign intercourse of the country, he could prescribe the duties of such a minister. In like manner, with the con-

In addition to these powers, the committee of detail had provided for certain direct relations, of a special nature, between the President and the Congress. One of these was to consist in giving to the Congress from time to time information of the state of the Union, and in recommending to their consideration such measures as he shall judge necessary and expedient. The other was embraced in the power to convene the two houses on extraordinary occasions; and, whenever there should be a disagreement between them with respect to the time of adjournment, to adjourn them to such time as he shall think proper. The latter power is to be taken in connection with the clause which requires Congress to meet at least once in every year, and on the first Monday in December, unless a different day shall be appointed by law. Neither the two houses by agreement, nor the President in case of a disagreement, can fix on a time of adjournment beyond the day of the commencement of the next regular session. But subject to this restriction, the power of the President to determine the time at which the two houses shall reassemble, when they do not agree upon a time, extends to every session of Congress, whether it be regular or "extraordinary." [1]

sent of the Senate, the President could appoint a judge of the Supreme Court, and would be bound to do so, although no act of Congress existed providing for the organization and duties of the Court. But as the President cannot distribute the judicial power, the Court, when so appointed, would have only the functions conferred by the Constitution, namely, original jurisdiction in certain enumerated cases.

[1] In the text of the Constitution, the President's power to adjourn

the two houses of Congress in case of a disagreement follows immediately after his power to convene them on "extraordinary occasions"; and it has, therefore, been suggested that his power to adjourn them is confined to cases where they have been "extraordinarily" convened under the first power. But it is to be observed that the whole of the third section of Article II. contains an enumeration of separate powers of the President, recited *seriatim*. The power to *convene* Congress is one power; and it extends only to "extraordinary" occasions, because the Constitution itself, or a law, convenes them at a fixed period, and thus makes the *ordinary* occasions. But the power to adjourn the two houses to a particular time, in cases of disagreement as to the time, is a separate and general power, because the reason for which it was given at all applies equally to all sessions. That reason is, that there may be a peaceful termination of what would otherwise be an endless and dangerous controversy. Both Hamilton in the Federalist and Judge Story in his Commentaries have treated this as a separate and general power. (The Federalist, No. 77. Story on the Constitution, § 1563.)

CHAPTER XIV.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED.—FORMATION OF THE JUDICIAL POWER.

THERE now remains to be described the full conception and creation of the third department of the government, its judicial power.

The distribution of the powers of government, when its subjects are to sustain no relation to any other sovereignty than that whose fundamental laws it is proposed to ordain, is a comparatively easy task. In such a government, when the theoretical division into the legislative, executive, and judicial functions is once adopted, the objects to which each is to be directed fall readily into their appropriate places. All that is necessary is, to see that these departments do not encroach upon the rights and duties of each other. There is, at least, no other power, claiming the obedience of the same people, whose just authority it is necessary to regard, and on whose proper domain no intrusion is to be permitted.

How different is the task, when a government, either federal or national, is to be created, for a people inhabiting distinct political States, whose sovereign power is to remain for many purposes supreme over their respective subjects; when the

individual is to be under rules of civil duty declared by different public organs; and when the object is to provide a judicial system through which this very difference of authority may be made to work out the ends of social order, harmony, and peace! This difficult undertaking was imposed upon the framers of the Constitution of the United States, and it was by far the most delicate and difficult of all their duties. It was comparatively easy to agree on the powers which the people of the States ought to confer on the general government, to define the separate functions of the legislature and the executive, and to lay down certain rules of public policy which should restrain the States in the exercise of their separate powers over their own citizens. But to construct a judicial power within the general government, and to clothe it with attributes which would enable it to secure the supremacy of the general Constitution and of all its provisions; to give it the exact authority that would maintain the dividing line between the powers of the nation and those of the State, and to give to it no more; and to add to these a faculty of dispensing justice to foreigners, to citizens of different States, and among the sovereign States themselves, with a more even hand and with a more assured certainty of the great ends of justice than any State power could furnish, — these were objects not readily or easily to be attained. Yet they were attained with wonderful success. The judicial power of the United States, considered with reference to its adaptation to

the purposes of its creation, is one of the most admirable and felicitous structures that human governments have exhibited.

The groundwork of its formation has been partly described in a previous chapter, where some of the principles are stated, which had been arrived at as being necessary to its great purposes. These principles related to the persons who were to exercise its functions, and to the jurisdiction or authority which they were to possess. With respect to the persons who were to exercise the judicial power, the result that had been reached when the first draft of the Constitution was to be prepared had fixed the tenure of good behavior for their office, and had placed their salaries, when once established, beyond the reach of any power of diminution by the legislature. It had also been determined that there should be one supreme tribunal, under the Constitution, and that the legislature should have power to establish inferior tribunals. But nothing more precise had been arrived at respecting jurisdiction, than the broad principles which declared that it should extend to cases arising under laws passed by the general legislature, and to such other questions as might touch the national peace and harmony. The committee of detail were to give effect to this declaration. Their scheme provided, under the first of these heads, that the jurisdiction should embrace cases arising under the laws of the United States; and as questions touching the national peace and harmony, they enumerated all

cases affecting ambassadors, other public ministers, and consuls; impeachments of officers of the United States; all cases of admiralty and maritime jurisdiction; controversies between two or more States, excepting such as might regard territory or jurisdiction; controversies between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign states, citizens, or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers, and consuls, and those in which a State should be party, they assigned the original jurisdiction to the Supreme Court. In all the other cases enumerated, the jurisdiction of the supreme tribunal was to be appellate only, with such exceptions and regulations as the legislature might make; and the original jurisdiction was left to be assigned by the legislature to such inferior tribunals as they might from time to time create. The trial of all criminal offences, except in cases of impeachment, was to be in the State where they had been committed, and was to be by jury. Controversies between States respecting jurisdiction or territory, and controversies concerning lands claimed under grants of different States, were to be tried by the Senate, and were consequently excluded from the judicial power.

This plan, when compared with the full outline of the jurisdiction, as it was finally established, presented several remarkable defects. In the first place, it was silent with respect to the important distinction, familiar to the people of the United States, between

proceedings in equity and proceedings at common law. This distinction, which extends not only to the forms of pleading, but to the principles of decision, the mode of trial, and the nature of the remedy, had been brought by the settlers of most of the Colonies from England, and had been perpetuated in their judicial institutions. It existed in most of the States, at the time of the formation of the national Constitution, and it was, in fact, a characteristic feature of the only system of judicature which the American people had known, excepting in their courts of admiralty. Although the institutions of the States differed in the degree in which they had adopted and followed it, the basis of their jurisprudence and forms of proceeding was the common law, as derived from its English sources and modified by their own customs or legislation, with more or less of that peculiar and more ample relief which is afforded by the jurisprudence and remedy known in the English system under the name of equity.

Since the judicial power of the United States was to be exercised over a people whose judicial habits were thus fixed; since it must, to some extent, take cognizance of rights that would have to be adjudicated in accordance with the jurisprudence under which they had arisen; and since the individuals who would have a title to enter its tribunals might reasonably demand remedies as ample as a judicature of English origin could furnish, it was highly expedient that the Constitution should fully adopt the main features of that judicature. It is quite true,

that a provision in the Constitution extending the judicial power to "all cases" affecting certain persons or certain rights, might be regarded by the legislature as a sufficient authority for the establishment of inferior courts with both a legal and an equitable jurisdiction, and might be considered to confer such a double jurisdiction on the supreme tribunal contemplated by the Constitution. But the text of the Constitution itself would be the source to which the people of the United States would look, when called upon to adopt it, for the benefits which they were to derive from it, and there would be no part of it which they would scrutinize more closely than that which was to establish the judicial power of the new government. If they found in it no imperative declaration making it the duty of Congress to provide for a jurisdiction in equity as well as at law, and no express adoption of such a jurisdiction for the supreme tribunal, they might well say that the character of the judicial power was left to the accidental choice of Congress, or to doubtful interpretation, instead of being expressly ordained in its full and essential proportions by the people. If a citizen of one State were to pursue a remedy in the courts of the Union against a citizen of another State, or if one State should have a judicial controversy with another, that would be a very imperfect system of judicature which should leave the form and extent of the remedy to be determined by the local law where the process was to be instituted, or which should confine the relief to the forms and proceed-

ings of the common law. If the appellate jurisdiction of the supreme national tribunal were to be exercised over any class of controversies originating in the State courts, it was extremely important that the Constitution should expressly ascertain whether suits at law, or suits in equity, or both, were to be embraced within that appellate power. For these reasons, it became necessary for the Convention to supply this defect, by extending the judicial power, both in equity and at law, to the several cases embraced in it.

Another defect in the report of the committee, — or what was regarded as a defect when the Constitution was ratified, — and one which the Convention did not supply, was in the omission of any express provision for trial by jury in civil cases. Such a provision was supplied by an amendment proposed by the first Congress that assembled under the Constitution, and adopted in 1791; but it was regarded by the framers of the Constitution as inexpedient, on account of the different construction of juries in the different States, and the diversity of their usages with respect to the cases in which trial by jury was used.[1] It is quite possible that, after the Constitution had declared that the jurisdiction of the national tribunals should extend to all cases "in law" affecting certain parties or rights, Congress would not have been at liberty to establish inferior tribunals for the trial of cases "in law" by any other method than according to the course of the common law,

[1] Elliot, V. 550.

which requires that the fact in such cases shall be tried by a jury. But the objection which afterwards prevailed was connected, as we shall presently see, with what was regarded as a dangerous ambiguity in the clause of the Constitution which gave to the Supreme Court its appellate jurisdiction both as to law and fact.

The plan of the committee of detail contemplated a supreme tribunal with original jurisdiction over a few of the cases within the judicial power, and appellate jurisdiction over all the other cases enumerated. Inquiry was made in the Convention, whether this appellate jurisdiction was intended to embrace fact as well as law, and to extend to cases of common law as well as to those of equity and admiralty jurisdiction. The answer was given, that such was the intention of the committee, and the jurisdiction of the federal court of appeals, under the Confederation, was referred to as having been so construed. The words "both as to law and fact" were thereupon introduced into the description of the appellate power, by unanimous consent.[1] Various explanations were subsequently given, when the Constitution came before the people, of the force and meaning of these words. The most probable and the most acute of these explanations was that made by Hamilton in the Federalist,[2] which limited the effect of the words, in reference to common law cases, to so much cognizance of the facts involved in a record as is implied in the application of the law to them by

[1] Elliot, V. 483. [2] No. 81.

the appellate tribunal. But the truth was, the words were of very comprehensive import. While they were used in order to save to the Supreme Court power to revise the facts in equity and admiralty proceedings, they made no distinction, and imposed upon Congress no duty to make a distinction, between cases in equity and admiralty, and cases at common law; and although it might be true, that in some States the facts in all cases were tried by a jury, and that in some cases so tried there ought to be a power to revise the facts, yet it was not conceded that such a power ought to exist over the verdicts of juries in cases of common law jurisdiction. This explanation will serve to show the double purpose of the amendment made in 1791. The people of many of the States required an express guaranty that trial by jury should be preserved in suits at common law, and that the facts once tried by a jury should not be re-examined otherwise than according to the rules of the common law, which have established certain well-defined limits to the power of an appellate tribunal concerning the facts appearing to have been found by a jury.[1]

There was still another omission in the report of the committee, of great magnitude. They had included in the judicial power cases arising under the laws of the United States, but they had not embraced cases arising under the Constitution and under treaties. At the same time, the Constitution was to embrace not only the powers of the general govern-

[1] See the seventh Amendment.

ment, but also special restrictions upon the powers of the States; and not only the Constitution itself, but the laws made in pursuance of its provisions, and all treaties made under the authority of the United States, were to be the supreme law of the land. This supremacy could only be enforced by some prescribed action of some department of the general government. The idea of a legislative arrest, or *veto*, of State laws supposed to be in conflict with some provision of the national Constitution, or with a treaty or a law of the United States, had been abandoned. The conformity, moreover, of the laws of Congress to the provisions of the Constitution, could only be determined by the judicial power, when drawn into question in a judicial proceeding. The just and successful operation of the Constitution, therefore, required that, by some comprehensive provision, all judicial cases[1] arising under the Constitution, laws, or treaties of the United States — whether the question should grow out of the action of a State legislature, or the action of any department of the general government — should be brought within the cognizance of the national judiciary. This provision was added by the Convention. It completed the due proportions and efficacy of this branch of the judicial power.

[1] By "cases arising under the Constitution," &c. the framers of that instrument did not mean all cases in which any department of the government might have occasion to act under provisions of the Constitution, but all cases *of a judicial nature;* that is, cases which, having assumed the form of judicial proceedings between party and party, involve the construction or operation of the Constitution of the United States. Elliot, V. 483.

Trial by jury of all criminal offences (except in cases of impeachment) had been provided for by the committee of detail, and such trial was to be had in the State where the offence had been committed. The Convention, in order to secure the same right of a jury trial in cases where the offence had been committed out of any State, provided that the trial should be at such place or places as the Congress might by law have directed.[1]

These additions, with one other which included within the judicial power all cases to which the United States might be party; the transfer of the trial of impeachments to the Senate; and the transfer to the judiciary of controversies between the States respecting jurisdiction or territory, and controversies respecting land titles claimed under the grants of different States, — were the principal changes and improvements made in the plan of the committee.

The details of the arrangement will perhaps fail to interest the general reader. Yet I cannot but think that to understand the purpose and operation of this department of the national government would be a very desirable acquisition for any of my readers not already possessed of it; and having completed the description of the mode in which the judicial power was constructed, I shall conclude this part of the subject with a brief statement of its constitutional functions.

One of the leading purposes for which this branch

[1] Elliot, V. 484. Constitution, Art. III. § 2, clause 3.

of the government was established, was to enable the Constitution to operate upon individuals, by securing their obedience to its commands, and by protecting them in the enjoyment of the rights and privileges which it confers. The government of the United States was eminently intended, among other purposes, to secure certain personal rights, and to exact certain personal duties. The Constitution confers on the general government a few special powers, but it confers them in order that the general government may accomplish for the people of each State the advantages and blessings for which the State governments are presumed to be, and have in fact proved to be, inadequate. It lays upon the governments and people of the States certain restrictions, and it lays them for the protection of the people against an exercise of State power deemed injurious to the general welfare. The government of the United States, therefore, is not only a government which seeks to protect the welfare and happiness of the people who live under it, but it is so constructed as to make its citizens directly and individually its subjects, exacting of them certain duties, and securing to them certain rights. It comes into this relation by reason of its supreme legislative power over certain interests, and the supreme authority of its restrictions upon the powers of the States; and it is enabled to make this relation effectual through its judicial department, which can take cognizance of every duty that the Constitution exacts and of every right that it confers, whenever they have assumed a

shape in which judicial power can act upon them. Let us take, as illustrations of this function of the national judiciary, a single instance of the obedience required by the Constitution, and also one of a right which it protects. The Constitution empowers Congress to lay and collect duties; which, when they are laid and incurred, become a debt due from the individual owner of the property on which they are assessed to the general government. Payment, in disputed cases, might have been left to be enforced by executive power; but the Constitution has interposed the judicial department, as the more peaceful agent, which can at once adjudicate between the government and the citizen, and compel the payment of what is found due. Again, the Constitution provides that no State shall pass any law impairing the obligation of contracts. An individual supposing himself to be aggrieved by such a law might have been left to obtain such redress as the judicial or legislative authorities of the State might be disposed to give him; but the Constitution enables him finally to resort to the national judiciary, which has power to relieve him against the operation of the law upon his personal rights, while the law itself may be left upon the statute-book of the State.

But while the judicial department of the general government was thus designed to enforce the duties and protect the rights of individuals, it is obvious that, in a system of government where such rights and duties are to be ascertained by the provisions of a fundamental law framed for the express purpose

of defining the powers of the general government and of each of its departments, and establishing certain limits to the powers of the States, the mere act of determining the existence of such rights or duties may involve an adjudication upon the question, whether acts of legislative or executive power are in conformity with the requirements of the fundamental law. On the one hand, the judicial department is to see that the legislative authority of the Union does not exact of individuals duties which are not within its prescribed powers, and that no department of the general government encroaches upon the rights of any other, or upon the rights of the States; and, on the other hand, it has to see that the legislative authority of the States does not encroach upon the powers conferred upon the general government, or violate the rights which the Constitution secures to the citizen. All this may be, and constantly is, involved in judicial inquiries into the rights, powers, functions, and duties of private citizens or public officers; and therefore, in order that the judicial power should be able effectually to discharge its functions, it must possess authority, for the purposes of the adjudication, to declare even an act of legislation to be void, which conflicts with any provision of the Constitution.

There were great differences of opinion in the Convention upon the expediency of giving to the judges, as expositors of the Constitution, power to declare a law to be void;[1] and undoubtedly such a

[1] Elliot, V. 429.

power, if introduced into some governments, would be legislative in its nature, whether the persons who were to exercise it should be called judges, or be clothed with the functions of a council of revision. But under a limited and written constitution, such a power, when given in the form and exercised in the mode provided for in the Constitution of the United States, is strictly judicial. This is apparent from the question that is to be determined. It arises in a judicial controversy respecting some right asserted by or against an individual; and the matter to be determined is whether an act of legislation, supposed to govern the case as law, is itself in conformity to the supreme law of the Constitution. In a government constituted like ours, this question must be determined by some one of its departments. If it be left with the executive to decide finally what laws shall be executed, because they are consistent with the Constitution, and what laws shall be suspended, because they violate the Constitution, this practical inconvenience may arise, namely, that the decision is made upon the abstract question, before a case to be governed by the law has arisen. If the legislature were empowered to determine, finally, that the laws which they enact are constitutional, the same practical difficulty would exist; and the individual, whose rights or interests may be affected by a law, when put into operation, would have no opportunity to be heard upon what in our form of government is a purely juridical question, on which every citizen should be heard, if he desires it, before

the law is enforced in his case. On the other hand, if the final and authoritative determination is postponed until the question arises in the course of a judicial controversy respecting some right or duty or power of an individual who is to be affected by the law, or who acts under it, the question itself is propounded not in the abstract, but in the concrete; not in reference to the bearing of the law upon all possible cases, but to its bearing upon the facts of a single case. In this aspect, the question is of necessity strictly judicial. To withhold from the citizen a right to be heard upon the question which in our jurisprudence is called the constitutionality of a law, when that law is supposed to govern his rights or prescribe his duties, would be as unjust as it would be to deprive him of the right to be heard upon the construction of the law, or upon any other legal question that arises in the cause. The citizen lives under the protection, and is subject to the requirements, of a written fundamental law. No department of the national, or of any State government, can lawfully act otherwise than according to the powers conferred or the restrictions imposed by that instrument. If the citizen believe himself to be aggrieved by some action of either government which he supposes to be in violation of the Constitution, and his complaint admit of judicial investigation, he must be heard upon that question, and it must be adjudicated, or there can be no administration of the laws worthy of the name of justice.

It is interesting, therefore, to observe how this

function of the judicial power gives to the operation of the government a comparatively high degree of simplicity, exactness, and directness, notwithstanding the refined and complex character of the system which its framers were obliged to establish. To judge of the merits of that system, in this particular, it is necessary to recur again to those alternative measures, to which I have frequently referred, and which lay directly in their path. One of these measures was that of a council of revision, to be charged with the duty of arresting improper laws. Besides the objection which has been already alluded to, — that the question of the conformity of a law to the Constitution would have thus been finally passed upon in the abstract, — such an institution, although theoretically confined to this inquiry, would have become practically a third legislative chamber; for it would inevitably have happened that considerations of expediency would also have found their way into the deliberations of a numerous body appointed to exercise a revisory power over all acts of legislation. There is no mode in which the question of constitutional power to enact a law can be determined, without the influence of considerations of policy or expediency, so effectually, as by confining the final determination to the special operation of the law upon the facts of an individual case. When the tribunal that is to decide this question is, by the very form in which it is required to act, limited to the bearing of the law upon some right or duty of an individual placed in judgment by a record, it is

at once relieved of the responsibility, and in a great degree freed from the temptation, of considering the policy of the legislation. If, therefore, it be conceded — as every one will concede — that, whatever public body is specially instituted for the purpose of submitting the acts of the legislature to the test of the Constitution, it should neither possess the power, nor be exposed to the danger, of invading the legislative province, by acting upon motives of expediency, it must be allowed that the framers of the Constitution did wisely in rejecting the artificial, cumbrous, and hazardous project of a council of revision. The plan of such a council was, it is true, much favored, and indeed insisted upon, by some of the wisest men in the Convention. But it was urged at a time when the negative that was to be given to the President had not been settled, and when he had not been made sufficiently independent of the legislature to insure his unfettered employment of the negative that might be given to him. The purpose of the proposed council of revision was to strengthen his hands, by uniting the judges with him in the exercise of the "veto." This would have given to the judges a control both over the question of constitutional power and the question of legislative policy. As to the latter, it became unnecessary, as well as inexpedient, to unite the judges with the President, after he had been clothed with a suitable negative, and after his election had been taken from the legislature; and as to the former question, the final arrangement of the judicial power

made it equally unnecessary to form the judges into a council of revision, since, if the President should fail to arrest an unconstitutional law, when presented for his approval, it could be tested in the ordinary course of judicial proceedings after it had gone into operation.

But the conformity of laws of Congress to the Constitution was not all that was to be secured. Some prudent and effectual means were to be devised, by which the acts of the State governments could be subjected to the same test. The project of submitting the laws of the States to some department of the general government, while they were in the process of being enacted, or before they could have the form of law, was full of inconvenience and hazard. It could not have been attempted without an injury to State pride, that would have aroused an inextinguishable opposition to the national authority, even if the plan could once have been assented to. Yet there was no other alternative, unless the judicial power of the general government should be so constructed as to enable it to take the same cognizance of a constitutional question, when arising upon the law of a State, that it was to take of such a question when arising upon an act of Congress. The same necessity would exist in the one case, as in the other, for a power within the general government to give practical effect to that supremacy which the Constitution was to claim for itself, for treaties, and for the laws passed in pursuance of its provisions. All the restrictions which the Constitution was to lay upon

the powers of the States would be nugatory, if the States themselves were to be the final judges of their meaning and operation. This transcendent power of interpretation and application, so logically necessary, and yet so certain to wound and irritate, if exercised by direct interference, could be wielded, without injurious results, through the agency of judicial forms, by a judicial investigation into personal rights, when affected by the action of a State government, just as it could be in reference to the acts of any department of the national government that could be made the subject of proceedings in a court of justice.

The relation of the judicial power to the execution of treaties rests upon the same grounds of paramount necessity. It is not merely for the sake of uniformity of interpretation, that the national judiciary is authorized to decide finally all cases arising under treaties, although uniformity of interpretation is essential to the preservation of the public faith; but it is in order that the treaty shall be executed, by being placed beyond the hazards both of wrong construction and of interested opposition. The memorable instance of the Treaty of Peace, the absolute failure of which in point of execution, before the adoption of the Constitution, has been described in the first volume of this work, presents the great illustration, in our constitutional history, of the only mode in which the supremacy of treaty stipulations as law can be maintained in our system of government. "The United States in Congress assembled,"

under the Confederation, had the same exclusive authority to make treaties that is now possessed by the President and the Senate under the Constitution, and a treaty was in theory as obligatory then, upon the separate States and their inhabitants, as it is now. But it has been found to be an axiom of universal application in the art of government, that a supremacy which is merely theoretical is no real supremacy. If a stipulation made by the proper authority with a foreign government is to have the force of law, requiring the obedience of individuals and of all public authorities, its execution must be committed to a judiciary acting upon private rights without the hinderance or influence of adverse legislation.

There is another branch of the judicial power which illustrates in a striking manner the object embraced in the preamble of the Constitution, where the people of the United States declare it to be their purpose "to establish justice." This is found in the provision for a special jurisdiction over the rights of persons bearing a certain character. Like almost everything else in the Constitution, this feature of the judicial power sprang from a necessity taught by previous and severe experience. Reasoning from the mere nature of such a government as that of the United States, it might seem that the judicatures of the separate States would be sufficient for the administration of justice in all cases in which private rights alone are concerned, and by which no power or interest of the general government, and no provision of the general Constitution, is likely to be affected.

But we find in the judicial power of the United States a particular jurisdiction given on account of the mere civil characters of the parties to a controversy; and its existence there is to be accounted for upon other than speculative reasons. From the Declaration of Independence to the day of the ratification of the Constitution, the judicial tribunals of the States had been unable to administer justice to foreigners, to citizens of other States, to foreign governments and their representatives, and to the governments of their sister States, so as to command the confidence and satisfy the reasonable expectations of an enlightened judgment. Hence the necessity for opening the national courts to these various classes of parties, whose different positions may now be briefly considered.

In a country of confederated States, each possessing a full power of legislation, it could not but happen — as it did constantly happen in this Union before the adoption of the Constitution — that the determination of controversies between citizens of the State where the adjudication was to be had, and citizens of another State, would be exposed to influences unfavorable to the ends of justice. In truth, one of the parties in such a controversy was virtually an alien, in the tribunal which he was obliged to enter; for although the Articles of Confederation undertook to secure to the free inhabitants of each State all the privileges and immunities of free citizens in the several States, yet it is obvious that the efficacy of such a provision must depend

almost wholly upon the spirit of the tribunals, and upon their capacity to give effect to such a declaration of rights, against a course of State policy or the positive enactments of a State code. The chief difficulty of the condition of affairs existing before the Constitution lay not so much in the hazards of a violation of principle through local prejudice, or the superior force of local policy or legislation, — although these influences were always powerful, — as in the fact that, when these influences were likely to be most active, or were most feared, there was no tribunal to which resort could be had, and which was known to be beyond their operation and their reach. The articles of compact between the States had intended to remove from the citizens of the different States the disabilities of practical alienage under which they would have stood in the tribunals of each other. But with that mere declaration those articles stopped. If the litigant saw that the local law was likely to be administered to him as if he were a foreigner, or feared that the scales of justice would not be held with an impartial hand, he could go nowhere else for a decision. This was a great evil; for much of the value of every judicature depends upon the confidence it inspires.

There were still other and perhaps stronger reasons for creating an independent jurisdiction, to be resorted to by foreigners, in controversies with citizens of the States. No clause in the Constitution was to make them equal in rights with citizens, and for the very reason of their alienage, therefore, it was

necessary to give them access to tribunals organized under the authority of the general government, which would be responsible to foreign powers for the treatment that their subjects might receive in the United States. Ambassadors, too, and other foreign ministers, would not only be aliens, but would possess the character of representatives of their sovereigns; and consuls would be the public agents of their governments, although not bearing the diplomatic character. These functionaries were therefore permitted to resort to the judicial power of the United States; and for the purpose of more effectually protecting the national interests that might be involved in their personal or official relations, original jurisdiction was given to the Supreme Court in all cases affecting them.

In addition to these, there were other controversies, which, as we have seen, were included within the judicial power of the United States, on account of the character of the parties; namely, those to which the United States might be a party; those to which a State of the Union might be a party, where the opposite party was another State of the Union, or a citizen of another State of the Union, or a foreign state or its citizens or subjects; and those between citizens of a State of the Union, and foreign states, citizens, or subjects. Finally, controversies between citizens of the same State claiming lands under grants of different States were placed under the same jurisdiction for similar reasons; — because the State tribunals could not be expected to afford that degree of

impartiality which the circumstances of these several cases required.

There remains only one other branch of the jurisdiction conferred by the Constitution on the tribunals of the United States which it is necessary to notice; namely, the admiralty and maritime jurisdiction. With respect to the criminal jurisdiction in admiralty, in cases of piracies and felonies committed on the high seas, and the prize jurisdiction, the Articles of Confederation had given to the Congress the exclusive power of appointing courts for the trial of the former, and for hearing and finally determining appeals in all cases of capture. Such appeals were taken from the State courts of admiralty, — tribunals which also possessed and exercised a civil jurisdiction corresponding to that of the admiralty in England, but in practice somewhat more extensive. When the Constitution was framed, it was perceived to be expedient, on account of the relation of maritime commerce to the intercourse of the people of the United States with foreign nations, or to the intercourse of the people of different States with each other, to give the whole civil as well as criminal jurisdiction in admiralty, and the entire prize jurisdiction, original as well as appellate, to the government of the Union. This was effected by the comprehensive provision, which gives the judicial power cognizance of "all cases of admiralty and maritime jurisdiction"; expressions which have often been, and are still likely to be, the subject of much forensic controversy with respect to the particular trans-

actions, of a civil nature, intended to be embraced in the jurisdiction, but in reference to which there is nothing in the known proceedings of the Convention, other than what is to be inferred from the language selected, that affords any special evidence of the intention of the framers of the Constitution.

CHAPTER XV.

REPORT OF THE COMMITTEE OF DETAIL, CONTINUED. — EFFECT OF RECORDS. — INTER-STATE PRIVILEGES. — FUGITIVES FROM JUSTICE AND FROM SERVICE.

WE now come to a class of provisions designed to place the people of the separate States in more intimate relations with each other, by removing, in some degree, the consequences that would otherwise flow from their distinct and independent jurisdictions. This was to be done by causing the rights and benefits resulting from the laws of each State to be, for some purposes, respected in every other State. In other words, by the establishment and effect of certain exceptions, the general rule which absolves an independent government from any obligation to regard the law, the authority, or the policy of another government was, for some purposes, to be obviated between the States of the American Union.

To some extent, this had been attempted by the Articles of Confederation, by providing, — first, that the free inhabitants of each of the States (paupers, vagabonds, and fugitives from justice excepted) should be entitled to all privileges and immunities of free citizens in the several States; and that the people of each State should have free ingress and

regress to and from any other State, and the same privileges of trade and commerce as its inhabitants; — secondly, that fugitives from justice charged with certain enumerated crimes, and escaping from one State into another, should be given up, on demand of the executive of the State from which they had escaped; — and thirdly, that full faith and credit should be given in each State to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

The Confederation, however, was a "firm league of friendship with each other," entered into by separate States, and the object of the provisions above cited was "the better to secure and perpetuate mutual friendship and intercourse among the people" of those States. One of the purposes of the Constitution, on the other hand, was "to form a more perfect Union"; and we are therefore to expect to find its framers enlarging and increasing the scope of these provisions, and giving to them greater precision and vigor. We shall see, also, that they made a very important addition to their number.

The first thing that was done was to make the language of the Confederation respecting the privileges of general citizenship somewhat more precise. The Articles of Confederation had made "the free *inhabitants* of each State," with certain exceptions, entitled to the privileges and immunities of "free *citizens* in the several States."[1] It is probable that

[1] See and compare Art. IV. of the Confederation and Art. IV. § 2 of the Constitution.

these two expressions were intended to be used in the same sense, and that by "free inhabitants" of a State was meant its "free citizens." The framers of the Constitution substituted the latter expression for the former, and thus designated more accurately the persons who are to enjoy the privileges and immunities of free citizens in other States besides their own.

In the next place, while the Articles of Confederation declared that full faith should be given in each State to the acts, records, and judicial proceedings of every other State, they neither prescribed the mode in which the proof was to be made, nor the effect when it had been made. The committee of detail, in preparing the first draft of the Constitution, merely adopted the naked declaration of the articles. The Convention added to it the further provision, which enabled Congress to prescribe by general laws the manner in which such acts, records, and proceedings shall be proved, and the effect to be given to them when proved.[1]

With respect to fugitives from justice, the Articles of Confederation had specified persons "charged with treason, felony, or other high misdemeanor in

[1] So far as the proceedings in the Convention are to be regarded as a guide to construction, it appears clearly that the clause which empowers Congress to "prescribe the manner in which such acts, records, and proceedings shall be proved, *and the effect thereof*," was intended to give a power to declare the effect of the acts, records, and judicial proceedings of any State, when offered in evidence in another State, as well as to prescribe the mode of proving them. See Elliot, V. 487, 488, 503, 504. See also a learned discussion on this clause in Story's Commentaries, §§ 1302 – 1313.

any State," as those who were to be given up by the States to each other. For the purpose of avoiding the ambiguity of this language, the provision was made to embrace all other crimes, as well as treason and felony.[1]

Besides correcting and enlarging these provisions, the framers of the Constitution introduced into the system of the Union a special feature, which, in the relations *of the States to each other*, was then entirely novel, although not without precedent. I refer, of course, to the clause requiring the extradition of "fugitives from service," who have escaped from one State into another.

In describing the compromises of the Constitution relating to slavery, I have not placed this provision among them, because it was not a part of the arrangement by which certain powers were conceded to the Union by one class of States, in consideration of certain concessions made by another class. It is a provision standing by itself, in respect to its origin, about which there is some popular misapprehension. Its history is as follows.

In many of the discussions that had taken place, in preparing the outline of the government that was sent to the committee of detail, a good deal of jealousy had been felt and expressed by some of the Southern members, not only with regard to the relative weight of their States in the representative system, but also with respect to the security of their slave property. Slavery, although it had existed in

[1] Elliot, V. 487.

all of the States, and although there still remained in all of them excepting Massachusetts some persons of the African race still held in that condition, was likely soon to disappear from the States of New Hampshire, Rhode Island, Connecticut, New York, and Pennsylvania, under changes that would be introduced by their constitutions or by statutory provision. In the whole of New England, therefore, and in nearly all of the Middle States excepting Maryland, if the principles of the common law and of the law of nations were to be applied to such cases, the relation of master and slave, existing under the law of another State, could not be recognized, and there could be no means of enforcing a return to the jurisdiction which gave to the master a right to the custody and services of the slave. At the same time, it was apparent that, in the five States of Maryland, Virginia, North Carolina, South Carolina, and Georgia, slavery would not only be likely to continue for a very long period of time, but that this form of labor constituted, and would be likely long to constitute, a necessary part of their social system. The theory on which the previous Union had been framed, and on which the new Union now intended to be consummated was expressly to be founded, was, that the domestic institutions of the States were exclusively matters of State jurisdiction. But if a relation between persons, existing by the law of a particular State, was to be broken up by an escape into another State, by reason of the fact that such a relation was unknown to or prohibited by the

law of the place to which the party had fled, it was obvious that this theory of the Union would be of very little practical value to the States in which such a relation was to exist, and to be one of great importance. If the territory of every State in which this relation was not to be recognized, were to be made an asylum for fugitives, the right of the master to the services of the slave would be wholly insecure.

It was in reference to this anticipated condition of things, that General Pinckney of South Carolina, at the time when the principles that were to be the basis of the Constitution were sent to the committee of detail,[1] gave notice, that, unless some provision should be inserted in their report to prevent this consequential emancipation, he should vote against the Constitution. Considering the position and influence of this gentleman, his declaration was equivalent to a notice that, without such a provision, the Constitution would not be accepted by the State which he represented. Still, the committee of detail omitted to make any such special provision in their report of a Constitution, and inserted only a general article that the *citizens* of each State should be entitled to all the privileges and immunities of citizens in the several States.[2] General Pinckney was not satisfied with this, and renewed his demand for a provision "in favor of property in slaves."[3]

[1] July 23d. Elliot, V. 357.

[2] Art. XIV. of the report of the committee of detail.

[3] These are the words of Mr. Madison's Minutes. Elliot, V. 487. This was on the 26th of August.

But the article was adopted, South Carolina voting against it, and the vote of Georgia being divided.

As soon, however, as the next article was taken up, which required the surrender of fugitives from justice escaping from one State into another, the South Carolina members moved to require "fugitive slaves and servants to be delivered up, like criminals."[1] Objection was made, that this would require the executive of the State to do it at the public expense,[2] and that there was no more propriety in the public seizing and surrendering a slave or a servant, than a horse.[3] The proposition was then withdrawn, in order that a particular provision might be framed, apart from the article requiring the surrender of fugitives from justice. That article was then adopted without opposition.[4]

For a provision respecting fugitives from service, the movers had two remarkable precedents to which they could resort, and which had settled the correctness of the principle involved. Negro slavery, as well as other forms of service, had existed in the New England Colonies at a very early period. In 1643, the four Colonies of Massachusetts Bay, Plymouth, Connecticut, and New Haven had formed a confederation, in which, among other things, they had mutually stipulated with each other for the restoration of runaway "servants"; and there is indu-

[1] Madison, *ut supra*. The motion was made by Butler and Pinckney, according to Mr. Madison.

[2] By Wilson.

[3] By Sherman.

[4] Madison, *ut supra*. August 28.

bitable evidence, that African slaves, as well as other persons in servitude, were included in this provision.[1]

The other precedent was found in the Ordinance which had just been adopted by Congress for the settlement and government of the Territory north-

[1] The reader who will consult a paper in the fourth volume of the Collections of the Massachusetts Historical Society (p. 194), written by Dr. Belknap, in 1795, will find that slavery, in the sense in which the term is now commonly understood, existed in Massachusetts Bay as early as 1630. The proof of it consists, — 1. In the provisions of the colonial laws and ordinances, which recognize and regulate a relation very different from that of service for hire. On this subject, the early colonists of Massachusetts held and practised the law of Moses. They regarded it as lawful to *buy* and *sell* "slaves taken in lawful war," or reduced to servitude by judicial sentence, and placed them under the same privileges as those given by the Mosaic law. But they punished man-*stealing* capitally, re-enacting expressly the 16th verse of the 21st chapter of Exodus; and when there were any negroes in their jurisdiction who had been stolen, or "fraudulently" acquired in Africa, they endeavored to send them back again. 2. In the actual presence of negro slaves, brought from Africa, who had been "lawfully" acquired, that is, by fair purchase from those who held them as prisoners of war. These existed to some extent in the Colony in 1638, and were numerous in 1673; and of course were included in all the legislation of that period respecting service, being sometimes described as "slaves," and sometimes by the more general and comprehensive term of "servants." — Slavery by judicial sentence was inflicted for no higher crimes than theft and burglary. Thus at a Quarter Court holden at Boston the 4th day of the 10th month, 1638, "John Hazlewood being found guilty of severall thefts and breaking into severall houses, was censured to be severely whipped and delivered up a *slave* to whom the Court shall appoint." (Shurtleff's Edition of Records of Massachusetts, I. 246.) Many of the Indians taken prisoners in King Philip's war, who had formerly submitted to the Colonial government and had been called "Praying Indians" from their supposed conversion to Christianity, were adjudged guilty of "rebellion," and were sold into slavery in foreign countries. Dr. Belknap says that some of them found their way back again, and took a severe revenge on the English in a subsequent war. (Hist. Soc. Coll. *ut supra.*)

west of the river Ohio; in which, when legislating for the perpetual exclusion of "slavery or involuntary servitude," a similar provision was made for the surrender of persons escaping into the Territory, "from whom labor or service is lawfully claimed in any one of the original States."

In making this provision, the early colonists of New England, and the Congress of the Confederation, had acted upon a principle directly opposite to the objection that was raised in the formation of the Constitution of the United States. When it was said in the Convention, that the public authority ought no more to interfere and surrender a fugitive slave or servant than a horse, it was forgotten that, by the principles of the common law and the comity of nations, not only is property in movable things recognized by civilized states, but a remedy is afforded for restitution. But in the case of a fugitive person, from whom, by the law of the community from which he escapes, service is due to another, the right to the service is not recognized by the common law or the law of nations, and no means exist of enforcing the duties of the relation. If the case is to be met at all, therefore, it can only be by a special provision, in the nature of a treaty, which will so far admit the relation and the claim of service, as to make them the foundation of a right to restore the individual to the jurisdiction of that law which recognizes and enforces its duties.

This was precisely what was done by the New England Confederation of 1643, and the Ordinance

of 1787; and it was what was now proposed to be done by the Constitution of the United States. It was regarded at the time by the Southern States as absolutely necessary to secure to them their right of exclusive control over the question of emancipation,[1] and it was adopted in the Convention by unanimous consent,[2] for the express purpose of protecting a right that would otherwise have been without a satisfactory security. A proper understanding of the grounds of this somewhat peculiar provision is quite important.

The publicists of Christendom are universally agreed, that independent nations are under no positive obligation to support the institutions, or to enforce the municipal laws, of each other. So far does this negative principle extend, that the general law of nations does not even require the extradition of fugitive criminals, who have escaped from one country into another. If compacts are made for this purpose, they rest entirely upon comity, and upon those considerations of public policy which make it expedient to expel from our own borders those who have violated the great laws on which the welfare of society depends; and such compacts are usually limited to those offences which imply great moral as well as civil guilt. The general rule is, that a nation is not obliged to surrender those who have taken

[1] Mr. Madison stated in the Convention of Virginia in which the Constitution was ratified, that "this clause was expressly inserted, to enable owners of slaves to reclaim them." (Elliot's Debates, III. 453.)

[2] August 29. Elliot, V. 492.

sanctuary in its dominions. At the same time, every political state has an undoubted right to forbid the entry into its territories of any person whose presence may injure its welfare or thwart its policy. No foreigner, whether he comes as a fugitive escaping from the violated laws of another country, or comes for the innocent purposes of travel or residence, can demand a sanctuary as a matter of right. Whether he is to remain, or not to remain, depends entirely upon the discretion of the state to which he has resorted; — a discretion that is regulated by a general principle, among Christian nations, while at the same time the general principle is subject to such exceptions as the national interest may require to be established.

Slavery, or involuntary servitude, being considered by public law as contrary to natural right, and being a relation that depends wholly on municipal law, falls entirely within the principle which relieves independent nations of the obligation to support or to enforce each other's laws. It has not, therefore, been customary for states which have no peculiar connection, to surrender fugitives from that relation, or to do anything to enforce its duties. But such fugitives stand upon a precise equality with all other strangers who seek to enter a society of which they are not members. If the welfare of the society demands their exclusion, or if it may be promoted by a stipulation that they shall be taken back to the place where their service is lawfully due, the right to exclude or to surrender them is perfect; for every political society has the moral power, and is under a

moral obligation, to provide for its own welfare. If such stipulations have not usually been made among independent nations, their absence may prove that the public interest has not required them, but it does not prove the want of a right to make them.

Each of the American States, when its people adopted the national Constitution, possessed the right that belongs to every political society, of determining what persons should be permitted to enter its territories. Each of them had a complete right to judge for itself how far it would go, in recognizing or aiding the laws or institutions of the other States. It is obvious, moreover, that States which are in general independent of each other, but which propose to enter into national relations with each other under a common government, for certain great political and social ends, may have reasons for giving a particular effect to each other's laws, or for sustaining each other's institutions, which do not operate with societies not standing in such a relation; and that these reasons may be of a character so grave and important, as to amount to a moral obligation. Thus independent and disconnected nations are ordinarily under no obligation to support or guarantee each other's forms of government. But the American States, in entering into the new Union under their national Constitution, found that a republican form of government in every State was a thing so essential to the welfare and safety of all of them, as to make it both a necessity and a duty for all to guarantee that form of government to each other.

In the same way, although nations in general do not recognize the relation of master and servant prevailing by the law of another country, so far as to stipulate for the surrender of persons escaping from that relation, the American States found themselves surrounded by circumstances so imperative, as to make it both a necessity and a duty to make with each other that stipulation. These circumstances I shall now briefly state.

I have already referred to all the known proceedings in the Convention on this subject, and have stated to what extent those proceedings justify the opinion that the Constitution could not have been formed without this provision.[1] But there is higher evidence both of its necessity and its propriety than anything that may have been said by individuals or delegations. The States were about to establish a more perfect Union, under a peculiar form of national government, the effect of which would necessarily bring them into closer relations with each other, multiplying greatly the means and opportunities of intercourse, and enabling them to act on each other's internal condition with an influence that would be nearly irresistible, unless it should be arrested by constitutional barriers. Among the features of their internal condition, the relation of master and servant, or the local institution of servitude, was one that must either be placed under national cognizance.

[1] I am not aware of any more positive evidence than that above given in the text, that this clause of the Constitution was expressly made in the Convention a condition of assent by any of the States.

or be left exclusively to the local authority of each State. There was no middle or debatable ground, which it could with safety be suffered to occupy. The African race, although scattered throughout all of the States, was placed in very different circumstances in different parts of the country. There could have been no national legislation with respect to that race, concerning the time or mode of emancipation, the tenure of the master's right, or the treatment of the slave, that would not have been forced to adapt itself to an almost endless variety of circumstances in different localities. At the same time, it was one of the fundamental principles on which the whole Constitution was proposed to be founded, that, where the national authority could not furnish a uniform rule, its legislative power was not to extend. Whatever required one rule in Massachusetts and another rule in Virginia, for the exigencies of society, was necessarily left to the separate authority of the respective States. It was upon matters on which the States could not legislate alike, but on which the national power could furnish a safe and advantageous uniform rule, that the want of a national Constitution was felt, and for these alone was its legislative power to be created.

We may suppose, then, that the framers of the Constitution had sought to bring the relation of master and servant, or the condition of the African race, within the States, under the cognizance of national legislation; and we may imagine, for the purposes of the argument, that consent had been given

by every one of the States. The power must have remained dormant, or its exercise would have been positively mischievous. It never could have been exercised beneficially for either of the two races; not only because it could not have followed any uniform system, but because the confusions and jealousies which must have attended any attempt to legislate specially, must either have totally obstructed the power, or must have made its exercise absolutely pernicious. These consequences, which the least reflection will reveal, may serve to show us, far better than any declarations or debates, why the framers of the Constitution studiously avoided acquiring any power over the institution of slavery in the States; — why the representatives of one class of States could not have consented to give, and the representatives of another class could never have desired to obtain, such a power for the national Constitution.

But it may be asked, — and the question is often prompted by a feeling of pity towards individual cases of hardship, — Why did not the framers of the Constitution content themselves with the negative position, which leaves the institution of slavery to the uncontrolled direction of every State in which it is found? Why did they establish a rule that obtains nowhere else among distinct communities, and require that the fugitive from this relation of a purely local character, who has committed no crime, and has fled only to acquire a natural liberty, shall be restored to the dominion of the local law which declares him to be a slave? Why should the States

which had abolished, or were about to abolish, this relation, consent to the use of force within their own territories, for the purpose of upholding the relation in other States? These questions are pertinent to the estimate which mankind may be called upon to form concerning the provisions of our national Constitution, and they admit of an answer.

The most material answer to them is, that, without some stipulation on the part of the States where slavery was not to exist that their free territory should not be made the means of a practical interference with the relation in other States, the mere concession of the abstract principle that slavery was to be exclusively under the control of State authority would have been of no real value to any one of the States, or to any of their inhabitants, of either race. But some active security for this principle was of the utmost importance, not merely as a concession which would secure the formation of the new Union, but as a means to secure the beneficent working of the Constitution after its acceptance had been obtained. It was as important to the black race as it was to the whites; for it is not to be doubted, that the continuance of a division into separate States, and the firm maintenance of an exclusive local authority over the domestic relations of their inhabitants, have been the cause, under the Divine Providence, of a far higher civilization, and consequently of a far better condition of the subjected race, than could have been attained in the same localities if the States had been in all respects resolved into one consolidated republic.

Let the reader spread before him the map of the thirteen republics of 1787, and mark upon each of them the relative numbers of their white and colored inhabitants, and then efface the boundaries of the States. Let him imagine all legislative power, all the superintending care of government, withdrawn into a central authority, whose seat must have been somewhere near the centre of the free white population. Let him observe how that population must have tended away from the regions where the labor of slaves would be most productive, and how dense the slave populations must there have become. All that now constitutes the pride of men in their separate State, that induces to residence and makes it the home of their affections, would have passed away; and at the same time, vast tracts of wonderful fertility must have retained the African, and with him scarcely any white man but the speculator, the overseer, and a solitary tradesman. Into such regions as those, the national authority could not have penetrated with success. Legislation would have wanted the necessary machinery, by which to reach and elevate the condition of society at such remote extremities from the centre. A more than Russian despotism would not have sufficed to carry the authority of government and the restraints of law into communities so depopulated of freemen, so filled with slaves, and so far removed from the seat of power.

But now let the same map be again unfolded, with all the lines that mark the distinct sovereignties of

the States. In each of them there is a complete and efficient government. Each has its history, unbroken since the first settlers laid the foundations of a State. In each there is a centre of civilization, a source of law, and the public conscience of an organized self-governing community. Each of them can act, and does act, upon the condition of the African race within its own limits, according to its own judgment of the exigencies of the case; and it is a fact capable of easy verification, that, in the progress of three quarters of a century, this local power has effected for that race what no national legislature could have accomplished. For, if we look back to the period when the Constitution of the United States was adopted, and suppose it to have acquired the means of acting on the institution of slavery within the States, we shall see that, if the national authority had approached the subject of emancipation at all, it must have applied the same rule in South Carolina as in Pennsylvania, and at the same time. But the emancipation of the half a million of slaves held in widely different proportions in the various subdivisions of the country, or of their still more numerous descendants, by a single and uniform measure comprehending them all, would at no time since the Constitution was adopted have been a merciful or defensible act. Nothing could have remained, therefore, for the national power to do, but to attempt such legislation as might tend to regulate and ameliorate the condition of servitude; and such legislation must have been wholly ineffectual, and would

soon have been abandoned, or been superseded by schemes that must have increased the evils which they aimed to remove.

In thus placing a high value upon the exclusive power of the separate States over this the most delicate and embarrassing of all the social problems involved in their destiny, I have not forgotten that, since the adoption of the national Constitution, nine slave States have been added to the Union, and that the slaves have increased to more than three millions. This increase, however, has not been in a greater *ratio* than that of the white population, nor greater than it must have been under any form of polity which the thirteen original States might have seen fit to adopt in the year 1787, unless that polity had had a direct tendency to restrain the growth of the country, and to prevent the settlement of new regions.[1] As it is, it is to be remembered that, wherever the institution of slavery has gone, there has gone with it the system of State government, the power and organization of a distinct community, and consequently a better civilization than could have been the lot of distant provinces of a great empire, or distant territories of a consolidated republic.

These considerations will account for that apparent inconsistency which has sometimes attracted the attention of those who view the institutions of the United States from a distance, and without a suffi-

[1] In 1790, the slaves numbered 697,897, and the whites 3,172,464. In 1850, the slaves had increased to 3,204,313, and the whites to 19,533,068.

cient knowledge of the circumstances in which they originated. It has been occasionally made a matter of reproach, that a people who fought for political and personal freedom, who proclaimed in their most solemn papers the natural rights of man, and who proceeded to form a constitution of government that would best secure the blessings of liberty to themselves and their posterity, should have left in their borders certain men from whom those rights and blessings are withheld. But in truth the condition of the African slaves was neither forgotten nor disregarded by the generation who established the Constitution of the United States; and it was dealt with in the best and the only mode consistent with the facts and with their welfare. The Constitution of the United States does not purport to secure the blessings of liberty to all men within the limits of the Union, but to the people who established it, and their posterity. It could not have done more; for the slaveholding States could not, and ought not, to have entered a Union which would have conferred freedom upon men incapable of receiving it, or which would have required those States to surrender to a central and insufficient power that trust of custody and care which, in the providence of God, had been cast upon their more effectual local authority. The reproach to which they would have been justly liable would have been that which would have followed a desertion of the duty they owed to those who could not have cared for themselves, and whose fate would have been made infinitely worse by a consolidation

of all government into a single community, or by an attempt to extend the principles of liberty to all men. The case is reduced, therefore, to the single question, whether the people of the United States should have foregone the blessings of a free republican government, because they were obliged by circumstances to limit the application of the maxims of liberty on which it rests. On this question, they may challenge the judgment of the world.

CHAPTER XVI.

REPORT OF THE COMMITTEE OF DETAIL, CONCLUDED. — GUARANTY OF REPUBLICAN GOVERNMENT AND INTERNAL TRANQUILLITY. — OATH TO SUPPORT THE CONSTITUTION. — MODE OF AMENDMENT. — RATIFICATION AND ESTABLISHMENT OF THE CONSTITUTION. — SIGNING BY THE MEMBERS OF THE CONVENTION.

THE power and duty of the United States to guarantee a republican form of government to each State, and to protect each State against invasion and domestic violence, had been declared by a resolution, the general purpose of which has been already described. It should be said here, however, that the objects of such a provision were two; first, to prevent the establishment in any State of any form of government not essentially republican in its character, whether by the action of a minority or of a majority of the inhabitants; second, to protect the State against invasion from without, and against every form of domestic violence.[1] When the committee of detail came to give effect to the resolution, they prepared an article, which made it the duty of the United States to guarantee to each State a republican form of government, and to protect each State against invasion, without any application from its

[1] Elliot, V. 332, 333.

authorities; and to protect the State against domestic violence, on the application of its legislature.[1] No change was made by the Convention in the substance of this article, excepting to provide that the application, in a case of domestic violence, may be made by the executive of the State, when the legislature cannot be convened.[2]

It now remains for me to state what appears to have been the meaning of the framers of the Constitution, embraced in these provisions. It is apparent, then, from all the proceedings and discussions on this subject, that, by guaranteeing a republican form of government, it was not intended to maintain the existing constitutions of the States against all changes. This would have been to exercise a control over the sovereignty of the people of a State, inconsistent with the nature and purposes of the Union. The people must be left entirely free to change their fundamental law, at their own pleasure, subject only to the condition, that they continue the republican form of government. The question arises then, What is that form? Does it imply the existence of some organic law, establishing the departments of a government, and prescribing their powers, or does it admit of a form of the body politic under which the public will may be declared from time to time, either with or without the agency of any established organs or representatives? Is it competent to a State to abolish altogether that body of its funda-

[1] First draft of the Constitution, Art. XVIII. Elliot, V. 381.

[2] Constitution, Art. IV. § 4.

mental law which we call its Constitution, and to proceed as a mere democracy, enacting, expounding, and executing laws by the direct action of the people, and without the intervention of any representative system constituting what is known as a government?

The Constitution of the United States assumes, in so many of its provisions, that the States will possess organized governments, in which legislative, executive, and judicial departments will be known and established, that it must be taken for granted that the existence of such agents of the public will is a necessary feature of a State government, within the meaning of this clause. No State could participate in the government of the Union, without at least two of these agents, namely, a legislature and an executive; for the people of a State, acting in their primary capacity, could not appoint a Senator of the United States; nor fill a vacancy in the office of Senator; nor appoint Electors of the President of the United States, without the previous designation by a legislature of the mode in which such Electors were to be chosen; nor apply to the government of the United States to protect them against "domestic violence," through any other agent than the legislature or the executive of the State. It is manifest, therefore, that each State must have a government, containing at least these distinct departments; and whether this government is organized periodically, under mere laws perpetually re-enacted, and subject to perpetual changes without reference to forms, or

under standing and fundamental laws, changeable only in a prescribed form, and being so far what is called a constitution, it is apparent that there must be a "form of government" possessed of these distinct agencies.

There must be, moreover, not only this "form of government," but it must be a "republican" form; and in order to determine the sense in which this term qualifies the nature of the government in other respects besides those already referred to, it is necessary to take into view the previous history of American political institutions, because that history shows what is meant, in the American sense, by a "republican" government.

History, then, establishes the fact, that, in the American system of government, the people are regarded as the sole original source of all political authority; that all legitimate government must rest upon their will. But it also teaches that the will of the people is to be exercised through representative forms. For even in the exercise of original suffrage, which has never been universal in any of the States of the Union, and in the bestowal of power upon particular organs, those who are regarded as competent to express the will of society are, in that expression, deemed to represent all its members; and those who, in the distribution of political functions, exercise the sovereignty of the people, so far as it has been thus imparted to them, exercise a representative function, to which they are appointed, directly or indirectly, by popular suffrage, that may be more or less restricted,

according to the public will. It may be said, therefore, with strictness, that in the American system a republican government is one based on the right of the people to govern themselves, but requiring that right to be exercised through public organs of a representative character; and these organs constitute the government. How much or how little power shall be imparted to this government, what restrictions shall be imposed upon it, and what the precise functions of its several departments shall be, with respect to the internal concerns of the State, the Constitution of the United States leaves untouched, except in a few particulars. It merely declares that a government having the essential characteristics of an American republican system shall be guaranteed by the United States; that is to say, that no other shall be permitted to be established.

The provision by which the State is protected against domestic violence was necessary to complete the republican character of the system intended to be upheld. The Constitution of the United States assumes that the governments of the States, existing when it goes into operation, are rightfully in the exercise of the authority of the State, and will so continue until they are changed. But it means that no change shall be made by force, by public commotion, or by setting aside the authority of the existing government. It recognizes the right of that government to be protected against domestic violence; in which expression is to be included every species of force directed against that government, excepting the will

of the people operating to change it through the forms of constitutional action.

The next topic on which the Convention was required to act was the question whether the Constitution should be made capable of amendment, and in what mode amendments were to be proposed and adopted. The Confederation, from its nature as a league between States otherwise independent of each other, was made incapable of alteration excepting by the unanimous consent of the States. It affords a striking illustration of the different character of the government established by the Constitution, that a mode was devised by which changes in the organic law could become obligatory upon all the States, by the action of a less number than the whole.

The frame of government which the members of the Convention were endeavoring to establish, if once adopted, was to endure, as a continuing power, indefinitely; and that it might, as far as possible, be placed beyond the danger of destruction, it was necessary to make it subject to such peaceful changes as experience might render proper, and which, by being made capable of introduction by the organic law itself, would preserve the identity of the government. The existence and operation of a prescribed method of changing particular features of a government mark the line between amendment and revolution, and render a resort to the latter, for the purpose of melioration or reform, save in extreme cases of oppression, unnecessary. According to our American theory of government, revolution and amendment both rest

upon the doctrine, that the people are the source of all political power, and each of them is the exercise of an ultimate right. But this right is exercised, in the process of amendment, in a prescribed form, which preserves the continuity of the existing government, and changes only such of its fundamental rules as require revision, without the destruction of any public or private rights that may have become vested under the former rule. Revolution, on the contrary, proceeds without form, is the violent disruption of the obligations resting on the authority of the former government, and terminates its existence often, without saving any of the rights which may have grown up under it. The question, therefore, whether the Constitution should be made capable of amendment, was identical with the question whether some mode of amending it should be prescribed in the instrument itself, since, without an ascertained and limited method of proceeding, all change becomes, in effect, revolution; and this was accordingly, in substance, the same as the question whether revolution should be the only method by which the American people could ever modify their system of government, when in the progress of time changes might become indispensable.

It was originally proposed in the Convention, that provision should be made for amending the Constitution, without requiring the assent of the national legislature.[1] But this was justly regarded as a very important question, and the Convention came to no

[1] Elliot, V. 157.

other decision, when the committee of detail were instructed, than to declare that provision ought to be made for amending the Constitution whenever it should seem necessary.[1] The mode selected by the committee, and embraced in the first draft of the instrument, was to have a convention called by the Congress, when applied for by the legislatures of two thirds of the States; but they did not declare whether the legislatures were to propose amendments and the convention was to adopt them, or whether the convention was both to propose and adopt them, or only to propose them for adoption by some other body or bodies not specified. There lay, therefore, at the basis of this whole subject, the very grave question whether there should ever be another national convention, to act in any manner upon or in reference to the national Constitution, after its adoption, and if so, what its functions and authority were to be. There would follow, also, the further question, whether this should be the sole method in which the Constitution should be made capable of amendment. Several reasons concurred to render it highly inexpedient to make a resort to a convention the sole method of reaching amendments, and we can now see that the decision that was made on this subject was a wise one. It was a rare combination of circumstances that gave to the first national Convention its success. The war of the Revolution, and the exigencies which it caused, had produced a class of men, possessing an influence,

[1] Elliot, V. 376.

as well as qualifications for the duty assigned to them, that would not be likely to be again witnessed. Of these men, Washington was the head; and no second Washington could be looked for. The peculiar crisis, too, occasioned by the total failure of the Confederation, notwithstanding the apparent fitness and actual necessity of that government at the time of its formation, could never occur again. There were, moreover, but thirteen States in the confederacy, nearly all of which dated their settlement and their existence as political communities from about the same period, and all had passed through the same revolutionary history. But the number of the States was evidently destined to be greatly increased, and the new members of the Union would also be likely to be very different in character from the old States. It was not probable, therefore, that the time would ever arrive when the people of the United States would feel that another national convention, for the purpose of acting on the national Constitution, would be safe or practicable. Still, it would not have been proper to have excluded the possibility of a resort to this method of amendment; since the national legislature might itself be interested to perpetuate abuses springing from defects in the Constitution, and to incur the hazards attending a convention might become a far less evil than the continuance of such abuses, or the failure to make the necessary reforms.

But it was indispensable that the precise functions and authority of such a convention should be defined,

lest its action might result in revolution. The method of amendment proposed by the committee of detail did not enable the Congress to call a convention on their own motion, and did not prescribe the action of such a body, or provide any mode in which the amendments proposed by it should be adopted. Hamilton and Madison both opposed this plan; — the former, because it was inadequate, and because he considered it desirable that a much easier method should be devised for remedying the defects that would become apparent in the new system; the latter, on account of the vagueness of the plan itself. Accordingly, Mr. Madison brought forward, as a substitute, a method of proceeding, which, with some modifications, became what is now the fifth article of the Constitution; namely, that the Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments; or, on the application of the legislatures of two thirds of the States, shall call a convention for proposing amendments. In either case, the amendments proposed are to become valid as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths of the States, as the one or the other mode of ratification may be proposed by the Congress.[1]

But when this provision had been agreed upon, the grave question arose, whether the power of amendment was to be subjected to any limitations. There were two objects, in respect to which, as we

[1] Elliot, V. 530–532.

have more than once had occasion to see, different classes of the States felt great jealousy. One of them had been covered by the stipulations that the States should not be prohibited before the year 1808 from admitting further importations of slaves, and that no capitation or other direct tax should be laid unless in proportion to the census or enumeration of the inhabitants of the States, in which three fifths only of the slaves were included.[1] The other was the equality of representation in the Senate, so long and at length so successfully contended for by the smaller States.[2] At the instance of Mr. Rutledge of South Carolina, a proviso was added, which forbade any amendment before the year 1808 affecting in any manner the clauses relating to the slave-trade and the capitation or other direct taxes.[3] This proviso having now become inoperative, those clauses are, like others, subject to amendment. At the instance of Mr. Sherman of Connecticut, a restriction that is of perpetual force was placed upon the power of amendment, which prevents each State from being deprived of its equality of representation in the Senate, without its consent.[4]

The oath or affirmation to support the Constitution was provided for by the committee of detail, in accordance with the resolution directing that it should be taken by the members of both houses of Congress and of the State legislatures, and by all

[1] Constitution, Art. I. § 9.
[2] Ibid. Art. I. § 3.
[3] Elliot, V. 532.
[4] Ibid. 551, 552. Constitution, Art. I § 3.

executive and judicial officers of the United States and of the several States; and for the purpose of for ever preventing any connection between church and state, and any scrutiny into men's religious opinions, the Convention unanimously added the clause, that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[1]

We are next to ascertain in what mode the Constitution, which had thus been framed, was to provide for its own establishment and authority. There is a great difference between the importance of this question, as it presented itself to the framers of the Constitution, and its importance to this or any succeeding generation. To us it is chiefly interesting because it displays the basis of a government which has been established for seventy years over the thirteen original States of the confederacy, and is now acknowledged by more than twice the number of those original States. To those who made the Constitution, and to the people who were to vote upon it and to put it into operation, the mode in which it was to become the organic law of the Union was a topic of serious import and delicacy. It involved the questions, of what course would be politic with reference to the people; of what would be practicable; of the initiation of the new government without force; of its establishment on a firm, just, and legitimate authority; and of its right to supersede the Confederation, without a breach of faith toward the

[1] Constitution, Art. VI.

members of that body by whose inhabitants the new system might be rejected.

The Convention had already decided that the Constitution must be ratified by the people of the States; but a difficulty had all along existed, in the opinions held by some of the members respecting the compact then subsisting between the States, which they regarded as indissoluble but by the consent of all the parties to it. The resolution, which the committee of detail were instructed to carry out, had declared that the new plan of government should first be submitted to the approbation of the existing Congress, and then to assemblies of representatives to be recommended by the State legislatures and to be expressly chosen by the people to consider and decide upon it. But this direction embraced no decision of the question, whether the ratification by the people of a less number than all the States should be sufficient for putting the government into operation. If the people of a smaller number than the whole of the States could establish this form of government, what was to be its future relation to the States which might reject or refuse to consider it? Could any number of the States thus withdraw themselves from the Confederation, and establish for themselves a new general government, and could that government have any authority over the rest? Various and widely opposite theories were maintained. One opinion was, that all the States must accept the Constitution, or it would be a nullity; — another, that a majority of the States might establish it, and so bind the

minority, upon the principle that the Union was a society subject to the control of the greater part of its members; — still another, that the States which might ratify it would bind themselves, but no one else.

The truth with regard to these questions, which perplexed the minds of men in that assembly somewhat in proportion to their acuteness and their proneness to metaphysical speculations, was in reality not very far off. The Articles of Confederation had certainly declared that no alteration should be made in any of them, unless first proposed by the Congress, and afterwards unanimously agreed to by the State legislatures. But in two very important particulars the Convention had already passed beyond what could be deemed an alteration of those Articles. They had prepared and were about to propose a system of government that would not merely alter, but would abolish and supersede, the Confederation; and they had determined to obtain, what they regarded as a legitimate authority for this purpose, the consent of the people of the States, by whose will the State governments existed, from whom those governments derived their authority to enter into the compact of the Confederation, and whose sovereign right to ameliorate their own political condition could not be disputed. This system they intended should be offered to all. The refusal of some States to accept it could not, upon principles of natural justice and right, oblige the others to remain fettered to a government which had been pronounced by twelve of the thirteen

legislatures to be defective and inadequate to the exigencies of the Union. At the same time, the independent political existence of the people of each State made it impossible to treat them as a minority subject to the power of such majority as would be formed by the States that might adopt the Constitution. If the people of a State should ratify it, they would be bound by it. If they should refuse to ratify it, they would simply remain out of the new Union that would be formed by the rest. It was therefore determined that the Constitution should undertake to be in force only in those States by whose inhabitants it might be adopted.[1]

Then came the question, in what mode the assent of the people of the States was to be given. The constitution of one of the States[2] provided that it should be altered only in a prescribed mode; and it was said that the adoption of the Constitution now proposed would involve extensive changes in the constitution of every State. This was equally true of the constitutions of those States which had provided no mode for making such changes, and in which the State officers were all bound by oath to support the existing constitution. These difficulties, however, were by no means insurmountable. It was universally acknowledged that the people of a State were the fountain of all political power, and if, in the method of appealing to them, the consent of the State government that such appeal should be made were involved, there could be no question that

[1] Elliot, V. 499. [2] Maryland.

the proceeding would be in accordance with what had always been regarded as a cardinal principle of American liberty. For, since the birth of that liberty, it had been always assumed that, when it has become necessary to ascertain the will of the people on a new exigency, it is for the existing legislative power to provide for it by an ordinary act of legislation.[1]

Whatever changes, therefore, in the State constitutions might become necessary in consequence of the adoption of the national Constitution, it would be a just presumption that the will of the people, duly ascertained by their legislature, had decided, by that adoption, that such changes should be made; and the formal act of making them could follow at any time when arrangements might be made for it. But if no mode of ratification of the national Constitution were to be prescribed, and it were left to each State to act upon it in any manner that it might prefer, there would be no uniformity in the mode of creating the new government in the different States; and if the Convention and the Congress were to refer its adoption to the State legislatures, it would not rest on the direct authority of the people. For these reasons, the Convention adhered to the plan of having the Constitution submitted directly to assemblies of representatives of the people in each State, chosen for the express purpose of deciding on its adoption.[2]

[1] Works of Daniel Webster, VI. 227.

[2] The vote, however, was only six States to four. Elliot, V. 500.

There was still another question, of great practical importance, to be determined. Was the Constitution to go into operation at all, unless adopted by all the States, and if so, what number should be sufficient for its establishment? It appeared clearly enough, that to require a unanimous adoption would defeat all the labors of the Convention. Rhode Island had taken no part in the formation of the Constitution, and could not be expected to ratify it. New York had not been represented for some weeks in the Convention, and it was at least doubtful how the people of that State would receive the proposed system, to which a majority of their delegates had declared themselves to be strenuously opposed.[1] Maryland continued to be present in the Convention, and a majority of her delegates still supported the Constitution; but Luther Martin confidently predicted its rejection by the State, and it was evident that his utmost energies would be put forth against it. Under these circumstances, to have required a unanimous adoption by the States would have been fatal to the experiment of creating a new government. Some of the members were in favor of such a number as would form both a majority of the States and a majority of the people of the United States. But

[1] Two of the New York delegates, Messrs. Yates and Lansing, left the Convention on the 5th of July. Hamilton had previously returned to the city of New York, on private business. He left June 29 and returned August 13. It appears from his correspondence that he was again in the city of New York on the 20th of August, and that he remained there until the 28th. On the 6th of September he was in the Convention. The vote of the State was not taken in the Convention after the retirement of Yates and Lansing.

there was an idea familiar to the people, in the number that had been required under the Confederation upon certain questions of grave importance; and in order that the Constitution might avail itself of this established usage, it was determined that the ratifications of the conventions of *nine* States should be sufficient to establish the Constitution between the States that might so ratify it.[1]

The Constitution, as thus finally prepared, received the formal assent of the States in the Convention, on the last day of the session.[2] The great majority of the members desired that the instrument should go forth to the public, not only with an official attestation that it had been agreed upon by the States represented, but also with the individual sanction and signatures of their delegates. Three of the members present, however, Randolph and Mason of Virginia, and Gerry of Massachusetts, notwithstanding the proposed form of attestation contained no personal approbation of the system, and signified only that it had been agreed to by the unanimous consent of the States then present, refused to sign the instrument.[3] The objections which these gentlemen had to different features of the Constitution would have been waived, if the Convention had been willing to take a course quite opposite to that which

[1] Elliot, V. 499–501. The article embodying this decision was the 21st in the report of the committee of detail. It became, on the revision, Article VIII. of the Constitution.

[2] September 17.

[3] This form of attestation had been adopted in the hope of gaining the signatures of all the members, but without success.

had been thought expedient. They desired that the State conventions should be at liberty to propose amendments, and that those amendments should be finally acted upon by another general convention.[1] The nature of the plan, however, and the form in which it was to be submitted to the people of the States, made it necessary that it should be adopted or rejected as a whole, by the convention of each State. As a process of amendment by the action of the Congress and the State legislatures had been provided in the instrument, there was the less necessity for holding a second convention. The State conventions would obviously be at liberty to propose amendments, but not to make them a condition of their acceptance of the government as proposed.

A letter having been prepared to accompany the Constitution, and to present it to the consideration and action of the existing Congress, the instrument was formally signed by all the other members then present. The official record sent to the Congress of the resolutions, which directed that the Constitution be laid before that body, recited the presence of the States of New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. New York was not regarded as officially present; but in order that the proceedings might have

[1] Mr. Madison has given the principal grounds of objection which these gentlemen felt to the Constitution. It is not necessary to repeat them here, as they were nearly all met by the subsequent amendments, so far as they were special, and did not relate to the general tendency of the system. (See Madison, Elliot, V. 552–558.)

all the weight that a name of so much importance could give to them, in the place that should have been filled by his State, was recited the name of "Mr. Hamilton from New York." The prominence thus given to the name of Hamilton, by the absence of his colleagues, was significant of the part he was to act in the great events and discussions that were to attend the ratification of the instrument by the States. His objections to the plan were certainly not less grave and important than those which were entertained by the members who refused to give to it their signatures; but like Madison, like Pinckney and Franklin and Washington, he considered the choice to be between anarchy and convulsion, on the one side, and the chances of good to be expected of this plan, on the other. Upon this issue, in truth, the Constitution went to the people of the United States. There is a tradition, that, when Washington was about to sign the instrument, he rose from his seat, and, holding the pen in his hand, after a short pause, pronounced these words: — "Should the States reject this excellent Constitution, the probability is that an opportunity will never again offer to cancel another in peace, — the next will be drawn in blood."[1]

[1] My authority for this anecdote is the Pennsylvania Journal of November 14, 1787, where it was stated by a writer who dates his communication from Elizabethtown, November 7.

BOOK V.

ADOPTION OF THE CONSTITUTION.

CHAPTER I.

General Reception of the Constitution. — Hopes of a Reunion with Great Britain. — Action of the Congress. — State of Feeling in Massachusetts, New York, Virginia, South Carolina, Maryland, and New Hampshire. — Appointment of their Conventions.

The national Convention was dissolved on the 14th of September. The state of expectation and anxiety throughout the country during its deliberations, and at the moment of its adjournment, will appear from a few leading facts and ideas, which illustrate the condition of the popular mind when the Constitution made its appearance.

The secrecy with which the proceedings of the Convention had been conducted, the nature of its business, and the great eminence and personal influence of its principal members, had combined to create the deepest solicitude in the public mind in all the chief centres of population and intelligence throughout the Union. An assembly of many of the wisest and most distinguished men in America had been engaged for four months in preparing for the United States a new form of government, and the public

had acquired no definite knowledge of their transactions, and no information respecting the nature of the system they were likely to propose. Under these circumstances, we may expect to find the most singular rumors prevailing during the session of the Convention, and a great excitement in the public mind in many localities, when the result was announced. Among the reports that were more or less believed through the latter part of the summer, was the idle one that the Convention were framing a system of monarchical government, and that the Bishop of Osnaburg was to be sent for, to be the sovereign of the new kingdom.

Foolish as it may appear to us, this story occasioned some real alarm in its day. It is to be traced to a favorite idea of that class of Americans who had either been avowed "Tories" during the Revolution, or had secretly felt a greater sympathy with the mother country than with the land of their birth, and who were at this period generally called "Loyalists." Some of these persons had taken no part, on either side, during the Revolutionary war, and had abstained from active participation in public affairs since the peace. They were all of that class of minds whose tendencies led them to the belief that the materials for a safe and efficient republican government were not to be found in these States, and that the public disorders could be corrected only by a government of a very different character. Their feelings and opinions carried them towards a reconciliation with England, and their grand scheme for this

purpose was to invite hither the titular Bishop of Osnaburg.[1]

Their numbers were not large in any of the States; but the feeling of insecurity and the dread of impending anarchy were shared by others who had no particular inclination towards England; and it is not

[1] It may be amusing to Americans of this and future generations to know who this personage was for whom it was rumored that the Loyalists desired to "send," and whose advent as a possible ruler of this country was a vague apprehension in the popular mind for a good while, and finally came to be imputed as a project to the framers of the Constitution. The Bishop of Osnaburg was no other than the late Duke of York, Frederick, the second son of King George III.; a prince whose conduct as commander-in-chief of the army, in consequence of the sale of commissions by his mistress, one Mrs. Clarke, became in 1809 a subject of inquiry, leading to the most scandalous revelations, before the House of Commons. The Duke was born in 1763, and was consequently, at the period spoken of in the text, at the ripe age of twenty-four. When about a year old (1764), he was chosen Bishop of Osnaburg. This was a German province (Osnabrück), formerly a bishopric of great antiquity, founded by Charlemagne. At the Reformation most of the inhabitants became Lutherans, and by the Treaty of Westphalia it was agreed that it should be governed alternately by a Roman Catholic and a Protestant Bishop. In 1802 it was secularized, and assigned as an hereditary principality to George III., in his capacity of King of Hanover. Prince Frederick continued to be called by the title of Bishop of Osnaburg, until he was created Duke of York. I am not aware that the whispers of his name in the secret counsels of our Loyalists, as a proposed king for America, became known in England. Whether such knowledge would have excited a smile, or have awakened serious hopes, is a question on which the reader can speculate. But it is certain that there were persons in this country, and in the neighboring British Provinces, who had long hoped for a reunion of the American States with the parent country, through this or some other "mad project." Colonel Humphreys, (who had been one of Washington's *aides*,) writing to Hamilton, from New Haven, under date of September 16, 1787, says: "The quondam Tories have undoubtedly conceived hopes of a future union with Great Britain, from the inefficacy of our government, and the tumults which prevailed during the last winter. I saw

to be doubted that the Constitution, among the other mischiefs which it averted, saved the country from a desperate attempt to introduce a form of government which must have been crushed beneath commotions that would have made all government, for a long time at least, impracticable. The public anxiety, created by the reports in circulation, had reached such a point

a letter, written at that period, by a clergyman of considerable reputation in Nova Scotia, to a person of eminence in this State, stating the impossibility of our being happy under our present constitution, and proposing (now we could think and argue calmly on all the consequences), that the efforts of the moderate, the virtuous, and the brave should be exerted to effect a reunion with the parent state. . . . . It seems, by a conversation I have had here, that the ultimate practicability of introducing the Bishop of Osnaburg is not a novel idea among those who were formerly termed Loyalists. Ever since the peace it has been occasionally talked of and wished for. Yesterday, where I dined, half jest, half earnest, he was given as the first toast. I leave you now, my dear friend, to reflect how ripe we are for the most mad and ruinous project that can be suggested, especially when, in addition to this view, we take into consideration how thoroughly the patriotic part of the community, the friends of an efficient government, are discouraged with the present system, and irritated at the popular demagogues who are determined to keep themselves in office, at the risk of everything. Thence apprehensions are formed, that, though the measures proposed by the Convention may not be equal to the wishes of the most enlightened and virtuous, yet that they will be too high-toned to be adopted by our popular assemblies. Should that happen, our political ship will be left afloat on a sea of chance, without a rudder as well as without a pilot." (Works of Hamilton, I. 443.) In a grave and comprehensive private memorandum, drawn up by Hamilton soon after the Constitution appeared, in which he summed up the probabilities for and against its adoption, and the consequences of its rejection, the following occurs, as among the events likely to follow such rejection: "A reunion with Great Britain, from universal disgust at a state of commotion, is not impossible, though not much to be feared. The most plausible shape of such a business would be, the establishment of a son of the present monarch in the supreme government of this country, with a family compact." (Works, II. 419, 421.)

in the month of August, — when it was rumored that the Convention had recently given a higher tone to the system they were preparing, — that members found it necessary to answer numerous letters of inquiry from persons who had become honestly alarmed. "Though we cannot affirmatively tell you," was their answer, "what we are doing, we can negatively tell you what we are *not* doing: — we never once thought of a king."[1]

All doubt and uncertainty were dispelled, however, by the publication of the Constitution in the newspapers of Philadelphia, on the 19th of September. It was at once copied into the principal journals of all the States, and was perhaps as much read by the people at large as any document could have been in the condition of the means of public intelligence which a very imperfect post-office department then afforded. It met everywhere with warm friends and warm opponents; its friends and its opponents being composed of various classes of men, found, in different proportions, in almost all of the States. Those who became its advocates were, first, a large body of men, who recognized, or thought they recognized, in it the admirable system which it in fact proved to be when put into operation; secondly, those who, like most of the statesmen who made it, believed it to be the best attainable government that could be adopted by the people of the United States, overlooking defects which they acknowledged, or trusting to the power of amendment which it contained; and, thirdly, the

[1] Pennsylvania Journal, August 22, 1787.

mercantile and manufacturing classes, who regarded its commercial and revenue powers with great fafor. Its adversaries were those who had always opposed any enlargement of the federal system; those whose consequence as politicians would be diminished by the establishment of a government able to attract into its service the highest classes of talent and character, and presenting a service distinct from that of the States; those who conscientiously believed its provisions and powers dangerous to the rights of the States and to public liberty; and, finally, those who were opposed to any government, whether State or national or federal, that would have vigor and energy enough to protect the rights of property, to prevent schemes of plunder in the form of paper money, and to bring about the discharge of public and private debts. The different opponents of the Constitution being animated by these various motives, great care should be taken by posterity, in estimating the conduct of individuals, not to confound these classes with each other, although they were often united in action.

As the Constitution presented itself to the people in the light of a proposal to enlarge and reconstruct the system of the Federal Union, its advocates became known as the "Federalists," and its adversaries as the "Anti-Federalists." This celebrated designation of Federalist, which afterwards became so renowned in our political history as the name of a party, signified at first nothing more than was implied in the title of the essays which passed under

that name, namely, an advocacy of the Constitution of the United States.[1]

Midway between the active friends and opponents

[1] The history of the term "Federal," or "Federalist," offers a curious illustration of the capricious changes of sense which political designations often undergo, within a short period of time, according to the accidental circumstances which give them their application. During the discussions of the Convention which framed the Constitution of the United States, the term *federal* was employed in its truly philosophic sense, to designate the nature of the government established by the Articles of Confederation, in distinction from a national system, that would be formed by the introduction of the plan of having the States represented in the Congress in proportion to the numbers of their inhabitants. But when the Constitution was before the people of the States for their adoption, its friends and advocates were popularly called Federalists, because they favored an enlargement of the Federal government at the expense of some part of the State sovereignties, and its opponents were called the Anti-Federalists. In this use, the former term in no way characterized the nature of the system advocated, but merely designated a supporter of the Constitution. A few years later, when the first parties were formed, in the first term of Washington's Administration, it so happened that the leading men who gave a distinct character to the development which the Constitution then received had been prominent advocates of its adoption, and had been known therefore as Federalists, as had also been the case with some of those who separated themselves from this body of persons and formed what was termed the Republican, afterwards the Democratic party. But the prominent supporters of the policy which originated in Washington's administration continued to be called Federalists, and the term thus came to denote a particular school of politics under the Constitution, although it previously signified merely an advocacy of its adoption. Thus, for example, Hamilton, in 1787, was no Federalist, because he was opposed to the continuance of a federal, and desired the establishment of a national government. In 1788, he was a Federalist, because he wished the Constitution to be adopted; and he afterwards continued to be a Federalist, because he favored a particular policy in the administration of the government, under the Constitution. It was in this latter sense that the term became so celebrated in our political history. The reader will observe that I use it, of course, in this work, only in the sense attached to it while the Constitution was before the people of the States for adoption.

of the Constitution lay that great and somewhat inert mass of the people, which, in all free countries, finally decides by its preponderance every seemingly doubtful question of political changes. It was composed of those who had no settled convictions or favorite theories respecting the best form of a general government, and who were under the influence of no other motive than a desire for some system that would relieve their industry from the oppressions under which it had long labored, and would give security, peace, and dignity to their country. Ardently attached to the principles of republican government and to their traditionary maxims of public liberty, and generally feeling that their respective States were the safest depositaries of those principles and maxims, this portion of the people of the United States were likely to be much influenced by the arguments against the Constitution founded on its want of what was called a Bill of Rights, on its omission to secure a trial by jury in civil cases, and on the other alleged defects which were afterwards corrected by the first ten Amendments. But they had great confidence in the principal framers of the instrument, an unbounded reverence for Washington and Franklin, and a willingness to try any experiment sanctioned by men so illustrious and so entirely incapable of any selfish or unworthy purpose.[1] There were, however, consider-

[1] A striking proof of the importance attached by the people to the opinions of Washington and Franklin may be found in a controversy carried on for a short time in the newspapers of Philadelphia and New York, after the Constitution appeared, whether those distinguished persons *really approved* what they had signed.

able numbers of the people, in the more remote districts of several of the States, who had a very imperfect acquaintance, if they had any, with the details of the proposed system, at the time when their legislatures were called upon to provide for the assembling of conventions; for we are not to suppose that what would now be the general and almost instantaneous knowledge of any great political event or topic, could have taken place at that day concerning the proposed Constitution of the United States. Still it was quite generally understood before its final ratification in the States where its adoption was postponed to the following year, where information was most wanted, and where the chief struggles occurred; and it is doubtless correct to assert that its adoption was the intelligent choice of a majority of the people of each State, as well as the choice of their delegates, when their conventions successively acted upon it.

On the adjournment of the Convention, Madison, King, and Gorham, who held seats in the Congress of the Confederation, hastened to the city of New York, where that body was then sitting. They found eleven States represented.[1] But they found also that an effort was likely to be made, either to arrest the Constitution on its way to the people of the States, or to subject it to alteration before it should be sent to the legislatures. It was received by official communication from the Convention in about ten days after that assembly was dissolved. All that was asked of the Congress was, that they

[1] All but Maryland and Rhode Island.

should transmit it to their constituent legislatures for their action. The old objection, that the Congress could with propriety participate in no measure designed to change the form of a government which they were appointed to administer, having been answered, Richard Henry Lee of Virginia proposed to amend the instrument by inserting a Bill of Rights, trial by jury in civil cases, and other provisions in conformity with the objections which had been made in the Convention by Mr. Mason.

To the address and skill of Mr. Madison, I think, the defeat of this attempt must be attributed. If it had succeeded, the Constitution could never have been adopted by the necessary number of States; for the recommendation of the Convention did not make the action of the State legislatures conditional upon their receiving the instrument from the Congress; the legislatures would have been at liberty to send the document published by the Convention to the assemblies of delegates of the people, without adding provisions that might have been added by the Congress; some of them would have done so, while others would have followed the action of the Congress, and thus there would have been in fact two Constitutions before the people of the States, and their acts of ratification would have related to dissimilar instruments. This consideration induced the Congress, by a unanimous vote of the States present, to adopt a resolution which, while it contained no approval of the Constitution, abstained from interfering with it as it came from the Conven-

tion, and transmitted it to the State 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."[1]

In Massachusetts, the Constitution was well received, on its first publication, so far as its friends in the central portion of the Union could ascertain. Mr. Gerry was a good deal censured for refusing to sign it, and the public voice, in Boston and its neighborhood, appeared to be strongly in its favor. But in a very short time three parties were formed among the people of the State, in such proportions as to make the result quite uncertain. The commercial classes, the men of property, the clergy, the members of the legal profession, including the judges, the officers of the late army, and most of the people of the large towns, were decidedly in favor of the Constitution. This party amounted to three sevenths of the people of the State. The inhabitants of the district of Maine, who were then looking forward to the formation of a new State, would be likely to vote for the new Constitution, or to oppose it, as they believed it would facilitate or retard their wishes; and this party numbered two sevenths. The third party consisted of those who had been concerned in the late insurrection under Shays, and their abettors; the majority of them desiring the annihilation of debts, public and private, and believing that the proposed Constitution would strengthen

[1] Passed September 28, 1787. Journals, XII. 149–166.

all the rights of property. Their numbers were estimated at two sevenths of the people.[1] It was evident that a union of the first two parties would secure the ratification of the instrument, and a union of the last two would defeat it. Great caution, conciliation, and good temper were, therefore, required, on the part of its friends. The influence of Massachusetts on Virginia, on New York, and indeed on all the States that were likely to act after her, would be of the utmost importance. The State convention was ordered to assemble in January.

In New York, as elsewhere, the first impressions were in favor of the Constitution. In the city, and in the southern counties generally, it was from the first highly popular. But it was soon apparent that the whole official influence of the executive government of the State would be thrown against it. There had been a strong party in the State, ever since its refusal to bestow on the Congress the powers asked for in the revenue system of 1783, who had regarded the Union with jealousy, and steadily opposed the surrender to it of any further powers. Of this party, the Governor, George Clinton, was now the head; and the government of the State, which embraced a considerable amount of what is termed "patronage," was in their hands. Two of the delegates of the State to the national Convention, Yates and Lansing, had retired from that body before the Constitution was completed, and had announced their

[1] This is the substance of a careful account given by General Knox to General Washington. (Works of Washington, IX. 310, 311.)

opposition to it in a letter to the Governor, which, from its tone and the character of its objections, was likely to produce a strong impression on the public mind. It became evident that the Constitution could be carried in the State of New York in no other way than by a thorough discussion of its merits, — such a discussion as would cause it to be understood by the people, and would convince them that its adoption was demanded by their interests. For this purpose, Hamilton, Madison, and Jay, under the common signature of Publius, commenced the publication of the series of essays which became known as The Federalist. The first number was issued in the latter part of October.

In January, the Governor presented the official communication of the instrument from the Congress to the legislature, with the cold remark, that, from the nature of his official position, it would be improper for him to have any other agency in the business than that of laying the papers before them for their information. Neither he nor his party, however, contented themselves with this abstinence. After a severe struggle, resolutions ordering a State convention to be elected were passed by the bare majorities of three in the Senate and two in the House, on the first day of February, 1788. The elections were held in April; and when the result became known, in the latter part of May, it appeared that the Anti-Federalists had elected two thirds of the members of the Convention, and that probably four sevenths of the people of the State were unfriendly to the Con-

stitution. Backed by this large majority, the leaders of the Anti-Federal party intended to meet in convention at the appointed time, in June, and then to adjourn until the spring or summer of 1789. Their argument for this course was, that, if the Constitution had been adopted in the course of a twelve-month by nine other States, New York would have an opportunity to witness its operation and to act according to circumstances. They would thus avoid an immediate rejection, — a step which might lead the Federalists to seek a separation of the southern from the northern part of the State, for the purpose of forming a new State. On the other hand, the Federalists rested their hopes upon what they could do to enlighten the public at large, and upon the effect on their opponents of the action of other States, especially of Virginia, whose convention was to meet at nearly the same time. The Convention of New York assembled at Poughkeepsie,[1] on the 17th of June, 1788.

However strong the opposition in other States, it was to be in Virginia far more formidable, from the abilities and influence of its leaders, from the nature of their objections, and from the peculiar character of the State. Possessed of a large number of men justly entitled to be regarded then and always as statesmen, although many of them were prone to great refinements in matters of government; filled with the spirit of republican freedom, although its

[1] A town on the Hudson River, seventy-five miles north of the city of New York.

polity and manners were marked by several aristocratic features; having, on the one hand, but few among its citizens interested in commerce, and still fewer, on the other hand, of those levelling and licentious classes which elsewhere sought to overturn or control the interests of property; ever ready to lead in what it regarded as patriotic and demanded by the interests of the Union, but jealous of its own dignity and of the rights of its sovereignty; — the State of Virginia would certainly subject the Constitution to as severe an ordeal as it could undergo anywhere, and would elicit in the discussion all the good or the evil that could be discovered in the examination of a system before it had been practically tried. The State was to feel, it is true, the almost overshadowing influence of Washington, in favor of the new system, exerted, not by personal participation in its proceedings, but in a manner which could leave no doubt respecting his opinion. But it was also to feel the strenuous opposition of Patrick Henry, that great natural orator of the Revolution, whose influence over popular assemblies was enormous, and who added acuteness, subtilty, and logic to the fierce sincerity of his unstudied harangues, although his knowledge was meagre and his range of thought circumscribed; and the not less strenuous or effective opposition of George Mason, who had little of the eloquence and passion of his renowned compatriot, but who was one of the most profound and able of all the American statesmen opposed to the Constitution, while he was inferior in

general powers and resources to not more than two or three of those who framed or advocated it. Richard Henry Lee, William Grayson, Benjamin Harrison, John Tyler, and others of less note, were united with Henry and Mason in opposing the Constitution. Its leading advocates were to be Madison, Marshall, the future Chief Justice of the United States, George Nicholas, and the Chancellor Pendleton. The Governor, Edmund Randolph, occupied for a time a middle position between its friends and its opponents, but finally gave to it his support, from motives which I have elsewhere described as eminently honorable and patriotic.

One of the most distinguished of the public men of Virginia had been absent in the diplomatic service of the country for three years. His eminent abilities and public services, his national reputation, and the influence of his name, naturally made both parties anxious to claim the authority of Jefferson, and he was at once furnished with a copy of the Constitution as soon as it appeared. In the heats of subsequent political conflicts he has been often charged by his opponents with a general hostility to the Constitution. The truth is, that Mr. Jefferson's opinions on the subject of government, and of what was desirable and expedient to be done in this country, united with the effect of his long absence from home,[1] did lead him, at first, to think and to say that the Constitution had defects which, if not corrected, would destroy the liberties of America.

[1] He went abroad in the summer of 1784.

He was by far the most democratic, in the tendency of his opinions, of all the principal American statesmen of that age. He was, according to his own avowal, no friend to an energetic government anywhere. He carried abroad the opinion that the Confederation could be adapted, with a few changes, to all the wants of the Union; and this opinion he continued to retain, because the events which had taken place here during his absence did not produce upon his mind the effect which they produced upon the great majority of public men who remained in the midst of them. He freely declared to more than one of his correspondents in Virginia, at this time, that such disorders as had been witnessed in Massachusetts were necessary to public liberty, and that the national Convention had been too much influenced by them, in preparing the Constitution. He held that the natural progress of things is for liberty to lose and for government to gain ground; and that no government should be organized without those express and positive restraints which will jealously guard the liberties of the people, even if those liberties should periodically break into licentiousness. One of his favorite maxims of government was "rotation in office"; and he thought the government of the Union should have cognizance only of matters involved in the relations of the people of each State to foreign countries, or to the people of the other States, and that each State should retain the exclusive control of all its internal and domestic concerns, and especially the power of direct taxation.

Hence it is not surprising that, when Mr. Jefferson received at Paris, early in November, a copy of the Constitution, and when he found in it no express declarations insuring the freedom of religion, freedom of the press, and freedom of the person under the uninterrupted protection of the *habeas corpus*, and no trial by jury in civil cases, and found also that the President would be re-eligible, and that the government would have the power of direct taxation, his anxiety should have been excited. It is a mistake, however, to suppose that he counselled a direct rejection of the instrument by the people of Virginia. His first suggestion was, that the nine States which should first act upon it should adopt it, unconditionally, and that the four remaining States should accept it only on the previous condition that certain amendments should be made. This plan of his became known in Virginia in the course of the winter of 1787–88, and it gave the Anti-Federalists what they considered a warrant for using his authority on their side. But before the following spring, when he had had an opportunity to see the course pursued by Massachusetts, he changed his opinion, and authorized his friends to say that he regarded an unconditional acceptance by each State, and subsequent amendments, in the mode provided by the Constitution, as the only rational plan.[1] He also abandoned the opinion that the general government ought not

[1] Compare Mr. Jefferson's autobiography, and his correspondence, in the first, second, and third volumes of his collected works (edition of 1853), and the letters of Mr. Madison.

to have the power of direct taxation; but he never receded from his objections founded on the want of a bill of rights, and of trial by jury, and on the re-eligibility of the President.

Immediately after his return to Mount Vernon from the national Convention, Washington sent copies of the Constitution to Patrick Henry, Mason, Harrison, and other leading persons whose opposition he anticipated, with a temperate but firm expression of his own opinion. The replies of these gentlemen furnished him with the grounds of their objections, and at the same time relieved him, as to all of them but Henry, from the apprehension that they might resist the calling of a State convention. Mason and Henry were both members of the legislature. The former was expressly instructed by his constituents of Alexandria county[1] to vote for a submission of the Constitution to the people of the State in convention; — a vote which he would probably have given without instruction, as he declared to General Washington that he should use all his influence for this purpose. Mr. Henry was not in-

[1] In the newspapers of the time there is to be found a story that Mr. Mason was very roughly received on his arrival at the city of Alexandria, after the adjournment of the national Convention, on account of his refusal to sign the Constitution. The occurrence is not alluded to in Washington's correspondence, although he closely observed Mr. Mason's movements, and regarded them with evident anxiety. The story is told in the Pennsylvania Journal of October 17, 1787, — a strong Federal paper. I know of no other confirmation of it than the fact that the people of Alexandria embraced the Constitution from the first with "enthusiastic warmth," according to the account given by General Washington to one of his correspondents. (Works, IX. 272.)

structed, and the friends of the Constitution expected his resistance. The legislature assembled in October, and on the first day of the session, in a very full House, Henry declared, to the surprise of everybody, that the proposed Constitution must go to a popular convention. The elections for such a body were ordered to be held in March and April of the following spring. When they came on, the news that the convention of New Hampshire had postponed their action was employed by the Anti-Federalists, who insisted that this step had been taken in deference to Virginia; although it was in fact taken merely in order that the delegates of New Hampshire might get their previous instructions against the Constitution removed by their constituents. The pride of Virginia was touched by this electioneering expedient, and the result was that the parties in the State convention were nearly balanced, the Federalists however having, as they supposed, a majority.[1] The convention was to assemble on the 2d of June, 1788.

In the legislature of South Carolina the Constitution was debated, with great earnestness, for three days, before it was decided to send it to a popular convention. This was owing to the great persistency of Rawlins Lowndes, who carried on the discussion in opposition to the Constitution, almost single-handed and with great ability, against the two Pinckneys, Pierce Butler, John and Edward Rutledge, John Julius Pringle, Robert Barnwell, Dr. David

[1] Washington's Works, IX. 266, 267, 273, 340–342, 345, 346.

Ramsay, and many other gentlemen. At length, on the 19th of January, a resolution was passed, directing a convention of the people to assemble on the 12th of May. The debate in the legislature had tended to diffuse information respecting the system, but it had also produced a formidable minority throughout the State. Mr. Lowndes had employed, with a good deal of skill, the local arguments which would be most likely to form the objections of a citizen of South Carolina. He inveighed against the regulation of commerce, the power over the slave-trade that was to belong to Congress at the end of twenty years, and the preponderance which he contended would be given to the Eastern States by the system of representation in Congress; and although he was ably answered on all points, the effect of the discussion was such, that a large minority was returned to the Convention having a strong hostility to the proposed system.[1]

The legislature of Maryland assembled in December, and directed the delegates who had represented the State in the national Convention to attend and give an account of the proceedings of that assembly.

[1] This debate of three days in the South Carolina legislature was one of the most able of all the discussions attending the ratification of the Constitution. Mr. Lowndes was overmatched by his antagonists, but he resisted with great spirit, and finally closed with the declaration that he saw dangers in the proposed government so great, that he could wish, when dead, for no other epitaph than this: "Here lies the man that opposed the Constitution, because it was ruinous to the liberty of America." He lived to find his desired epitaph a false prophecy. He was the father of the late William Lowndes, who represented the State of South Carolina in Congress, with so much honor and distinction, during the administration of Mr. Madison.

It was in compliance with this direction that Luther Martin laid before the legislature that celebrated communication which embodied not only a very clear statement of the mode in which the principal compromises of the Constitution were framed, as seen from the point of view occupied by one who resisted them at every step, but also an exceedingly able argument against the fundamental principle of the proposed government. It was a paper, too, marked throughout with an earnestness almost amounting to fanaticism. Repelling, with natural indignation and dignity, the imputation that he was influenced by a State office which he then held, he referred to the numerous honors and emoluments which the Constitution of the United States would create, and suggested — what his abilities and reputation well justified — that his chance of obtaining a share of them was as good as most men's. "But this," was his solemn conclusion, "I can say with truth, — that so far was I from being influenced in my conduct by interest, or the consideration of office, that I would cheerfully resign the appointment I now hold; I would bind myself never to accept another, either under the general government or that of my own State; I would do more, sir; — so destructive do I consider the present system to the happiness of my country, I would cheerfully sacrifice that share of property with which Heaven has blessed a life of industry; I would reduce myself to indigence and poverty; and those who are dearer to me than my own existence, I would in-

trust to the care and protection of that Providence who hath so kindly protected myself, — if on *those terms only* I could procure my country to reject those chains which are forged for it."

Such a strength of conviction as this, on the part of a man of high talent, was well calculated to produce an effect. No document that appeared anywhere, against the Constitution, was better adapted to rouse the jealousy, to confirm the doubts, or to decide the opinions, of a certain class of minds. But it was an argument which reduced the whole question substantially to the issue, whether the principle of the Union could safely be changed from that of a federal league, with an equality of representation and power as between the States, to a system of national representation in a legislative body having cognizance of certain national interests, in one branch of which the people inhabiting the respective States should have power in proportion to their numbers.[1] This was a question on which men would naturally and honestly differ; but it was a question which a majority of reflecting men, in almost every State, were likely, after due inquiry, to decide against the views of Mr. Martin, because it was clear that the Confederation had failed, and had failed chiefly by reason of the peculiar and characteristic nature of its representative system, and because the represent-

[1] Mr. Martin's objections extended to many of the details of the Constitution, but his great argument was that directed against its system of representation, which he predicted would destroy the State governments.

ative system proposed in the Constitution was the only one that could be agreed upon as the alternative. Mr. Martin's objections, however, like those of other distinguished men who took the same side in other States, were of a nature to form the creed of an earnest, conscientious, and active minority. They had this effect in the State of Maryland. The legislature ordered a State convention, to consider the proposed Constitution, and directed it to meet on the 21st of April, 1788.

The convention of New Hampshire was to assemble in February. A large portion of the State lay remote from the channels of intelligence, and a considerable part of the people in the interior had not seen the Constitution, when they were called upon to elect their delegates. The population, outside of two or three principal places, was a rural one, thinly scattered over townships of large territorial extent, lying among the hills of a broken and rugged country, extending northerly from the narrow strip of sea-coast towards the frontier of Canada. It was easy for the opposition to persuade such a people that a scheme of government had been prepared which they ought to reject; and the consequence of their efforts was that the State convention assembled, probably with a majority, certainly with a strong minority, of its members bound by positive instructions to vote against the Constitution which they were to consider.

I have thus, in anticipation of the strict order of events, given a general account of the position of

this great question in six of the States, down to the time of the meeting of their respective conventions, because when the session of the convention of Massachusetts commenced, in January, 1788, the people of the five States of Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut had successively ratified the Constitution without proposing any amendments, and because the action of the others, extending through the six following months, embraced the real crisis to which the Constitution was subjected, and developed what were thereafter to be considered as its important defects, according to the view of a majority of the States, and probably also of a majority of the people of all the States. For although the people of Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut ratified the Constitution without insisting on previous or subsequent amendments, it is certain that some of the same topics were the causes of anxiety and objection in those States, which occasioned so much difficulty, and became the grounds of special action, in the remaining States.

In coming, however, to the more particular description of the resistance which the Constitution encountered, it will be necessary to discriminate between the opposition that was made to the general plan of the government, or to the particular features of it which it was proposed to create, and that which was founded on its omission to provide for certain things that were deemed essential. Of what may be called the positive objections to the Constitution, it may be said,

in general, that, however fruitful of debate, or declamation, or serious and important doubt, might be the question whether such a government as had been framed by the national Convention should be substituted for the Confederation, the opposition were not confined to this question, as the means of persuading the people that the proposed system ought to be rejected. One of the most deeply interested of the men who were watching the currents of public opinion with extreme solicitude, observed "a strong belief in the people at large of the insufficiency of the Confederation to preserve the existence of the Union, and of the necessity of the Union to their safety and prosperity; of course, a strong desire of a change, and a predisposition to receive well the propositions of the Convention."[1] But while the Constitution came before the people with this conviction and this predisposition in its favor, yet when its opponents, in addition to their positive objections to what it did contain, could point to what it did *not* embrace, and could say that it proposed to establish a government of great power, without providing for rights of primary importance, and without any declaration of the cardinal maxims of liberty which the people had from the first been accustomed to incorporate with their State constitutions; and while the local interests, the sectional feelings, and the separate policy, real or supposed, of different States, furnished such a variety of means for defeating its adoption by the necessary number of nine States; — we

[1] Hamilton, Works, II. 419, 420.

may not wonder that its friends should have been doubtful of the issue. "It is almost arrogance," said the same anxious observer, "in so complicated a subject, depending so entirely upon the incalculable fluctuations of the human passions, to attempt even a conjecture about the result." [1]

[1] Hamilton, Works, II. 421.

CHAPTER II.

RATIFICATIONS OF DELAWARE, PENNSYLVANIA, NEW JERSEY, GEORGIA, AND CONNECTICUT, WITHOUT OBJECTION. — CLOSE OF THE YEAR 1787. — BEGINNING OF THE YEAR 1788. — RATIFICATION OF MASSACHUSETTS, THE SIXTH STATE, WITH PROPOSITIONS OF AMENDMENT. — RATIFICATION OF MARYLAND, WITHOUT OBJECTION. — SOUTH CAROLINA, THE EIGHTH STATE, ADOPTS, AND PROPOSES AMENDMENTS.

THE first State that ratified the Constitution, although its convention was not the first to assemble, was Delaware. It was a small, compact community, with the northerly portion of its territory lying near the city of Philadelphia, with which its people had constant and extensive intercourse. Its public men were intelligent and patriotic. In the national Convention it had contended with great spirit for the interests of the smaller States, and its people now had the sagacity and good sense to perceive that they had gained every reasonable security for their peculiar rights. The public press of Philadelphia friendly to the Constitution furnished the means of understanding its merits, and the discussions in the convention of Pennsylvania, which assembled before that of Delaware, threw a flood of light over the whole subject, which the people of Delaware did not

fail to regard. Their delegates unanimously ratified and adopted the Constitution on the 7th of December.

The convention of Pennsylvania met, before that of any of the other States, at Philadelphia, on the 20th of November. It was the second State in the Union in population. Its chief city was perhaps the first in the Union in refinement and wealth, and had often been the scene of great political events of the utmost interest and importance to the whole country. There had sat, eleven years before, that illustrious Congress of deputies from the thirteen Colonies, who had declared the independence of America, had made Washington commander-in-chief of her armies, and had given her struggle for freedom a name throughout the world. There, the Revolutionary Congress had continued, with a short interruption, to direct the operations of the war. There, the alliance with France was ratified, in 1778. There, the Articles of Confederation were finally carried into full effect, in 1781. There, within six months afterwards, the Congress received intelligence of the surrender of Cornwallis, and walked in procession to one of the churches of the city, to return thanks to God for a victory which in effect terminated the war. There, the instructions for the treaty of peace were given, in 1782, and there the Constitution of the United States had been recently framed. For more than thirteen years, since the commencement of the Revolution, and with only occasional intervals, the people of Philadelphia had

been accustomed to the presence of the most eminent statesmen of the country, and had learned, through the influences which had gone forth from their city, to embrace in their contemplation the interests of the Union.

They placed in the State convention, that was to consider the proposed Constitution of the United States, one of the wisest and ablest of its framers, — James Wilson. The modesty of his subsequent career,[1] and the comparatively little attention that has been bestowed by succeeding generations upon the personal exertions that were made in framing and establishing the Constitution, must be regarded as the causes that have made his reputation, at this day, less extensive and general than his abilities and usefulness might have led his contemporaries to expect that it would be. Yet the services which he rendered to the country, first in assisting in the preparation of the Constitution, and afterwards in securing its adoption by the State of Pennsylvania, should place his name high upon the list of its benefactors. He had not the political genius which gave Hamilton such a complete mastery over the most complex subjects of government, and which enabled him, when the Constitution had been adopted, to give it a development in practice that made it even more successful than its theory alone could have allowed any one to regard as probable; nor had he the talent of Madison for debate and for constitutional analysis; but in the comprehensiveness of his

[1] See an account of him, *ante*, Vol. I. Book III. Chap. XIV.

views, and in his perception of the necessities of the country, he was not their inferior, and he was throughout one of their most efficient and best informed coadjutors.

He had to encounter, in the convention of the State, a body of men, a majority of whom were not unfriendly to the Constitution, but among whom there was a minority very hard to be conciliated. In the counties which lay west of the Susquehanna, — the same region which afterwards, in Washington's administration, became the scene of an insurrection against the authority of the general government, — there was a rancorous, active, and determined opposition. Mr. Wilson, being the only member of the State convention who had taken part in the framing of the Constitution, was obliged to take the lead in explaining and defending it. His qualifications for this task were ample. He had been a very important and useful member of the national Convention; he had read every publication of importance, on both sides of the question, that had appeared since the Constitution was published, and his legal and historical knowledge was extensive and accurate. No man succeeded better than he did, in his arguments on that occasion, in combating the theory that a State government possessed the whole political sovereignty of the people of the State. However true it might be, he said, in England, that the Parliament possesses supreme and absolute power, and can make the constitution what it pleases, in America it has been incontrovertible since the Revolu-

tion, that the supreme, absolute, and uncontrollable power is in the people, before they make a constitution, and remains in them after it is made. To control the power and conduct of the legislature by an overruling constitution, was an improvement in the science and practice of government reserved to the American States; and at the foundation of this practice lies the right to change the constitution at pleasure, — a right which no positive institution can ever take from the people. When they have made a State constitution, they have bestowed on the government created by it a certain portion of their power; but the fee simple of their power remains in themselves.

Mr. Wilson was equally clear in accounting for the omission to insert a bill of rights in the Constitution of the United States. In a government, he observed, consisting of enumerated powers, such as was then proposed for the United States, a bill of rights, which is an enumeration of the powers reserved by the people, must either be a perfect or an imperfect statement of the powers and privileges reserved. To undertake a perfect enumeration of the civil rights of mankind, is to undertake a very difficult and hazardous, and perhaps an impossible task; yet if the enumeration is imperfect, all implied power seems to be thrown into the hands of the government, on subjects in reference to which the authority of government is not expressly restrained, and the rights of the people are rendered less secure than they are under the silent operation of the maxim

that every power not expressly granted remains in the people. This, he stated, was the view taken by a large majority of the national Convention, in which no direct proposition was ever made, according to his recollection, for the insertion of a bill of rights.[1] There is, undoubtedly, a general truth in this argument, but, like many general truths in the construction of governments, it may be open to exceptions when applied to particular subjects or interests. It appears to have been, for the time, successful; probably because the opponents of the Constitution, with whom Mr. Wilson was contending, did not bring forward specific propositions for the declaration of those particular rights which were made the subjects of special action in other State conventions.

Besides a very thorough discussion of these great subjects, Mr. Wilson entered into an elaborate examination and defence of the whole system proposed in the Constitution. He was most ably seconded in his efforts by Thomas McKean, then Chief Justice of Pennsylvania and afterwards its Governor, the greater part of whose public life had been passed in the service of Delaware, his native State, and who had always been a strenuous advocate of the interests of the smaller States, but who found himself satisfied with the provision for them made by the Constitution for the construction of the Senate of

[1] This was a mistake. On the 12th of September, Messrs. Gerry and Mason moved for a committee to prepare a bill of rights, but the motion was lost by an equal division of the States. Elliot, V. 538.

the United States.[1] "I have gone," said he, "through the circle of office, in the legislative, executive, and judicial departments of government; and from all my study, observation, and experience, I must declare, that, from a full examination and due consideration of this system, it appears to me the best the world has yet seen. I congratulate you on the fair prospect of its being adopted, and am happy in the expectation of seeing accomplished what has long been my ardent wish, that you will hereafter have a salutary permanency in magistracy and stability in the laws."

The result of the discussion in the convention of Pennsylvania was the ratification of the Constitution. The official ratification sent to Congress was signed by a very large majority of the delegates, and contains no notice of any dissent.[2] But the representatives of that portion of the State which lay west of the Susquehanna generally refused their assent, and their district afterwards became the place in which the proposition was considered whether the government should be allowed to be organized.[3]

The convention of New Jersey was in session at the time of the ratification by Pennsylvania. Mr. Madison had passed through the State, in the au-

[1] Mr. McKean, although his residence was at Philadelphia, represented the lower counties of Delaware in Congress from 1774 to 1783. In 1777 he was made Chief Justice of Pennsylvania, being at the same time a member of Congress and President of the State of Delaware.

[2] The Constitution was ratified by a vote of 46 to 23.

[3] This was at a meeting held at Harrisburg, September 3d, 1788.

tumn, on his way to the Congress, then sitting in the city of New York, and could discover no evidence of serious opposition to the Constitution. Lying between the States of New York and Pennsylvania, New Jersey was closely watched by the friends and the opponents of the Constitution in both of those States, and was likely to be much influenced by the predominating sentiment in the one that should first act.[1] But the people of New Jersey had, in truth, fairly considered the whole matter, and had found what their own interests required. They alone, of all the States, when the national Convention was instituted, had expressly declared that the regulation of commerce ought to be vested in the general government. They had learned that to submit longer to the diverse commercial and revenue systems in force in New York on the one side of them, and in Pennsylvania on the other side, would be like remaining between the upper and the nether millstone. Their delegates in the national Convention had, it is true, acted with those of New York, in the long contest concerning

[1] The opposite parties were so much excited against each other, and the course of New Jersey was viewed with so much interest at Philadelphia among the "Federalists," that a story found currency and belief there, to the effect that Clinton, the Governor of New York, had offered the State of New Jersey, through one of its influential citizens, one half of the impost revenue of New York, if she would reject the Constitution. The preposterous character of such a proposition stamps the rumor with gross improbability. But its circulation evinces the anxiety with which the course of New Jersey was regarded in the neighboring States, and it is certain that the opposition in New York made great efforts to influence it.

the representative system, resisting at every step each departure from the principle of the Confederation, until the compromise was made which admitted the States to an equal representation in the Senate. Content with the security which this arrangement afforded, the people of New Jersey had the sagacity to perceive that their interests were no longer likely to be promoted by following in the lead of the Anti-Federalists of New York. Their delegates unanimously ratified the Constitution on the 12th of December, five days after the ratification of Pennsylvania.

A few days later, there came from the far South news that the convention of Georgia had, with like unanimity, adopted the Constitution. Neither the people of the State, nor their delegates, could well have acted under the influence of what was taking place in the centre of the Union. Their situation was too remote for the reception, at that day, within the same fortnight, of the news of events that had occurred in Pennsylvania and New Jersey, and they could scarcely have read the great discussions that were going on in various forms of controversy in the cities of New York and Philadelphia, and throughout the Middle and the Eastern States. Wasted excessively during the Revolution, by the nature of the warfare carried on within her limits; left at the peace to contend with a large, powerful, and cruel tribe of Indians, that pressed upon her western settlements; and having her southern frontier bordering upon the unfriendly territory of a Span-

ish colony, — the State of Georgia had strong motives to lead her to embrace the Constitution of the United States, and found little in that instrument calculated to draw her in the opposite direction. Her delegates had resisted the surrender of control over the slave-trade, but they had acquiesced in the compromise on that subject, and there was in truth nothing in the position in which it was left that was likely to give the State serious dissatisfaction or uneasiness. The people of Georgia had something more important to do than to quarrel with their representatives about the principles or details of the system to which they had consented in the national Convention. They felt the want of a general government able to resist, with a stronger hand than that of the Confederation, the evils which pressed upon them.[1] Their assent was unanimously given to the Constitution on the 2d of January, 1788.

The legislature of Connecticut had ordered a convention to be held on the 4th of January. When the elections were over, it was ascertained that there was a large majority in favor of the Constitution;

[1] The situation of Georgia was brought to the notice of Washington immediately after his first inauguration as President of the United States, in an Address presented to him by the legislature of the State, in which they set forth two prominent subjects on which they looked for protection to "the influence and power of the Union." One of these was the exposure of their frontier to the ravages of the Creek Indians. The other was the escape of their slaves into Florida, whence they had never been able to reclaim them. Both of these matters received the early attention of Washington's administration.

but there was to be some opposition, proceeding principally from that portion of the people who resisted whatever tended to the vigor and stability of government, — a spirit that existed to some extent in all the New England States. When the convention of the State assembled, the principal duty of advocating the adoption of the Constitution devolved on Oliver Ellsworth, who had borne an active and distinguished part in its preparation. He found that the topic which formed the chief subject of all the arguments against the Constitution, was the general power of taxation which it would confer on the national government, and the particular power of laying imposts. Mr. Ellsworth was eminently qualified to explain and defend the proposed revenue system. While he contended for the necessity of giving to Congress a general power to levy direct taxes, in order that the government might be able to meet extraordinary emergencies, and thus be placed upon an equality with other governments, he demonstrated by public and well-known facts that an indirect revenue, to be derived from imposts, would be at once the easiest and most reliable mode of defraying the ordinary expenses of the government, because it would interfere less than any other form of taxation with the internal police of the States; and he argued, from sufficient data, that a very small rate of duty would be enough for this purpose.[1] Under

[1] He stated the annual expenditure of the government, including the interest on the foreign debt, at £ 260,000 (currency), and then showed that, in the three States of Massachusetts, New York,

his influence and that of Oliver Wolcott, Richard Law, and Governor Huntington, the Constitution was ratified by a large majority, on the 9th of January.[1]

The action of Connecticut completed the list of the States that ratified the Constitution without any formal record of objections, and without proposing or insisting upon amendments. The opposition in these five States had been overcome by reason and argument, and they were a majority of the whole number of States whose accession was necessary to the establishment of the government. But a new act in the drama was to open with the new year. The conventions of Massachusetts, New York, and Virginia were still to meet, and each of them was full of elements of opposition of the most formidable character, and of different kinds, which made the result in all of them extremely doubtful. If all the three were to adopt the Constitution, still one more must be gained from the States of New Hampshire, Maryland, and North and South Carolina. The influence of each accession to the Constitution on the remaining States might be expected to be considerable; but, unfortunately, the convention of New Hampshire was to meet five months before those of Virginia and New York, and a large number of its members had been instructed to reject the Constitu-

and Pennsylvania, £160,000 or £180,000 per annum had been raised by impost.

[1] Fragments only of the debates in the convention of Connecticut are known to be preserved. They may be found in the second volume of Elliot's collection.

tion. If New Hampshire and Massachusetts were to refuse their assent in the course of the winter, the States that were to act in the spring could scarcely be expected to withstand the untoward influence of such an example, which would probably operate with a constantly accelerating force throughout the whole number of the remaining States.

The convention of Massachusetts commenced its session on the 9th of January, the same day on which that of Connecticut closed its proceedings. The State certainly held a very high rank in the Union. Her Revolutionary history was filled with glory; with sufferings cheerfully borne; with examples of patriotism that were to give her enduring fame. The blood of martyrs in that cause, which she had made from the first the cause of the whole country, had been poured profusely upon her soil, and in the earlier councils of the Union she had maintained a position of commanding influence. But there had been in her political conduct, since the freedom of the country was achieved, an unsteadiness and vacillation of which her former reputation gave no presage. In 1783, the legislature had refused to give the revenue powers asked for by the Congress, for the miserable reason that the Congress had granted half-pay for life to the officers of the Revolutionary army. In May, 1785, the legislature adopted a resolution for a convention of the States to consider the subject of enlarging the powers of the Federal Union, and in the following November they rescinded it. These, and other oc-

currences, when remembered, gave the friends of the Constitution elsewhere great anxiety, as they turned their eyes towards Massachusetts. They were fully aware, too, that the recent insurrection in that State, and the severe measures which had followed it, had created divisions in society which it would be difficult, if not impossible, to heal.

But it was not easy for the most intelligent men out of the State to appreciate fully all the causes that exposed the Constitution of the United States to a peculiar hazard in Massachusetts, and made it necessary to procure its ratification by a kind of compromise with the opposition for a scheme of amendments. In no State was the spirit of liberty more jealous and exacting. In the midst of the Revolution, and led by the men who had carried on the profound discussions which preceded it, — discussions in which the natural rights of mankind and the civil rights of British subjects were examined and displayed as they had never been before, — the people of Massachusetts had framed a State constitution, filled with the most impressive maxims and the most solemn securities with which public liberty has ever been invested. Not content to trust obvious truths to implication, they expressly declared that government is instituted for the happiness and welfare of the governed, and they fenced it round not only with the chief restrictions gained by their English ancestors, from Magna Charta down to the Revolution of 1688, but with many safeguards which had not descended to them from Runnymede or

Westminster. It may be that an anxious student of politics, examining the early constitution of Massachusetts, — happily in its most important features yet unchanged, — would pronounce it unnecessarily careful of personal rights and too jealous for the interests of liberty. But no intelligent mind, thoughtful of the welfare of society, can now think that to have been an excess of wisdom which formed a constitution of republican government that has so well withstood the assaults of faction and the levelling tendencies of a levelling age, and has withstood them because, while it carefully guarded the liberties of the people, it secured those liberties by institutions which stand as bulwarks between the power of the many and the rights of the few.

It may hereafter become necessary for me to consider what degree of importance justly belongs to the amendments which the State of Massachusetts, and to those which other States, so impressively insisted ought to be made to the Constitution of the United States. Without at present turning farther aside from the narrative of events, I content myself here with observing, that, whether the alleged defects in the Constitution were important or unimportant, a people educated as the people of Massachusetts had been would naturally regard some provisions as essential which they did not find in the plan presented to them.

The general aspect of parties in Massachusetts, down to the time when the convention met, has been already considered. In the convention itself there

was a majority originally opposed to the Constitution; and if a vote had been taken at any time before the proposition for amendments was brought forward, the Constitution would have been rejected. The opposition consisted of a full representation of the various parties and interests already described as existing among the people of the State who were unfriendly to it. One contemporary account gives as many as eighteen or twenty members, who had actually been out in what was called Shays's "army." Whether this enumeration was strictly correct or not, it is well known that the western counties of the State sent a large number of men whose sympathies were with that insurrection, who were friends of paper money and tender laws, and enemies of any system that would promote the security of debts. The members from the province of Maine had their own special objects to pursue. In addition to these were the honest and well-meaning doubters, who had examined the Constitution with care and objected to it from principle. The anticipated leader of this miscellaneous host was that celebrated and ardent patriot of the Revolution, Samuel Adams. With all his energy and his iron determination of character, however, he could be cautious when caution was expedient. He had read the Constitution, and all the principal publications respecting it which had then appeared, and down to the time of the meeting of the convention he had maintained a good deal of reserve. But it was known that he disapproved of it.

This remarkable man — often called the American Cato — was far better fitted to rouse and direct the storms of revolution, than to reconstruct the political fabric after revolution had done its work. He had the passionate love of liberty, fertility of resource, and indomitable will, which are most needed in a truly great leader of a popular struggle with arbitrary power. But that struggle over, his usefulness in an emergency like the one in which Massachusetts was now placed was limited to the actual necessity for the intervention of an extreme devotion to the maxims and principles of popular freedom. He believed that there was such a necessity, and he acted always as he believed. But his influence, at this time, was by no means commensurate with his power and reputation at a former day, and he appears to have wisely avoided a direct contest with the large body of very able men who supported the Constitution.

That body of men would certainly have been, in any assembly convened for such a purpose, an overmatch in debate for Samuel Adams; for they were the civilians Fisher Ames, Parsons, King, Sedgwick, Gorham, Dana, Gore, Bowdoin, and Sumner, the Revolutionary officers Heath, Lincoln, and Brooks, and several of the most distinguished clergymen in the State. The names of the members who acted on the same side with Mr. Adams, and were then regarded as leaders of the opposition, have reached posterity in no other connection.[1] But some

[1] Three of them, Widgery, Thompson, and Nason, were from Maine;

of the elements of which that opposition was composed could not be controlled by any superiority in debate, and were, therefore, little in need of great powers of discussion or great wisdom in council. So far as their objections related to the powers to be conferred on the general government, or to the structure of the proposed system, they could be answered, and many of them could be, and were, convinced. But with respect to what they considered the defects of the Constitution, theoretical reasoning, however able, could have no influence over men whose minds were made up; and it became, as the reader will see, necessary to make an effort to gain a majority by some course of action which would involve the concession that the proposed system required amendment.

There were great hazards attending this course, in reference to its effect on other States, although it was not impossible to procure by it the ratification of this convention. Notwithstanding all that had detracted from the former high standing of the State, — notwithstanding the easy explanation that might be given of the influence of her late internal disturbances upon her subsequent political affairs, — she was still Massachusetts; still she was the eldest of all the States but one, — still she held in the sacred places of her soil the bones of the first martyrs to liberty, — still she was renowned, as she has ever

there was a Dr. Taylor from the county of Worcester, and a Mr. Bishop from the county of Bristol. These gentlemen carried on the greater part of the discussion against the Constitution.

been, for her intelligence, — still she wore a name of more than ordinary consideration among her sisters of the Confederacy. If it should go forth to New York, to Virginia, to the Carolinas, that Massachusetts had pronounced the Constitution unfit for the acceptance of a free people, or had declared that public liberty could not be preserved under it without the addition of provisions which its framers had not made, the effect might be disastrous beyond all previous calculation. The legislature of New York, in session at the same time with the convention of Massachusetts, was much divided on the question of submitting the Constitution to a convention, and it was the opinion of careful observers that the result in either way in the latter State would involve that in the former. In Virginia the elections for their convention were soon to take place. In Pennsylvania the minority were becoming restless under their defeat, and were agitating plans which looked to the obstruction of the government when an attempt should be made to organize it. The convention of South Carolina was not to meet until May, and North Carolina stood in an extremely doubtful position. A great weight of responsibility rested therefore upon the convention of Massachusetts.

Its proceedings commenced with a desultory debate upon the several parts of the instrument, which lasted until the 30th of January; the friends of the Constitution having carefully provided, by a vote at the outset, that no separate question should be taken.

The discussion of the various objections having been exhausted, Parsons[1] moved that the instrument be assented to and ratified. One or two general speeches followed this motion, and then Hancock, the President of the convention, descended from the chair, and, with some conciliatory observations, laid before it a proposition for certain amendments. This step was not taken by him upon his own suggestion merely, although he was doubtless very willing to be the medium of a reconciliation between the contending parties. He was at that time Governor of the State, and had been placed in the chair of the convention, partly in deference to his official station and his personal eminence, and partly because he held a rather neutral position with respect to the Constitution. These circumstances, as well as his Revolutionary distinction, led the friends of the Constitution to seek his intervention; and his love of popularity and deference made the office of arbitrator exceedingly agreeable to him. The selection was a wise one, for Hancock had great influence with the classes of men composing the opposition, and he could not be suspected of any undue admiration of the system the adoption of which he was to recommend.

He proceeded with characteristic caution. It does not appear, from what is preserved of the remarks with which he presented his amendments, whether he intended they should become a condition

[1] Theophilus Parsons, afterwards the celebrated Chief Justice of Massachusetts.

precedent to the ratification, or should be adopted as a recommendation subsequent to the assent of the convention to the Constitution then before it. He brought them forward, he said, to quiet the apprehensions and remove the doubts of gentlemen, relying on their candor to bear him witness that his wishes for a good constitution were sincere. But the form of ratification which he proposed contained a distinct and separate acceptance of the Constitution, and the amendments followed it, with a recommendation that they "be introduced into the said Constitution." Samuel Adams, with much commendation of the Governor's proposition, immediately affected to understand it as recommending conditional amendments, and advocated it in that sense. Other members of the opposition understood it in the opposite sense, and, fearing its effect, insisted that the convention had no power to propose amendments, and that there could be no probability that, if recommended to the attention of the first Congress that might sit under the Constitution, they would ever be adopted. Upon both of these points, the arguments of the other side were sufficient to convince a few of the more candid members of the opposition, and the Constitution was ratified on the 7th of February, by a majority of nineteen votes,[1] the ratification being followed by a recommendation of certain amendments, and an injunction addressed to the representatives of the State in Congress to insist at all times on their being considered and

[1] Yeas, 187; nays, 168.

acted upon in the mode provided by the fifth article of the Constitution.

The smallness of the majority in favor of the Constitution was in a great degree compensated by the immediate conduct of those who had opposed it. Many of them, before the final adjournment, expressed their determination, now that it had received the assent of a majority, to exert all their influence to induce the people to anticipate the blessings which its advocates expected from it. They acted in accordance with their professions; and those portions of the people whose sentiments they had represented exhibited generally the same candor and patriotism, and acquiesced at once in the result. This course of the opposition in Massachusetts was observed elsewhere, and largely contributed to give to the action of the State, in proposing amendments, a salutary influence in some quarters, which would otherwise have probably failed to attend it.

The amendments proposed by the convention of Massachusetts were, as was claimed by those who advocated them, of a general, and not a local character; but they were at the same time highly characteristic of the State. They may be divided into three classes. One of them embraced that general declaration which was afterwards incorporated with the amendments to the Constitution, and which expressly reserved to the States or the people the powers not delegated to the United States. Another class of them comprehended certain restraints upon the powers granted to Congress by the Constitution,

with respect to elections, direct taxes, the commercial power, the jurisdiction of the courts, and the power to consent to the holding of titles or offices conferred by foreign sovereigns. The third class contemplated the two great provisions of a presentment by a grand jury, for crimes by which an infamous or a capital punishment might be incurred, and trial by jury in civil actions at the common law between citizens of different States.

The people of Boston, although in general strongly in favor of the Constitution, had carefully abstained from every attempt to influence the convention. But now that the ratification was carried, they determined to give to the event all the importance that belonged to it, by public ceremonies and festivities. On the 17th of February, there issued from the gates of Faneuil Hall an imposing procession of five thousand citizens, embracing all the trades of the town and its neighborhood, each with its appropriate decorations, emblems, and mottoes. In the centre of this long pageant, to mark the relation of everything around it to maritime commerce, and the relation of all to the new government, was borne the ship Federal Constitution, with full colors flying, and attended by the merchants, captains, and seamen of the port.[1] On the following day, the rejoicings were terminated by a public banquet, at which each of the States that had then adopted the Constitution

[1] This was the first of a series of similar pageants, which took place in the other principal cities of the Union, in honor of the ratification of the Constitution.

was separately toasted, the minorities of Connecticut and Massachusetts were warmly praised for their frank and patriotic submission, and strong hopes were expressed of the State of New York.

In this manner the Federalists of Massachusetts wisely sought to kindle the enthusiasm of the country, and to conciliate the opinion of the States which were still to act, in favor of the new Constitution. The influence of their course did not fail in some quarters. In the convention of New Hampshire, which assembled immediately after that of Massachusetts was adjourned, although there was a majority who, either bound by instructions or led by their own opinions, would have rejected the Constitution if required to vote upon it immediately, yet that same majority was composed chiefly of men willing to hear discussion, willing to be convinced, and likely to feel the influence of what had occurred in the leading State of New England. There was a body of Federalists in New Hampshire acting in concert with the leading men of that party in Massachusetts. They caused the same form of ratification and the same amendments which had been adopted in the latter State, with some additional ones, to be presented to their own convention.[1] The discussions

[1] The form of ratification and the amendments introduced by Hancock into the convention of Massachusetts were drawn by Theophilus Parsons. They were probably communicated to General Sullivan, the President of the New Hampshire convention, by his brother, James Sullivan, an eminent lawyer of Boston, afterwards Governor of Massachusetts. The reader should compare the Massachusetts amendments with those of the other States whose action followed that of Massachusetts, for the purpose of seeing the influence which they exerted. (All

changed the opinions of many of the members, but it was not deemed expedient to incur the hazard of a vote. The friends of the Constitution found it necessary to consent to an adjournment, in order that the instructed delegates might have an opportunity to lay before their constituents the information which they had themselves received, and of which the people in the more remote parts of the State were greatly in need. Unfortunately, however, for the course of things in other States, the occurrence of a general election in New Hampshire made it necessary to adjourn the convention until the middle of June. We have seen what was the effect of this proceeding in Virginia, where it was both misunderstood and misrepresented. But it saved the Constitution in New Hampshire.

Six States only, therefore, had adopted the Constitution at the opening of the spring of 1788. The convention of Maryland assembled at Annapolis on the 21st of April. The convention of South Carolina was to follow in May, and the conventions of Virginia and New York were to meet in June. So critical was the period in which the people of Maryland were to act, that Washington considered that a postponement of their decision would cause the final defeat of the Constitution; for if, under the influence of such a postponement, following that of New Hampshire, South Carolina should reject it,

the amendments may be found in the Journals of the Old Congress, Vol. XIII., Appendix.) See also *post*, Chap. III., as to the effect of the course of Massachusetts on the mind of Jefferson.

its fate would turn on the determination of Virginia.

The people of Maryland appear to have been fully aware of the importance of their course. They not only elected a large majority of delegates known to be in favor of the Constitution, but a majority of the counties instructed their members to ratify it as speedily as possible, and to do no other act. This settled determination not to consider amendments, and not to have the action of the State misinterpreted, or its influence lost, gave great dissatisfaction to the minority. Their efforts to introduce amendments were disposed of quite summarily. The majority would entertain no proposition but the single question of ratification, which was carried by sixty-three votes against eleven, on the 28th of April.

On the first of May, there were public rejoicings and a procession of the trades, in Baltimore, followed by a banquet, a ball, and an illumination. In this procession, the miniature ship "Federalist," which was afterwards presented to General Washington, and long rode at anchor in the Potomac opposite Mount Vernon, was carried, as the type of commerce and the consummate production of American naval architecture.[1] The next day a packet sailed from the port of Baltimore for Charleston, carrying the news of the ratification by Maryland.[2] In how many

[1] This little vessel sailed from Baltimore on the 1st of June, and arrived at Mount Vernon, "completely rigged and highly ornamented," on the 8th. It was a fine specimen of the then state of the mechanic arts. See an account of it in Washington's Works, IX. 375, 376.

[2] There was then no land com-

days this "coaster" performed her voyage is not known; but it is a recorded, though now forgotten, fact among the events of this period, that on her return to Baltimore, where she arrived on Saturday the 31st of May, the same vessel brought back the welcome intelligence, that on the 23d of that month, "at five o'clock in the afternoon," the convention of South Carolina had ratified the Constitution of the United States. A salute of cannon on Federal Hill, in the neighborhood of Baltimore, spread the joyful news far down the waters of the Chesapeake to the shores of Virginia, and bold express riders placed it in Philadelphia before the following Monday evening.

Such was the anxiety with which the friends of the Constitution in the centre of the Union watched the course of events in the remaining States. The accession of South Carolina was naturally regarded as very important. Her delegates in the national Convention had assumed what might be thought, at home and elsewhere, to be a great responsibility. They had taken a prominent part in the settlement of the compromises which became necessary between the Northern and the Southern States. They had consented to a full commercial power, to be exercised by a majority in both houses of Congress; to a power

munication between the two places, that could have carried intelligence in less than a month. A letter written by General Pinckney to General Washington on the 24th of May, announcing the result in South Carolina, was more than four weeks on its way to Mount Vernon. (Washington's Works, IX. 389.) General Washington had received the same news by way of Baltimore soon after its arrival there.

to extinguish the slave-trade in twenty years; and to a power of direct and indirect taxation, exports alone excepted. Would the people of South Carolina consider the provisions made for their peculiar demands as equivalents for what had been surrendered? Would they acquiesce in a system founded in the necessities for local sacrifices, standing as they did at the extremity of the interests involved in the Southern side of the adjustment?

It is not probable that the people of South Carolina, at the time of their adoption of the Constitution, supposed that they had any solid reasons for dissatisfaction with such of its arrangements as in any way concerned the subject of slavery. A good deal was said, *ad captandum*, by the opponents of the Constitution, on these points, but it does not appear to have been said with much effect. No man who has ever been placed by the State of South Carolina in a public position, has been more true to her interests and rights than General Pinckney; and General Pinckney furnished to the people of the State — speaking from his place in the legislature on his return from the national Convention — what he considered, and they received, as a complete answer to all that was addressed to their local fears and prejudices, on these particular topics. When he had shown that, by the universal admission of the country, the Constitution had given to the general government no power to emancipate the slaves within the several States, and that it had secured a right which did not previously exist, of recovering those

who might escape into other States; that the slave-trade would remain open for twenty years, a period that would suffice for the supply of all the labor of that kind which the State would require; and that the admission of the blacks into the basis of representation was a concession in favor of the State, of singular importance as well as novelty; — he had disposed of every ground of opposition relating to these points. And so the people of the State manifestly considered.

But there was one part of the arrangements included in the Constitution, on which they appear to have thought that they had more reason to pause; and it is quite important that we should understand both the grounds of their doubt, and the grounds on which they yielded their assent to this part of the system. South Carolina was then, and was ever likely to be, a great exporting State. Some of her people feared that, if a full power to regulate commerce by the votes of a majority in the two houses of Congress were to be exercised in the passage of a navigation act, the Eastern States, in whose behalf they were asked to grant such a power, would not be able to furnish shipping enough to export the products of the planting States. This apprehension arose entirely from a want of information; which some of the friends of the Constitution supplied, while it was under discussion. They showed that, if all the exported products of Virginia, the Carolinas, and Georgia were obliged to be carried in American bottoms, the Eastern States were then able to fur-

nish more than shipping enough for the purpose; and that this shipping must also compete with that of the Middle States. Still it remained true, that the grant of the commercial power would enable a majority in Congress to exclude foreign vessels from the carrying trade of the United States, and so far to enhance the freights on the products of South Carolina. What then were the motives which appear to have led the convention of that State to agree to this concession of the commercial power?

It is evident from the discussions which took place in the legislature, and which had great influence in the subsequent convention, that the attention of the people of South Carolina was not confined to the particular terms and arrangements of the compromises which took place in the formation of the Constitution. They looked to the propriety, expediency, and justice of a general power to regulate commerce, apart from the compromise in which it was involved. They admitted the commercial distresses of the Northern States; they saw the policy of increasing the maritime strength of those States, in order to encourage the growth of a navy; and they considered it neither prudent, nor fit, to give the vessels of all foreign nations a right to enter American ports at pleasure, in peace and in war, and whatever might be the commercial legislation of those nations towards the United States. For these reasons, a large majority of the people of South Carolina were willing to make so much sacrifice, be it more or less, as was involved in the sur-

render to a majority in Congress of the power to regulate commerce.[1]

Still, the Constitution was not ratified without a good deal of opposition on the part of a considerable minority. As the convention drew towards the close of its proceedings, an effort was made to carry an adjournment to the following autumn, in order to gain time for the anticipated rejection of the Constitution by Virginia. This motion probably stimulated the convention to act more decisively than they might otherwise have done, for it touched the pride of the State in the wrong direction. After a spirited discussion it was rejected by a majority of forty-six votes, and the Constitution was thereupon ratified by a majority of seventy-six. Several amendments were then adopted, to be presented to Congress for consideration, three of which were substantially the same with three of those proposed by Massachusetts.[2]

On the 27th of May, there was a great procession of the trades, in Charleston, in honor of the accession of the State, in which the ship Federalist, drawn by eight white horses, was a conspicuous object, as it had been in the processions of other cities.

1 See the course of argument of Edward Rutledge, General Pinckney, Robert Barnwell, Commodore Gillon, and others, as given in Elliot, IV. 253–316.

2 See the Amendments, Journals of the Old Congress, Vol. XIII., Appendix.

CHAPTER III.

Ratifications of New Hampshire, Virginia, and New York, with Proposed Amendments.

South Carolina was the eighth State that had ratified the Constitution, and one other only was required for its inauguration. In this posture of affairs the month of May in the year 1788 was closed. An intense interest was to be concentrated into the next two months, which were to decide the question whether the Constitution was ever to be put into operation. The convention of Virginia was to meet on the 2d, and that of New York on the 17th, of June; the convention of New Hampshire stood adjourned to the 18th of the same month. The latter assembly was to meet at Concord, from which place intelligence would reach the Middle and Southern States through Boston and the city of New York. The town of Poughkeepsie, where the convention of New York was to sit, lay about midway between the cities of Albany and New York, on the east bank of the Hudson. The land route from the city of New York to Richmond, where the convention of Virginia was to meet, was of course through the city of Philadelphia. The distance from Concord to Pough-

keepsie, through Boston, Springfield, and Hudson, was about two hundred and fifty miles. The distance from Poughkeepsie to Richmond, through the cities of New York, Philadelphia, and Baltimore, was about four hundred and fifty miles. The public mails, over any part of these distances, were not carried at a rate of more than fifty miles for each day, and over a large part of them they could not have been carried so fast. The information needed at such a crisis could not wait the slow progress of the public conveyances.

No one could tell how long the conventions of New York and Virginia might be occupied with the momentous question that was to come before them. It was evident, however, that there was to be a great struggle in both of them, and it was extremely important that intelligence of the final action of New Hampshire should be received in both at the earliest practicable moment. For, whatever might be the weight due to the example of New Hampshire under other circumstances, if, before the conventions of New York and Virginia had decided, it should appear that nine States had ratified the Constitution, the course of those bodies might be materially influenced by a fact of so much consequence to the future position of the Union, and to the relations in which those two States were to stand to the new government. It was equally important, too, that whatever might occur in the conventions of New York and Virginia should be known respectively in each of them, as speedily as possible. About

the middle of May, therefore, Hamilton arranged with Madison for the transmission of letters between Richmond and Poughkeepsie, by horse expresses; and by the 12th of June he had made a similar arrangement with Rufus King, General Knox, and other Federalists at the East, for the conveyance from Concord to Poughkeepsie of intelligence concerning the result in New Hampshire.

A very full convention of delegates of the people of Virginia assembled at Richmond on the 2d of June, embracing nearly all the most eminent public men of the State, except Washington and Jefferson. All parties felt the weight of responsibility resting upon the State. Every State that had hitherto acted finally on the subject had ratified the Constitution; in three of them it had been adopted unanimously; in several of the others it had been sanctioned by large majorities; and in those in which amendments had been proposed, they had not been made conditions precedent to the adoption. So far, therefore, as the voice of any State had pronounced the Constitution defective, or dangerous to any general or particular interest, the mode of amendment provided by it, to be employed after it had gone into operation, had been relied upon as sufficient and safe. The opposition in Virginia were consequently reduced to this dilemma; — they must either take the responsibility of rejecting the Constitution entirely, or they must assume the equally hazardous responsibility of insisting that the ratification of the State should be given only upon the condition of previous

amendments. They were prepared to do both, or either, according to the prospects of success; for their convictions were fixed against the system proposed; their abilities, patriotism, courage, and personal influence were of a high order; and their devotion to what they deemed the interests of Virginia was unquestionable.

They were led, as I have already said they were to be, by Patrick Henry, whose reputation had suffered no abatement since the period when he blazed into the darkened skies of the Revolution, — when his untutored eloquence electrified the heart of Virginia, and became, as has been well said, even "a cause of the national independence."[1] He had held the highest honors of the State, but had retired, poor, and worn down by twenty years of public service, to rescue his private affairs by the practice of a profession which, in some of its duties, he did not love, and for which he had, perhaps, a single qualification in his amazing oratorical powers. His popularity in Virginia was unbounded. It was the popularity that attends genius, when thrown with heart and soul, and with every impulse of its being, into the cause of popular freedom; and it was a popularity in which reverence for the stern independence and the self-sacrificing spirit of the patriot was mingled with admiration for the splendid gifts of oratory

[1] Notice of Henry, in the National Portrait Gallery of Distinguished Americans, Vol. II. Mr. Jefferson has said that Henry's power as a popular orator was greater than that of any man he had ever heard, and that Henry "appeared to speak as Homer wrote." (Jefferson's Works, I. 4.)

which Nature, and Nature alone, had bestowed upon him. But Mr. Henry was rightly appreciated by his contemporaries. They knew that, though a wise man, his wisdom lacked comprehensiveness, and that the mere intensity with which he regarded the ends of public liberty was likely to mislead his judgment as to the means by which it was to be secured and upheld The chief apprehension of his opponents, on this important occasion, was lest the power of his eloquence over the feelings or prejudices of his auditory might lead the sober reflections of men astray.

He was at this time fifty-two years of age. Although feeling or affecting to feel himself an old and broken man, he was yet undoubtedly master of all his natural powers. Those powers he exerted to the utmost, to defeat the Constitution in the convention of Virginia. He employed every art of his peculiar rhetoric, every resource of invective, of sarcasm, of appeal to the fears of his audience for liberty; every dictate of local prejudice and State pride. But he employed them all with the most sincere conviction that the adoption of the proposed Constitution would be a wrong and dangerous step. Nor is it surprising that he should have so regarded it. He had formed to himself an ideal image which he was fond of describing as the American spirit. This national spirit of liberty, erring perhaps at times, but in the main true to right and justice as well as to freedom, was with him a kind of guardian angel of the republic. He seems to have considered it able to correct its own errors without the aid of

any powerful system of general government, — capable of accomplishing in peace all that it had unquestionably effected for the country in war. As he passed out of the troubles and triumphs of the Revolution into the calmer atmosphere of the Confederation, his reliance on this American spirit, and his jealousy for the maxims of public liberty, led him to regard that system as perfect, because it had no direct legislative authority. He could not endure the thought of a government, external to that of Virginia, and yet possessed of the power of direct taxation over the people of the State. He regarded with utter abhorrence the idea of laws binding the people of Virginia by the authority of the people of the United States; and thinking that he saw in the Constitution a purely national and consolidated government, and refusing to see the federal principle which its advocates declared was incorporated in its system of representation, he shut his eyes resolutely upon all the evils and defects of the Confederation, and denounced the new plan as a monstrous departure from the only safe construction of a Union. He belonged, too, to that school of public men — some of whose principles in this respect it is vain to question — who considered a Bill of Rights essential in every republican government that is clothed with powers of direct legislation.

On the first day of the session, at the instance of Mr. Mason, the convention determined not to take a vote upon any question until the whole Constitution had been debated by paragraphs; but the discussions

in fact ranged over the whole instrument without any restriction. The opposition was opened by Henry, in a powerful speech of a general nature, in which he demanded the reasons for such a radical change in the character of the general government. That the new plan was a consolidated government, and not a confederacy, he held to be indisputable. The language of the preamble, which said *We, the People*, and not *We, the States*, made this perfectly clear. But States were the characteristics and the soul of a confederation. If States were not to be the agents of this new compact, it must be one great, consolidated, national government of the people of all the States. This perilous innovation, altogether beyond the powers of the Convention which had proposed it, had given rise to differences of opinion which had gone to inflammatory resentments in different parts of the country. He denied altogether the existence of any necessity for exposing the public peace to such a hazard.

As soon as Henry had sat down, the Governor, Edmund Randolph, rose, to place himself in a position of some apparent inconsistency. He had, as we have seen, refused to sign the Constitution. On his return to Virginia, he had addressed a long, exculpatory letter to the Speaker of the House of Delegates, giving his reasons for this refusal; which were, in substance, that he considered the Constitution required important amendments, and that, as it would go to the conventions of the States to be accepted or rejected as a whole, without power to

amend, he thought that his signature would preclude him from proposing the changes and additions which he deemed essential. This letter had attracted much attention both in and out of Virginia, and Randolph was consequently, up to this moment, regarded as a firm opponent of the Constitution. He chose, however, to incur the charge of that kind of inconsistency which a statesman should never hesitate to commit, when he finds that the public good is no longer consistent with his adherence to a former opinion. He declared that the day of previous amendments had passed. The ratification of the Constitution by eight States had placed Virginia and the country in a critical position. If the Constitution should not be adopted by the number of States required to put it into operation, there could be no Union; and if it were to be ratified by that number, and Virginia were to reject it, she would have at least two States at the south of her which would belong to a confederacy of which she would not be a member. He should, therefore, vote for the unconditional adoption of the Constitution, looking to future amendments, although he had little expectation that they would be made.

This announcement took the opposition by surprise. But they relaxed none of their efforts. They subjected every part of the Constitution to a rigid scrutiny, and to the most subtle course of reasoning, as well as to one which addressed the prejudices of the common mind. Some of the most important only of the topics on which they enlarged can be noticed here.

Their first and chief object was to show that the Constitution presented a national and consolidated government, in the place of the Confederation, and that under such a government the liberties of the people of the States could not be secure. This character of the proposed government Mr. Mason deduced from the power of direct taxation, which, he contended, entirely changed the confederacy into one consolidated government. This power, being at discretion and unrestrained, must carry everything before it. The general government being paramount to, and in every respect more powerful than, the State governments, the latter must give way; for two concurrent powers of direct taxation cannot long exist together. Assuming that taxes were to be levied for the use of the general government, the mode in which they were to be assessed and collected was of the utmost consequence, and it ought not to be surrendered by the people of Virginia to those who had neither a knowledge of their situation nor a common interest with them. He would cheerfully acquiesce in giving an effectual alternative for the power of direct taxation. He would give the general government power to demand their quotas of the States, with an alternative of laying direct taxes in case of non-compliance. The certainty of this conditional power would, in all probability, prevent the application of it, and the sums necessary for the Union would then be raised by the States, and by those who would best know how they could be raised.

Mr. Henry took a broader ground. He argued

that the Constitution presented a consolidated government, because it spoke in the name of the People, and not in the name of the States. It was neither a monarchy like England, — a compact between prince and people, with checks on the former to secure the liberty of the latter; nor a confederacy like Holland, — an association of independent States, each retaining its individual sovereignty; nor yet a democracy, in which the people retain securely all their rights. It was an alarming transition from a confederacy to a consolidated government. It was a step as radical as that which separated us from Great Britain. The rights of conscience, trial by jury, liberty of the press, all immunities and franchises, all pretensions to human rights and privileges, were rendered insecure, if not lost, by such a transition. It was said that eight States had adopted it. He declared that, if twelve States and a half had adopted it, he would, with manly firmness, and in spite of an erring world, reject it. "You are not to inquire," said he, "how your trade may be increased, or how you are to become a great and prosperous people, but how your liberties may be secured"; — and then, kindling with the old fire of his earlier days, and with the recollection of what he had done and suffered for the liberties of his country, he broke forth in one of his most indignant and impassioned moods.[1]

Madison, always cool, clear, and sensible, answered

[1] It is said in the newspapers of that period that Henry was on his legs in one speech for seven hours. I think it must have been the one from which I have made the abstract in the text. But he made a great many speeches, quite as earnest.

these objections. He described the new government as having a mixed character. It would be in some respects federal, in others consolidated. The manner in which it was to be ratified established this double character. The parties to it were to be the people, but not the people as composing one great society, but the people as composing thirteen sovereignties. If it were a purely consolidated government, the assent of a majority of the people would be sufficient to establish it. But it was to be binding on the people of a State only by their own separate consent; and if adopted by the people of all the States, it would be a government established, not through the intervention of their legislatures, but by the people at large. In this respect, the distinction between the existing and the proposed governments was very material.

The mode in which the Constitution was to be amended also displayed its mixed character. A majority of the States could not introduce amendments, nor yet were all the States required; three fourths of them must concur in alterations; and this constituted a departure from the federal idea. Again, the members of one branch of the legislature were to be chosen by the people of the States in proportion to their numbers; the members of the other were to be elected by the States in their equal and political capacities. Had the government been completely consolidated, the Senate would have been chosen in the same way as the House; had it been completely federal, the House would have been chosen in the

same way as the Senate. Thus it was of a complex nature; and this complexity would be found to exclude the evils of absolute consolidation and the evils of a mere confederacy. Finally, if Virginia were separated from all the States, her power and authority would extend to all cases; in like manner, were all powers vested in the general government, it would be a consolidated government; but the powers of the general government are enumerated; it can only operate in certain cases; it has legislative powers on defined and limited objects, beyond which it cannot extend its jurisdiction.

With respect to the powers proposed to be conferred on the new government, he conceived that the question was whether they were necessary. If they were, Virginia was reduced to the dilemma of either submitting to the inconvenience which the surrender of those powers might occasion, or of losing the Union. He then proceeded to show the necessity for the power of direct taxation; and in answer to the apprehended danger arising from this power united with the consolidated nature of the government, — thus giving it a tendency to destroy all subordinate or separate authority of the States, — he admitted that, if the general government were wholly independent of the governments of the States, usurpation might be expected to the fullest extent; but as it was not so independent, but derived its authority partly from those governments, and partly from the people, — the same source of power, — there was no danger that it would destroy the State governments.

In this manner, extending to all the details of the Constitution, the discussion proceeded for nearly a week, the opposition aiming to show that at every point it exposed the liberties of the people to great hazards; Henry sustaining nearly the whole burden of the argument on that side, and fighting with great vigor against great odds.[1] At length, finding himself sorely pressed, he took advantage of an allusion made by his opponents to the debts due from the United States to France, to introduce the name of Jefferson.

"I might," said he, "not from public authority, but from good information, tell you that his opinion is that you reject this government. His character and abilities are in the highest estimation; he is well acquainted in every respect with this country; equally so with the policy of the European nations. This illustrious citizen advises you to reject this government till it be amended. His sentiments coincide entirely with ours. His attachment to, and services done for, this country are well known. At a great distance from us, he remembers and studies our happiness. Living in splendor and dissipation, he thinks yet of Bills of Rights, — thinks of those little, despised things called *maxims*. Let us follow

[1] There has been, I am aware, a modern scepticism concerning Patrick Henry's abilities; but I cannot share it. He was not a man of much information, and he had no great breadth of mind. But he must have been, not only a very able debater, but a good parliamentary tactician. The manner in which he carried on the opposition to the Constitution in the convention of Virginia, for nearly a whole month, shows that he possessed other powers besides those of great natural eloquence.

the sage advice of this common friend of our happiness."[1]

At the time when Mr. Henry made this statement, he had seen a letter written by Mr. Jefferson from Paris, in the preceding February, which was much circulated among the opposition in Virginia, and in which Mr. Jefferson had expressed the hope that the first nine conventions might accept the Constitution, and the remaining four might refuse it, until a Declaration of Rights had been annexed to it.[2] Mr. Henry chose to construe this into an advice to *Virginia* to reject the Constitution. But this use of Mr. Jefferson's opinion was not strictly justifiable, since Virginia, in the actual order of events, might be the ninth State to act; for the convention of New Hampshire was not to reassemble until nearly three weeks after the first meeting of that of Virginia, in which Mr. Henry was then speaking. The

[1] Elliot, III. 152, Debates in the Virginia Convention.

[2] Under date of February 7, 1788, Mr. Jefferson wrote from Paris, in a private letter to a gentleman in Virginia, as follows: — "I wish, with all my soul, that the nine first conventions may accept the new Constitution, because this will secure to us the good it contains, which I think great and important. But I equally wish that the four latest conventions, whichever they be, may refuse to accede to it till a Declaration of Rights be annexed. This would probably command the offer of such a Declaration, and thus give to the whole fabric, perhaps, as much perfection as any one of that kind ever had. By a Declaration of Rights, I mean one which shall stipulate freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by juries in all cases, no suspensions of the *habeas corpus*, no standing armies. These are fetters against doing evil, which no honest government should decline. There is another strong feature in the new Constitution which I as strongly dislike. That is, the perpetual re-eligibility of the President. Of this, I expect no amendment at present, because I do not see that anybody has objected to it on your

friends of the Constitution, therefore, became somewhat restive under this attempt to employ the influence of Jefferson against them. Without saying anything disrespectful of him, but, on the contrary, speaking of him in the highest terms of praise and honor, they complained of the impropriety of introducing his opinion, — saying that, if the opinions of important men not within that convention were to govern its deliberations, they could adduce a name at least equally great on their side;[1] and they then contended that Mr. Jefferson's letter did not admit of the application that had been given to it.[2] But the truth was, that the assertions of his opponents respecting New Hampshire, and the ambiguous form of Mr. Jefferson's opinion, gave Henry all the opportunity he wanted to employ that opinion for the purpose for which he introduced it. "You say," said he, "that you are absolutely certain New

side the water. But it will be productive of cruel distress to our country, even in your day and mine. The importance to France and England to have our government in the hands of a friend or foe, will occasion their interference by money, and even by arms. Our President will be of much more consequence to them than a king of Poland. We must take care, however, that neither this nor any other objection to the new form produces a schism in our Union. That would be an incurable evil, because near friends falling out never reunite cordially; whereas, all of us going together, we shall be sure to cure the evils of our new Constitution before they do great harm." (Jefferson's Works, II. 355.) That Mr. Jefferson intended this letter should be used as it was in the convention of Virginia, is not probable; but it would seem from the care he took to state a plan of proceeding in the adoption of the Constitution, that he intended his suggestions should be known. His subsequent opinion will be found in a note below.

[1] Alluding, evidently, to Washington.

[2] See the speeches of Pendleton and Madison, in reply to Henry. Elliot, III. 304, 329.

Hampshire will adopt this government. Then she will be the ninth State; and if Mr. Jefferson's advice is of any value, and this system requires amendments, we, who are to be one of the four remaining States, ought to reject it until amendments are obtained."[1]

Notwithstanding the efforts of Madison to counteract this artifice, it gave the opposition great strength, because it enabled them to throw the whole weight of their arguments against the alleged defects and dangers of the Constitution into the scale of an absolute rejection. Mr. Jefferson's subsequent opinion, formed after he had received intelligence of the course of Massachusetts, had not then been received, and indeed did not reach this country until after the convention of Virginia had acted.[2] The opposition went on, therefore, with renewed vigor, to attack the Constitution in every part which they considered vulnerable.

[1] Elliot, III. 314.

[2] On the 27th of May, 1788, Mr. Jefferson wrote from Paris to Colonel Carrington, as follows:— "I learn with great pleasure the progress of the new Constitution. Indeed, I have presumed it would gain on the public mind, as I confess it has on my own. At first, though I saw that the great mass and groundwork was good, I disliked many appendages. Reflection and discussion have cleared off most of those. You have satisfied me as to the query I had put to you about the right of direct taxation. My first wish was that nine States would adopt it, and that the others might, by holding off, produce the necessary amendments. But the plan of Massachusetts is far preferable, and will, I hope, be followed by those who are yet to decide," &c. (Jefferson's Works, II. 404.) Colonel Carrington, the person to whom this letter was addressed, was a member of Congress, and received it at New York, about the 2d of July, when it was seen by Madison. (See a letter from Madison to E. Randolph of that date, among the Madison papers. Elliot, V. 573.)

Among the topics on which they expended a great deal of force was that of the navigation of the Mississippi. They employed this subject for the purpose of influencing the votes of members who represented the interests of that part of Virginia which is now Kentucky. They first extorted from Madison and other gentlemen, who had been in the Congress of the Confederation, a statement of the negotiations which had nearly resulted in a temporary surrender of the right in the Mississippi to Spain.[1] They then made use of the following argument. It had appeared, they said, from those transactions, that the Northern and Middle States, seven in number,[2] were in favor of bartering away this great interest for commercial privileges and advantages; that those States, particularly the Eastern ones, would be influenced further by a desire to supress the growth of new States in the Western country, and to prevent the emigration of their own people thither, as a means of retaining the power of governing the Union; and that the surrender of the Mississippi could be made by treaty, under the Constitution, by the will of the President and the votes of ten Senators,[3] whereas, under the Confederation, it never could be done without the votes of nine States in Congress.

[1] See an account of this matter, *ante*, Vol. I. Book III. Chap. V. pp. 309–327.

[2] They meant the four New England States and New York, Pennsylvania, and Maryland. New Jersey and Delaware were supposed to be with the four Southern States on this question.

[3] Ten would be two thirds of the constitutional quorum of fourteen; so that the argument supposed only a quorum to be present.

It must be allowed that there had been much in the history of this matter on which harsh reflections could be made by both sections of the Union. But it was not correct to represent the Eastern and Middle States as animated by a desire to prevent the settlement of the Western country, or to say that they would be ready at any time to barter away the right in the Mississippi. Seven of the States had consented, in a time of war and of great peril, to the proposal of a temporary surrender of the right to Spain, just when it was supposed that negotiations between Spain and Great Britain might result in a coalition which would deprive us of the river for ever, and when it was thought that a temporary cession would fix the permanent right in our favor.[1] This was undoubtedly an error; but it was one from which the country had been saved, by the disputes which arose respecting the constitutional power of seven States to give instructions for a treaty, and by the prospect of a reconstruction of the general government.[2] Now, therefore, that an entirely new constitutional system had been prepared, the real question, in relation to this very important subject, was one of a twofold character. It involved, first, the moral probabilities respecting the wishes and policy of a majority of the States; and, secondly, a comparison of the means afforded by the Constitution for protecting the national right to the Mississippi, with those afforded by the Confederation, —

[1] See Mr. Madison's explanation in the convention of Virginia. Elliot, III. 346.

[2] *Ante*, Book III. Chap. V., Vol. I. pp. 324–327.

assuming that any State or States might wish to surrender it.

Upon this question Mr. Madison made an answer to the opposition, which shows how accurately he foresaw the relations between the western and the eastern portions of the Union, and how justly he estimated the future working of the Constitution with respect to the preservation of the Mississippi, or any other national right.

If interest alone, he said, were to govern the Eastern States, they must derive greater advantage from holding the Mississippi than even the Southern States; for if the carrying trade were their natural province, it must depend mainly on agriculture for its support, and agriculture was to be the great employment of the Western country. But in addition to this security of local interest, the Constitution would make it necessary for two thirds of all the Senators present — and those present would represent all the States, if all attended to their duty — to concur in every treaty. The President, who would represent the people at large, must also concur. In the House of Representatives, the landed, rather than the commercial interest, would predominate; and the House of Representatives, although not to be directly concerned in the making of treaties, would have an important influence in the government. A weak system had produced the project of surrendering the Mississippi; a strong one would remove the inducement.[1]

[1] Debates in the Virginia Convention, Elliot, III. 344 – 347.

In the midst of these discussions, and while the opposition were making every effort to protract them until the 23d of June, — when the assembling of the legislature would afford a colorable pretext for an adjournment, — Colonel Oswald of Philadelphia arrived at Richmond, with letters from the Anti-Federalists of New York and Pennsylvania to the leaders of that party at Richmond, for the purpose of concerting a plan for the postponement of the decision of Virginia until after the meeting of the convention of New York. It was supposed that, if this could be effected, the opponents of the Constitution in New York would be able to make some overture to the opposition in Virginia, for the same course of action in both States. If this could not be brought about, it was considered by the opposition at Richmond that the chances of obtaining a vote for previous amendments would be materially increased by delay. The parties in their convention were nearly balanced, at this time. Mr. Madison estimated the Federal majority at not more than three or four votes, if indeed the Federalists had a majority, on the 17th of June, the day on which the convention of New York was to meet.[1]

But we must now leave the convention of Virginia, and turn our eyes to the pleasant village on the banks of the Hudson, where the convention of New York was already assembling. Hamilton was

[1] He thought at this moment that, if the Constitution should be lost, the Mississippi question would be the cause. The members from Kentucky were then generally hostile. (See a letter from Madison to Hamilton, of June 16th, Hamilton's Works, I. 457.)

there, and was its leading spirit. How vigilant and thoughtful he was, we know; — sometimes watching for the messenger who might descend the eastern hills with reports from New Hampshire, — sometimes turning to the South and listening for the footfall of his couriers from Virginia; — but always preparing to meet difficulties, always ready to contest every inch of ground, and never losing sight of the great end to be accomplished. The hours were slow and heavy to him. The lines of horse-expresses which he had so carefully adjusted, and at whose intersection he stood to collect the momentous intelligence they would bring him, were indeed a marvel of enterprise at that day; but how unlike were they to the metallic lines that now daily gather for us, from all the ends of the land and with the speed of lightning, minute notices of the most trivial or the most important events! Still, such as his apparatus was, it was all that could be had; and he awaited, alike with a firm patience and a faithful hope, for the decisive results. Even at this distance of time, we share the fluctuations of his anxious spirit, and our patriotism is quickened by our sympathy.

Rarely, indeed, if ever, was there a statesman having more at stake in what he could not personally control, or greater cause for solicitude concerning the public weal of his own times or that of future ages, than Hamilton now had. His own prospects of usefulness, according to the principles which had long guided him, and the happiness or the misery of his country, were all, as he was deeply convinced,

involved in what might happen within any hour of those few eventful days. The rejection of the Constitution by Virginia would, in all probability, cause its rejection by New York. Its rejection by those States would, as he sincerely believed, be followed by eventual disunion and civil war. But if the Constitution could be established, he could see the way open to the happiness and welfare of the whole Union; for although it was not in all respects the system that he would have preferred, he had shown, in the Federalist, how profoundly he understood its bearing upon the interests of the country, into what harmony he could bring its various provisions, and what powerful aid he could give in adjusting it into its delicate relations to the States. He had, too, already conceived the hope that its early administration might be undertaken by Washington; and with the government in the hands of Washington, Hamilton could foresee the success which to us is now historical.

To say that Hamilton was ambitious, is to say that he was human; and he was by no means free from human imperfections. But his was the ambition of a great mind, regulated by principle, and made incapable, by the force and nature of his convictions, of seeking personal aggrandizement through any course of public policy of which those convictions were not the mainspring and the life. In no degree is the character of any other American statesman undervalued or disparaged, when I insist on the importance to all America, through all time, of Hamil-

ton's public character and conduct in this respect. It was because his future opportunities for personal distinction and usefulness were now evidently at stake in the success of a system that would admit of the exercise of his great powers in the service of the country, — a system that would afford at once a field for their exercise and for the application of his political principles, — and because he could neither seek nor find distinction in a line of politics which tended to disunion, — that his position at this time is so interesting and important. As a citizen of New York, too, his position was personally critical. He had carried on a vigorous contest with the opponents of the Constitution in that State; he had encountered obloquy and misrepresentation and rancor, — perhaps he had provoked them. He had told the people of the State, for years, that they had listened to wrong counsels, when they had lent themselves to measures that retarded the growth of a national spirit and an efficient general government. The correctness of his judgment was now, therefore, openly and palpably in the issue. His public policy, with reference to the relations of the State to the Union, was now to stand, or to fall, with the Constitution proposed.

When he entered the convention of the State, he was convinced that the Anti-Federalists were determined that New York should not become a member of the new Union, whatever might be done by the other States.[1] He had also received information,

[1] See his correspondence with Madison, Works, I. pp. 450–469.

which led him to believe that the Governor, Clinton, had in conversation declared the Union unnecessary; but of this, if true, he could make no public use. His suspicions were certainly justified by the tendency of the arguments made use of by the opposition, during the few first days of the session; for it was the tendency of those arguments to maintain the idea that New York could very well stand alone, even if the Constitution should be established by nine States, she refusing to be one of them. With this view, they pressed the consideration under which they had all along acted, that the Confederation, if amended, would be sufficient for all the proper purposes of a general government; and their plan for such an amendment of the Confederation was, to provide that its requisitions for money should continue to be made as they had been, and that Congress should have the new power of compelling payment by force, when a State had refused to comply with a requisition.

Hamilton answered this suggestion with great energy. It is inseparable, he said, from the disposition of bodies which have a constitutional power of resistance, to inquire into the merits of a law. This had ever been the case with the federal requisitions. In this examination, the States, unfurnished with the lights which directed the deliberations of the general government, and incapable of embracing the general interests of the Union, had almost uniformly weighed the requisitions by their own local interests, and had only executed them so far as an-

swered their particular convenience or advantage. But if we have national objects to pursue, we must have national revenues. If requisitions are made and are not complied with, what is to be done? To coerce the States would be one of the maddest projects ever devised. No State would ever suffer itself to be used as the instrument of coercing another. A federal standing army, then, must enforce the requisitions, or the federal treasury would be left without supplies and the government without support. There could be no cure for this great evil, but to enable the national laws to operate on individuals, like the laws of the States. To take the old Confederation as the basis of a new system, and to trust the sword and the purse to a single assembly organized upon principles so defective, — giving it the full powers of taxation and the national forces, — would be to establish a despotism. These considerations showed clearly that a totally different government, with proper powers and proper checks and balances, must be established.

The convention soon afterwards passed to an animated discussion on the system of representation proposed in the Constitution, and while an amendment relating to the Senate was pending, on the 24th of June, Hamilton received intelligence from the East, that on the 21st the convention of New Hampshire had ratified the Constitution. Up to this moment, the opposition, while disclaiming earnestly all wish to bring about a dissolution of the Union, or to prevent the establishment of some firm

and efficient government, had still continued, in every form, to press a line of argument which tended to produce the rejection of the Constitution proposed; and it was evident that their opponents could throw upon them the responsibility of a dissolution of the Union only by a deduction from the tendency of their reasoning. But now that the Constitution had been adopted by the number of States which its provisions required for its establishment, the Federalists determined that the opposition should publicly meet the issue raised by the new aspect of affairs, which was to determine whether the State of New York should or should not place itself out of the pale of the new confederacy, — whether it should or should not stand in a hostile attitude towards the nine States which had thus signified their determination to institute a new government. Accordingly, on the next day, Chancellor Livingston formally announced in the convention the intelligence that had been received from New Hampshire, which, he said, had evidently changed the circumstances of the country and the ground of the present debate. He declared that the Confederation was now dissolved. Would they consider the situation of their country? However some might contemplate disunion without pain, or flatter themselves that some of the Southern States would form a league with them, he could not look without horror at the dangers to which any such confederacy would expose the State of New York.

This dilemma embarrassed, but did not subdue,

the opposition. They reiterated their denial of a purpose to produce a dissolution of the Union, doubtless with entire sincerity; but they continued the argument which was designed to show that the State ought not to adopt a system dangerous to liberty, under a fear of the situation in which it might be placed.

Here, then, the reader should pause for a moment, in order to form a just appreciation of the course pursued by Hamilton, in this altered aspect of affairs, when nothing remained to be done but to get the State of New York, if possible, into the new Union. We have now the means of knowing precisely how he estimated the chances of succeeding in this effort. On the 27th, while the discussion was still going on, he wrote to Madison as follows: "There are some slight symptoms of relaxation in some of the leaders, which authorizes a gleam of hope, if you do well; but certainly I think not otherwise."[1] At the same time, we know that his latest news from Virginia was not encouraging.[2]

How easy, then, perhaps natural, it would have been for him to have abandoned this "gleam of hope,"—to have turned his back upon the State and all its cabals,—to have left the Anti-Federalists to determine the fate of New York, and to have transferred himself to what was then the larger community, the great State of Pennsylvania, or to any of the other States which had adopted the Constitution!

[1] Works, I. 462.

[2] See the latest letter which he had then received from Madison. Ibid. 461.

He must have been received anywhere with the consideration due to his high reputation, his abilities, his public services, and his acknowledged patriotism. He must have been regarded, in any State that had accepted the new government, as a person whose assistance was indispensable to its success; and so he would have been looked upon by the main body of the people throughout the new confederacy. He had no ties of office to bind him to the State of New York. He held one of her seats in the Congress of the Confederation, but that was a body which must soon cease to exist. His political opponents had an undoubted majority in the State. The social ties which had bound him to her soil could have been severed. He could have left her, therefore, to the counsels of his adversaries, and could have sought and found for himself a career of ambition in the new sphere that was open to receive him. That career would have tempted men of an inferior mould, and would have seen them yield to the temptation perhaps the more readily, because the conflicts that would have been inevitable between rival confederacies would have presented fresh fields for exertion and personal energy, new excitements and new adventures. It is, too, a mournfully interesting reflection, that if Hamilton had then cut himself free from the entanglements of the local politics of New York by a change of residence, he probably could never have been drawn into that miserable quarrel with the wretch who in after years planned his destruction, and who gained by it the execrable distinction

of having taken the most important life that has ever fallen by the assassination of the duel, since its opportunities for murder have been known among men.

But with whatever melancholy interest we may pursue such a suggestion of what Hamilton might have done, it needs but to be made, in order to show how far he stood above the reach of such a temptation. From his first entrance, in boyhood, into public life, his patriotism had comprehended nothing less than the whole of the United States. Whatever may be thought of his policy, either before or after the Constitution was established, no just man will deny its comprehensive nationality. He now saw that no partial confederacy of the States could be of any permanent value. He had no favorite theories involved in the Constitution, no peculiar experiments that he wished to try. He embraced it, because he believed in its capacity to unite the whole of the States, to concentrate and harmonize their interests, and to accomplish national objects of the utmost importance to their welfare. It could, without doubt, be inaugurated and put into operation without the concurrence of New York. But to leave that, or any other State near the geographical centre of the Union, out of the confederacy, would be to leave its sovereignty and rights exposed to perpetual collision with the new government. No public or private purpose could have induced Hamilton to abandon any effort that might prevent such a result. He still labored, therefore, with those who were as-

sociated with him, to procure an adoption of the Constitution by the State of New York; and we must bear in mind the vast importance of her action, and the difficulties with which he had to contend, that we may take a just view of the concessions to the opposition which he seems at one stage of the crisis to have been obliged to consider.

But we must now leave him in the midst of the embarrassments by which he was surrounded, to follow his messenger, whom he instantly despatched, on the 24th, with letters to Madison at Richmond, announcing the news of the ratification by New Hampshire. The courier passed through the city of New York on the 25th, and reached Philadelphia on the 26th. The newspapers of the latter city immediately cried out, "The reign of anarchy is over," and the popular enthusiasm rose to the highest point. The courier passed on to the South; but the convention of Virginia had, in fact, ratified the Constitution before he arrived in Philadelphia. Thus, while New Hampshire, in the actual order of events, was the ninth State to adopt the Constitution, yet Virginia herself, so far as the members of her convention were informed, appeared at the time of their voting to be the ninth adopting State. It is certain that they acted without any real knowledge of what had taken place in New Hampshire, although there may have been random assertions of what nobody at Richmond could then have known.[1]

[1] It has been supposed that this was not so, but that Hamilton's messenger arrived at Richmond before the final action of the Vir-

The result was brought about in Virginia by the force of argument, and because the friends of the Constitution were at last able to reduce the issue to the single question of previous or subsequent, that is, of conditional or recommendatory, amendments. As the State appeared likely to be the ninth State to act, and they could insist that, if she rejected the Constitution, she must bear the responsibility of defeating the establishment of the new government, — a consequence which they could reasonably predict, — they had a high vantage-ground from which to address the reason and patriotism of the assembly.

Henry and the other leaders of the opposition fought valiantly to the last. When the whole subject had been exhausted, the friends of the Constitution presented the propositions on which they were willing to rest the action of the State, and which declared, in substance, that the powers granted under the proposed Constitution are the gift of the people, and that every power not granted thereby remains with them, and at their will, — consequently

ginia convention, and so that the decision of New Hampshire had an important influence. I think this is clearly a mistake. I have traced the progress of the messenger in the newspapers of that time, and find his arrival at New York and Philadelphia chronicled as it is given in the text. The dates are therefore decisive. It appears also from Mr. Madison's correspondence with Hamilton, that he did not receive the despatch about New Hampshire until the 31st. (Hamilton's Works, I. 463.) The ratification passed the Virginia convention on the 25th, and that body was dissolved on the 27th. There is no trace in the Virginia debates of any authentic news from New Hampshire. On the contrary, it was assumed by one of the speakers, Mr. Innes, on the day of their ratification, that the Constitution then stood adopted by *eight* States. (Elliot, III. 636.)

that no right can be abridged, restrained, or modified by the general government or any of its departments, except in those instances in which power is given by the Constitution for those purposes; and that, among other essential rights, liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified, by any authority of the United States; that the Constitution ought, therefore, to be ratified, but that whatsoever amendments might be deemed necessary ought to be recommended to the consideration of the first Congress that should assemble under the Constitution, to be acted upon according to the mode prescribed therein.

Mr. Henry, on the other hand, brought forward a counter project, by which he proposed to declare that, previous to the ratification of the Constitution, a Declaration of Rights, asserting and securing from encroachment the great principles of civil and religious liberty, and the inalienable rights of the people, together with amendments to the most exceptionable parts of the Constitution, ought to be referred by the convention of Virginia to the other States in the American confederacy for their consideration.

The issue was thus distinctly made between previous or conditional and subsequent or unconditional amendments, and made in a form most favorable to the friends of the Constitution; for it enabled them to present so vigorously and vividly the consequences of suspending the inauguration of the new government until the other States could consider the amendments desired by Virginia, that they procured

a rejection of Mr. Henry's resolution by a majority of eight, and a ratification of the Constitution by a majority of ten votes. A long list of amendments, together with a Bill of Rights, was then adopted, to be presented to Congress for its consideration.[1]

The conduct of Mr. Henry, when he saw that the adoption of the Constitution was inevitable, was all that might have been expected from his patriotic and unselfish character. "If I shall be in the minority," he said, "I shall have those painful sensations which arise from a conviction of being overpowered in a good cause. Yet I will be a peaceable citizen. My head, my hand, and my heart shall be free to retrieve the loss of liberty, and remove the defects of this system in a constitutional way. I wish not to go to violence, but will wait with hopes that the spirit which predominated in the Revolution is not yet gone, nor the cause of those who are attached to the Revolution yet lost. I shall, therefore, patiently wait in expectation of seeing this government so changed as to be compatible with the safety, liberty, and happiness of the people."[2] This

[1] The form of ratification embraced the recitals given in the text respecting the powers of Congress. It was adopted by a vote of 89 to 79, on the 25th of June, 1788. I do not go into the particular consideration of the amendments proposed by several of the State conventions, because the present work is confined to the origin, the formation, and the adoption of the Constitution, and no State that ratified the instrument proposed by the national Convention made amendments a condition. The examination of the amendments proposed, therefore, belongs to the history of the Constitution subsequent to its inauguration. They may all be found in the Appendix to the thirteenth volume of the Journals of the Old Congress.

[2] Debates in Virginia Convention, Elliot, III. 652.

noble and disinterested patriot lived to find the Constitution all that he wished it to be, and to enroll himself, in the day of its first serious trial, among its most vigorous and earnest defenders.

But some of the members of the opposition were not so discreet. Immediately after the adjournment of the convention, they prepared an address to the people, intended to produce an effort to prevent the inauguration of the new government by a combined arrangement among the legislatures of the several States. But this paper, which never saw the light, was rejected by their own party, and the opposition in Virginia subsided into a general acquiescence in the action of the convention.[1]

The ratification of Virginia took place on the 25th of June; the news of this event was received and published in Philadelphia on the 2d of July. The press of the city was at once filled with rejoicings over the action of Virginia. She was the tenth pillar of the temple of liberty. She was Virginia, — eldest and foremost of the States, — land of statesmen whose Revolutionary services were as household words in all America, — birthplace and home of Washington! We need not wonder, when she had come so tardily, so cautiously, into the support of the Constitution, that men should have hailed her accession with enthusiasm. The people of Philadelphia had been for some time preparing a public demonstration, in honor of the adoption of the Constitution by nine States. Now that Virginia was added to the num-

[1] Madison's letters to Hamilton, Works of Hamilton, I. 462, 463.

ber, they determined that all possible magnificence and splendor should be given to this celebration, and they chose for it the anniversary day of the National Independence

A taste for allegory appears to have been quite prevalent among the people of the United States at this period. Accordingly, the Philadelphia procession of July 4, 1788, was filled with elaborate and emblematic representations. It was a long pageant of banners, of trades, and devices. A decorated car bore the Constitution framed as a banner and hung upon a staff. Then another decorated car carried the American flag and the flags of all friendly nations. Then followed the judges in their robes, and all the public bodies, preceding a grand federal edifice, which was carried on a carriage drawn by ten horses. On the floor of this edifice were seated, in chairs, ten gentlemen, representing the citizens of the United States at large, to whom the Federal Constitution had been committed before its ratification. When it arrived at "Union Green," they gave up their seats to ten others representing the ten States which had ratified the instrument. The federal ship, "The Union," came next, followed by all the trades, plying their various crafts upon elevated platforms, with their several emblems and mottoes, strongly expressing confidence in the protection that would be afforded under the Constitution to all the forms of American manufactures and mechanic arts. Ten vessels paraded on the Delaware, each with a broad white flag at its masthead, bearing the name

of one of the ten States in gold letters; and, as if to combine the ideas both of the absence and the presence of the ten States, ten carrier-pigeons were let off from the printers' platform, each with a small package bearing "the ode of the day" to one of the ten rejoicing and sympathizing States.

Thus did ingenuity and mechanical skill exert themselves in quaint devices and exhibitions, to portray, to personify, and to celebrate the vast social consequences of an event which had then no parallel in the history of any other country, — the free and voluntary adoption by the people of a written constitution of government framed by the agents and representatives of the people themselves. The carrier birds are not known to have literally performed their tasks, but as rapidly as horse and man could carry it, the news from Virginia pressed on to the North, and reached Hamilton at Poughkeepsie on the 8th of July.

It found him still surrounded by the same difficulties that existed when he received the result of the convention of New Hampshire. The opposition had relaxed none of their efforts to prevent the adoption of the Constitution; they had only become somewhat divided respecting the method to be pursued for its defeat. Some of them were in favor of conditions precedent, or previous amendments; some, of conditions subsequent, or the proposal of amendments upon the condition that, if they should not be adopted within a certain time, the State should be at liberty to withdraw from the Union; and all of them

were determined, in case the Constitution should be ratified, to carry constructive declarations of its meaning and powers as far as possible. Hamilton was conscious that the chief danger to which the Constitution itself was now exposed, was that a general concurrence in injudicious recommendations might seriously wound its power of taxation, by causing a recurrence, in some shape, to the system of requisitions. The danger to which the State of New York was exposed, was that it might not become a member of the new Union, in any form.

The leading Federalists who were united with Hamilton in the effort to prevent such a disastrous issue of this convention were John Jay, the Chancellor Robert R. Livingston, and James Duane. A few days after the intelligence from New Hampshire was received, these gentlemen held a consultation as to the most effectual method of encountering the objections made to the general power of taxation that would be conferred by the Constitution upon the general government. The legislative history of the State, from 1780 to 1782, embraced a series of official acts and documents, showing that the State had been compelled to sustain a very large share of the burden of the Revolutionary war; that requisitions had been unable to call forth the resources of the country; and that, in the judgment of the State, officially and solemnly declared in 1782, and concurred in by those who now resisted the establishment of the Constitution, it was necessary that the Union should possess other sources of revenue. The

Federalists now resolved that these documents be formally laid before the convention, and Hamilton undertook to bring them forward.

On the 27th of June, he commenced the most elaborate and important of the speeches which he made in this assembly, for the purpose of showing that in the construction of a government the great objects to be attained are a free and pure representation, and a proper balance between the different branches of administration; and that when these are obtained, all the powers necessary to answer, in the most ample manner, the purposes of government, may be bestowed with entire safety. He proceeded to argue, not only that a general power of taxation was essential, but that, under a system so complex as that of the Constitution, — so skilfully endowed with the requisite forms of representation and division of executive and legislative power, — it was next to impossible that this authority should be abused. In the course of this speech, and for the purpose of showing that the State had suffered great distresses during the war from the mode of raising revenues by requisitions, he called for the reading at the clerk's table of a series of documents exhibiting this fact. Governor Clinton resisted their introduction, but they were read; and Hamilton and his friends then contended, that they proved beyond dispute that the State had once been in great peril for want of an energetic general government.

This movement produced a warm altercation between the leading gentlemen on the opposite sides

of the house. But while it threw a grave responsibility upon the opposition, it did not conquer them; and by the day on which the intelligence from Virginia arrived, they had heaped amendments upon the table on almost every clause and feature of the Constitution, some one or more of which it was highly probable they would succeed in making a condition of its acceptance.

This critical situation of affairs led Hamilton to consider, for a short time, whether it might not be necessary to accede to a plan, by which the State should reserve the right to recede from the Union, in case its amendments should not have been decided upon, in one of the modes pointed out by the Constitution, within five or six years. He saw the objections to this course; and he was determined to leave no effort untried to bring the opposition to an unqualified ratification. But the danger of a rejection of the Constitution was extreme; and as a choice of evils, he thought that, if the State could in the first instance be received into the Union under such a reserved right to withdraw, succeeding events, by the adoption of all proper and necessary amendments, would make the reservation unimportant, because such amendments would satisfy the more reasonable part of the opposition, and would thus break up their party. But he determined not to incur the hazard of this step upon his own judgment alone, or that of any one else having a personal interest in the question; and accordingly, on the 12th of July, he despatched a letter to Madison, who was then

attending in Congress at the city of New York, asking his opinion upon the possibility of receiving the State into the Union in this form.[1]

Madison instantly replied, that, in his opinion, this would be a conditional ratification, and would not make the State of New York a member of the new Union; that the Constitution required an adoption *in toto* and for ever; and that any condition must vitiate the ratification of any State.[2]

Before this reply could have been received at Poughkeepsie, the Federalists had introduced their proposition for an unconditional ratification, and this was followed by that of the Anti-Federalists for a conditional one. The former was rejected by the convention on the 16th of July. The opposition then brought forward a new form of conditional ratification, with a Bill of Rights prefixed, and with amendments subjoined. After a long debate, the Federalists succeeded, on the 23d of July, in procuring a vote to change this proposition, so that, in place of the words "on condition," the people of the State would be made to declare that they assented to and ratified the Constitution "in full confidence" that, until a general convention should be called for proposing amendments, Congress would not exercise certain powers which the Constitution conferred upon them. This alteration was carried by thirty-one votes against twenty-seven. A list of amendments was then agreed upon, and a circular letter was adopted, to be sent to all the States, recommending a general

[1] Letter to Madison, Works of Hamilton, I. 464. [2] Ibid. 465.

convention; and on Saturday, the 26th of July, the ratification, as thus framed, with the Bill of Rights and the amendments, was carried by thirty affirmative against twenty-seven negative votes.[1]

By this slender majority of her delegates, and under circumstances of extreme peril of an opposite decision, did the State of New York accept the Constitution of the United States, and become a member of the new government. The facts of the case, and the importance of her being brought into the new Union, afford a sufficient vindication of the course pursued by the Federalists in her convention. But it is necessary, before closing the history of these events, to consider a complaint that was made at the time, by some of the most zealous of their political associates in other quarters, and which touched the correctness of their motives in assenting to the circular letter demanding a general convention for the amendment of the Constitution.

That there was danger lest another general convention might result in serious injury to the Constitution, perhaps in its overthrow, was a point on which there was probably no difference of opinion among the Federalists of that day. Washington regarded it in this light; and there is no reason to

[1] It was reported in the newspapers of that period that the Constitution was adopted in this convention by 30 yeas against 25 nays. But the official record gives the several votes as they are stated in the text; from which it appears that, on the critical question of a conditional or unconditional ratification, the majority was only 2. In truth, the ratification of New York barely escapes the objection of being a qualified one, if it does in fact escape it.

doubt that Hamilton and Jay, and many others of the friends of the Constitution, would have felt great anxiety about its result. But there were some members of the Federal party, in several of the States, who do not seem to have fully appreciated the importance of conceding to the opposition, at the time of the adoption of the Constitution, the use of any and every form of obtaining amendments which the Constitution itself recognized. This was true everywhere, where serious dissatisfaction existed, and it was especially true in the State of New York. It was impossible to procure a ratification in that State, without an equivalent concession; and if the Federal leaders in that convention assented to the proposal of a course of amending the Constitution for which the instrument itself provided, however ineligible it might be, their justification is to be found in the circumstances of their situation. Washington himself, when all was over, wrote to Mr. Jay as follows: — "Although I could scarcely conceive it possible, after ten States had adopted the Constitution, that New York, separated as it is from the others, and peculiarly divided in sentiments as it is, would withdraw from the Union, yet, considering the great majority which appeared to cling together in the convention, and the decided temper of the leaders, I did not, I confess, see how it was to be avoided. The exertion of those who were able to effect this great work must have been equally arduous and meritorious."[1]

[1] Works of Washington, IX. 408.

But others were not so just. The Federalists of the New York convention were complained of by some of their friends for having assented to the circular letter, for the purpose of procuring a ratification at any price, in order to secure the establishment of the new government at the city of New York. It was said that the State had better have remained out of the Union, than to have taken a course which would prove more injurious than her rejection would have done.[1]

With respect to these complaints and the accompanying charge, it is only necessary to say, in the first place, that Hamilton and Jay and their associates believed that there was far less danger to be apprehended from a mere call for a second general convention, than from a rejection of the Constitution by the State of New York; and they had to choose between these alternatives. The result shows that they chose rightly; for the assembling of a general convention was superseded by the action of Congress upon the amendments proposed by the States. In the second place, the alleged motive did not exist. We now know that Hamilton certainly, and we may presume his friends also, did not expect or desire the new government to be more than temporarily placed at the city of New York. He himself saw the impolicy of establishing it permanently either at that place or at Philadelphia. He regarded its temporary establishment at the city of

[1] Madison's letter to Washington, August 24, 1788, Works of Washington, IX. 549.

New York as the certain means of carrying it farther south, and of securing its final and permanent place somewhere upon the banks of the Delaware within the limits of New Jersey, or upon the banks of the Potomac within the limits of Virginia.[1]

The people of the city of New York had waited long for the decision of their State convention. They had postponed several times their intended celebration in honor of the Constitution, which, as it was to be the last, they determined should be the most imposing of these ceremonies. When the day at length came, on the 5th of August, 1788, it saw a population whose mutual confidence and joy had absorbed every narrow and bigoted distinction in that noblest of all the passions that a people can exhibit, — love of country. It were a vain and invidious task to attempt to determine, from the contemporary descriptions, whether this display exceeded that of all the other cities in variety and extent. But there was one feature of it so striking, so creditable to the people of the city of New York, that it should not be passed over. It consisted in the honors they paid to Hamilton.

He must have experienced on that day the best reward that a statesman can ever find; for there is no purer, no higher pleasure for a conscientious statesman, than to know, by demonstrations of public gratitude, that the humblest of the people for whose welfare he has labored appreciate and are thankful

[1] See his letter to Governor Livingston of New Jersey, August 29, 1788, Works, I. 471.

for his services. Public life is often represented, and often found, to be a thankless sphere, for men of the greatest capacity and the highest patriotism; and the accidents, the defeats, the changes, the party passions and obstructions of the political world, in a free government, frequently make it so. But mankind are neither deliberately heartless nor systematically unthankful; and it has sometimes happened, in popular governments, that statesmen of the first order of mind and character have, while living, received the most unequivocal proofs of feeling directly from the popular heart, while the sum total of their lives appears in history to be wanting in evidences of that personal success which is attained in a constant triumph over opponents. Such an expression of popular gratitude and sympathy it was now the fortune of Hamilton to receive.

The people of the city did not stop to consider, on this occasion, whether he was entitled, in comparison with all the other public men in the United States, to be regarded as the chief author of the blessings which they now anticipated from the Constitution. And why should they? He was their fellow-citizen,—their own. They remembered the day when they saw him, a mere boy, training his artillerymen in their public park, for the coming battles of the Revolution. They remembered the youthful eloquence and the more than youthful power with which he encountered the pestilent and slavish doctrines of their Tories. They thought of his career in the army, when the extraordinary maturity, depth,

and vigor of his genius, and his great accomplishments, supplied to Washington, in some of the most trying periods of his vast and prolonged responsibility, the assistance that Washington most needed. They recollected his career in Congress, when his comprehensive intellect was always alert, to bear the country forward to measures and ideas that would concentrate its powers and resources in some national system. They called to mind how he had kept their own State from wandering quite away into the paths of disunion, — how he had enlightened, invigorated, and purified public opinion by his wise and energetic counsels, — how he had led them to understand the true happiness and glory of their country, — how he had labored to bring about those events which had now produced the Constitution, — how he had shown to them the harmony and success that might be predicted of its operation, and had taught them to accept what was good, without petulantly demanding what individual opinion might claim as perfect.

What was it to them, therefore, on this day of public rejoicing, that there might be in his policy more of consolidation than in the policy of others, — that he was said to have in his politics too much that was national and too little that was local, — that some had done as much as he in the actual construction of the system which they were now to celebrate? Such controversies might be for history, or for the contests of administration that were soon to arise. On this day, they were driven out of men's thoughts by the glow of that public enthusiasm which banishes

the spirit of party, and touches and opens the inmost fountains of patriotism. Hamilton had rendered a series of great services to his country, which had culminated in the adoption of the Constitution by the State of New York; and they were now acknowledged from the very hearts of those who best knew his motives and best understood his character.

The people themselves, divided into their respective trades, evidently undertook the demonstrations in his honor, and gave them an emphasis which they could have derived from no other source. They bore his image aloft upon banners. They placed the Constitution in his right hand, and the Confederation in his left. They depicted Fame, with her trumpet, crowning him with laurels. They emblazoned his name upon the miniature frigate, the federal ship of state. They anticipated the administration of the first President, by uniting on the national flag the figure of Washington and the figure of Hamilton.[1] All that ingenuity, all that affection, that popular pride and gratitude could do, to honor a public benefactor, was repeated again and again through the long line of five thousand citizens, of all orders and conditions, which stretched away from the shores of that beautiful bay, where ocean ascends into river and river is lost in ocean, — where Commerce then wore her holiday attire, to prefigure the magnificence and power which she was to derive from the Constitution of the United States.

[1] Some of the most elaborate of these devices were borne by the "Block and Pump Makers" and the "Tallow-Chandlers."

CHAPTER IV.

ACTION OF NORTH CAROLINA AND RHODE ISLAND. — CONCLUSION.

THUS had eleven States, at the end of July, 1788, unconditionally adopted the Constitution; five of them proposing amendments for the consideration of the first Congress that would assemble under it, and one of the five calling for a second general convention to act upon the amendments desired. Two other States, however, North Carolina and Rhode Island, still remained aloof.

The legislature of North Carolina, in December, 1787, had ordered a State convention, which assembled July 21, 1788, five days before the convention of New York ratified the Constitution. In this body the Anti-Federalists obtained a large majority. They permitted the whole subject to be debated until the 2d of August; still it had been manifest from the first that they would not allow of an unconditional ratification. They knew what had been the result in New Hampshire and Virginia; but the decision of New York had, of course, not reached them. Their determination was not, however, to be affected by the certainty that the new government

would be organized. Their purpose was not to enter the new Union, until the amendments which they desired had been obtained. They assumed that the Congress of the Confederation would not provide for the organization of the new government until another general convention had been held; or, if they did, that such a convention would be called by the new Congress; — and it appeared to them to be the most effectual mode of bringing about one or the other of these courses, to remain for the present in an independent position. The inconvenience and hazard attending such a position do not seem to have had much weight with them, when compared with what they regarded as the danger of an unconditional assent to the Constitution as it then stood.

The Federalists contended strenuously for the course pursued by the other States which had proposed amendments, but they were overpowered by great numbers, and the convention was dissolved, after adopting a resolution declaring that a Bill of Rights, and certain amendments, ought to be laid before Congress and the convention that might be called for amending the Constitution, previous to its ratification by the State of North Carolina.[1] But in order, if possible, to place the State in a position to accede to the Constitution at some future time, and to participate fully in its benefits, they also declared, that, having thought proper neither to ratify nor to reject it, and as the new Congress would probably

[1] This resolution was adopted August 2, 1788, by 184 yeas to 84 nays. North Carolina Debates, Elliot, IV. 250, 251.

lay an impost on goods imported into the States which had adopted it, they recommended the legislature of North Carolina to lay a similar impost on goods imported into the State, and to appropriate the money arising from it to the use of Congress.[1]

The elements which formed the opposition to the Constitution in other States received in Rhode Island an intense development and aggravation, from the peculiar spirit of the people, and from certain local causes, the history of which has never been fully written, and is now only to be gathered from scattered sources. Constitutional government was exposed to great perils, in that day, throughout the country, in consequence of the false notions of State sovereignty and of public liberty which prevailed everywhere. But it seemed as if all these causes of opposition and distrust had centred in Rhode Island, and had there found a theatre on which to exhibit themselves in their worst form. Fortunately, this theatre was so small and peculiar, as to make the display of these ideas extremely conspicuous.

The Colony of Rhode Island was established upon the broadest principles of religious and civil freedom. Its early founders and rulers, flying from religious persecution in the other New England Colonies, had transmitted to their descendants a natural jealousy of other communities, and a high spirit of individual and public independence. In the progress of time, as not infrequently happens in such communities, the principles on which the State was founded were

[1] North Carolina Debates, Elliot, IV. 250, 251.

falsely interpreted and applied, until, in the minds of a large part of the people, they had come to mean a simple aversion to all but the most democratic form of government. No successful appeal to this hereditary feeling could be made during the early part of the Revolution, against the interests and influence of the confederacy, because the early and local effect of the Revolution in fact coincided with it. But when the Revolution was fairly accomplished, and the State had assumed its position of absolute sovereignty, what may be called the extreme *individualism* of the people, and their old unfortunate relations with the rest of New England, made them singularly reluctant to part with any power to the confederated States. The manifestations of this feeling we have seen all along, from the first establishment of the Confederation down to the period at which we are now arrived.

The local causes which gave to this tendency its utmost activity, at the time of the formation of the Constitution of the United States, were the following.

First, there had existed in the State, for a considerable period, a despotic and well-organized party, known as the paper-money party. This faction had long controlled the legislation of the State, by furnishing the agricultural classes, in the shape of paper money, with the only circulating medium they had ever had in any large quantity; and they were determined to extinguish the debt of the State by this species of currency, which the legislature could, and did, depreciate at pleasure.

Secondly, there existed, to a great and ludicrous extent, a constant antagonism between town and country,—between the agricultural and the mercantile or trading classes; and this hostility was especially violent and active between the people of the towns of Providence and Newport and the people of the surrounding and the more remote rural districts.[1] The paper-money question divided the inhabitants of the State in the same way. The loss of this circulation would deprive the agricultural classes of their sole currency. They kept their paper-money party, therefore, in a state of constant activity; and when the Constitution of the United States appeared, this was an organized and triumphant party, ready for any new contest. Finally, there prevailed among the country party a notion that the maritime advantages of the State ought in some way to be made use of, for obtaining better terms with the general government than could be had under the Constitution, and that by some such means funds could be obtained for paying their most urgent debts.

If we may judge of the spirit and the acts of the majority of the people of Rhode Island, at this time, by the manner in which they were looked upon throughout the rest of the Union, no language of

[1] The march of the country people upon Providence, on the 4th of July, 1788, and the manner in which they compelled the inhabitants of the town to abandon their purpose of celebrating the adoption of the Constitution by nine States, —dictating even their toasts and salutes,—reads more like a page in Diedrich Knickerbocker's History of New York than like anything else. But it is a veracious as well as a most amusing story. (See Staples's Annals of Providence, pp. 329–335.)

censure can be too strong to be applied to them. They were regarded and spoken of everywhere, among the Federalists, with contempt and abhorrence. Even the opposition in other States, in all their arguments against the Constitution, never ventured to defend the people of Rhode Island. Ridicule and scorn were heaped upon them from all quarters of the country, and ardent zealots of the Federal press urged the adoption of the advice which they said the Grand Seignior had given to the king of Spain, with respect to the refractory States of Holland, namely, to send his men with shovels and pick-axes, and throw them all into the sea. Such an undertaking, we may suppose, might have proved as difficult on this, as it would have been on the other side of the Atlantic. But however this might have been, it is probable that the natural effect of their conduct on the minds of men in other States, and the treatment they received, reacted upon the people of Rhode Island, and made them still more tenacious and persistent in their wrongful course.

But we need not go out of the State itself, to find proof that a majority of its people were at this time violent, arbitrary, and unenlightened, both as to their true interests and as to the principles of public honesty. Determined to adhere to their paper-money system, they did not pause to consider and to discuss the great questions respecting the Constitution, — its bearing upon the welfare of the States, — its effect upon public liberty and social order, — the necessity for its amendment in certain particulars, — which led,

in the conventions of the other States, to some of the most important debates that the subjects of government and free institutions have ever produced. Indeed, they resolved to stifle all such discussions at once; or, at any rate, to prevent them from being had in an assembly whose proceedings would be known to the world. When the General Assembly received the Constitution, at their session in October, 1787, they directed it to be published and circulated among the inhabitants of the State. In February, 1788, instead of calling a convention, they referred the adoption of the Constituion to the freemen in their several town meetings, for the purpose of having it rejected. There were at this time a little more than four thousand legal voters in the State. The Federalists, a small minority, indignant at the course of the legislature, generally withdrew from the meetings and refused to vote. The result was, that the people of the State appeared to be nearly unanimous in rejecting the Constitution.[1]

The freemen of the towns of Providence and Newport, thereupon presented petitions to the General Assembly, complaining of the inconvenience of acting upon the proposed Constitution in meetings in which the people of the seaport towns and the people of the country could not hear and answer each other's arguments, or agree upon the amendments that it might be desirable to propose, and praying for a State convention. Their application was re-

[1] There were 2,708 votes thrown against it, and 232 in its favor. This occurred in March, 1788.

fused, and Rhode Island remained in this position, at the time when the question of organizing the new government came before the Congress of the Confederation, in July, 1788.

Better counsels prevailed with her people, at a later period, and the same redeeming virtue and good sense were at length triumphant, which, in still more recent trials, have enabled her to overcome error, and party passion, and the false notions of liberty that have sometimes prevailed within her borders. As the stranger now traverses her little territory, in the journey of a day, and beholds her ample enjoyment of all civil and religious blessings, — her busy towns, her fruitful fields, her fair seat of learning, crowning her thriving capital, her free, happy, and prosperous people, her noble waters where she sits enthroned upon her lovely isles, — and remembers her ancient and her recent history, he cannot fail, in his prayer for her welfare, to breathe the hope that an escape from great social perils may be found for her and for all of us, in the future, as it has been in the past.

But the attitudes taken by North Carolina and Rhode Island — although in truth quite different and taken from very different motives — placed the Union in a new crisis, involving the Constitution in great danger of being defeated, notwithstanding its adoption by more than nine States. Both of them were members of the existing confederacy; both had a right to vote on all questions coming before the Congress of that confederacy; and it was to this

body that the national Convention itself had looked for the initiatory measures necessary to organize the new government under the Constitution. The question whether that government should be organized at all, was necessarily involved with the question as to the place where it should be directed to assemble and to exercise its functions. This latter topic had often been a source of dissension between the States; and there was much danger lest the votes of North Carolina and Rhode Island, in the Congress of the Confederation, by being united with the votes of States opposed to the selection of the place that might be named as the seat of the new government, might prevent the Constitution from being established at all.

But now, the pen that has thus traced these great events, and has sought to describe them in their true relations to the social welfare of the American people, must seek repose. How the Constitution was inaugurated, — by whom and upon what principles it was put into operation, — how and why it was amended or altered, — when and under what circumstances the two remaining States accepted its benefits, — what development and what direction it received from the generation of statesmen who made and established it, — belongs to the next epoch in our political history, the Administration of Washington.

APPENDIX.

APPENDIX.

CONSTITUTION

OF

THE UNITED STATES OF AMERICA.*

WE the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. [1]The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2]No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3]Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the

* This copy of the Constitution has been compared with the Rolls in the Department of State, and is punctuated and otherwise printed in exact conformity therewith.

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 chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4]When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5]The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. [1]The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2]Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3]No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4]The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5]The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the office of President of the United States.

[6]The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.

When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7]Judgment in Cases of Impeachment shall not extend further than to removal from Office, and Disqualification to hold and enjoy any Office of honour, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. [1]The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2]The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. [1]Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2]Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[3]Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4]Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. [1]The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2]No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the

United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. [1]All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2]Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3]Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power [1]To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2]To borrow Money on the credit of the United States;

[3]To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4]To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5]To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6]To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7]To establish Post Offices and post Roads;

[8]To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9]To constitute Tribunals inferior to the supreme Court;

[10]To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11]To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12]To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13]To provide and maintain a Navy;

[14]To make Rules for the Government and Regulation of the land and naval Forces;

[15]To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16]To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17]To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings; — And

[18]To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. [1]The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2]The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3]No Bill of Attainder or ex post facto Law shall be passed.

[4]No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5]No Tax or Duty shall be laid on Articles exported from any State.

[6]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.

[7]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.

[8]No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. [1]No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2]No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's 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 Controul of the Congress.

[3]No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of Delay.

ARTICLE. II.

SECTION. 1. [1]The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

[2]Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

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 chuse 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 chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from twothirds of the States, and a Majority of all the States shall be necessary to a Choice. 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 chuse from them by Ballot the Vice President.*

[3]The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[4]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.

[5]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

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* Altered by the 12th Amendment.

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.

[6]The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased 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.

[7]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. 2. [1]The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2]He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3]The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. 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 Ad-

journment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the officers of the United States.

SECTION. 4. 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.

SECTION. 2. [1]The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers, and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2]In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3]The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. [1]Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless

on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2]The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2 [1]The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2]A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3]No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. [1]New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2]The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. 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.

[1]All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2]This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3]The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

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 Independance of the United States of America the Twelfth **In Witness** whereof We have hereunto subscribed our Names,

G° WASHINGTON—

Presidt and Deputy from Virginia

NEW HAMPSHIRE.

JOHN LANGDON, NICHOLAS GILMAN.

MASSACHUSETTS.

NATHANIEL GORHAM, RUFUS KING.

CONNECTICUT.

WM. SAML. JOHNSON, ROGER SHERMAN.

NEW YORK.

ALEXANDER HAMILTON.

NEW JERSEY.

WIL: LIVINGSTON, DAVID BREARLEY,
WM. PATERSON, JONA. DAYTON.

PENNSYLVANIA.

B. FRANKLIN, THOMAS MIFFLIN,
ROBT. MORRIS, GEO: CLYMER,
THOS FITZ SIMONS, JARED INGERSOLL,
JAMES WILSON, GOUV: MORRIS.

DELAWARE.

GEO: READ, GUNNING BEDFORD, jun.
JOHN DICKINSON, RICHARD BASSETT.
JACO: BROOM.

MARYLAND.

JAMES M'HENRY, DAN: OF ST. THOS. JENIFER,
DANL. CARROLL.

VIRGINIA.

JOHN BLAIR, JAMES MADISON, JR.

NORTH CAROLINA.

WM. BLOUNT, RICH'D DOBBS SPAIGHT.
HU. WILLIAMSON.

SOUTH CAROLINA.

J. RUTLEDGE, CHARLES COTESWORTH PINCKNEY,
CHARLES PINCKNEY, PIERCE BUTLER.

GEORGIA.

WILLIAM FEW, ABR. BALDWIN.

Attest:

WILLIAM JACKSON, *Secretary.*

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.*

(ARTICLE 1.)

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

(ARTICLE 2.)

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

(ARTICLE III.)

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

(ARTICLE IV.)

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

(ARTICLE V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

* Although this work does not embrace the history of the Amendments, they are printed here in connection with the Constitution, for the convenience of the reader.

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(ARTICLE VI.)

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

(ARTICLE VII.)

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

(ARTICLE VIII.)

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

(ARTICLE IX.)

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

(ARTICLE X.)

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII.

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 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.

INDEX.

A.

Acquisition, national spirit of, reflections on, II. 312.

ADAMS, JOHN, delegate to first Continental Congress, I. 13. On Washington's appointment as commander-in-chief, 42. One of the committee to prepare Declaration of Independence, 50. His account of the Declaration, 82. First minister to Great Britain, 257. Answer to his complaints about the treaty, 257. Instructed to negotiate treaty with the Netherlands, 280. One of the commissioners to procure commercial treaties, 287. Views of, respecting taxation of slaves, II. 159. Practice of, respecting cabinet, 409.

ADAMS, SAMUEL, delegate to first Continental Congress, I. 13. Reserve of, respecting Constitution, II. 533. Disapproves of Constitution, 533. Character of, 534. Position of, in convention of Massachusetts, 534. In favor of Hancock's amendments to Constitution, 538.

ADAMS, captain in the Revolutionary naval force, I. 74.

Address of the Colonies to the people of Great Britain, I. 23.

Admiralty Jurisdiction, criminal, II. 330. Of courts of United States, 445. Under Confederation, 445.

Adoption of Constitution, mode of, recommended, II. 372.

Albany, convention of Colonies at, in 1753-54, I. 8.

Alexandria, meeting of commissioners at, from Virginia and Maryland, I. 341.

Alexandria Commissioners, visit General Washington, I. 425. Report of, received in Virginia legislature, 426.

Aliens, rights to be conceded to, in certain treaties, I. 280. See *Foreigners*.

Allegiance of people of the Colonies, transferred, I. 52.

Alliance. See *Treaty of Alliance*.

Ambassadors, proposed appointment of, by Senate, II. 223, 410; by President, 234. Received by President, 415. To be nominated by President, 418. Jurisdiction of cases affecting, 444.

Amendment of Constitution, II. 84. Provision for, adopted without debate, 177. And revolution, distinction between, 473.

Amendments of Constitution, when to be proposed by Congress, II. 268. How to be proposed and adopted, 473. How ratified, 477. Power to make, limited, 477. States at liberty to propose, 486. Proposed by Hancock, 537; by Massachusetts, classified, 539; by South Carolina, 548; by Patrick Henry, 580; by Virginia, 581; by New York, 587, 588; by North Carolina, 597. Refused in Maryland convention, 543. Proposed, not made conditions of adoption, 551.

Amendments of Articles of Confederation, how made, II. 84, 473, 481.

America, natural advantages of, for commercial pursuits, II. 309. Variety of climate and products of, 309.

American Constitutions, character of, I. 261.

American Feeling, Washington's efforts to create, I. 110.

American People perceive the insufficiency of State governments, I. 114. Early familiarity of, with the principles of government, 117. Perceive the necessity of a union, 121. See *People of America*.

American Revolution, commencement

of, I. 3. Attempt to alter charter governments, a principal cause of, 6. Found local legislatures in all the Colonies, 7. Fundamental principle established by, 379. Object and effects of, II. 196. Policy which led to, real cause of, 238. Effect of, on views of people of United States, relating to government, 238.

Annapolis, general commercial convention at, I. 326, 340, 350. Recommends general convention to revise the federal system, 349. Recommendation, how received, 351. See HAMILTON and MADISON.

Annapolis Commissioners, report of, acted upon in Congress, I. 355.

Anti-Federalists, plan of, to postpone action of Virginia on Constitution, II. 568. See *Federalists*.

Appropriation Bills, provision concerning, objected to, II. 147. See *Money Bills* and *Revenue Bills*.

Arms of the United States, when adopted, I. 151.

ARMSTRONG, JOHN, wrote the Newburgh Addresses, I. 168.

Army, power of Congress to raise and support, II. 333. Appropriation of money for support of, 333. Power of Congress to make rules for, 334. Standing, repugnant to American feelings, 336. Not to be kept by States in time of peace, 371. President commander-in-chief of, 413. Power of President to employ, 413.

Army of the Revolution, first suggested, I. 31. How first raised, 32. State of, when Washington arrived at Cambridge, 55. How constituted, 58. Short enlistments in, how accounted for, 60. Committee of Congress sent to examine, 60. Discontents in, 79, 158, 186. History of, after the evacuation of Boston, 91. Reorganized, 91, 92. Defects in organization of, 93. Officers of, how appointed, 93; how treated in 1776, 94. Bad construction of, 94, 96. Third effort of Washington to reorganize, 109. Embarrassments and difficulties attending, 110. State of, in April, 1777, 111; in May, 1782, 158.

Arrest, privilege from, II. 263.

Arsenals, authority of Congress over, II. 340.

Articles of Confederation, I. 509. Reported in Congress, and recommended to the States, 53, 104, 113. Adoption of, by the States, 124. Amendments to, proposed by the States, 128; by New Jersey, for regulation of commerce, 129. Chief obstacle to the completion of, 131. States urged to accede to, 134. Ratified by New Jersey, 135; by Delaware, 135; by Maryland, 136. Completion of, announced, 137. Established by patriotic sacrifices, 139. Outline of, 142. Construction of third article of, 265. Circular letter of Congress, recommending adoption of, 491. Representation of New Jersey respecting, 493. Act of New Jersey accepting, 497. Resolves of Delaware respecting, 498. Action of Maryland on, 501; of New York on, 505. Amendment of, at first contemplated, II. 16. How altered, 84, 180, 481. Citizenship under, 206. Effort to include in, power over Western Territory, 341. Admission of new States under, 345. On what terms ratified by smaller States, 346. Restraints imposed on States by, 363. Inter-state privileges under, 447.

Assemblies in Provincial governments, how constituted, I. 4.

Assembling, one of the common law rights, I. 23.

Association, drawn up by House of Burgesses in Virginia, I. 12. For non-importation, &c., how carried out by colonists, 24.

Attainder, Bills of, defined, II. 360. Congress prohibited to pass, 360. States prohibited to pass, 368.

Attestation to Constitution, form of, II. 485.

B.

BALDWIN, ABRAHAM, model of Senate suggested by, II. 139. Vote and views of, respecting representation in Senate, 142.

Baltimore, public rejoicings in, in honor of Constitution, II. 543.

BARNWELL, ROBERT, in favor of Constitution, II. 510. Arguments of, in convention of South Carolina, 548.

BELKNAP, Dr., on slavery in Massachusetts, II. 454.

Bill of Rights, want of, a strong argument with some against Constitution, II. 498. James Wilson's views re-

specting, 522. States equally divided on question of, in Convention, 523. Considered essential by Patrick Henry, 554. Proposed by Virginia, 581.

Bills of Credit, power to emit, prohibited to States, II. 328, 364. Meaning of, 329.

Boston, occupied by royal troops in 1774–75, I. 27. Invested by army under General Ward, in 1775, 32. Reception of Constitution by people of, II. 501. Rejoicings in, in honor of Constitution, 540.

Boundary, Southern, fixed by the Treaty of Peace, I. 312. Questions of, proposed to be determined by Senate, II. 223, 231; plan respecting, 235. Determination of, a judicial question, 232. See *Western Territory, Lands*, and *Northwestern Territory*.

Bounties offered for enlistment in 1776, I. 93. Additional, offered by States, 95; effect of, 110.

BOWDOIN, JAMES, delegate to first Continental Congress, I. 13. Governor of Massachusetts, 270. Suppresses Shays's rebellion, 270. Message of, suggesting a general convention, 336.

Brandywine, battle of the, force engaged in, I. 113.

Bribery, by executive, dangers of, II. 242.

British Colonies, legislatures of, divided into two branches, II. 132.

BROUGHTON, NICHOLAS, commander of the Hannah, I. 74.

BUTLER, PIERCE, in favor of the Constitution, II. 510.

C.

Cabinet, functions of, II. 407. Views respecting, in Convention, 408. President may require opinions of, 408. Constitutional character of, 409. Practice of first three Presidents respecting, 409.

Captures, power of Congress to regulate, II. 330.

Capitation Tax, report of committee of detail respecting, II. 290. Provision respecting, adopted, 304.

CARROLL, CHARLES, proposition of, for asserting right of United States to vacant lands, II. 353, 355.

Cases arising under Constitution, &c., meaning of, II. 430.

Census, periodical, proposed by Williamson of North Carolina, II. 153. Vote respecting, 153. See *Federal Census*.

Cessions of Northwestern Territory, II. 342 Of land by States to United States, 356. See *Western* and *Northwestern Territory*.

Charleston, rejoicings in, on adoption of Constitution, II. 548.

Charter, of William and Mary to Massachusetts, I. 5; attempt to alter, 6. Inviolability of, 23. How distinguished from constitution, II. 7.

Charter Governments, form and character of, I. 5.

CHASE, SAMUEL, views of, respecting taxation of slaves, II. 159.

Checks of one department on another, II. 301.

Citizenship, as qualification of national officers, II. 186, 188, 204; of senators, 223. State rules respecting, unlike, 199. General privileges of, under Confederation, 206, 448; under Constitution, 448. See *Naturalization*.

CLARKE, GEORGE ROGERS, General, proceedings of, in Kentucky, I. 322.

CLINTON, GEORGE, message of, as Governor of New York, on revenue system of 1783, I. 359. Head of party in New York opposed to Constitution, II. 502.

Coinage of the United States, origin of, I. 443.

COIT, captain in the Revolutionary naval force, I. 74.

Colonies, thirteen English, I. 3. Ante-Revolutionary governments of, 3. Form a union, 3. No union of, before the Revolution, 7. Common grievances of, 9. People of, how descended, 9. Rights of, how to be determined, 16; when and how stated, 20; declaration of, 22; what included in, 22; how to be enforced, 23. Trade of, how far right to regulate in Parliament, 20. Reduction of, to submission, great preparations for, 38. Trade with, prohibited by Parliament, December, 1775, 38. Change of, into States, 116. Constitutional power of, II. 179.

Commerce, of the United States, I. 276; capacity of, at the close of the war, 284. Regulation of, a leading

object of Constitutional Convention, II. 12; became an exigency of the Union, 13; how provided for, by Virginia plan, 90; if universal, must include slave-trade, 285; report of committee of detail respecting, 289; generally conceded to general government as necessary, 290; views of Southern statesmen respecting, 290; by Congress, beneficial to North and South 291; a power conceded by South to North, 291; indivisible, 370; reluctance of South Carolina to concede, 546. Want of power over, in Confederation, 279. Interest of, in different States, not identical, 291, 299. Powers of government over, influence of, 311. Necessities of, basis of Constitution, 312. See *Regulation of Commerce.*

Commercial Convention. See *Annapolis* and *Virginia.*

Commercial Power asked for by Congress, I. 285. Action of the States respecting, 286.

Commercial Treaties, want of, displayed, I. 277. Existing at the peace, 279. How far the Confederation competent to make, 279. Why not made with England, 282. Congress endeavors to get power to make, 285. Attempt to negotiate without power, 286. States refuse the power to make, 287. Fruitless efforts of the commissioners to negotiate, 289.

Commission. See *Commercial Treaties* and JOHN ADAMS.

Committee of Congress sent to confer with Washington, I. 60, 93.

Committee of the States under the Confederation, I. 146.

Committees of Correspondence recommended by Virginia, I. 11. Agency of, 12.

Common Law, one of the rights of the Colonies, I. 23. And equity, distinction between, preserved by Constitution, II. 425. Basis of State jurisprudence, 425.

Commutation. See *Half-Pay.*

Compromises between national and federal systems, II. 102, 104. Lie at the basis of the Constitution, 129. Respecting formation of Congress, 141, 167, 195; representation in Congress, 146. Respecting slavery, 161; how to be effected, 163; reflections on, 309. Committee of, proposed by Gouverneur Morris, 201. Respecting Senate, as affected by money bills, 217; choice of executive, 220. How to be studied, 220. Respecting slave-trade and navigation act, 302. If not made, necessary consequences, 315.

Confederation, office of, in American history, I. 140, 149. Revenues of, 147. Defects of, 148, 155; II. 11, 14, 15, 35, 60, 79, 376. Restraints imposed by, upon the States, I. 149. Legal commencement of, 149. Operation of, to the close of the war, 181. Power of, to maintain an army and navy in peace, 215. Analyzed by Hamilton, 221. Principle of, adhered to, 225. Summary of its operations, 228. Incapacity of, to protect the State governments, 260. Had no strict power to hold or manage public lands, 291. Decay and failure of, 328; II. 13. Fatal defect in the principle of the, I. 371. Nature of, II. 16. Had no power of compulsion, 16, 376. Powers of, 27. Principle of, 33. Rule of suffrage under, 42. Had no executive or judiciary, 60. Laws of, to be executed by State tribunals, 61. Compared with Constitution, 90. Articles of, framed in 1776, 158. Assessments on States under, 160. Still in force while Convention in session, 178. Relation of, to States, 179. States opposed to entering, except on full federal equality, 227. Had no seat of government, 268. Want of power in, over commerce, 279; over revenues, 279. Engagements of, proposal to assume, 321. Want of power in, to admit new States, 349. Rule of, respecting making of treaties, 376, 416, 441. Nature and objects of, 448. How amended, 473. Chief cause of failure of, 573. See *Articles of Confederation* and *Congress.*

Confiscations, provided against, by the Treaty of Peace, I. 250. Strict right of, belonged to the Union, 251.

Congress of the Revolution, leaves Philadelphia after the battle of the Brandywine, I. 113; assembles at Lancaster and Yorktown, 113. Of the Confederation, first meeting of, 125; structure and form of, 143, II. 133, 226; powers of, I. 144; restrictions on powers of, 146; attendance diminished after the peace, 189; driven from Philadelphia by a mutiny,

220; decline of, 226; meeting of, in 1783, 235; thinly attended, 235; appointment and attendance of delegates, 237, 239; perpetually in session, 238; public objects to be accomplished by, 239; condition of, in 1785, 339; unfitted to revise the federal system, 364; had but one chamber, II. 132; resolution for continuance of, 176; method of voting in, 226; members of, chosen annually, and liable to recall, 241; appointment of officers by, complaints respecting, 248; met where, 268; presence of, in New York, benefits resulting from, 273; attempts of, to procure cessions from States, 342; resolve of, for regulation of Northwest Territory, 342; power of, to admit new States, 344; transmission of Constitution to, 486; action of, on Constitution, 499. Old, authority of, continued till new adopted, 86. Under Virginia plan, to have two houses, 101. Under New Jersey plan, to be one body, 101. Present constitution of, by whom first suggested, 138; compromise respecting, 141, 167. Power of, to legislate for general interests of Union, 170; to negative State laws, 170; respecting elections to, 257; in general, 279; over taxes, duties, &c., 322; to pay debts of United States, 322; to provide for common defence, &c., 322; over places purchased for forts, &c., 340; over Territories, different views concerning, 340, 358; limited, 340; over soil of national domain, 351; proposed, over property of United States, 355; restraints on, 359; to establish inferior tribunals, 423, 427. Acts of, supreme law, 170; how passed, 264. Proposal that executive be chosen by, 171. Members of, qualifications of, 194; ineligibility of, to office, 250; time, &c. of electing, left to States, 258; pay of, proceedings in Convention respecting, 258; objections to States paying, 259; privileged from arrest, 263; punishment and expulsion of, 263; not to be questioned elsewhere for speech or debate, 263. Importance of early legislation of, 208. Proposed to be modelled after Congress of Confederation, 226. Admission of members of Cabinet, &c. to, question respecting, 253. Each house of, to be judge of elections, &c. of its own members, 262; to determine its own rules of proceeding, 263; to keep journal, 263. Adjournment of, 275, 419. Exclusive sovereign of District of Columbia, 277. Time of meeting of, 277. To make all necessary and proper laws for execution of powers, 338. To declare war, 413. To authorize calling out of militia, 413. Special relations of President to, 419. To prescribe mode of proof and effect of State records, &c., 449. To propose amendments to Constitution, 477. To call Convention to amend Constitution, when, 477.

Connecticut, a charter government, I. 5. Governor, council, and representatives always chosen by the people, 6. Had five representatives in first House, 149. Cedes claims to Western territory, 300, 344. Appoints and instructs delegates to the Convention, 369. Opposed to Convention, II. 23; to executive holding office during "good behavior," 173; to property qualification for office, 189; to nine years' citizenship as qualification of Senator, 224; to taxing exports, 296; to restricting President to stated salary, 407. In favor of equality of suffrage in both branches of Congress, 122, 138; of equal representation of States in Senate, 141, 148, 165; of census of free inhabitants, 153; of referring Constitution to State legislatures, 184; of each State having one vote in Senate, 227. Vote of, respecting citizenship as qualification for office, 209; respecting money bills, 216, 218; respecting eligibility of members of Congress to office, 251; respecting slave-trade, 305. Ratification of Constitution by, 515. Convention of, 527; debates in, mostly lost, 529.

Connecticut Reservation, note on, I. 300.

Constitution, how framed, II. 3. Means of peaceful coercion a leading object of, 62. An abridgment of State powers in some respects, 73. Republican government guaranteed to States by, 80, 458, 468. Capacity of, of amendment, 84. Why submitted to people for ratification, 84. As reported to Convention, 86. Different plans of, proposed in Convention, 89. Compared with Confederation, 90. Compromise of, between national

and federal system, 102. Based on compromises, 129. Possibility of failure to create, reflections on, 142. Framers of, problem before, 155; position and purposes of, 178; had been observers of Parliamentary corruption, 242. State and national officers sworn to support, 177, 372. Ratification of, 177. Dissatisfaction with, in different States, 182. How differs from league, 184. Proposal to submit, to Congress of Confederation, 185. Growth of, important to be pursued through entire proceedings, 193. Divided into twenty-three articles by committee's report, 194. Interest in Europe respecting, 196. Should define eligibility to national offices, 199. Purposes of, respecting immigrants, 209. Analogy of, to British Constitution, 214. Provisions of, as originally proposed, 230. Benefits of, to North and South, 303. Conception of, gradually attained, 311. Hopes of framers of, exceeded, 311. Sprung from necessities of commerce, 312. Objections to, of favoring slavery, superficial, 313. Proper mode of judging, 313. Rights guaranteed to States by, 314. Beneficent operation of, on condition of slaves, 315. Provision of, respecting power of Congress over Territories, 355; purpose of, 355; explanation of, 357. Adoption of, 372. Preamble to, 372. Supreme law, 374. Binding on all judicial officers, 374. Complex character of, 379. Workings of, not impaired by territorial growth, 381. Success of, when other systems had failed, cause of, 384. Proposed by Governor Randolph, 410. Cases arising under, meaning of, 430. Confers few special powers on general government, 432. Restrictions laid on States by, 432. Powers of national and State governments determined by, 436. Designed to form a more perfect union, 448. Inter-state privileges under, 448. Amendments of, how proposed and adopted, 473. Oath to support, by whom to be taken, 478. Religious test never to be required under, 478. Serious questions respecting mode of establishing, 479. Effect of ratification of, by only part of States, 484. Formal assent of States to, in Convention, 485. Form of attestation to, 485. Refusal of three delegates to sign, 485. Presentation of, to Congress, 486. Probable consequences of rejection of, 487. Issue presented by, to people of United States, 487. Attempt to introduce monarchy averted by, 494. Published September 19th, 1787, 495. Reception of, among the people, 495. Friends and opponents of, classified, 495. Advocates of, why styled Federalists, 496. Adopted by intelligent majority in each State, 499. Reception of, by Congress, 499. Attempt in Congress to arrest or alter, 499. Real crisis of, 515. General and special opposition to, 515. People predisposed to adopt, 516. First ratified by Delaware, 518. Right of people to change at pleasure, 522. Bestows only a part of power of people, 522. Ratification of, rejoicings in honor of, 540. Anxiety respecting State action on, 544. Amendments of, proposed by South Carolina, 548. Opposition to, in New York, 572. Adoption of, an event unparalleled in history, 584. Opponents of, concessions to, justified, 590.

Constitutions, written, how far existed before the Revolution, I. 4. Of the States, origin and character of, 261.

Constitutional Convention, first suggestion of, I. 206. First suggested by Massachusetts, 336. Suggestion of Massachusetts respecting, not adopted, 337; withdrawn, 338; objections of her delegates in Congress to, 339. Urged by various public bodies, 349. Considered and adopted by Congress, 350. Early recommendations of, 350. Recommended by the Annapolis Commissioners, 350; by Congress, 361. Difficulties of its position, 367. Powers of, not strictly defined, 367. Opinions of leading statesmen respecting, 373. Assembles at Philadelphia, 374. Novelty and peculiarity of its task, 374. List of members of, 516. Great object of, II. 5. Members of, character of, 17; different views of, 17; greatness of, 144. Authority and powers of, uncertain, 18. All States but Rhode Island represented in, 23. Presence of all States in, not required, 26. Had no power to enact or establish, 29. Character of, 29. Proceedings of, how to be studied, 29; secrecy of, 491; singu-

lar rumors respecting, 492. Supposed want of authority in, to propose fundamental changes, 91. Report of committee of the whole made to, June 19th, 129. Struggle in, respecting form of Constitution, 129. Disruption of, imminent at one time, 142. Possible consequences of failure of, 143. Resolution recommending, 185. Instructions to delegates to, 185. Causes of success of, 475. A second, inexpedient, 475, 589. Dissolved September 14th, 1787, 491.

Constitutional Law, American, originates in The Federalist, I. 417. Questions of, how determined, II. 375.

Constitutionality of laws, questions of, how settled, II. 433.

Construction, questions of, how far considered, II. 4.

Consuls, to be nominated by President, I. 418. Cases affecting, jurisdiction of, 444.

Continental Congress, formation of first, I. 3. Advised by Franklin in 1773, 10. First suggestion of, 11. Recommended by Virginia, 11. Appointed for September, 1774, 12. Declared expedient by Massachusetts, 12. First, assembled and organized, 13; delegates to, how appointed, 13; how composed, 14; method of voting in, 15; relation of, to the people of the several Colonies, 15; purpose of, not revolutionary, 16; instructions to delegates in, 18; how it sought redress, 18, 19; revolutionary tendency of, 19; assumed guardianship of rights and liberties, 19; proceedings of, in stating rights, 20; duration of, 24; adjournment of, 25; recommends another Congress, 25; where held from 1774 to 1783, 226; each Colony had one vote in, II. 227. Second, election of delegates to, by Massachusetts Provincial Congress, I. 27; assembles at Philadelphia, 28; delegates to, how appointed, 29; instructions to delegates to, 29; rule of voting in, 29; powers assumed by, 31. Becomes a permanent body, 30. Petition of, to the King, 38. Dissolves the allegiance of the Colonies to the King, 38. Becomes a revolutionary government, 39. Nature of the government by, 54. Situation of, at the end of 1776, 100. Change in the members of, in 1777, 104. Credentials of members of, in 1776, 105. Constitution of, II. 42.

Continental Currency first issued, I. 34.

Contracts, restraint on legislative violation of, origin of, II. 361, 365; obligation of, impaired by State law, redress in case of, 433. See *Obligation of Contracts*.

Contribution, rule of, attempted to be changed, I. 210.

Convention, at Williamsburg, I. 12. At Hartford, in 1779, 205.

Convention of all the States. See *Constitutional Convention*.

Copyrights, State legislation concerning, II. 339. Power over, surrendered to Congress, 339.

CORNWALLIS, enters Newark, I. 98. Effect of capture of, 157.

Council, vacancies in, how filled in provincial governments, I. 4. Suspension of, from office in provincial governments, 4. Part of the provincial governments, 4; charter governments, 5. How chosen, 5.

Council of Revision, proposed, dangers of, II. 435; much favored in Convention, 438; purpose of, 438.

Counterfeiting, power of Congress to define and punish, II. 332.

Courts, inferior, Congress may establish, II. 330, 423.

Courts of United States, jurisdiction of, over persons of certain character, II. 441. Admiralty and maritime jurisdiction of, 445.

Creditors, rights of, secured by the Treaty of Peace, I. 250.

Crimes, trial for, to be in State where committed, II. 424; to be by jury, 424.

Crown, the source of political power in the Colonies, I. 3. Powers of, in provincial governments, 4.

Currency under Revolutionary government, I. 78.

CUSHING, THOMAS, suggests Continental Congress, I. 11. Delegate to first Continental Congress, 13.

D.

DANE, NATHAN, author of Ordinance of 1787, II. 365.

Debts due to English merchants at the peace, I. 250. Action of Con-

gress respecting, 258. Of States, proposition to assume, II. 319. Of United States, provision for payment of, 320; power of Congress to pay, 322.
Debt of the United States, in 1783, I. 172. Foreign and domestic, where held, 178. National character of, 182. Necessity of revenue power to discharge, 183. Amount of, at the close of the war, 184.
Declaration of Independence, authorship of, I. 81. Effect of, upon the country, 89; upon Congress, 90. See *Independence*.
Declaration of Rights, by first Continental Congress, I. 22.
Delaware, a proprietary government, I. 5. Constitution of, formed, 122. Resists the claim of great States to Western lands, 131. Ratifies the Confederation, 135. Action of, commended, 138. Resolves of, respecting the Articles of Confederation, 498. Opposed to change in rule of suffrage, II. 36; to division of legislature, 133; to census of free inhabitants, 153; to striking out wealth from rule of representation, 164; to referring Constitution to people, 185; to property qualification for office, 189; to restricting President to stated salary, 407. Vote of, respecting citizenship as qualification for office, 209; respecting money bills, 216, 218; respecting slave-trade, 305; respecting admission of States, 354. In favor of equality of suffrage in House of Representatives, 138; of equality of States in Senate, 165; of executive holding office during "good behavior," 173; of referring Constitution to State legislatures, 184; of each State having one vote in Senate, 227; of taxing exports, 296. Had one representative in first House, 149. Ratification of Constitution by, 515, 518. Patriotism of, 518. Enlightened by discussions on Constitution in Pennsylvania convention, 518.
Delaware River, Washington crosses the, I. 99.
Delegate, Territorial, position of, in Congress, II. 256.
Democracy, did not originate in America, II. 7. Principle of, how modified in America, 7.
Departments of Government, division of, I. 118.
DICKINSON, JOHN, in favor of tax on exports, II. 284.
Dictatorship. See *Washington*.
District of Columbia, under exclusive government of Congress, II. 277.
Dock-Yards, authority of Congress over, II. 340.
DORSET, Duke of, reply of, to the American Commissioners, I. 289.
DUANE, JAMES, efforts of, to procure adoption of Constitution by New York, II. 585.
Duties, power to levy, asked for by Congress in 1781, I. 173; not given, 174. Power of Congress to impose, II. 322. To be uniform throughout United States, 325. What may be laid by States, 368. Laid by States, net produce of, how applied, 368; subject to revision of Congress, 368. Payment of, how compelled, 433.

E.

Eastern States, course of, respecting the navigation of the Mississippi, I. 315.
Elections, frequency of, favored, II. 241.
Elective Franchise, could not be confined to native citizens, II. 198.
Electors, of President, advantages of, II. 175; proposed in committee, 220; number of, 235, 389; embarrassments respecting choice of, 388; mode of election by, 390; case of no choice by, 390; required to return votes for two persons, 393; how chosen, 398; method of proceeding, 399; new appointment of, when, 403. Property as a qualification of, 187. Of representatives in Congress, qualification of, 194, 200.
ELLSWORTH, OLIVER, compromise respecting Congress proposed by, II. 141. Opposed to tax on exports, 294. Influence and arguments of, in Connecticut convention, 528.
Emigration, from Europe, a subject of solicitude, II. 195.
England, government of, not a model for the Constitution, I. 391.
English Language spoken by the colonists, I. 3, 9.
English Laws inherited by the colonists, I. 9.
Enlistments. See *Army* and *Bounties*.
Equity and common law, distinction between, preserved by Constitution,

II. 425. Jurisdiction under Constitution important, 425.
Europe, politics of, as affecting America, II. 80.
Excises, power of Congress to collect, II. 322. To be uniform throughout United States, 325.
Executive, methods proposed for choice of, II. 59, 171. Duration of office of, under Hamilton's plan, 100. Duration of office of, 171; proposed to be during "good behavior," 173. Re-eligibility of, different views respecting, 172, 175. Choice of, directly by people, difficulties attending, 174. Whether should be subject to impeachment, 175. Choice of, conflict of opinions respecting, 220; proposed to be by Congress for seven years, 220; by electors, 220; by Senate, in certain events, 221; by House of Representatives, 222; by concurrent vote of Senate and House of Representatives, 223, 230; proposed negative of Senate in, 232. Jealousy of, 232. See *President* and *Vice-President*.
Executive Department, proposed constitution and powers of, II. 56, 170. Relation of, to legislature, 57, 247. Unknown to Confederation, 60. Powers of, defined by constitutions in America, 72. Influence to be allowed to, over legislative, 244. Action of, requires discretion, 246.
"*Executive Power*" vested in President, meaning of, 412.
Exports, taxation of, Pinckney's proposition concerning, II. 189; refusal of South Carolina to submit to, 281, 285; an undoubted function of government, 282; consequences of denial of, 282; when only beneficial, 282; question of, as affected by variety, 283; members of Convention in favor of, 284; report of committee of detail respecting, 290; great embarrassments respecting, 294; arguments for and against, 294, 297; opposition to, not confined to South, 294; by States, an oppressive power, 295; finally prohibited, 295; for what reasons opposed in Convention, 297; by States, arguments for and against, 368.
Ex Post Facto Laws, definition of, II. 360, 367. Passage of, prohibited to Congress, 360; to States, 368.

F.

Faith and Credit, to be given to certain acts, &c., I. 143.
Falmouth (now Portland), burnt, I. 38, 74.
Faneuil Hall, meeting at, respecting a national regulation of commerce, I. 336.
Federal Census, origin of its rule of three fifths, I. 213.
Federal Government, how distinguished from "national," II. 33. By what States preferred, 117. Arguments in favor of, 124; theoretically sound, 126. Had proved a failure, 127.
Federal Town. See *Congress* and *Seat of Government*.
Federalist, original meaning of, II. 496. Changes in meaning of term, 497. Miniature ship so called, 543.
Federalists of Massachusetts, enthusiasm kindled by, II. 541. Of New Hampshire, action of, 541. Of New York, justified by Washington, 590; complaints against, 591.
Federalist, The, published, I. 409. Character and influence of, 417. History of the editions of, 418. Remark of, respecting Confederation, II. 61. Purpose of publication of, 503. When first issued, 503. Authors of, 503.
Felony, various meanings of, II. 331. Power of Congress to define and punish, 331.
Finances, must rest on some source of compulsory revenue, I. 183. See *Debts*, *Revenue*, and *Duties*.
Fisheries, great value of, II. 310.
Foreigners, cases affecting, jurisdiction in, II. 443. Cannot demand sanctuary as matter of right, 457.
Foreign Influence, jealousy of, II. 196, 204, 223. Necessity of counteracting, 211.
Forts, authority of Congress over, II. 340.
Framers of the Constitution, difficulties and perplexities of their task, I. 380. Their qualifications, &c., 386. Their success, 393.
France, debts of the United States to, I. 172. Contracts with the king of, 177. Relations of the United States to, 178.
FRANKLIN, BENJAMIN, his plan of union in 1754, I. 8. Advises a Con-

gress in 1773, 10. Appointed Postmaster-General by Continental Congress, 35. One of the committee to prepare Declaration of Independence, 50. One of the commissioners to procure commercial treaties, 287. Returns from Europe, 433. Public services of, 433. Character of, 435. Influence in the Convention, 436. Speech of, at the close of the Convention, 437. Witnesses the success of Washington's administration, 439. Proposition of, respecting representation in Congress, II. 146. Views of, respecting money bills, 218. Opposed to paying President, 405. In favor of plural executive, 405. Views of, respecting executive, quite unlike Hamilton's, 405; respecting consequences of rejection of Constitution, 487. Unbounded confidence of people in, 498.

Free Inhabitants, privileges of, I. 143.

French Loans. See *France*.

French Revolution, early writers of the, I. 378. Begun when Constitution went into operation, II. 80. Interest felt in, in America, 80.

French Troops, arrive at Newport, I. 156. Join the army at New York, 156.

Fugitives, from justice, provision for surrender of, under the Confederation, I. 143, II. 449. From service, clause in Constitution respecting, history of, 450. See *Slaves*.

G.

General Convention. See *Constitutional Convention*.

Georgia, a provincial government, I. 4. Constitution of, formed, 122. Appoints and instructs delegates to the Convention, 369. Had but one chamber in legislature, II. 132. Opposed to equality of suffrage in House of Representatives, 138. Divided on question of equal vote of States in Senate, 141, 148. Had three representatives in first House, 149. Opposed to census of free inhabitants, 153; to equality of States in Senate, 165; to executive holding office during "good behavior," 173. In favor of property qualification for national officers, 204. Vote of, respecting citizenship as qualification for office 209; respecting money bills, 216, 218. Divided on question of each State having one vote in Senate, 227. Opposed to taxing exports, 296. Position of, in Convention, respecting slave-trade, 297, 301. Vote of, respecting slave-trade, 305. Cession by, in 1802, 357. Vote of, on suspension of habeas corpus, 360; respecting citizenship clause in Constitution, 453. Ratification of Constitution by, 515, 526. Remoteness of, 526. Situation of, at close of Revolution, 526. Motives of, to embrace Constitution, 526. Address by legislature of, to President Washington, 527. Exposure of, to ravages of Indians, 527. Escape of slaves from, to Florida, 527.

GERRY, ELBRIDGE, opposed to numerical representation in Congress, II. 49; to tax on exports, 294. Refused to sign Constitution, why, 485. Censured for refusing to sign Constitution, 501.

GILLON, Commodore, arguments of, in convention of South Carolina, II. 548.

GORHAM, NATHANIEL, views of, respecting rule of suffrage for House of Representatives, II. 135. A member of committee to apportion representatives, 148.

Government, disobedience to, how punished, II. 61. Essentials to supremacy of, 62. Different departments in, advantages of, 245. Approximation to perfect theory of, only attainable, 247. Distribution of powers of, when easy, 421; when difficult, 421.

Governor, part of the provincial governments, I. 4.

GRAYSON, WILLIAM, opposed to Constitution, II. 506.

Great Britain, re-union with, desired by some, II. 493; letter of Colonel Humphreys respecting, 493; Hamilton's views respecting, 494.

Green Dragon Tavern, meeting at, respecting a national regulation of commerce, I. 336.

Grievances. See *Colonies* and *Revolution*.

Guardoqui, Spanish minister, arrival of, I. 313. Negotiations with, respecting the Mississippi, 313.

H.

Habeas Corpus, privilege of, when suspended, II. 359; under common law of England, 359.

Half-pay, resisted by Connecticut and Massachusetts, I. 190. History of, 194. Commutation of, 194. See *Officers of the Revolution.*

HALLAM, HENRY, Constitutional History of England by, great value of, II. 244.

HAMILTON, ALEXANDER, laments the changes in Congress in 1778, I. 127. Exertions of, respecting revenue system, 176. Reasons of, for voting against revenue system, 177. Answers the objections of Rhode Island, 177, 206, 207. On the commercial advantages of a revenue power, 184. On the discontents of the army, and the public credit, 197. Opinions of, concerning the reorganization, &c., in 1780, 202. Maintains that Congress should have greatly enlarged powers, 204. Suggests a convention of all the States in 1780, 205. Enters Congress, 206. On a revenue, and the mode of collecting it, 207. On the compatibility of federal and State powers, 207. On the appointment of revenue officers, 208. Extent of views of, 209. On the rule of contribution, 210. On the necessity for power of taxation, 211. Seeks to introduce new principles, 211. On a peace establishment, 214. Opinions on the powers that should be given to Congress, 219. Exertions of, to suppress the mutiny at Philadelphia, 220. Views of, respecting defects of the Confederation, 221. Opinions of, too far in advance of the time, 224. Answers New York objections to revenue system, 247. Opinions of, concerning the Confederation, 263. Views of, respecting the regulation of commerce, 277; the statesmanship of America, 278. Induces New York to send delegates to Annapolis, 345. Reports at Annapolis in favor of a general Convention to revise the federal system, 347. Relation of, to the plan of a general Convention, and a national Constitution, 350. Contemplates a new government, 350. Induces the legislature of New York to urge a general Convention, 359. Views of, on the mode of proceeding, 364. Confidence of, in the experiment of a Convention, 373. History and character of, 406. Birth of, 408. Various public services of, 409, II. 593. Talleyrand's opinion of, I. 410. Death of, 410. Views of, respecting the English Constitution, 411. Relation of, to the Constitution, 412. Compared with the younger Pitt, 413, 416. Eminent fitness of, for the times, 414. Advocates the Constitution in the Federalist, 417. Compared with Webster, 418. Anxiety of, about the Constitution, 419. Unjustly charged with monarchical tendencies, II. 11, 94, 110. Views of, respecting Constitution, 94. Principles of civil obedience, as propounded by, 96. Views of, respecting rule of suffrage for House of Representatives, 135; dissolution of Union, 136; choice of President, 174, 240, 392; naturalization, 205; larger House of Representatives, 213. Measures of, respecting summoning of Constitutional Convention, 273. Views of, respecting executive, quite unlike Franklin's, 405; President's power to adjourn Congress, 420. Explanation of, respecting appellate power of Supreme Court, 428. Views of, respecting amendment of Constitution, 477. Objections of, to Constitution, 487. Views of, respecting consequences of rejection of Constitution, 487, 570; possible reunion with Great Britain, 494. Essays of, in Federalist, 503. Believed people predisposed in favor of Constitution, 516. Arrangements of, for transmission of news of action of States on Constitution, 551. Leading spirit in convention of New York, 568. Anxiety of, respecting action of States on Constitution, 569. Had great cause for solicitude, 569. Prospects of usefulness of, 569. Foresight of, respecting operation of Constitution, 570. Had profound understanding of Constitution, 570. Ambition of, 570. Importance of public character and conduct of, 570. Contest of, with opponents of Constitution in New York, 571. Critical position of, as citizen of New York, 571. Reply of, to opponents of Constitution in New York, 572. News received by, of ratification of Constitution by New

Hampshire, 573. Letter of, to Madison, respecting chances of ratification by New York, 575. Would have been led by personal ambition to remove from New York, 575. Policy of, national, 577. Reason of, for embracing Constitution, 577. Efforts of, to procure adoption of Constitution by New York, 577, 584. Sends news of ratification by New Hampshire to Madison, 578. Great speech of, in New York convention, in favor of Constitution, 586. Writes to Madison, asking advice respecting New York, 587. Honors paid to, by city of New York, 592.

HANCOCK, JOHN, retires from Congress, I. 125. Returns to Congress, 126. President of Massachusetts convention, II. 537. Proposes amendments to Constitution, 537. Great influence of, 537.

HARRISON, BENJAMIN, opposed to Constitution, II. 506.

Hartford Convention, met in 1779, I. 205.

Heights of Haerlem, occupied by Washington, I. 92.

HENRY, PATRICK, Governor of Virginia, I. 126. Declined to attend Convention, II. 173. Opposed to Constitution, 505. Characteristics of, 505, 561. In favor of submitting Constitution to people of Virginia, 510. Leader of opponents of Constitution in Virginia, 552. Jefferson's estimate of, 552. Great popularity of, 552. Wisdom of, lacked comprehensiveness, 553. Great powers of, employed against Constitution, 553. Views of, respecting American spirit of liberty, 553. Considered Bill of Rights essential, 554. Arguments of, against Constitution, 555, 557. Modern scepticism concerning abilities of, 561. Quotes Jefferson's views of Constitution, 561. Opposed to Constitution to the last, in Virginia Convention, 579. Project of, for amending Constitution, 580. Patriotic conduct of, on adoption of Constitution by Virginia, 581. Became earnest defender of Constitution, 582.

House of Burgesses, of Virginia, dissolved, I. 11.

House of Commons, ministerial majority of, during Revolution, II. 237.

House of Representatives, Constitution of, discussion respecting, II. 36. Members of, chosen for two years, 134; qualifications of, 134. Rule of suffrage for, great debate on, 135. Exclusive power of, over money bills, 146, 214. Power of, to fix salaries of government officers, 146. Ratio of representation in, 147, 212. First, apportionment of members for, 148, 151. Basis of, agreed to, 165. Members of, must be twenty-five years old, 203; have been citizens three years, 203; be inhabitants of States from which chosen, 212. Larger, favored by Wilson, Madison, and Hamilton, 213. Ultimate choice of executive by, 222. To present impeachments, 262. Quorum of, 262. To choose its own presiding officer, 263. To vote for President by States, 394. Choice of President by, quorum for, 394; majority of States requisite to, 394.

HOWE, SIR WILLIAM, proclamation by, respecting oath of allegiance, I. 106. Takes possession of Philadelphia, 113. Estimate of, concerning the American force at the Brandywine, 113.

HUMPHREYS, Colonel, one of Washington's aids, II. 493. Letter of, respecting hopes of loyalists, 493.

HUNTINGTON, Governor, influence of, in convention of Connecticut, II. 529.

I.

Impeachment, executive proposed to be removable on, II. 171. Whether executive should be subject to, 176. How to be decided, 232. To be presented by House of Representatives, 262. Of President, causes of, 397. King's pardon cannot be pleaded in bar of, 414. President cannot pardon, 414. King may pardon, 414.

Impeachments, proposed plan respecting, II. 235. Nature of, and constitutional provisions respecting, 260. To be tried by Senate, 261.

Imposts, power of Congress to collect, II. 322. To be uniform throughout United States, 325. What may be laid by States, 368. Laid by States, net produce of, how applied, 368; subject to the revision of Congress, 368. Revenue from, easiest mode of paying expenses of government, 528.

Indian Affairs, superintendence of, assumed by Continental Congress, I. 35.
Indians, position of, II. 325. Commerce with, 325; regulated by federal authority, 326; provision of Confederation respecting, 326. Not regarded as foreign nations, 326.
Independence, resolution of, adopted in Congress, I. 49. Declaration of, ordered to be prepared, 50; brought in, 51; adopted, 51; effect of, 51.
Inspection Laws, subject to what abuse, II. 368.
Insurrection. See *Massachusetts* and *Shays's Rebellion*.

J.

JAY, JOHN, report of, on the infractions of the Treaty of Peace, I. 254, 257. Projected mission of, to Spain, 313. Proceedings of, as Secretary for Foreign Affairs, respecting the Mississippi, 313. Essays of, in Federalist, II. 503. Efforts of, to procure adoption of Constitution by New York, 585.
JEFFERSON, THOMAS, one of the committee to prepare Declaration of Independence, I. 50. Account by, concerning the Congress of 1776, 64. Account by, of Declaration of Independence, 82. In the legislature of Virginia, 126. One of the commissioners to procure commercial treaties, 287. On the surrender of the Mississippi, 321. Suggests the decimal coinage, 443. Views of, respecting admission of States, II. 76. Resolve of, for organization of States from Northwestern Territory, 343. Practice of, respecting cabinet, 409. Views of, respecting government, 506; modifications of Constitution, 506. At Paris when Constitution was adopted, 506. Did not counsel rejection of Constitution, 508. Persevered in certain objections to Constitution, 509. Letters of, respecting Constitution, 562, 564.
JOHNSON, Dr., of Connecticut, views of, respecting Constitution, II. 128. First suggested present constitution of Congress, 138.
Journal, to be kept by each house of Congress, II. 263.
Judges, tenure of office of, II. 67; in England, 67. Removal of, 68. Power of removal of, in England, 69; in Massachusetts, 70. "Good behavior" of, 70.
Judicial Power of United States, to settle disputes between State and nation, II. 54. Unknown to Confederation, 60. Necessity and office of, 61. Intent evinced by introduction of, 63. Made supreme, 64. Coextensive with legislative, 65. Control of, over State legislation, 66. Formation of, 421. Great embarrassments respecting, 422. Admirable structure of, 422. Jurisdiction of, cases embraced by, 423. Great importance of clearly defining, 425. Embraces cases under Constitution, laws, and treaties, 429. Changes and improvements in original plan of, 431. Constitutional functions of, 431. Leading purposes of, 431. May declare laws unconstitutional, 434. Simplicity, &c. given by, to operation of government, 437.
Judiciary, functions of, II. 63, 432. Question concerning number of tribunals in, 65. Proposed powers of, 66. Restriction respecting salary of, 176. Jurisdiction of, respecting impeachment of national officers, 176; over cases arising under national laws, 176; over questions involving national peace, 176. Action of, not to be influenced by other departments, 246.
Judiciary of Massachusetts, attempt to alter the charter in respect to, I. 6.

K.

Kentucky, inhabitants of, resist the surrender of the Mississippi, I. 322.
KING, RUFUS, birth and education of, I. 448. Public services of, 448. Proposes the clause respecting the obligation of contracts, 452; II. 365. Senator in Congress, I. 453. Minister to England, 453. A member of committee to apportion representatives, II. 148. Views of, respecting Senate, 225; seat of government, 275. Remarks of, respecting slave-trade, 281. Views of, respecting representation of slaves, 292. Effort of, to exclude slavery from Northwestern Territory, 343.

L.

Land as the basis of a rule for contribution, I. 210. Adopted as measure of wealth by Congress of 1776, II. 160. Of United States unappropriated, Madison's motion respecting, 351.

Lands, right of aliens to hold, proposed in certain treaties, I. 280. See *Western Lands* and *Territory*.

Law of Nations, offences against, II. 330; power of Congress to define and punish, 331. Respecting extradition of fugitives, 456.

Laws of United States, how enacted, II. 264; supreme, 372, 374; to be in pursuance of Constitution, 374; cases arising under, jurisdiction over, 430. Of States, constitutionality of, 374. Constitutionality of, how determined, 434.

LAW, RICHARD, influence of, in convention of Connecticut, II. 529.

LEE, CHARLES, General, expedition of, against the Tories of New York, I. 66.

LEE, RICHARD HENRY, moves the resolution of independency, I. 49. Account of, 49. On the navigation of the Mississippi, 315. Proposition of, in Congress, to amend Constitution, II. 500. Opposed to Constitution, 506.

Legislative Department, division of, into two chambers, I. 119. Omnipotent in England, 72. Powers of, limited in America by constitutions, 72. Hamilton's views respecting, II. 100, 103, 105. Great struggle respecting, in Constitutional Convention, 130. Objections to one chamber in, 130. How far may safely be influenced by executive, 244. Action of, requires discretion, 246. Close relation of, to executive, 247.

Letters of Marque and Reprisal issued by Massachusetts in 1775, I. 75. Power of Congress to grant, II. 332.

Lexington, battle of, I. 27.

LIVINGSTON, ROBERT R., one of the committee to prepare Declaration of Independence, I. 50. Remarks of, in convention of New York, II. 574. Efforts of, to procure adoption of Constitution by New York, 585.

Long Island, battle of, I. 91.

LOWNDES, RAWLINS, opposed to Constitution, II. 510. Arguments of, against Constitution, 511.

Loyalists, scheme of, respecting Bishop of Osnaburg, II. 492. Numbers of, small, 493. Alarm occasioned by supposed scheme of, 493. See *Tories*.

M.

MADISON, JAMES, enters the Revolutionary Congress, I. 126. Exertions of, respecting revenue system, 176. Writes the address in favor of revenue system, 177. Answers Massachusetts on the half-pay, 193. Birth of, 420. Public services of, to the close of the war, 420. Initiates the Virginia measures leading to a general Convention, 423. Attends the convention at Annapolis, 427. Attends the general Convention, 427. Labors of, in the Convention, 427. Opinions and character of, 428. Described by Jefferson, 430. Letter of, to Philip Mazzei, 431. Action of, respecting change in rule of suffrage, II. 36. Views of, respecting national government, 40; Senate, 41; revision by Congress of State legislation, 54; revisionary check on legislation by executive, 58; use of force against States, 62; Constitution, 106; rule of suffrage for House of Representatives, 135; dissolution of Union, 136; Western States, 152. How far in favor of executive during "good behavior," 173. Views of, respecting difference between Constitution and league, 184; naturalization, 205. In favor of larger House of Representatives, 213. Views of, respecting eligibility of members of Congress to office, 250; seat of government, 275. In favor of tax on exports, 284. Views of, respecting slave-trade, 304. Proposition of, respecting Indian affairs, 327. Views of, respecting legislation of Congress of Confederation over Northwestern Territory, 345, 348, 351. Views and votes of, concerning Northwestern Territory, 348. Holds regulation of commerce to be indivisible, 371. Views of, respecting treason, 386. Motion of, respecting election of President, 403. Views of, respecting amendment of Constitution, 477; consequences of rejection of Constitution, 487. Proposed

amendment of Constitution by Congress, defeated by, 500. Essays of, in Federalist, 503. A leading advocate of Constitution in Virginia, 506. Reply of, to opponents of Constitution in Virginia convention, 558. Description of new government by, 559. Efforts of, in Virginia convention, 564. Opinion of, respecting conditional ratification of Constitution, 588.

Magazines, authority of Congress over, II. 340.

Majority, principle of, seldom to be departed from, II. 299.

Mandamus Councillors, appointment of, in Massachusetts, I. 25. Treatment of, by the people, 25.

MANLY, JOHN, commander of the Lee, I. 74. Captures a prize, 75.

Maritime Jurisdiction, of courts of United States, II. 445. Under Confederation, 445.

MARSHALL, JOHN, a leading advocate of Constitution in Virginia, II. 506.

MARTIN, LUTHER, views of, respecting Constitution, II. 92, 121; rule of suffrage for House of Representatives, 135; manner of voting in Senate, 186. Motion of, respecting admission of States, 354. Supremacy of Constitution, &c. proposed by, 374. Great opposition of, to Constitution, 484, 512. Communication of, to legislature of Maryland, 512; chief ground of, 513.

MARTINDALE, captain in the Revolutionary naval force, I. 74.

Maryland, a proprietary government, I. 5. Constitution of, formed, 122. Remonstrates against the claims to Western lands, 131, 421. Ratifies the Constitution, 136. Action of, commended, 138. Appoints and instructs delegates to the Convention, 369. Action of, upon the Articles of Confederation, 501. Delegates from, divided in opinion, II. 121. Divided on question of national legislature, 133; equality of suffrage in House of Representatives, 138. In favor of equal representation of States in Senate, 141, 165. Had six representatives in first House, 149. Opposed to census of free inhabitants, 153; executive holding office during "good behavior," 173. In favor of referring Constitution to State legislatures, 184; each State having one vote in Senate, 186, 227. Vote of, respecting citizenship, as qualification for office, 209; money bills, 216, 218. Opposed to nine years' citizenship as qualification of senator, 224; taxing exports, 296. Vote of, respecting slave-trade, 305; admission of States, 354. Action of legislature of, respecting Constitution, 511. Convention of, to vote on Constitution, 514; importance of action of, 542; efforts made in, to amend Constitution, defeated, 543.

MASON, GEORGE, views of, respecting Constitution, II. 123. Objections of, to compound ratio of representation, 151. Views of, respecting money bills, 218. Opposed to tax on exports, 294. Proposition of, to restrain grants of perpetual revenue, 319. Views of, respecting militia, 337. Refused to sign Constitution, why, 485, 509. Great ability of, 505. Opposed to Constitution, 505. In favor of submitting Constitution to people of Virginia, 509. Arguments of, against Constitution, in Virginia convention, 557.

Massachusetts, a charter government, I. 5. Provincial governor of, appointed by the crown, 5. Council of, chosen by Assembly, 5. Representatives of, chosen by the people, 5. Appoints delegates to first Continental Congress, 12. Colonial government of, how ended, 25. Provincial Congress of, how formed, 26. Authority assumed by Provincial Congress, 26. Applies to the Continental Congress, for direction and assistance, 31; about government, 32. Army raised by, in 1775, 31. Issues letters of marque and reprisal, 75. Establishes prize court, 75. Money borrowed of, by General Washington, 80. Constitution of, formed, 121. Objections of, to the half-pay, 191; answered by Madison, 193. Act of, concerning British debts, 253. Constitution of, dangers to which it was exposed, 263. Insurrection in, 266, II. 83. Disaffection in, extensive, I. 273. Cedes claims to Western Territory, 300. Proceedings of, respecting a general Convention, 334. Condition of the trade of, in 1785-86, 335. Legislature of, proposes a general Convention, 336; resolutions

of, not presented to Congress, 337. Resolution of, for a general Convention, 361. Appoints and instructs delegates to the Convention, 369. Opposed to equality of suffrage in House of Representatives, II. 138; equal representation of States in Senate, 141, 217. Divided on question of equal vote of States in Senate, 148, 165. Had eight representatives in first House, 149. In favor of census of free inhabitants, 153. Opposed to executive holding office during "good behavior," 173. Qualifications of voter in, 188. In favor of property qualification for national officers, 204. Vote of, respecting citizenship as qualification for office, 209; money bills, 216, 218. Opposed to nine years' citizenship as qualification of Senator, 224; each State having one vote in Senate, 227. Sentiments of, respecting holding of office by members of Congress, 249. In favor of States paying members of Congress, 259. Opposed to taxing exports, 296. Vote of, respecting slave-trade, 305. Slavery in, as early as 1630, 454. Parties in, for and against Constitution, 501. Reception of Constitution in, 501. Convention in, to vote on Constitution, 502, 530. Formidable opposition to Constitution in convention of, 529. High rank of, 530. Vacillation of, 530. Revolutionary history of, 530. Anxiety respecting action of, on Constitution, 531. Insurrection in, effect of, 531. Constitution exposed to peculiar hazard in, 531; ratified in, by compromise, 531. Constitution of, excellence of, 531. Parties in convention of, 532. Convention in, amendments to Constitution recommended by, 532, 538, 539; opponents of Constitution in, 533, 534; eminent men in, 534. Probable disastrous effects of rejection of Constitution by, 535. Convention of, proceedings in, 536; discussion in, respecting Hancock's amendments to Constitution, 538; patriotic conduct of, 539. Enthusiasm kindled by action of, 541.

MAZZEI, PHILIP, letter to, by Madison, I. 431.

MCKEAN, THOMAS, views of, respecting Constitution, II. 523. Public services of, 524.

MIFFLIN, General, sent by Washington to the Congress, I. 98.

Military Posts, retained by the British after the treaty, I. 256, 259.

Militia, relation of, to the Continental Congress, I. 35. Committee on, II. 319. Of States, power of general government over, 334; inefficient as troops in Revolution, 334; lack of uniformity among, 335; power of general government over, necessary, 336; how to be disciplined, 337; when Congress may call forth, 338; President commander-in-chief of, 413; cannot call out without authority of Congress, 413.

Ministers. See *Ambassadors*.

Mint, establishment of, I. 444.

Mississippi River, controversy and negotiations respecting navigation of, I. 310; referred to the new government, 327. Navigation of, a topic of opponents of Constitution in Virginia convention, II. 565; Madison's views respecting, 567.

Mississippi Valley, people of, spirit of the, I. 319; retaliate upon the Spanish authorities, 322; form committees, &c., 323.

Monarchical Government, dangers of attempting to establish, I. 370.

Monarchy, detested by people of United States, II. 237, 492. Proposed, rumors of, 492. Attempt to introduce, averted by Constitution, 494.

Money, power to coin, given to Congress, II. 328; borrow, and emit bills, 328.

Money Bills, Originated by House of Representatives, II. 146. Provision concerning, objected to, 147; origin of, 214. Originated by House of Commons, 216. Hallam's discussion respecting, 216. Vote of States respecting, 216. Different propositions in Convention repecting, 219. May be amended in Senate, 222.

MONTESQUIEU, political discussions of, alluded to, I. 377.

MORRIS, GOUVERNEUR, Enters the Revolutionary Congress, I. 127. Birth of, 440. Public services of, 440. Chosen Assistant Financier, 443. Author of the decimal notation, 443. Prepares the text of the Constitution, 444. Character of, 444. First Minister to France, 447. Senator from New York, 447. Invited to write in The Federalist, 447. Death of, 447.

Action of, respecting change in rule of suffrage, II. 36. A member of committee to apportion representatives, 148. Views of, respecting Atlantic and Western States, 152; respecting compound ratio of representation, 152. Proviso of, respecting taxation and representation, 158. Views of, respecting choice of executive, 174. Remarks of, respecting slave-trade, 281. In favor of tax on exports, 284. Views of, on concession to Southern States, 293. Committee of compromise proposed by, 301. Proposition of, respecting vacant lands, 355.

MORRIS, ROBERT, on a committee to inform Washington of extraordinary powers, I. 101. Laments the absence of some great revolutionary characters, 104. Appointed Superintendent of Finances, 174. Resignation of, 198.

Mutiny, at Philadelphia, of federal troops, I. 220.

N.

Natchez, seizure of property at, by Spanish authorities, I. 318.

National Government, how distinguished from "federal," II. 33. Necessities of, 34. To be kept distinct from State governments, 37. By what States preferred, 117. Arguments in favor of, 122; theoretically sound, 126; strengthened by facts of previous history, 127. Supposed tendency of, to absorb State sovereignties, 128. Self-defence a principal object of, 292.

National Legislature, how to be constituted, II. 35. Divided into two branches, 36. Representation in, diverse views respecting, 36; as affected by State interests, 43; difficulty in fixing ratio of, 43. Unanimity respecting powers of, in Convention, 50. Negative by, on State legislatures, proposed, 51. Must operate directly on people, 63. Proposed powers of, 65.

Naturalization, a subject of solicitude, II. 196. Formerly a State power, 198, 199. A proper subject of constitutional provision, 200. Power of, transferred from State to national government, 201. Views of Hamilton and Madison respecting, 205. Embarrassments of subject, 205. Uniform rule of, power to establish, given to Congress, 328.

Naval Force, employment of, in Massachusetts Bay, I. 73.

Navigation Act, report of committee of detail respecting, II. 290, 301. Position of Southern States respecting, 297. Two-thirds vote proposed by them to be required for, 299. Interest of different States respecting, 301. Passage of, by majority, agreed to, 304.

Navy, origin of the Revolutionary, I. 73. Want of, II. 298. Power of Congress to provide and maintain, 334; to make rules for, 334. Power of President to employ, 413. President commander-in-chief of, 413.

Newark, Washington's evacuation of, I. 98.

Newburgh Addresses, authorship and style of, I. 168. Copy of, sent to the States, 177. Note on, 194.

New England, confederation of, in 1643, II. 453.

New Hampshire, a provincial government, I. 4. Ante-Revolutionary government of, 4. Constitution of, formed, 119. Appoints and instructs delegates to the Convention, 369. Late attendance of, in Convention, II. 24 Had three representatives in first House, 149. In favor of property qualification for national officers, 204. Vote of, respecting citizenship, as qualification for office, 209; respecting money bills, 218; respecting slave-trade, 305. In favor of taxing exports, 296. Vote on Constitution in, postponed, why, 510; effect of, on parties in Virginia, 510. Population of, easily led to oppose Constitution, 514. Convention of, to vote on Constitution, 514; members of, instructed to reject Constitution, 529; amendments presented to, 541; majority of, at first opposed to Constitution, 541; adjournment of, effect of, 541. Action of Federalists of, 541. Convention of, meets, on adjournment, 549; anxiety respecting action of, 549. Ratification of Constitution by, 573. Ninth State to ratify Constitution, 578.

New Jersey, a provincial government, I. 4. Washington's retreat through, 97. Constitution of, formed, 122.

Proposal of, in 1778, for the regulation of commerce, 129. Resists the claim of great States to Western lands, 131. Ratifies the Confederation, 135. Action of, commended, 138. Attempts to pay its quotas in paper money, 242. Recommends the regulation of commerce, 277. Appoints and instructs delegates to the Convention, 368. Representation of, concerning the Articles of Confederation, 493. Act of, accepting them, 497. Purely "federal" government proposed by, II. 92. Hamilton's plan of, radical objections to, 99; condemned by Madison, 106. Opposed to division of legislature, 133. In favor of equality of suffrage in House of Representatives, 138; of equal representation of States in Senate, 141, 148, 165. Had four representatives in first House, 149. In favor of census of free inhabitants, 153; of executive holding office during "good behavior," 173. Vote of, respecting citizenship as qualification for office, 209; respecting money bills, 216, 218. In favor of each State having one vote in Senate, 227. Vote of, respecting eligibility of members of Congress to office, 251; respecting representation of slaves, 293; respecting slave-trade, 305; respecting admission of States, 354. In favor of taxing exports, 296. Opposed to restricting President to stated salary, 407. Ratification of Constitution by, 515. Convention of, 524. Position of, respecting Constitution, 524. Always in favor of vesting regulation of commerce in general government, 525. Action of, in Constitutional Convention, respecting representation, 525.

New States, admission of, under the Confederation, I. 292; under the Ordinance of 1787, 308. See *Western Territory* and *Northwestern Territory*.

New York, Constitution of, formed, I. 122. Magnanimity of, commended, 137. Action of, upon the revenue system of 1783, 246. Act of, respecting British debts, 253. Trespass act of, 256. Proceedings of, respecting a general commercial convention, 343, 358. Resolution of, for a general Convention, 360; how received in Congress, 360. Appoints and instructs delegates to the Convention, 369. Act of, respecting boundaries, &c., 505. Rank of, at formation of Constitution, II. 118. Commerce of, at formation of Constitution, 118. Views of public men of, 118. Opposed to division of legislature, 133. In favor of equality of suffrage in House of Representatives, 138; in Senate, 141, 148. Had six representatives in first House, 149. Withdrawal of delegates of, from Convention, 165, 182, 484, 502. Rejection of Constitution by, probable, 182. Vote of, respecting money bills, 216. In favor of each State having one vote in Senate, 227. Reception of Constitution in, 502. Executive government of, opposed to Constitution, 502. Jealousy of Union existing in, 502. Letter of delegates of, against Constitution, 502. Proceedings of legislature of, respecting Constitution, 503; of parties in, respecting Constitution, 503. Convention of, to vote on Constitution, 504. Formidable opposition to Constitution in convention of, 529. Legislature of, divided on question of submitting Constitution to people, 536. Convention of, importance of action of, 542; time of meeting of, 549; anxiety respecting action of, 549; met at Poughkeepsie, 549; Hamilton leading spirit in, 568; discussion in, respecting system of representation proposed by Constitution, 573. Opponents of Constitution in, arguments and plan of, 572; Hamilton's reply to, 572. Effect on, of ratification by New Hampshire, 574. Opponents of Constitution in, schemes of, 584. Numerous amendments to Constitution proposed by, 587. Plan of, to adopt Constitution conditionally, 587. Great struggle in, over ratification of Constitution, 588. Circular letter from, to all other States, 588. Federalists of, justified by Washington, 590; complaints against, 591.

New York City, applies to the Continental Congress respecting British troops, I. 31. Occupied by the British, 91. Temporary establishment of seat of government at, effect of, 591. Celebration in, of adoption of Constitution, 592. Honors paid by, to Hamilton, 592.

NICHOLAS, GEORGE, a leading advo-

cate of Constitution in Virginia, II. 506.
Nobility, title of, cannot be granted by Congress, II. 362.
Non-Intercourse, when and why adopted by Colonies, I. 23. Association for, recommended and adopted, 24.
North Carolina, a provincial government, I. 4. Constitution of, formed, 122. Appoints and instructs delegates to the Convention, 369. Opposed to equality of suffrage in House of Representatives, II. 138; to equality of votes in Senate, 141, 217. Vote of, respecting equal vote of States in Senate, 141, 148, 165; respecting census of free inhabitants, 153. Had five representatives in first House, 149. Opposed to executive holding office during "good behavior," 173. Vote of, respecting citizenship as qualification for office, 209; respecting money bills, 216, 218. Divided on question of nine years' citizenship as qualification of Senator, 224. Opposed to each State having one vote in Senate, 227; to taxing exports, 296. Position of, in Convention, respecting slave-trade, 297, 301. Vote of, respecting slave-trade, 305; on suspension of habeas corpus, 360. Cession by, in 1790, 357. Opposed to restricting President to stated salary, 407. Convention of, Anti-Federal majority in, 596; debate in, 596; amendments to Constitution proposed by, 597; peculiar action of, 597. Attitude of, placed Union in new crisis, 603.
Northern States, in favor of granting to government full revenue and commercial powers, II. 292. Chief motive of, for forming Constitution a commercial one, 298. Cut off from British West India trade, 298. Separate interests of, different, 300.
Northwestern Territory ceded by Virginia, I. 137, 295. Cession modified, 300. Ordinance respecting, why framed, 301; provisions of, 302; character of, 306. Ordinance for, reported, 452. Cession of, II. 15. Origin and relations of, &c., 341. Jefferson's resolve for organization of States in, 343. Slavery in, proposals for prohibiting, 343. Ceded on what trusts, 347, 349. Admission of new States under, see *New States*.

O.

Oath, of office, proposed by New Jersey in 1778, I. 130.
Oath of Allegiance, to the King, received by Sir William Howe in New Jersey, I. 106. To the United States required by Washington in New Jersey, 107; dissatisfaction occasioned by, 107. Propriety of, defended by Washington, 108. Prescribed in Congress in 1778, 109.
Obligation of Contracts, clause respecting, taken from the Ordinance of 1787, I. 452.
Officers of United States, appointment of, II. 417.
Officers of the Revolution, treatment of, by Congress, and the country, I. 159. Pay of, 159. Proceedings in Congress respecting half-pay for, 160. Pennsylvania line, 163. Proceedings of, respecting their pay, 165. See *Army of the Revolution*, *Half-pay*, and *Newburgh Addresses*.
Oligarchy, detested by people of United States, II. 237.
Orders in Council, respecting trade with the United States, I. 283. Efforts of Congress to counteract, 285. Effect of, on Northern States, II. 298.
Ordinance of 1787, framing of, I. 452. Admission of new States provided for by, II. 77. Fixed no mode of admitting new States, 79. Provisions of, 344. Slavery excluded by, 344. Author of, 344, 365. Passed, 365. Character of, 366. Provision in, respecting contracts, occasion of, 366. Extradition of slaves under, 454.
Osnaburg, Bishop of, rumored purpose of loyalists respecting, II. 492. Afterwards Duke of York, 493.

P.

PAINE, ROBERT TREAT, delegate to first Continental Congress, I. 13.
PALFREY, Colonel, sent to New Hampshire to arrest Tories, I. 65.
Paper Money, first issued by the Continental Congress, I. 78. Signing of, 78. State systems of, under Confederation, II. 310. See *Rhode Island*.
Pardon, President's power of, II. 413. See *Treason*.
Parliament, British, authority of, over trade, how recognized by first Conti-

nental Congress, I. 20. Two houses in, origin of, II. 130; mutual relations of, 130. Corruption in, origin and extent of, 242; effect of knowledge of, on framers of Constitution, 243. Necessity of officers of state, &c. sitting in, 254. Analogy of Congress to, 254.

PARSONS, THEOPHILUS, motion of, in Massachusetts Convention, to ratify Constitution, II. 537. Form of ratification and proposed amendments drawn by, 541.

Patents for useful inventions, subject of, brought forward by Pinckney, II. 339. State legislation concerning, 339. Power over, surrendered to Congress, 339.

PATTERSON, WILLIAM, mover of New Jersey plan of government, II. 93. Arguments of, in Convention, 93.

Peace, effect of, upon the country, I. 179. See *Treaty of Peace*.

Peace Establishment. See *Washington* and *Hamilton*.

PENDLETON, Chancellor, a leading advocate of Constitution in Virginia, II. 506.

Pennsylvania, a proprietary government, I. 5. Constitution of, formed, 122. Stop-law of, 253. Appoints and instructs delegates to the Convention, 368. Had but one chamber in legislature, II. 132. Opposed to election of Senators by State legislatures, 135; to equality of suffrage in House of Representatives, 138; to equal representation of States in Senate, 141, 148, 165, 217. Had eight representatives in first House, 149. In favor of census of free inhabitants, 153; of executive holding office during good behavior, 173. Opposed to property qualification for office, 189. Constitution of, citizenship under, 206. Vote of, respecting citizenship as qualification for office, 209; respecting money bills, 218. Opposed to nine years' citizenship as qualification of Senator, 224; to each State having one vote in Senate, 227; to impeachments being tried by Senate, 262. In favor of taxing exports, 296. Vote of, respecting slave-trade, 305. Ratification of Constitution by, 515. Convention of, first to meet, 519. Second State in population, in 1787, 519. Western counties of, insurrection in, 521; opposition of, to Constitution, 524.

People of America, when not associated as such, I. 16. Sole original source of political power, II. 38, 471, 482. Will of, how to be exercised, 471; on a new exigency, how to be ascertained, 483.

Petition, right of assembling for, asserted, I. 23. Of Continental Congress to the King, 23, 38.

Philadelphia, threatened loss of, to the enemy, I. 99. Falls into the hands of the enemy, 113. Fought for, at the battle of the Brandywine, 113. The scene of many great events, II. 519. Demonstration at, in honor of adoption of Constitution, 582.

PICKERING, TIMOTHY, suggests academy at West Point, I. 218.

PINCKNEY, CHARLES COTESWORTH, Revolutionary services of, I. 454. Views of, respecting the requisite reform, 455; on the slave-trade, 456, 459, 460; respecting consequences of rejection of Constitution, 487. Proposition of, respecting taxes on exports, II. 189; respecting extradition of slaves, 189, 452. Notifies Convention of position of South Carolina concerning tax on exports, 280. In favor of Constitution, 510. Writes to Washington of adoption of Constitution by South Carolina, 544. Fidelity of, to South Carolina, 545. Arguments of, in South Carolina convention, 548.

PINCKNEY, CHARLES, plan of government submitted by, II. 32. Proposition of, respecting House of Representatives, negatived, 40. Suggestions of, respecting public debt, revenue, &c., 319. In favor of Constitution, 510.

Piracy, nature of, II. 331. Power of Congress to define and punish, 331.

PITT, WILLIAM, designs commercial relations with the United States, I. 282. His bill to effect them, 283. His extraordinary opportunities, 413. Estimate of, 414.

Political Science, among the ancients, I. 374. In the Middle Ages of Europe, 375; in England, 376; in France, 377.

Popular Governments, American theory of, I. 261.

Population of States in 1790, table of, II. 55.

Ports, no preference to be given to, II. 324.
Post-Office department, Continental, first established, I. 35; colonial, 433. Power to establish, extended to post-roads, II. 328.
Preamble of Constitution, as reported and adopted, II. 372; language of, important, 373.
President, making of treaties by, with consent of Senate, II. 234. Officers proposed to be appointed by, with consent of Senate, 234. Re-eligibility of, arguments in favor of, 235. Choice of, proposed method of, 235; by Senate, objections to, 236, 392; ultimate, by House of Representatives, 240, 394. Revisionary control over, where to be lodged, 239. Extensive patronage of, 252. Subject to impeachment, 261; for what causes, 397. Veto power of, 264. Objections of, to law, to be entered on journal of Congress, 264. Choice of, direct, by people, negatived, 388; by electors, objections to, 388; advantages of, 389; method of, 390. Term of office of, proposed to be seven years, 392. Choice of, by majority of electors, objections to, 393. Vacancy in office of, 397; when Congress to provide for, 401. "Inability" of, to discharge duties, meaning of, 397; how ascertained, 397. Insanity of, 397. Death of, and of Vice-President, 398. Choice of, changes in mode of, 400; if not made before 4th of March, 400; by House of Representatives, to be from three highest candidates, 400. Qualifications of, 404. Pay of, arguments in favor of, 404; not to be increased nor diminished during term of office, 406. Forbidden to receive more than stated salary, 407. Council for, question concerning, 407. May require opinions of cabinet officers, 408. Alone responsible for conduct of executive department, 409. Powers of, 409; to make war and peace, 411; over State militia, 413; to pardon offences, 413; to appoint officers, 417. "Executive power" vested in, meaning of, 412. Oath of, to execute laws, 412. Commander-in-chief, 413. To prosecute war, 413. Treaty-making power of, 414. To receive ambassadors, &c., 415. Cannot create offices, 418. To inform Congress of state of Union, 419. To recommend measures to Congress, 419. May call extra sessions of Congress, 419. When may adjourn Congress, 419.
PRINGLE, JOHN JULIUS, in favor of Constitution, II. 510.
Prize-Courts, want of, under the Revolutionary government, I. 73. Establishment of, urged by Washington, 75. Of Massachusetts, trials in, 75. Colonial, appeals from, to Congress, 76. Under Constitution, II. 330.
Property, urged as basis of representation, II. 148. As a qualification of elector, 148; for office, 187, 202.
Proprietary Governments, form and character of, I. 5.
Protections, issued by Sir William Howe in New Jersey, I. 106. Surrender of, required by Washington, 106.
Provincial Governments, form and character of, I. 4.
Public Lands. See *Western Territory*, *Northwestern Territory*, and *Ordinance of* 1787.

Q.

Qualifications, of national officers, proposals respecting, II. 186; landed, rejected, 187; property, an embarrassing subject, 202. Of electors, 187, 194, 200. Of voter in Massachusetts, 188. Of members of Congress, 194. Of citizenship, embarrassments respecting, 205; attempt to exempt certain persons from rule respecting, 205. Of Senators, 223. Of Vice-President, 401. Of President, 404. Of religious test, never to be required, 479.
Queen's County, Long Island, inhabitants of, to be disarmed, I. 68.
Quorum, discussions in Convention respecting, II. 262.
Quotas, first apportionment of, among the Colonies, I. 34. Of troops in 1776, 92. See *Requisitions*.

R.

RAMSAY, DAVID, Dr., in favor of Constitution, II. 510.
RANDOLPH, EDMUND, urges Washington to attend the Convention, I. 365. Revolutionary services of, 480.

Governor of Virginia, 481. Course of, in the Convention, 481. Reasons of, for supporting the Constitution, 481. Genealogy of, 485. Plan of government proposed by, II. 32, 410. A member of committee to apportion representatives, 148. Objections of, to compound ratio of representation, 151. Proposition of, respecting census, 162; to strike out "wealth" from rule of representation, 164. In favor of confining equality of States in Senate to certain cases, 165. Views of, respecting money bills, 218. Resolution of, respecting admission of new States, 349. Clause introduced by, respecting death of President, &c., 403. Refused to sign Constitution, why, 485, 555. Position of, respecting Constitution, 506. Advocated adoption of Constitution in Virginia convention, 556.

RANDOLPH, PEYTON, President of first Continental Congress, I. 13; of second Continental Congress, 28. Death and character of, 28.

Ratification of Constitution, as marking character of government, II. 85. Different theories respecting, 177. Mode of, 375; resolutions respecting, 375; purpose of, 375; an embarrassing question, 479. Vote of States respecting, 483, 515. By only part of States, effect of, 484. Unanimous, could not be required, 484. By nine States sufficient, 485. Pageants in honor of, 540. Public rejoicings in Baltimore at, 543. By New Hampshire, 573, 578. By Virginia, 578; how finally effected, 579; form of, 581. Vitiated by condition, in Madison's opinion, 588. Great struggle over, in New York, 588. See the different States.

Records and Judicial Proceedings of States, full faith to be given to, in other States, II. 449. Proof and effect of, 449.

READ, GEORGE, views of, respecting rule of suffrage for House of Representatives, II. 135.

Regulation of Commerce proposed by New Jersey in 1778, I. 129. Not provided for by the Confederation, 148. Advantages of, not perceived, 179. Origin of, as a national power, 276. Washington's views respecting, 334. Popular meetings in Boston in favor of, 336. Policy of Congress respecting, in 1785 – 86, 337.

Representation, views of members of Convention respecting, II. 18. In Congress, different views respecting, 36; difficulty in fixing ratio of, 44. As affected by State interests, 43. Original division between States respecting, 50. Under Virginia and New Jersey plans, 105. Great difficulty in adjusting, 108. Difficulty of fixing different basis of, for two houses of Congress, 133. Committee to adjust whole system of, 145. Dr. Franklin's proposal in Congress concerning, 146. Ratio of, in House of Representatives, 147. Of slaves, 149. Compound ratio of, depending on numbers and wealth, proposed, 149; objections to, 151; how to be applied, 156. By numbers, as affected by slaves, 153, 291. And taxation to go together, 156. System of, proposed by Constitution, discussion on in New York, 573.

Representatives, part of the Provincial government, I. 4. In the charter governments, how chosen, 5. Apportionment of, objections to, II. 148; in first House, how made, 148.

Representative Government familiar to the American people, I. 117.

Reprisals authorized by the Continental Congress, I. 34.

Republican Government involved in the effort to make the Constitution, I. 391. Guaranteed to States, II. 177; by Constitution, 458. Guaranty of, to States, object of, 468; meaning of, in America, 469.

Republican Liberty, nature of, II. 8. How to be preserved, 9.

Resolutions as referred to committee of detail, II. 190.

Requisitions, provision for, under the Confederation, I. 147. Of 1781, 156. Made and not complied with, 174. From 1782 to 1786, how treated, 180. In 1784, 240. In 1785, 242. In 1786, 242. Supply received from, in 1781 – 1786, 243; inadequacy of, declared by Congress, 245. Effect of, on the proposed revenue system, 244.

Revenue, report of committee of detail respecting, II. 289. Power over, generally conceded to new government, 290. Different systems of, under Confederation, 310. Powers of gov-

ernment, influence of, 311. Power, qualifications of, proposed, 320. From imports, easiest mode of paying expenses of government, 528.
Revenues, of the Confederation, I. 147. Want of power in Confederation to obtain, II. 280. Numerous questions respecting, 280. Collection of, by Congress, 323.
Revenue Bills, privilege of originating, views of members of Convention respecting, II. 221; restricted to House of Representatives, 221.
Revenue System of 1783, origin and purpose of, I. 175. Modified by Congress, 180. Defeated by New York, 180. Design of, 185. Effect of its proposal, 186. Character of, 224. Under consideration in 1784, 240. How acted on in 1786, 244. New appeal of Congress on the subject of, 245. Every State assents to, but New York, 246. Act of New York concerning, 246. Hamilton's answer to the New York objections to, 247. New York again appealed to respecting, 247; refuses to accede, 248. Action of New York respecting, 343. Final appeal of Congress for, 344. Rejected by New York, 345, 359. Address on, written by Madison, 422.
Revolution, right of, II. 473.
Revolutionary Congress, take up the Articles of Confederation, I. 113. Government of, breaking down, 115. Change in the members of, after 1777, 125. Leading members of, in 1777 and 1778, 126; in 1776, 127. Weakness of, II. 14. See *Congress*.
Revolutionary Government, defects of, I. 55.
Rhode Island, a charter government, I. 5. Resists the claim of the great States to Western lands, 131. Refuses to grant imposts to Congress, 174. Hamilton's answer to, 177. Attempts to pay its quotas in paper money, 242. Refusal of, to grant duties on imposts, 422. Not represented in Constitutional Convention, II. 23, 181. Did not assent to revenue system of 1783, 24. Admitted to Union in 1790, 25. Interests of, attended to by Convention, 26. Had one representative in first House, 149. Ratification of Constitution by, improbable, 181. Reason of, for not attending Convention, 329. Took no part in formation of Constitution, 484. Opposition to Constitution in, peculiarly intense, 598; causes of, 598. Jealous of other States, 598. Principles of founders of, falsely applied, 598. Paper money party in, great power of, 599. Great antagonism in, between town and country, 600. Opponents of Constitution in, ridiculed and scorned, 600. Great want of enlightenment in, 601. Action of General Assembly of, on Constitution, 602. People of, apparently nearly unanimous against Constitution, 602. Final prevalence of better counsels in, 603. Present prosperity of, 603. Attitude of, placed Union in new crisis, 603.
Rights. See *Colonies*.
ROBINSON, Mr., Speaker of Virginia House of Burgesses, I. 48. Celebrated compliment of, to Washington, 48.
ROUSSEAU, J. J., political discussions of, alluded to, I. 377.
Rule of Apportionment, proposal to change from land to numbers, I. 241.
RUTLEDGE, EDWARD, in favor of Constitution, II. 510. Arguments of, in convention of South Carolina, 548.
RUTLEDGE, JOHN, a member of committee to apportion representatives, II. 148. Motion of, for assumption of State debts, 319. In favor of Constitution, 510.

S.

Seat of Government, action respecting, II. 189. None under Confederation, 268. History of establishment of, 268. Grave questions concerning location of, 274. Impolicy of establishing at New York, or Philadelphia, 591. Embarrassments attending selection of, 604.
Sectional Jealousy, causes and operation of, I. 371.
SELMAN, captain in the Revolutionary naval force, I. 74.
Senate, reasons for present constitution of, II. 41. Rule of suffrage in, 48. Numerical representation in, favored at first, 49. To hold office during "good behavior" under Hamilton's plan, 100, 105. Members of, chosen for six years, 134; qualifications of,

134, 223. Objects of, 138; how to be attained, 138. Difficulty in fixing basis of, 139. Mr. Baldwin's model of, 139. Fortunately not founded on relative wealth of States, 140. Votes of States respecting, 141; representation in, 165. Advantages of present constitution of, 166. Members of, to be two from each State, 186; to vote *per capita*, 186; must have been citizens nine years, 211. Slight analogy of, to House of Lords, 215. Equality of votes in, by what States resisted, 217. Choice of President by, in certain events, proposed, 221, 390. Scheme of, tending to oligarchy, 222. May amend revenue bills, 222. Powers of, as at first proposed, 223. Number of members of, origin of, 224. Method of voting in, origin of, 224. Present mode of voting in, advantages of, 228. Vacancies in, how filled, 229. Primary purpose of, 229. Disposition to accumulate power in, 230. Constitution of, great embarrassments respecting, 233. Separate action of, difficult to determine, 234. Consent of, to certain acts of President, necessary, 235. Proposed choice of President by, objections to, 236. Only body fit to have revisionary control over appointments, 239. Ratification of treaties by, 240. Ultimate choice of President taken from, 240. Length of term in, 240. Biennial change in, 241. To try impeachments, 261. Quorum of, 262. President of, 263. May choose president *pro tempore*, 264. Choice of President by, quorum for, 401; majority necessary to, 401. President *pro tempore* of, when to act as President of the United States, 403. Proposed appointment of ambassadors and judges by, 410. Foreign relations committed to, 410. Treaty-making power of, 415. May propose treaty to President, 417. Certain controversies between States, proposed to be tried by, 424. Equality of States in, guaranteed by Constitution, 478.

Shays's Rebellion, causes of, I. 266. Progress of, 266, 269. How arrested, 270. How acted upon in Congress, 271. Effect of, upon the political state of the country, 273. Abettors of, opposed to Constitution, II. 501.

SHERMAN, ROGER, one of the committee to prepare Declaration of Independence, I. 50. Opposed to tax on exports, II. 294. Views of, respecting tax on slaves, 304. Motion of, respecting payment of old debts, 321.

Slavery, British government responsible for the existence of, I. 87. Complex relations of, II. 22. Regarded by Southern statesmen as an evil, 155. When and how abolished in States now free, 289. Existed in what States at formation of Constitution, 313. Facts respecting, as influencing judgment on Constitution, 313. A matter of local concern, 313. State laws respecting abolition of, 313. In Northwestern Territory, proposals for excluding, 343. State of, in 1787, 451. Probable duration of, 451. Principle of common law and law of nations respecting, 451, 455. Exclusively a matter of State jurisdiction, 451. Existed in Colonies at very early period, 453. In Massachusetts, Dr. Belknap's article on, 454. Depends wholly on municipal law, 457. Fortunately left to State control, 459. Existence of, unjustly made a reproach on United States, 465.

Slaves, as affecting ratio of representation, II. 19. Control of States over, never meant to be surrendered, 20. Necessarily regarded in forming Constitution, 20. As affecting basis of representation, 46. In fixing ratio of representation, included as inhabitants, 47. Three-fifths rule respecting, whence derived, 48. In fixing ratio of representation, how computed, 147; admission of, proper, 147. Propriety of counting, as inhabitants, in adjusting representation, 150. Rule respecting, under Confederation, 150. As affecting representation, votes respecting, 153. Social and political condition of, anomalous, 155. Number and distribution of, 155. An important element in determining rank of States, 155. As affecting representation and taxation, 157. As subjects of taxation, views of statesmen respecting, 159. Compromise respecting, how to be effected, 163. Extradition of, Pinckney's proposition concerning, 189. Manumission of, a matter of State con-

trol, 286. Representation of, a concession by North, why made, 292; Morris's motion respecting, 293; vote of New Jersey respecting, 293. Specific tax on importation of, 304. Word not used in Constitution by design, 305. Ratio of increase of, from 1790 to 1850, 308. Condition of, ameliorated by Constitution, 316. Advancing public sentiment concerning, 316. Colonization of, in Africa, 317. Representation of, an unimportant anomaly, 317. Emancipation of, a local question, 317. Extradition of, under Constitution, history of clause respecting, 450; a necessary provision of Constitution, 451; under New England Confederation of 1643, 453; under Ordinance of 1787, 454; importance of proper understanding of clause respecting, 456; necessity and propriety of clause, 459. Condition of, much better under State control, 462. Increase of, since adoption of Constitution, 465. See *Federal Census*.

Slave-Trade, discountenanced by first Continental Congress, I. 24. How dealt with by the Constitution, 456. Abolished in England, 457, 461. French abolition of, 457. Danish abolition of, 459. Compromise respecting, 460. Legislation against, 460. Discussions respecting, in England, 460. Probable encouragement of, II. 153; embarrassments respecting, 281. State action respecting, 285. Necessity of definite provision respecting, 285. Duty of framers of Constitution respecting, 286. Had been abolished by no nation in 1787, 286. A proper subject for national action, 286. Aspect of, political, 287; moral, 287. Economical importance of, to Southern States, 288. Report of committee of detail respecting, 290. Grave questions concerning, 296. Right to continue, insisted on by what States, 297, 301. Prospective prohibition of, provided for, 304. Concessions respecting, timely, 305. Vote of States respecting, 305. Patriotic course of both sections respecting, 306. Effect of discontinuance of, on Southern States, 308. State rights respecting, before Constitution, 314. Tolerated by European nations at formation of Constitution, 314. Interdicted by ten States before Constitution, 314. Refusal of certain States to grant power to suppress, immediately, 315. Indefinite continuance of, had Constitution not been formed, 315. First extinguished by America, 317.

South Carolina, a provincial government, I. 4. Constitution of, formed, 120. Tender-law of, 253. Appoints and instructs delegates to the Convention, 369. Opposed to equality of suffrage in House of Representatives, II. 138; equal vote of States in Senate, 141, 148, 165, 217. Had five representatives in first House, 149. Opposed to census of free inhabitants, 153; executive holding office during "good behavior," 173. Vote of, respecting citizenship as qualification for office, 209; money bills, 216, 218. Opposed to each State having one vote in Senate, 227. In favor of States paying members of Congress, 259. Refusal of, to submit to tax on exports, 280, 285. Exports of, in one year, 285. Position of, in Convention, respecting slave-trade, 297, 301. Vote of, respecting slave-trade, 305. Vote on Jefferson's resolve concerning Northwestern Territory, 346. Cession by, in 1787, 356. Vote of, on suspension of habeas corpus, 360. Condition of acceptance of Constitution by, 452. Motion for surrender of fugitive slaves made by, in Constitutional Convention, 453. Vote of, respecting citizenship clause in Constitution, 453. Debate in legislature of, on Constitution, 510. Convention in, to vote on Constitution, 511; importance of action of, 542. Ratification of Constitution by, 544; rejoicings at, 544; importance of, 544. Delegates of, responsibility assumed by, 544. A great exporting State, 546. Hesitation of, to concede power to regulate commerce, 546. Amendments to Constitution proposed by, 548. Eighth State to ratify Constitution, 549.

Southern States, views of, respecting regulation of commerce, II. 290.

Sovereignty, of the people, established by the Revolution, I. 379; necessary consequences of declaration of, II. 8. Resides in the people, 38. Powers of, may be exercised by different agents, 377.

Spain, claims the exclusive navigation

of the Mississippi, I. 312. See *Mississippi.*
Speaker, of House of Representatives, II. 264; when to act as President, 403.
Standing Armies, jealousy of, I. 81, 90.
States, interests and relations of, before Constitution, II. 5. Devotion of, to republican liberty, 6. Union of, essential to republican liberty, 9. Weakness of, without union, 9. General purposes of, in calling Constitutional Convention, 16. Position of, in Convention, 27. Powers surrendered by, to Confederation, 27. Why represented in Congress, 40. Diverse interests of, as affecting representation, 43. Tendency of, to encroach on federal authority, 51. Proposed control over legislation of, by Congress, 52. Population of, in 1790, table of, 55. Legislation of, control of judicial department over, 66. Admission of, 75, 79, 109, 176, 340, 344, 350, 354. Cessions by, to Union, 76. Republican government guaranteed to, 79, 83, 177, 458. Jealous of general government, 91. Sovereignty of, how reconciled with national sovereignty, 91. Plan to abolish, 92. To make partial surrender of power under Virginia plan, 95. Sovereignty of, preserved under New Jersey plan, 95. Conflicts of, with nation, probable, under Virginia plan, 102, 103. Struggle between large and smaller, respecting representation, 104. Proposed equalization of, 108. Populations of, at formation of Constitution, 116. Relative rank of, at formation of Constitution, 117. Conflict among, as to national and federal systems, 117. Danger of annihilation of sovereignty of, by national government, 128, 377. Danger of alliances of, with foreign powers, 136. Preservation of, in Congress, conceded to be necessary, 139. Divided respecting constitution of Senate, 145. Jealousy among, 150. Western, views of members respecting, 150. Slave and free, index of wealth of, 157. Wealth of, not measured by land, 160. Position of, in Convention, respecting slaves, 161, 162. Wealth of, for purpose of taxation, determined by inhabitants, 163. Smaller, concession to, in constitution of Senate, 166. Free and slave, populations of, compared, 168. Relation of, to Confederation, 179. Whether Constitution could be ratified by government of, 180. Voting by, history of practice of, 227. Equal representation of, in Senate, just, 233. Union desired by, from different motives, 303. Commercial legislation of, under Confederation, various, 310. Revenue and paper-money systems of, under Confederation, various, 310. Rights guaranteed to, by Constitution, 314. Power of, over slave-trade, anterior to Constitution, 314. Ports of one, not to be preferred to those of another, 324. Compacts between, outside of Articles of Confederation, 347. New, temporary governments for, Madison's motion respecting, 351. Admission of, number of votes requisite for, 352; by dismemberment of State, 352; by junction, 354; difference in cases of, 357; provisions for, general, 358. Restraints on political power of, 362. Issuing of bills of credit prohibited to, 364. Laying of duties and imposts by, 368. Cannot lay duty on tonnage, 370. Keeping of troops or ships of war by, 371. Agreements by, with another State or foreign power, 371. When may engage in war, 371. Governments of, how far supreme, 377. May be multiplied indefinitely under Constitution, 383. Levying war against, not treason against United States, 385. Certain controversies between, proposed to be tried by Senate, 424. Constitutional restrictions on, 432. Laws of, constitutionality of, how determined, 439. Courts of, not likely to administer justice to foreigners, &c., 442. Different, controversies between citizens of, 442; grants of lands by, jurisdiction of cases respecting, 444. A party to a suit, jurisdiction in cases of, 444. Foreign, jurisdiction in cases of, 444. Full faith given to acts, &c. of, 449. Have exclusive regulation of domestic institutions, 451. May exclude foreigners, 457. Republican government guaranteed to, object of, 468. Domestic violence in, application to general government in case of, 469. Competency of, to abolish constitutions, 469. Must have executive and legislature, 470. Protection of, against domestic

violence, 472. Equality of, in Senate, for ever guaranteed by Constitution, 478. Refusal of, to comply with requisitions of Congress, 572. See *New States.*

State Constitutions, formation of, I. 116.

State Governments, how formed, I. 36.

State Sovereignty, early assertion of, I. 90.

Stop Laws. See *Debts.*

STORY, JOSEPH, views of, respecting President's power to adjourn Congress, II. 420.

Suffrage, Rule of, Governor Randolph's resolution respecting, II. 35. Change in, opposed by Delaware, 36. In Continental Congress, 42. In Confederation, 42. In Senate, 48. For House of Representatives, great debate on, 135. According to Virginia plan, 145. Different in different States, 174, 198. Not universal in any State, 471.

SULLIVAN, General, president of New Hampshire Convention, II. 541.

SULLIVAN, JAMES, Governor of Massachusetts, II. 541.

Superintendent of the Finances, appointed, I. 174. See ROBERT MORRIS.

Supremacy of United States, meaning and scope of, II. 376. Of States, extent of, 377. Of Constitution, as affecting national growth, 383.

Supreme Court, tenure of office of, II. 67. Judges of, not removable by address, 68, 73; compensation of, 68; by whom appointed, 68. To determine constitutional questions, 74. Functions of, compared with those of State courts, 74. Judges of, proposed appointment of, by Senate, 223, 230, 410. Appointment of, proposals concerning, 234. Sole interpreters of Constitution, 380. Judges of, to be nominated by President, 418; tenure of office and salaries of, 423. One, under Constitution, 423. Original and appellate jurisdiction of, 424. Appellate jurisdiction of, ambiguity concerning, 428. Doubts about conferring power upon, to declare law unconstitutional, 434.

T.

TALLEYRAND, Prince, opinion of, respecting Hamilton, I. 410.

Taxation, right of, denied to Parliament, I. 20. How distinguished from regulation of trade, 20. Inseparable from representation, 20, II. 157. Difficulty of applying combined rule of wealth and numbers to, 158. Report of committee of detail respecting, 290. By general government, Mason's objections to, 557. See *Colonies.*

Taxes, odious to the people of United States, I. 180. Power of Congress to collect, II. 322.

Tender, State laws respecting, restraint on, II. 365.

Tender Law of Massachusetts, I. 268. See *Debts.*

Territory, power of Congress over, under the Confederation, I. 141. Authority of Congress over, under Constitution, II. 340; purpose of provision respecting, 355; diverse views concerning, 358. See *Western Territory* and *Northwestern Territory.*

Territorial Governments, power to frame, in Ordinance of 1787, II. 345.

Theory, danger of adhering too firmly to, II. 129.

THOMPSON, CHARLES, Secretary of first Continental Congress, I. 14.

TICKNOR, GEORGE, cited for a saying of Jefferson concerning the Revolutionary Congress, I. 64; for a saying of Talleyrand about Hamilton, 410.

Tonnage, duty on, States prohibited to lay, II. 370; proposed exception respecting, 370.

Tories, how dealt with by Continental Congress, I. 36; in New Hampshire, 65. Washington's opinion respecting, 65. Movements of, in the neighborhood of New York, 66; how met by Washington, 66. Steps taken by Congress to disarm, 68. Misunderstanding respecting, between Washington and Congress, 69. Subject referred to local authorities, 72. Relations of persons and property of, to the Union, 251.

Trade, inter-colonial, before the Revolution, I. 9. Regulation of, by Parliament, distinguished from taxation, 20. With Colonies prohibited by Parliament, December, 1775, 38. See *Colonies, Commerce, Continental Congress,* and *Parliament.*

Treason, definition of, in Constitution, origin and purpose of, II. 384. Nature of evidence of, 386. Punish-

ment of, to be declared by Congress, 386; how limited by Constitution, 386. President's power to pardon, different views respecting, 414.
Treasury Department, first established, I. 35.
Treaty of amity and commerce with France, Sweden, and the Netherlands, I. 279. Negotiation for, with the Netherlands, 280; with Sweden, 281.
Treaty of Alliance with France, I. 156.
Treaty of Peace signed and ratified, I. 155, 187, 235, 237. Objects secured by, 249. How violated by certain States, 254, 257. Southern boundary of the United States fixed by, 312. Accompanied by a secret article, 312, 313. Question respecting, II. 415.
Treaty Power under the Confederation, I. 325.
Treaties, supreme law of land, II. 170, 372, 374. Proposition that Senate should make, 223. Negotiation of, by numerous body, embarrassing, 232. Making of, proposals concerning, 234. Provision respecting, origin of, 240; how modified, 414. Rule of Confederation respecting, 416. May be proposed by Senate, 417. Jurisdiction over cases arising under, 430. Cases arising under, how settled, 440. Power to make, under Confederation, 440.
Trial by Jury, of the vicinage, one of the rights of the Colonies, I. 23. Under Constitution, II. 424. Provision for, in civil cases, not in Constitution originally, 427; supplied by amendment, 427. Guaranty of, required by many States, 429. For crimes, provisions respecting, 431. Omission to secure, a strong argument with some against Constitution, 498.
TUCKER, GEORGE, cited about Madison, I. 421.
TYLER, JOHN, opposed to Constitution, II. 506.

U.

Union, origin of, I. 3. Unknown to the colonial condition, 7. Power to form, a result of the Revolution, 8. Proposal of, in 1754, 8. Proposed in 1773, 10. Virginia recommends, 11, II. 12. As established by the Confederation, I. 142. Saved by the proposal of the revenue scheme, 188. Necessary to preserve the good faith of the country, 189. Of the people, idea of, 373. Change in character of, II. 4. Necessarily republican, 10. Preservation of, essential to independence of States, 10. Purposes of, at first indefinite, 12. Previous history of, important, 13. "Exigencies of," 13; how only to be provided for, 19. Objects of, embraced in two classes, 13; how ascertained, 13; different views respecting, 39. Proposed power in, to protect and uphold governments of States, 79. Dissolution of, Madison's views respecting, 136; Hamilton's views respecting, 136; at one time probable, 140. General interests of, power to legislate for, 170. Success of, to what attributable, 380. Sovereignty of, and of States, no conflict between, 380. Capacity of, for territorial expansion, cause of, 381. Theory of, respecting domestic institutions of States, 451.
"*United Colonies*," term of, first adopted, I. 33.
United States of America, title of, adopted, I. 52, 142.
United States, character of, at stake, I. 179. Laws and treaties of, supreme law of States, II. 170, 372. Guaranty by, of State institutions, 177. Became proprietor of crown lands, 352. Title of, to vacant lands, 357. Officer of, not to accept present, &c. from foreign king, &c., 362. Resolutions respecting supremacy of government of, 372, 373. Supremacy of, meaning and scope of, 376. Government of, unlike any other, 379; determines its own powers, 379; safeguard of, 379; success of, to what attributable, 379. Constitution, no impediment to growth of, 383. Treason against, definition of, 385. Importance of preserving federal character of government of, 392. Relation of government to citizens of, 432. A party to a suit, jurisdiction of cases of, 444.

V.

Valuation. See *Land* and *Contribution*.
Vermont, provision for admission of,

II. 353. Within asserted limits of New York, 353.
Vessels, entry and clearance of, II. 324. Payment of duties by, 324.
Veto, an essential power, II. 57. Bill may be passed notwithstanding, 264. Of President qualified, 265. Of king of England absolute, 265; how signified, 265; in disuse since William the Third, 266. History of, in Constitutional Convention, 267. Meaning of "two thirds" in provisions respecting, 267. Power of, proposed to be given to Council of Revision, 438.
Vice-President, ex officio President of Senate, II. 264. Has only casting vote in Senate, 264, 396. Choice of, embarrassments respecting, 390. Reasons for having, 395. Ultimate election of, by Senate, 396, 401. When to act as President, 400. Changes in appointment of, 400. Qualifications for, 401.
Virginia, a provincial government, I. 4. Advises a Continental Congress, 11. Elects delegates, 12. Constitution of, formed, 120. Effect of claim of, to Western Lands, 132. Cedes the Northwestern Territory, 137, 295. Repeals her act granting imposts, 175. Stop-law of, 253. Action of, concerning Western posts, 258. Opposes the surrender of the Mississippi, 315. Action of, leading to a general commercial convention, 340, 343. Appoints and instructs delegates to the Convention, 367. Measures of, respecting commerce, 423. First to declare for Union, II. 12. Plan of government proposed by, 89; Hamilton's doubts respecting, 99; inconsistency in, 101, 103; reported to Convention, 109; vote on, 109; chasm in, 133. Opposed to election of Senators by State legislatures, 135; to equality of suffrage in House of Representatives, 138; to equality of States in Senate, 141, 148, 165, 217. Had ten Representatives in first House, 149. In favor of census of free inhabitants, 153; of executive holding office during "good behavior," 173. Vote of, respecting citizenship as qualification for office, 209; money bills, 216, 218. Opposed to each State having one vote in Senate, 227; to impeachments being tried by Senate, 262; to taxing exports, 296. Vote of, respecting slave-trade, 305. Cession by, in 1784, 342. Strong opposition to Constitution in, 504. Statesmen of, 504. Character of people of, 504. Great influence of Washington in, 505. Effect of action of New Hampshire on, 510. Convention of, meets at Richmond, 510, 549; parties in, nearly balanced, 529, 568; anxiety respecting action of, 542, 549; eminence of members of, 551; responsibility resting on, 551; discussion on Constitution in, 554. Had ratified Constitution before news from New Hampshire, 578. Convention of, final propositions of friends of Constitution in, 579. Ratification of Constitution by, how finally effected, 579. Form of amendments and Bill of Rights proposed by, 581. Address prepared by opponents of Constitution in, 582. Adoption of Constitution by, rejoicings at, 582.
Virginia and Maryland, efforts of, to regulate the trade of the Potomac and the Chesapeake, I. 341.
Virginia Reservation, note on, I. 296.
Voters, qualifications of, in different States, II. 198.

W.

War, power to declare, proposed to be given to two branches of Congress, II. 231. To be declared by Congress, 332, 413. When States may engage in, 371. Ships of, not to be kept by States in time of peace, 371. And peace, power of President to make, 411. To be prosecuted by President, 413.
WASHINGTON, appointed and commissioned commander-in-chief, I. 33. Arrives at Cambridge, 33. Mode of his appointment as commander-in-chief, 41. Previous history and character of, 41. Embarrassments of, in the early part of the war, 55. Opinions and actions of, respecting Tories, 65. Urges Congress to establish prize court, 75. On the necessity for a standing army, 91. Leaves Boston for New York, 91. Compelled to abandon New York, 91. Retreats through New Jersey, 96. Complains of his situation, 96. Asks for extraordinary powers, 100. Dictatorial powers conferred on, 100; apology

for, 101. Requires oath of allegiance to United States, 106. Proclamation by, at Morristown, in 1777, 106. Powers conferred on, in 1776, jealousy respecting, 106. Opinion of, respecting an oath of allegiance, 108. Third effort of, to raise a new army, 109. Embarrassments of, 110. Thwarted by the local authorities, 112. Adheres to a plan for the campaign, 112. Anxious about the falling off of Congress, 127. Letters of, to the States, in 1782, 157; to the President of Congress, 158, 162. Situation of, 158. Warns Congress respecting the officers, 167. Painful position of, 167. Proceedings of, upon the Newburgh Addresses, 168. On the want of a revenue power, 182. Relations of, to the country during the war, 200. Opinions of, at the close of the war, 200. Address of, to the States, on resigning, 201. On a peace establishment, 218, 219. Resigns as commander-in-chief, 235. Address to, 235. On the insurrection in Massachusetts, 274. Plans communications with Western settlements, 310. Opinions of, respecting the navigation of the Mississippi, 311, 315. Opinions of, in 1785, on the state of the country, 333. Connection of, with the plan of a general Convention, 341. Pressed to attend the general Convention, 365, 397. On the idea of a monarchical government for the United States, 370. At Mount Vernon, 393. Views of, on public affairs, 394. Declines to attend the general Convention, 399; reconsiders and attends, 399. Reception of, at Philadelphia, 401. Placed in the chair of the Convention, 401. Opinions of, 401. Character of, as a statesman, 404. Meets the Alexandria commissioners at Mount Vernon, 425. Failure of civil power to sustain, II. 14. Difficulty experienced by, as President, in preserving neutrality and excluding foreign influence, 82. In Convention, confined himself to duties of presiding officer, 213. Suggestion of, respecting ratio of representation in Congress, adopted, 213. In favor of tax on exports, 284. Early nominated for President, 391. Received no pay as commander-in-chief, 405. Practice of, respecting cabinet, 409. Leading man in Constitutional Convention, 476. Tradition respecting words of, before signing Constitution, 487. Views of, respecting conseqnences of rejection of Constitution, 487. Unbounded confidence of people in, 498. Great influence of, in Virginia, 505. Copies of Constitution sent by, with expression of opinion, 509. Opinion of, respecting action of Maryland on Constitution, 542. Not a member of Virginia convention, 551. Justifies course of Federalists in New York convention, 590. Administration of, topics appropriate to history of, 604.

Washington, City of, an object of affection and pride, II. 277. See *Seat of Government*.

WEBSTER, DANIEL, compared with Hamilton, I. 419.

WEBSTER, NOAH, recommends a new government, I. 350.

WEBSTER, PELATIAH, recommends a general Convention, I. 350.

Weights and Measures, standard of, fixed by Congress, II. 328.

West Florida, secret article respecting, in the Treaty of Peace, I. 312.

West Point, academy at, suggested, I. 218.

Western Lands, claims of the States to, I. 131. Conflicting interests of the States concerning, 132. Surrender of claim to, by New York, 133. Cessions of, urged by Congress in 1780, 134. Motives of the cession of, 137. Surrender of claim to, by Virginia, 137. Become the bond of the Union, 140. Power of Congress over, under the Confederation, 141.

Western Posts. See *Military Posts*.

Western Settlements, position of, after the peace, I. 309. Connection of, with the Atlantic coast, 310. Alarm of, about the Mississippi, 318.

Western States, prospective character of, II. 300. Vast resources of, 310.

Western Territory, controversy respecting, before the adoption of Articles of Confederation, I. 291. Cessions of, invited, 292; Congress declares certain trusts respecting, 293. States to be formed in, 293. Power of Congress to deal with, 293. Cession of, by New York, 293; by Virginia, 295. Further legislation respecting, and further trusts declared, 296. Admis-

sion of States from, 298. Further cessions of, urged, 299. Proposition by Rufus King to exclude slavery from, 299. Cession of, by Massachusetts, 299; by Connecticut, 300. Ordinance for disposing of lands in, 300. Cessions of, by Virginia, modified, 300; by South Carolina, 301; by North Carolina, 301; by Georgia, 301. See *Northwestern Territory*.
West Indies, trade with, II. 309.
Whale Fishery in Massachusetts before the Revolution, I. 135.
Williamsburg, convention at, I. 12.
WILLIAMSON, HUGH, views of, respecting rule of suffrage for House of Representatives, II. 135; money bills, 218.
WILSON, JAMES, birth and career of, I. 462. Sent to the Constitutional Convention, 462. Services of, 462. Made a justice of the Supreme Court of the United States, 465. Death of, 465. His defence of the Constitution, 465. In favor of larger House of Representatives, II. 213; tax on exports, 284. One of the ablest framers of the Constitution, 520. Position and arguments of, in Pennsylvania convention, 521. Views of, respecting Bill of Rights, 522.
WOLCOTT, OLIVER, influence of, in Connecticut convention, II. 529.

Y.

Yeas and Nays, one fifth of members present in either House of Congress may require, II. 263. To be taken on passing bill over veto, 265.
Yorktown, Revolutionary Congress assembles at, I. 113.

THE END.

6152