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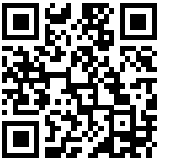

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COMMENTARIES

ON THE

CONSTITUTION OF THE UNITED STATES;

WITH

A PRELIMINARY REVIEW

OF

THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES,

BEFORE THE ADOPTION OF THE CONSTITUTION.

By JOSEPH STORY, LL. D.,

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

IN THREE VOLUMES.

"Magistratibus igitur opus est; sine quorum prudentiâ ac diligentiâ esse civitas non potest; quorumque descriptione omnis Reipublicæ moderatio continetur."

CICERO DE LEG. lib. 3. cap. 2.

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

BURKE.

VOLUME II.

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COMMENTARIES.

BOOK III.

CHAPTER VII.

DISTRIBUTION OF POWERS.

§ 517. In surveying the general structure of the constitution of the United States, we are naturally led to an examination of the fundamental principles, on which it is organized, for the purpose of carrying into effect the objects disclosed in the preamble. Every government must include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers, upon which all governments are supposed to rest, viz. the executive, the legislative, and the judicial powers. The manner and extent, in which these powers are to be exercised, and the functionaries, in whom they are to be vested, constitute the great distinctions, which are known in the forms of government. In absolute governments the whole executive, legislative, and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him. If the same powers are exclusively confided to a few persons, constituting a permanent sovereign council, the government may be appropriately denominated an absolute or despotic Aristocracy. If

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they are exercised by the people at large in their original sovereign assemblies, the government is a pure and absolute Democracy. But it is more common to find these powers divided, and separately exercised by independent functionaries, the executive power by one department, the legislative by another, and the judicial by a third; and in these cases the government is properly deemed a mixed one; a mixed monarchy, if the executive power is hereditary in a single person; a mixed aristocracy, if it is hereditary in several chieftains or families; and a mixed democracy or republic, if it is delegated by election, and is not hereditary. In mixed monarchies and aristocracies some of the functionaries of the legislative and judicial powers are, or at least may be, hereditary. But in a representative republic all power emanates from the people, and is exercised by their choice, and never extends beyond the lives of the individuals, to whom it is entrusted. It may be entrusted for any shorter period; and then it returns to them again, to be again delegated by a new choice.

§ 518. In the convention, which framed the constitution of the United States, the first resolution adopted by that body was, that "a national government ought to be established, consisting of a supreme legislative, judiciary, and executive."[1] And from this fundamental proposition sprung the subsequent organization of the whole government of the United States. It is, then, our duty to examine and consider the grounds, on which this proposition rests, since it lies at the bottom of all our institutions, state, as well as national.

§ 519. In the establishment of a free government, the division of the three great powers of government,

[1] Journals of Convent. 82, 83, 139, 207, 215.

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the executive, the legislative, and the judicial, among different functionaries, has been a favorite policy with patriots and statesmen. It has by many been deemed a maxim of vital importance, that these powers should for ever be kept separate and distinct. And accordingly we find it laid down with emphatic care in the bill of rights of several of the state constitutions. In the constitution of Massachusetts, for example, it is declared, that "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and judicial powers, or either of them; to the end it may be a government of *laws* and not of men."[1] Other declarations of a similar character are to be found in other state constitutions.[2]

§ 520. Montesquieu seems to have been the first, who, with a truly philosophical eye, surveyed the political truth involved in this maxim, in its full extent, and gave to it a paramount importance and value. As it is tacitly assumed, as a fundamental basis in the constitution of the United States, in the distribution of its powers, it may be worth inquiry, what is the true nature, object,

[1] Bill of Rights, article 30.

[2] The Federalist. No. 47. — It has been remarked by Mr. J. Adams, that the practicability or the duration of a republic, in which there is a governor, a senate, and a house of representatives, is doubted by Tacitus, though he admits the theory to be laudable. Cunctas nationes et urbes populus, aut priores, aut singuli regunt. Delecta ex his et constituta reipublicæ forma laudari facilius quam inveniri, vel si evenit, haud diuturna esse potest. Tacit. Ann. lib. 14. Cicero asserts, "Statuo esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo, et populari, modice confusa." Cic. Frag. de Repub.* The British government perhaps answers more nearly to the form of government proposed by these writers, than what we in modern times should esteem strictly a republic.

* 1 Adams's Amer. Constitutions, Preface, 19.

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and extent of the maxim, and of the reasoning, by which it is supported. The remarks of Montesquieu on this subject will be found in a professed commentary upon the constitution of England.[1] "When," says he, "the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again; there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of every thing, were the same man, or the same body, whether of the nobles, or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." [2]

§ 521. The same reasoning is adopted by Mr. Justice Blackstone, in his Commentaries.[3] "In all tyrannical governments," says he, "the supreme magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one and the same body of men; and wherever these two powers are united together,

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[1] Montesquieu, B. 11, ch. 6.

[2] Mr. Turgot uses the following strong language: "The tyranny of the people is the most cruel and intolerable, because it leaves the fewest resources to the oppressed. A despot is restrained by a sense of his own interest. He is checked by remorse or public opinion. But the multitude never calculate; the multitude are never checked by remorse, and will even ascribe to themselves the highest honour, when they deserve only disgrace." Letter to Dr. Price.

[3] 1 Black. Comm. 146.

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there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power, which he, as legislator, thinks proper to give himself. But where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject." Again; "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, by, but not removeable at, the pleasure of the crown, consists one main preservative of the public liberty; which cannot long subsist in any state, unless the administration of common justice be in some degree separated from the legislative, and also the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative." [1]

[1] 1 Black. Comm. 269. See 1 Wilson's Law Lectures, 394, 399, 400, 407, 408, 409; Woodeson's Elem. of Jurisp. 53, 56. — The remarks of Dr. Paley, on the same subject, are full of his usual practical sense. "The first maxim," says he, "of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends. Whilst they are kept separate, general laws are made by one body of men, without foreseeing whom they may affect; and, when made, they must be applied by the other, let them affect whom they will.

"For the sake of illustration let it be supposed, in this country, either

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§ 522. And the Federalist has, with equal point and brevity, remarked, that "the accumulation of all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny." [2]

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that, parliaments being laid aside, the courts of Westminster Hall made their own laws; or, that the two houses of parliament, with the king at their head, tried and decided causes at their bar. It is evident, in the first place, that the decisions of such a judicature would be so many laws; and, in the second place, that, when the parties and the interests to be affected by the laws were known, the inclinations of the law-makers would inevitably attach on one side or the other; and that where there were neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either without any constant laws, that is, without any known pre-established rules of adjudication whatever; or under laws made for particular persons, and partaking of the contradictions and iniquity of the motives, to which they owed their origin.

These dangers, by the division of the legislative and judicial functions, are in this country effectually provided against. Parliament knows not the individuals, upon whom its acts will operate; it has no cases or parties before it; no private designs to serve: consequently, its resolutions will be suggested by the consideration of universal effects and tendencies, which always produce impartial, and commouly advantageous regulations. Whcn laws are made, courts of justice, whatever be the disposition of the judges, must abide by them; for the legislative being necessarily the supreme power of the state, the judicial and every other power is accountable to that: and it cannot be doubted, that the persons, who possess the sovereign authority of government, will be tenacious of the laws, which they themselves prescribe, and sufficiently jealous of the assumption of dispensing and legislative power by any others." Paley's Moral Philosophy, B. 6, ch. 8.

[2] The Federalist, No. 47; Id. No. 22. See also Gov. Randolph's Letter, 4 Elliot's Deb. 133; Woodeson's Elem. of Jurisp. 53, 56. — Mr. Jefferson, in his Notes on Virginia,* has expressed the same truth with peculiar fervour and force. Speaking of the constitution of government of his own state, he says, "all the powers of government, legislative executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of a despotic

* Jefferson's Notes, p. 195.

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§ 523. The general reasoning, by which the maxim is supported, independently of the just weight of the authority in its support, seems entirely satisfactory. What is of far more value than any mere reasoning, experience has demonstated it to be founded in a just view of the nature of government, and the safety and liberty of the people. And it is no small commendation of the constitution of the United States, that instead of adopting a new theory, it has placed this practical truth, as the basis of its organization. It has placed the legislative, executive, and judicial powers in different hands. It has, as we shall presently see, made their term of office and their organization different; and, for objects of permanent and paramount importance, has given to the judicial department a tenure of office during good be

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government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those, who doubt it, turn their eyes on the republic of Venice. An elective despotism is not the government we fought for; but one, which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits without being effectually checked and restrained by the others." Yet Virginia lived voluntarily under this constitution more than fifty years;* and, notwithstanding this solemn warning by her own favourite statesman, in the recent revision of her old constitution and the formation of a new one, she has not in this respect changed the powers of the government. The legislature still remains with all its great powers.

No person, however, has examined this whole subject more profoundly, and with more illustrations from history and political philosophy, than Mr. John Adams, in his celebrated Defence of the American Constitutions. It deserves a thorough perusal by every statesman.

Milton was an open advocate for concentrating all powers, legislative and executive, in one body; and his opinions, as well as those of some other men of a philosophical cast, are sufficiently wild and extravagant to put us upon our guard against too much reliance on mere authority.†

* See 2 Pitkin's Hist. 298, 299, 300.

† See 1 Adams's Def. of Amer. Const. 365 to 371.

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haviour; while it has limited each of the others to a term of years.

§ 524. But when we speak of a separation of the three great departments of government, and maintain, that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm, that they must be kept wholly and entirely separate and distinct, and have no common link of connexion or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands, which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution. This has been shown with great clearness and accuracy by the authors of the Federalist.[1] It was obviously the view taken of the subject by Montesquieu and Blackstone in their Commentaries; for they were each speaking with approbation of a constitution of government, which embraced this division of powers in a general view; but which, at the same time, established an occasional mixture of each with the others, and a mutual dependency of each upon the others. The slightest examination of the British constitution will at once convince us, that the legislative, executive, and judiciary departments are by no means totally distinct, and separate from each other. The executive magistrate forms an integral part of the legislative department; for parliament consists of the king, lords, and commons; and no law can be passed except by the assent of the king. Indeed, he possesses certain prerogatives, such as, for instance, that of making foreign treaties, by which he can, to a limited extent,

[1] The Federalist, No. 42.

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impart to them a legislative force and operation. He also possesses the sole appointing power to the judicial department, though the judges, when once appointed, are not subject to his will, or power of removal. The house of lords also constitutes, not only a vital and independent branch of the legislature, but is also a great constitutional council of the executive magistrate, and is, in the last resort, the highest appellate judicial tribunal. Again; the other branch of the legislature, the commons, possess, in some sort, a portion of the executive and judicial power, in exercising the power of accusation by impeachment; and in this case, as also in the trial of peers, the house of lords sits as a grand court of trials for public offences. The powers of the judiciary department are, indeed, more narrowly confined to their own proper sphere. Yet still the judges occasionally assist in the deliberations of the house of lords by giving their opinions upon matters of law referred to them for advice; and thus they may, in some sort, be deemed assessors to the lords in their legislative, as well as judicial capacity.[1]

§ 525. Mr. Justice Blackstone has illustrated the advantages of an occasional mixture of the legislative and executive functions in the English constitution in a striking manner. "It is highly necessary," says he, "for preserving the balance of the constitution, that the executive power should be a branch, though not the whole of the legislative. The total union of them, we have seen, would be productive of tyranny. The total disjunction of them, for the present, would, in the end, produce the same effects by causing that union, against which it seems to provide. The legislative would soon

[1] The Federalist, No. 47; De Lolme on the English Constitution, B. 2, ch. 3.

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become tyrannical by making continual encroachments, and gradually assuming to itself the rights of the executive power, &c. To hinder, therefore, any such encroachments, the king is, himself, a part of the parliament; and, as this is the reason of his being so, very properly, therefore, the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting*, rather than *resolving*; this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of doing wrong; but merely of preventing wrong from being done. The crown cannot begin of itself any alterations in the present established law; but it may approve, or disapprove of the alterations suggested, and consented to by the two houses." [1]

§ 526. Notwithstanding the memorable terms, in which this maxim of a division of powers is incorporated into the bill of rights of many of our state constitutions, the same mixture will be found provided for, and indeed required in the same solemn instruments of government. Thus, the governor of Massachusetts exercises a part of the legislative power, possessing a qualified negative upon all laws. The house of representatives is a grand inquest for accusation; and the senate is a high court for the trial of impeachments. The governor, with the advice of the executive council, possesses the power of appointment in general; but the appointment of certain officers still belongs to the senate and house of representatives. On the other hand, although the judicial department is distinct from the

[1] 1 Black. Comm. 154.

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executive and legislative in many respects, either branch may require the advice of the judges, upon solemn questions of law referred to them. The same general division, with the same occasional mixture, may be found in the constitutions of other states. And in some of them the deviations from the strict theory are quite remarkable. Thus, until the late revision, the constitution of New-York constituted the governor, the chancellor, and the judges of the Supreme Court, or any two of them with the governor, a council of revision, which possessed a qualified negative upon all laws passed by the senate and house of representatives. And, now, the chancellor and the judges of the Supreme Court of that state constitute, with the senate, a court of impeachment, and for the correction of errors. In New-Jersey the governor is appointed by the legislature, and is the chancellor and ordinary, or surrogate, a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the branches of the legislature. In Virginia the great mass of the appointing power is vested in the legislature. Indeed, there is not a single constitution of any state in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.[1]

§ 527. It would not, perhaps, be thought important to have dwelt on this subject, if originally it had not been made a special objection to the constitution of the United States, that though it professed to be founded upon a division of the legislative, executive, and judicial departments, yet it was really chargeable with a departure from the doctrine by accumulating in some

[1] The Federalist, No. 47, 48.

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instances the different powers in the same hands, and by a mixture of them in others; so, that it, in effect, subverted the maxim, and could not but be dangerous to the public liberty.[1] The fact must be admitted, that such an occasional accumulation and mixture exists; but the conclusion, that the system is therefore dangerous to the public liberty, is wholly inadmissible. If the objection were well founded, it would apply with equal, and in some cases with far greater force to most of our state constitutions; and thus the people would be proved their own worst enemies, by embodying in their own constitutions the means of overthrowing their liberties.

§ 528. The authors of the Federalist thought this subject a matter of vast importance, and accordingly bestowed upon it a most elaborate commentary. At the present time the objection may not be felt, as possessing much practical force, since experience has demonstrated the fallacy of the suggestions, on which it was founded. But, as the objection may be revived; and as a perfect separation is occasionally found supported by the opinions of ingenious minds, dazzled by theory, and extravagantly attached to the notion of simplicity in government, it may not be without use to recur to some of the reasoning, by which those illustrious statesmen, who formed the constitution, while they admitted the general truth of the maxim, endeavoured to prove, that a rigid adherence to it in all cases would be subversive of the efficiency of the government, and result in the destruction of the public liberties. The proposition, which they undertook to maintain, was this, that "unless these departments be so far connected and blended, as to give to each a constitutional control over

[1] 1 Amer. Museum, 536, 549, 550; Id. 553; 3 Amer. Museum, 78, 79.

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the others, the degree of separation, which the maxim requires, as essential to a free government, can never in practice be duly maintained." [1]

§ 529. It is proper to premise, that it is agreed on all sides, that the powers belonging to one department ought not to be directly and completely administered by either of the other departments; and, as a corollary, that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.[2] Power, however, is of an encroaching nature, and it ought to be effectually restrained from passing the limits assigned to it. Having separated the three great departments by a broad line from each other, the difficult task remains to provide some practical means for the security of each against the meditated or occasional invasions of the others. Is it sufficient to declare on parchment in the constitution, that each shall remain, and neither shall usurp the functions of the other? No one, well read in history in general, or even in our own history during the period of the existence of our state constitutions, will place much reliance on such declarations. In the first place, men may and will differ, as to the nature and extent of the prohibition. Their wishes and their interests, the prevalence of faction, an apparent necessity, or a predominant popularity, will give a strong bias to their judgments, and easily satisfy them with reasoning, which has but a plausible colouring. And it has been accordingly found, that the theory has bent under the occasional pressure, as well as under the occasional elasticity of public opinion, and as well in the states, as in the general government under the confed-

[1] The Federalist, No. 48. [2] The Federalist, No. 48.

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eration. Usurpations of power have been notoriously assumed by particular departments in each; and it has often happened, that these very usurpations have received popular favour and indulgence.[1]

§ 530. In the next place, in order to preserve in full vigour the constitutional barrier between each department, when they are entirely separated, it is obviously indispensable, that each should possess equally, and in the same degree, the means of self-protection. Now, in point of theory, this would be almost impracticable, if not impossible; and in point of fact, it is well known, that the means of self-protection in the different departments are immeasurably disproportionate. The judiciary is incomparably the weakest of either; and must for ever, in a considerable measure, be subjected to the legislative power. And the latter has, and must have, a controlling influence over the executive power, since it holds at its own command all the resources, by which a chief magistrate could make himself formidable. It possesses the power over the purse of the nation, and the property of the people. It can grant, or withhold supplies; it can levy, or withdraw taxes; it can unnerve the power of the sword by striking down the arm, which wields it.

§ 531. De Lolme has said, with great emphasis, "It is, without doubt, absolutely necessary for securing the constitution of a state, to restrain the executive power; but it is still more necessary to restrain the legislative. What the former can duly do by successive steps, (I mean subvert the laws,) and through a longer, or a shorter train of enterprises, the latter does in a moment. As its bare will can give being to the laws, so its bare

[1] The Federalist, No. 48. See also The Federalist, No. 38, 42.

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will can also annihilate them; and if I may be permitted the expression, the legislative power can change the constitution, as God created the light. In order, therefore, to insure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But, here, we must observe a difference between the legislative and executive powers. The latter may be confined, and even is more easily so, when undivided. The legislative, on the contrary, in order to its being restrained, should absolutely be divided." [1]

§ 532. The truth is, that the legislative power is the great and overruling power in every free government. It has been remarked with equal force and sagacity, that the legislative power is every where extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republics, wise as they were, under the influence and the dread of the royal prerogative, which was pressing upon them, never for a moment seem to have turned their eyes from the immediate danger to liberty from that source, combined, as it was, with an hereditary authority, and an hereditary peerage to support it. They seem never to have recollected the danger from legislative usurpation, which, by ultimately assembling all power in the same hands, must lead to the same tyranny, as is threatened by executive usurpations. The representatives of the people will watch with jealousy every encroachment of the executive magistrate, for it trenches upon their own authority. But, who shall watch the encroachment of these representatives themselves? Will they be as jealous of the exercise of power by themselves, as by

[1] De Lolme, B. 2, ch. 3.

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others? In a representative republic, where the executive magistracy is carefully limited, both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions, which actuate the multitude; yet not so numerous, as to be incapable of pursuing the objects of its passions by means, which reason prescribes; it is easy to see, that the tendency to the usurpation of power is, if not constant, at least probable; and that it is against the enterprising ambition of this department, that the people may well indulge all their jealousy, and exhaust all their precautions.[1]

§ 533. There are many reasons, which may be assigned for the engrossing influence of the legislative department. In the first place, its constitutional powers are more extensive, and less capable of being brought within precise limits, than those of either of the other departments. The bounds of the executive authority are easily marked out, and defined. It reaches few objects, and those are known. It cannot transcend them, without being brought in contact with the other departments. Laws may check and restrain, and bound its exercise. The same remarks apply with still greater force to the judiciary. The jurisdiction is, or may be, bounded to a few objects or persons; or, however general and unlimited, its operations are necessarily confined to the mere administration of private and public justice. It cannot punish without law. It cannot create controversies to act upon. It can decide only

[1] The Federalist, No. 48, 49.

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upon rights and cases, as they are brought by others before it. It can do nothing for itself. It must do every thing for others. It must obey the laws; and if it corruptly administers them, it is subjected to the power of impeachment. On the other hand, the legislative power, except in the few cases of constitutional prohibition, is unlimited. It is for ever varying its means and its ends. It governs the institutions, and laws, and public policy of the country. It regulates all its vast interests. It disposes of all its property. Look but at the exercise of two or three branches of its ordinary powers. It levies all taxes; it directs and appropriates all supplies; it gives the rules for the descent, distribution, and devises of all property held by individuals. It controls the sources and the resources of wealth. It changes at its will the whole fabric of the laws. It moulds at its pleasure almost all the institutions, which give strength, and comfort, and dignity to society.

§ 534. In the next place, it is the direct, visible representative of the will of the people in all the changes of times and circumstances. It has the pride, as well as the power of numbers.[1] It is easily moved and steadily moved by the strong impulses of popular feeling, and popular odium. It obeys, without reluctance, the wishes and the will of the majority for the time being. The path to public favour lies open by such obedience; and it finds not only support, but impunity, in whatever measures the majority advises, even though they transcend the constitutional limits. It has no motive, therefore, to be jealous, or scrupulous in its own use of power; and it finds its ambition stimulated,

[1] "Numerous assemblies," says Mr. Turgot, "are swayed in their debates by the smallest motives."

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and its arm strengthened by the countenance, and the courage of numbers. These views are not alone those of men, who look with apprehension upon the fate of republics; but they are also freely admitted by some of the strongest advocates for popular rights, and the permanency of republican institutions.[1] Our domestic history furnishes abundant examples to verify these suggestions.[2]

§ 535. If, then, the legislative power possesses a decided preponderance of influence over either or both of the others; and if, in its own separate structure, it furnishes no effectual security for the others, or for its own abstinence from usurpations, it will not be sufficient to rely upon a mere constitutional division of the powers to insure our liberties.[3]

§ 536. What remedy, then, can be proposed, adequate for the exigency? It has been suggested, that an appeal to the people, at stated times, might redress any inconveniences of this sort. But, if these be frequent, it will have a tendency to lessen that respect for, and confidence in the stability of our constitutions, which is so essential to their salutary influence. If it be true, that all governments rest on opinion, it is no less true, that the strength of opinion in each individual, and its practical influence on his conduct, depend much upon the number, which he supposes to have entertained the same opinion.[4] There is, too, no small danger in disturbing the public tranquillity by a fre-

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[1] See Mr. Jefferson's very striking remarks in his Notes on Virginia, p. 195, 196, 197, 248. In December, 1776, and again, June, 1781, the legislature of Virginia, under a great pressure, were near passing an act appointing a dictator. Ib. p. 207.

[2] The Federalist, No. 48, 49.

[3] See Jefferson's Notes on Virginia, 195, 196, 197.

[4] The Federalist, No. 48.

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quent recurrence to questions respecting the fundamental principles of government.[1] Whoever has been present in any assembly, convened for such a purpose, must have perceived the great diversities of opinion upon the most vital questions; and the extreme difficulty in bringing a majority to concur in the long-sighted wisdom of the soundest provisions. Temporary feelings and excitements, popular prejudices, an ardent love of theory, an enthusiastic temperament, inexperience, and ignorance, as well as preconceived opinions, operate wonderfully to blind the judgment, and seduce the understanding. It will probably be found, in the history of most conventions of this sort, that the best and soundest parts of the constitution, those, which give it permanent value, as well as safe and steady operation, are precisely those, which have enjoyed the least of the public favour at the moment, or were least estimated by the framers. A lucky hit, or a strong figure, has not unfrequently overturned the best reasoned plan. Thus, Dr. Franklin's remark, that a legislature, with two branches, was a wagon, drawn by a horse before, and a horse behind, in opposite directions, is understood to have been decisive in inducing Pennsylvania, in her original constitution, to invest all the legislative power in a single body.[2] In her present constitution, that error has been fortunately corrected. It is not believed, that the clause in the constitution of Vermont providing for a septennial council of censors to inquire into the infractions of her constitution during the last septenary, and to recommend suitable measures to the legislature, and to call,

[1] The Federalist, No. 48, 50.
[2] 1 Adams's American Constitutions, 105, 106.

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if they see fit, a convention to amend the constitution, has been of any practical advantage in that state in securing it against legislative or other usurpations, beyond the security possessed by other states, having no such provision.[1]

§ 537. On the other hand, if an appeal to the people, or a convention, is to be called only at great distances of time, it will afford no redress for the most pressing mischiefs. And if the measures, which are supposed to be infractions of the constitution, enjoy popular favour, or combine extensive private interests, or have taken root in the habit of the government, it is obvious, that the chances of any effectual redress will be essentially diminished.[2]

§ 538. But a more conclusive objection is, that the decisions upon all such appeals would not answer the purpose of maintaining, or restoring the constitutional equilibrium of the government. The remarks of the Federalist, on this subject, are so striking, that they scarcely admit of abridgment without impairing their force: "We have seen, that the tendency of republican governments is to aggrandizement of the legislature at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But whether made by one or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part

[1] The history of the former constitution of Pennsylvania, and the report of its council of censors, shows the little value of provisions of this sort in a strong light. The Federalist, No. 48, 50.

[2] The Federalist, No. 50.

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"only of the people. The latter, by the mode of their "appointment, as well as by the nature and perma- "nency of it, are too far removed from the people to "share much in their professions. The former are "generally objects of jealousy; and their administra- "tion is always liable to be discoloured and rendered "unpopular. The members of the legislative depart- "ment, on the other hand, are numerous. They are "distributed and dwell among the people at large. "Their connexions of blood, of friendship, and of "acquaintance, embrace a great proportion of the most "influential part of the society. The nature of their "public trust implies a personal weight with the peo- "ple, and that they are more immediately the confi- "dential guardians of their rights and liberties. With "these advantages it can hardly be supposed, that the "adverse party would have an equal chance of a favour- "able issue. But the legislative party would not only "be able to plead their case most successfully with the "people; they would probably be constituted them- "selves the judges. The same influence, which had "gained them an election into the legislature, would "gain them a seat in the convention. If this should "not be the case with all, it would probably be the "case with many, and pretty certainly with those "leading characters, on whom every thing depends in "such bodies. The convention, in short, would be "composed chiefly of men, who had been, or who "actually were, or who expected to be, members of the "department, whose conduct was arraigned. They "would consequently be parties to the very ques- "tion to be decided by them."[1]

[1] The Federalist, No. 48. — The truth of this reasoning, as well as

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§ 539. If, then, occasional or periodical appeals to the people would not afford an effectual barrier against the inroads of the legislature upon the other departments of the government, it is manifest, that resort must be had to some contrivances in the interior structure of the government itself, which shall exert a constant check, and preserve the mutual relations of each with the other. Upon a thorough examination of the subject, it will be found, that this can be best accomplished, if not solely accomplished, by an occasional mixture of the powers of each department with that of the others, while the separate existence, and constitutional independence of each are fully provided for. Each department should have a will of its own, and the members of each should have but a limited agency in the acts and appointments of the members of the others. Each should have its own independence secured beyond the power of being taken away by either, or both of the others. But at the same time the relations of each to the other should be so strong, that there should be a mutual interest to sustain and protect each other. There should not only be constitutional means, but personal motives, to resist encroachments of one, or either of the others. Thus, ambition would be made to counteract ambition; the desire of power to check power; and the pressure of interest to balance an opposing interest.[1]

§ 540. There seems no adequate method of producing this result but by a partial participation of each

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the utter inefficacy of any such periodical conventions, is abundantly established by the history of Pennsylvania under her former constitution.*

1 The Federalist, No. 48, 50, 51.

* The Federalist, No. 50. See 2 Pitkin's Hist. 305, 306.

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in the powers of the other; and by introducing into every operation of the government in all its branches, a system of checks and balances, on which the safety of free institutions has ever been found essentially to depend. Thus, for instance, a guard against rashness and violence in legislation has often been found, by distributing the power among different branches, each having a negative check upon the other. A guard against the inroads of the legislative power upon the executive has been in like manner applied, by giving the latter a qualified negative upon the former; and a guard against executive influence and patronage, or unlawful exercise of authority, by requiring the concurrence of a select council, or a branch of the legislature in appointments to office, and in the discharge of other high functions, as well as by placing the command of the revenue in other hands.

§ 541. The usual guard, applied for the security of the judicial department, has been in the tenure of office of the judges, who commonly are to hold office during good behaviour. But this is obviously an inadequate provision, while the legislature is entrusted with a complete power over the salaries of the judges, and over the jurisdiction of the courts, so that they can alter, or diminish them at pleasure. Indeed, the judiciary is naturally, and almost necessarily (as has been already said) the weakest department.[1] It can have no means of influence by patronage. Its powers can never be wielded for itself. It has no command over the purse or the sword of the nation. It can neither lay taxes, nor appropriate money, nor command armies, nor appoint to offices. It is never brought into contact

[1] Montesq. Spirit of Laws, B. 11, ch. 6.

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with the people by the constant appeals and solicitations, and private intercourse, which belong to all the other departments of government. It is seen only in controversies, or in trials and punishments. Its rigid justice and impartiality give it no claims to favour, however they may to respect. It stands solitary and unsupported, except by that portion of public opinion, which is interested only in the strict administration of justice. It can rarely secure the sympathy, or zealous support, either of the executive, or the legislature. If they are not (as is not unfrequently the case) jealous of its prerogatives, the constant necessity of scrutinizing the acts of each, upon the application of any private person, and the painful duty of pronouncing judgment, that these acts are a departure from the law or constitution, can have no tendency to conciliate kindness, or nourish influence. It would seem, therefore, that some additional guards would, under such circumstances, be necessary to protect this department from the absolute dominion of the others. Yet rarely have any such guards been applied; and every attempt to introduce them has been resisted with a pertinacity, which demonstrates, how slow popular leaders are to introduce checks upon their own power; and how slow the people are to believe, that the judiciary is the real bulwark of their liberties. In some of the states the judicial department is partially combined with some branches of the executive and legislative departments; and it is believed, that in those cases, it has been found no unimportant auxiliary in preserving a wholesome vigour in the laws, as well as a wholesome administration of public justice.

§ 542. How far the constitution of the United States, in the actual separation of these departments, and the

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occasional mixtures of some of the powers of each, has accomplished the objects of the great maxim, which we have been considering, will appear more fully, when a survey is taken of the particular powers confided to each department. But the true and only test must, after all, be experience, which corrects at once the errors of theory, and fortifies and illustrates the eternal judgments of nature.

§ 543. It is not a little singular, however, (as has been already stated,) that one of the principal objections urged against the constitution at the time of its adoption was this occasional mixture of powers,[1] upon which, if the preceding reasoning (drawn, as must be seen, from the ablest commentators) be well founded, it must depend for life and practical influence. It was said, that the several departments of power were distributed, and blended in such a manner, as at once to destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of the other parts. The objection, as it presents itself in details, will be more accurately examined hereafter. But it may here be said, that the experience of more than forty years has demonstrated the entire safety of this distribution, at least in the quarter, where the objection was supposed to apply with most force. If any department of the government has an undue influence, or absorbing power, it certainly has not been either the executive or judiciary.

[1] The Federalist, No. 47; Id. 38.

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CHAPTER VIII.

THE LEGISLATURE.

§ 544. THE first article of the constitution contains the structure, organization, and powers, of the legislature of the Union. Each section of that article, and indeed, of every other article, will require a careful analysis, and distinct examination. It is proposed, therefore, to bring each separately under review, in the present commentaries, and to unfold the reasons, on which each is founded, the objections, which have been urged against it, and the interpretation, so far as it can satisfactorily be ascertained, of the terms, in which each is expressed.

§ 545. The first section of the first article is in the following words: "All legislative powers herein granted "shall be vested in a congress of the United States, which "shall consist of a senate and house of representatives."

§ 546. This section involves, as a fundamental rule, the exercise of the legislative power by two distinct and independent branches. Under the confederation, the whole legislative power of the Union was vested in a single branch. Limited as was that power, the concentration of it in a single body was deemed a prominent defect of the confederation. But if a single assembly could properly be deemed a fit receptacle of the slender and fettered authorities, confided to the federal government by that instrument, it could scarcely be consistent with the principles of a good government to entrust it with the more enlarged and vigorous powers delegated in the constitution.[1]

[1] The Federalist, No. 22.

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§ 547. The utility of a subdivision of the legislative power into different branches, having a negative upon each other, is, perhaps, at the present time admitted by most persons of sound reflection.[1] But it has not always found general approbation; and is, even now, sometimes disputed by men of speculative ingenuity, and recluse habits. It has been justly observed, that there is scarcely in the whole science of politics a more important maxim, and one, which bears with greater influence upon the practical operations of government. It has been already stated, that Pennsylvania, in her first constitution, adopted the scheme of a single body, as the depositary of the legislative power, under the influence, as is understood, of a mind of a very high philosophical character.[2] Georgia, also, is said in her first constitution, (since changed,) to have confided the whole legislative power to a single body.[3] Vermont adopted the same course, giving, however, to the executive council a power of revision, and of proposing amendments, to which she yet adheres.[4] We are also told by a distinguished statesman of great accuracy and learning, that at the first formation of our state constitutions, it was made a question of transcendant importance, and divided the opinions of our most eminent men. Legislation, being merely the expression of the will of the community, was thought to be an operation so simple in its nature, that inexperienced reason could not readily perceive the necessity of committing it to

[1] Jefferson's Notes on Virginia, 194; 1 Kent's Comm. 208; DeLolme on the Constitution of England, B. 2, ch. 3; 3 Amer. Museum, 62, 66, Gov. Randolph's Letter.

[2] 1 Adams's Defence of American Constitution, 105, 106; 2 Pitk. Hist. 294, 305, 316.

[3] 1 Kent's Comm. 208; 2 Pitk. Hist. 315.

[4] 2 Pitk. Hist. 314, 316; Const. of Vermont, 1793, ch. 2, § 2, 16.

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two bodies of men, each having a decisive check upon the action of the other. All the arguments derived from the analogy between the movements of political bodies, and the operations of physical nature; all the impulses of political parsimony; all the prejudices against a second co-ordinate legislative assembly stimulated by the exemplification of it in the British parliament, were against a division of the legislative power.[1]

§ 548. It is also certain, that the notion, that the legislative power ought to be confided to a single body, has been, at various times, adopted by men eminent for their talents and virtues. Milton, Turgot, Franklin, are but a few among those, who have professedly entertained, and discussed the question.[2] Sir James Mackintosh, in a work of a controversial character, written with the zeal and eloquence of youth, advocated the doctrine of a single legislative body.[3] Perhaps his maturer life may have changed this early opinion. At all events, he can, in our day, count few followers. Against his opinion, thus uttered, there is the sad example of France itself, whose first constitution, in 1791, was formed on this basis, and whose proceedings the genius of this great man was employed to vindicate. She stands a monument of the folly and mischiefs of the scheme; and by her subsequent adoption of a division of the legislative power, she has secured to herself (as it is hoped) the permanent blessings of liberty.[4] Against all visionary reasoning of this sort, Mr. Chancellor Kent

[1] President J. Q. Adams's Oration, 4th July, 1831. See also Adams's Defence of American Constitution, *per tot*; 1 Kent's Comm. 208, 209, 210; 2 Pitk. Hist. 233, 305; Paley's Moral Phil. B. 6, ch. 7.

[2] 1 Adams's Defence American Constitution, 3; Id. 105; Id. 366; 2 Pitk. Hist. 233.

[3] Mackintosh on the French Revolution, (1792) 4 edit. p. 266 to 273.

[4] 1 Kent's Comm. 209, 210.

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has, in a few pages of pregnant sense and brevity, condensed a decisive argument.[1] There is danger, however, that it may hereafter be revived; and indeed it is occasionally hinted by gifted minds, as a problem yet worthy of a fuller trial.[2]

§ 549. It may not, therefore, be uninstructive to review some of the principal arguments, by which this division is vindicated. The first and most important ground is, that it forms a great check upon undue, hasty, and oppressive legislation. Public bodies, like private persons, are occasionally under the dominion of strong passions and excitements; impatient, irritable, and impetuous. The habit of acting together produces a strong tendency to what, for want of a better word, may be called the corporation spirit, or what is so happily expressed in a foreign phrase, *l'esprit du corps*. Certain popular leaders often acquire an extraordinary ascendency over the body, by their talents, their eloquence, their intrigues, or their cunning. Measures are often introduced in a hurry, and debated with little care, and examined with less caution. The very restlessness of many minds produces an utter impossibility of debating with much deliberation, when a measure has a plausible aspect, and enjoys a momentary favour. Nor is it infrequent, especially in cases of this sort, to overlook well-founded objections to a measure, not only because the advocates of it have little desire to bring them in review, but because the opponents are often seduced into a credulous silence. A legislative body is not ordinarily apt to mistrust its own powers, and far

[1] 1 Kent's Comm. 208 to 210.

[2] Mr. Tucker, the learned author of the Commentaries on Blackstone, seems to hold the doctrine, that a division of the legislative power is not useful or important. See Tuck. Black. Comm. App. 226, 227.

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less the temperate exercise of those powers. As it prescribes its own rules for its own deliberations, it easily relaxes them, whenever any pressure is made for an immediate decision. If it feels no check but its own will, it rarely has the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations on society.[1]

§ 550. But it is not merely inconsiderate and rash legislation, which is to be guarded against, in the ordinary course of things. There is a strong propensity in public bodies to accumulate power in their own hands, to widen the extent of their own influence, and to absorb within their own circle the means, and the motives of patronage. If the whole legislative power is vested in a single body, there can be, practically, no restraint upon the fullest exercise of that power; and of any usurpation, which it may seek to excuse or justify, either from necessity or a superior regard to the public good. It has been often said, that necessity is the plea of tyrants; but it is equally true, that it is the plea of all public bodies invested with power, where no check exists upon its exercise.[2] Mr. Hume has remarked with

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[1] 1 Kent's Comm. 208, 209; 3 Amer. Museum, 66.

[2] The facility, with which even great men satisfy themselves with exceeding their constitutional powers, was never better exemplified, than by Mr. Jefferson's own practice and example, as stated in his own correspondence. In 1802, he entered into a treaty, by which Louisiana was to become a part of the Union, although (as we have seen) in his own opinion, it was unconstitutional.* And, in 1810, he contended for the right of the executive to purchase Florida, if, in his own opinion, the opportunity would otherwise be lost, notwithstanding it might involve a transgression of the law.† Such are the examples given of a state necessity, which is to supersede the constitution and laws. Such are the principles, which he contended, justified him in an arrest of persons not sanctioned by law.‡

* 4 Jefferson's Corresp. 1, 2, 3, 4. † Id. 149, 150. ‡ Id. 151.

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great sagacity, that men are generally more honest in their private, than in their public capacity ; and will go greater lengths to serve a party, than when their own private interest is alone concerned. Honour is a great check upon mankind. But where a considerable body of men act together, this check is in a great measure removed, since a man is sure to be approved of by his own party, for what promotes the common interest; and he soon learns to despise the clamours of adversaries.[1] This is by no means an opinion peculiar to Mr. Hume. It will be found lying at the foundation of the political reasonings of many of the greatest men in all ages, as the result of a close survey of the passions, and infirmaties, of the history, and experience of mankind.[2] With a view, therefore, to preserve the rights and liberties of the people against unjust encroachments, and to secure the equal benefits of a free constitution, it is of vital importance to interpose some check against the undue exercise of the legislative power, which in every government is the predominating, and almost irresistible power.[3]

§ 551. This subject is put in a very strong light by an eminent writer,[4] whose mode of reasoning can be

[1] 1 Hume's Essays, Essay 6; Id. Essay 16. — Mr. Jefferson has said, that "the functionaries of public power rarely strengthen in their dispositions to abridge it." 4 Jefferson's Corresp. 277.

[2] See 1 Adams's Defence of American Constitution, p. 121, Letter 26, &c.; Id. Letter, 24; Id. Letter 55; 1 Hume's Essays, Essay 16; 1 Wilson's Law Lect. 394 to 397; 3 Adams's Defence of American Constitution, Letter 6, p. 209, &c.

[3] Mr. Hume's thoughts are often striking and convincing; but his mode of a perfect commonwealth * contains some of the most extravagant vagaries of the human mind, equalled only by Locke's Constitution for Carolina. These examples show the danger of relying implicitly upon the mere speculative opinions of the wisest men.

[4] Mr. John Adams.

* 1 Hume's Essays, Essay 16.

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best conveyed in his own words. "If," says he, "we should extend our candour so far, as to own, that the majority of mankind are generally under the dominion of benevolence and good intentions; yet it must be confessed, that a vast majority frequently transgress; and what is more decidedly in point, not only a majority, but almost all, confine their benevolence to their families, relations, personal friends, parish, village, city, county, province; and that very few indeed extend it impartially to the whole community. Now, grant but this truth, and the question is decided. If a majority are capable of preferring their own private interests, or that of their families, counties, and party, to that of the nation collectively, some provision must be made in the constitution in favour of justice, to compel all to respect the common right, the public good, the universal law in preference to all private and partial considerations." [1] Again: "Of all possible forms of government, a sovereignty in one assembly, successively chosen by the people, is, perhaps, the best calculated to facilitate the gratification of self-love, and the pursuit of the private interests of a few individuals. A few eminent, conspicuous characters will be continued in their seats in the sovereign assembly from one election to another, whatever changes are made in the seats around them. By superior art, address, and opulence, by more splendid birth, reputations, and connexions, they will be able to intrigue with the people, and their leaders out of doors, until they worm out most of their opposers, and introduce their friends. To this end they will bestow all offices, contracts, privileges in commerce, and other emoluments on the latter, and their connexions, and

[1] 3 Adams's Defence of American Constitution, Letter 6, p. 215, 216. See North American Review, Oct. 1827, p. 263.

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throw every vexation and disappointment in the way of the former, until they establish such a system of hopes and fears throughout the whole state, as shall enable them to carry a majority in every fresh election of the house. The judges will be appointed by them and their party, and of consequence will be obsequious enough to their inclinations. The whole judicial authority, as well as the executive, will be employed, perverted, and prostituted, to the purposes of electioneering. No justice will be attainable; nor will innocence or virtue be safe in the judicial courts, but for the friends of the prevailing leaders. Legal prosecutions will be instituted, and carried on against opposers to their vexation and ruin. And as they have the public purse at command, as well as the executive and judicial power, the public money will be expended in the same way. No favours will be attainable, but by those, who will court the ruling demagogues of the house, by voting for their friends, and instruments; and pensions, and pecuniary rewards and gratifications, as well as honours, and offices of every kind, voted to friends and partisans, &c. &c. The press, that great barrier and bulwark of the rights of mankind, when it is protected by law, can no longer be free. If the authors, writers, and printers, will not accept of the hire, that will be offered them, they must submit to the ruin, that will be denounced against them. The presses, with much secrecy and concealment, will be made the vehicles of calumny against the minority, and of panegyric, and empirical applauses of the leaders of the majority, and no remedy can possibly be obtained. In one word, the whole system of affairs, and every conceivable motive of hope or fear, will be employed to promote the private interests of a few, and their obsequious majority; and

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there is no remedy but in arms. Accordingly we find in all the Italian republics, the minority always were driven to arms in despair.[1]

§ 552. Another learned writer has ventured on the bold declaration, that "a single legislature is calculated to unite in it all the pernicious qualities of the different extremes of bad government. It produces general weakness, inactivity, and confusion; and these are intermixed with sudden and violent fits of despotism, injustice and cruelty."[2]

§ 553. Without conceding, that this language exhibits an unexaggerated picture of the results of the legislative power being vested in a single assembly, there is enough in it to satisfy the minds of considerate men, that there is great danger in such an exclusive deposit of it.[3] Some check ought to be provided, to maintain the real balance intended by the constitution; and this check will be most effectually obtained by a co-ordinate branch of equal authority, and different organization, which shall have the same legislative power, and possess an independent negative upon the doings of the other branch. The value of the check will, indeed, in a great measure depend upon this difference of organization. If the term of office, the qualifications, the mode of election, the persons and interests represented by each branch, are exactly the same, the check will be less powerful, and the guard less perfect, than if some, or all of these ingredients differ, so as to bring into play all the various interests and influences, which belong to a free, honest, and enlightened society.

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1 3 Adams's Defence of American Constitution, 284 to 286.
2 1 Wilson's Law Lect. 393 to 405; The Federalist, No. 22.
3 See Sidney on Government, ch. 3, § 45.

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§ 554. The value, then, of a distribution of the legislative power, between two branches, each possessing a negative upon the other, may be summed up under the following heads. First: It operates directly as a security against hasty, rash, and dangerous legislation; and allows errors and mistakes to be corrected, before they have produced any public mischiefs. It interposes delay between the introduction, and final adoption of a measure; and thus furnishes time for reflection; and for the successive deliberations of different bodies, actuated by different motives, and organized upon different principles.

§ 555. In the next place, it operates indirectly as a preventive to attempts to carry private, personal, or party objects, not connected with the common good. The very circumstance, that there exists another body clothed with equal power, and jealous of its own rights, and independent of the influence of the leaders, who favour a particular measure, by whom it must be scanned, and to whom it must be recommended upon its own merits, will have a silent tendency to discourage the efforts to carry it by surprise, or by intrigue, or by corrupt party combinations. It is far less easy to deceive, or corrupt, or persuade two bodies into a course, subversive of the general good, than it is one; especially if the elements, of which they are composed, are essentially different.

§ 556. In the next place, as legislation necessarily acts, or may act, upon the whole community, and involves interests of vast difficulty and complexity, and requires nice adjustments, and comprehensive enactments, it is of the greatest consequence to secure an independent review of it by different minds, acting under different, and sometimes opposite opinions and

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feelings; so, that it may be as perfect, as human wisdom can devise. An appellate jurisdiction, therefore, that acts, and is acted upon alternatively, in the exercise of an independent revisory authority, must have the means, and can scarely fail to possess the will, to give it a full and satisfactory review. Every one knows, notwithstanding all the guards interposed to secure due deliberation, how imperfect all human legislation is; how much it embraces of doubtful principle, and of still more doubtful utility; how various, and yet how defective, are its provisions to protect rights, and to redress wrongs. Whatever, therefore, naturally and necessarily awakens doubt, solicits caution, attracts inquiry, or stimulates vigilance and industry, is of value to aid us against precipitancy in framing, or altering laws, as well as against yielding to the suggestions of indolence, the selfish projects of ambition, or the cunning devices of corrupt and hollow demagogues.[1] For this purpose, no better expedient has, as yet, been found, than the creation of an independent branch of censors to revise the legislative enactments of others, and to alter, amend, or reject them at its pleasure, which, in return, its own are to pass through a like ordeal.

§ 557. In the next place, there can scarcely be any other adequate security against encroachments upon the constitutional rights and liberties of the people. Algernon Sidney has said with great force, that the legislative power is always arbitrary, and not to be trusted in the hands of any, who are not bound to obey the

[1] "Look," says an intelligent writer, "into every society, analyze public measures, and get at the real conducters of them, and it will be found, that few, very few, men in any government, *and in the most democratical perhaps the fewest*, are, in fact, the persons, who give the lead and direction to all, which is brought to pass." Thoughts upon the Political Situation of the United States of America, printed at Worcester, 1788.

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laws they make.[1] But it is not less true, that it has a constant tendency to overleap its proper boundaries, from passion, from ambition, from inadvertence, from the prevalence of faction, or from the overwhelming influence of private interests.[2] Under such circumstances, the only effectual barrier against oppression, accidental or intentional, is to separate its operations, to balance interest against interest, ambition against ambition, the combinations and spirit of dominion of one body against the like combinations and spirit of another. And it is obvious, that the more various the elements, which enter into the actual composition of each body, the greater the security will be.[3] Mr. Justice Wilson has truly remarked, that, "when a single legislature is determined to depart from the principles of the constitution, *and its uncontrollable power may prompt the determination*, there is no constitutional authority to check its progress. It may proceed by long and hasty strides in violating the constitution, till nothing but a revolution can check its career. Far different will the case be, when the legislature consists of two branches. If one of them should depart, or attempt to depart, from the principles of the constitution, it will be drawn back by the other. The very apprehension of the event will prevent the departure, or the attempt.[4]

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[1] Sidney's Disc. on Government, ch. 3, § 45.

[2] The Federalist, No. 15. [3] Id. No. 62, 15.

[4] 1 Wilson's Law Lect. 396; The Federalist, No. 62, 63. — Mr. Jefferson was decidedly in favour of a division of the legislative power into two branches, as will be evident from an examination of his Notes on Virginia, (p. 194,) and his Correspondence at the period, when this subject was much discussed.* De Lolme, in his work on the constitution of England, has (ch. 3, p. 214, &c.) some very striking remarks on the same subject, in the passage already cited. He has added: "The result of a division of the executive power is either a more or less speedy

* 2 Pitk. Hist. 283.

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§ 558. Such is an outline of the general reasoning, by which the system of a separation of the legislative power into two branches has been maintained. Experience has shown, that if in all cases it has not been found a complete check to inconsiderate or unconstitutional legislation; yet, that it has, upon many occasions, been found sufficient for the purpose. There is not probably at this moment a single state in the Union, which would consent to unite the two branches into one assembly; though there have not been wanting at all times minds of a high order, which have been led by enthusiasm, or a love of simplicity, or a devotion to theory, to vindicate such a union with arguments, striking and plausible, if not convincing.

§ 559. In the convention, which formed the constitution, upon the resolution moved, "that the national legislature ought to consist of two branches," all the states present, except Pennsylvania, voted in the affirmative.[1] At a subsequent period, however, seven only, of eleven states present, voted in the affirmative; three in the negative, and one was divided.[2] But, although in the convention this diversity of opinion appears,[3] it seems probable, that ultimately, when a national government was decided on, which should exert great controlling authority over the states, all opposition was withdrawn, as the existence of two branches furnished a greater security to the lesser states. It does not appear, that this division of the legislative

establishment of the right of the strongest, or a continued state of war; that of a division of the legislative power is either truth, or general tranquillity." See also Paley's Moral and Political Philosophy, B. 6, ch. 6, 7.

1 Journal of the Convention, 85; 2 Pitk. Hist. 233.

2 Journal of the Convention, 140.

3 Yates's Minutes, 4 Elliot's Debates, 59, 75, 76; Id. 87, 88, 89; Id. 124, 125.

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power became with the people any subject of ardent discussion, or of real controversy. If it had been so, deep traces of it would have been found in the public debates, instead of a general silence. The Federalist touches the subject in but few places, and then principally with reference to the articles of confederation, and the structure of the senate.[1] In fact, the opponents of the constitution felt, that there was additional security given to the states, as such, by their representation in the senate; and as the large states must have a commanding influence upon the actual basis in the house, the lesser states could not but unite in a desire to maintain their own equality in a co-ordinate branch.[2]

§ 560. Having considered the general reasoning, by which the division of the legislative power has been justified, it may be proper, in conclusion, to give a summary of those grounds, which were deemed most important, and which had most influence in settling the actual structure of the constitution of the United States. The question of course had reference altogether to the establishment of the senate; for no one doubted the propriety of establishing a house of representatives, as a depositary of the legislative power, however much any might differ, as to the nature of its composition.

§ 561. In order to justify the existence of a senate with co-ordinate powers, it was said, first, that it was a misfortune incident to republican governments, though in a less degree than to other governments, that those, who administer it, may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and

[1] The Federalist, No. 22, 62, 63.
[2] The Federalist, No. 22; Id. No. 37, 38; Id. No. 39; Id. No. 62.

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dividing the power with a first, must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct bodies, in schemes of usurpation or perfidy; whereas the ambition or corruption of one would otherwise be sufficient. This precaution, it was added, was founded on such clear principles, and so well understood in the United States, that it was superfluous to enlarge on it. As the improbability of sinister combinations would be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance, which would consist with a due harmony in all proper measures, and with the genuine principles of republican government.[1]

§ 562. Secondly. The necessity of a senate was not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples of this sort might be cited without number, and from proceedings in the United States, as well as from the history of other nations. A body, which is to correct this infirmity, ought to be free from it, and consequently ought to be less numerous, and to possess a due degree of firmness, and a proper tenure of office.[2]

§ 563. Thirdly. Another defect to be supplied by a senate lay in the want of a due acquaintance with the objects and principles of legislation. A good government implies two things; fidelity to the objects of the

[1] The Federalist, No. 62.

[2] The Federalist, No. 62; Paley's Moral and Political Philosophy, B. 6, ch. 6, 7; 2 Wilson's Law Lect. 144 to 148.

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government; secondly, a knowledge of the means, by which those objects can be best attained. It was suggested, that in the American governments too little attention had been paid to the last; and that the establishment of a senate upon a proper basis would greatly increase the chances of fidelity, and of wise and safe legislation. What (it was asked) are all the repealing, explaining, and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding, against each preceding session; so many admonitions to the people of the value of those aids, which may be expected from a well-constituted senate?[1]

§ 564. Fourthly. Such a body would prevent too great a mutability in the public councils, arising from a rapid succession of new members; for from a change of men there must proceed a change of opinions, and from a change of opinions, a change of measures. Such instability in legislation has a tendency to diminish respect and confidence abroad, as well as safety and prosperity at home. It has a tendency to damp the ardour of industry and enterprise; to diminish the security of property; and to impair the reverence and attachment, which are indispensable to the permanence of every political institution.[2]

§ 565. Fifthly. Another ground, illustrating the utility of a senate, was suggested to be the keeping alive of a due sense of national character. In respect to foreign nations, this was of vital importance; for in our intercourse with them, if a scrupulous and uniform adherence to just principles was not observed, it must sub-

[1] The Federalist, No. 62.
[2] Id. No. 62.

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ject us to many embarrassments and collisions. It is difficult to impress upon a single body, which is numerous and changeable, a deep sense of the value of national character. A small portion of the praise, or blame of any particular measure can fall to the lot of any particular person; and the period of office is so short, that little responsibility is felt, and little pride is indulged, as to the course of the government.[1]

§ 566. Sixthly. It was urged, that paradoxical as it might seem, the want in some important cases of a due responsibility in the government arises from that very frequency of elections, which in other cases produces such responsibility. In order to be reasonable, responsibility must be limited to objects within the power of the responsible party; and in order to be effectual, it must relate to operations of that power, of which a ready and proper judgment can be formed by the constituents. Some measures have singly an immediate and sensible operation; others again depend on a succession of well connected schemes, and have a gradual, and perhaps unobserved operation. If, therefore, there be but one assembly, chosen for a short period, it will be difficult to keep up the train of proper measures, or to preserve the proper connexion between the past and the future. And the more numerous the body, and the more changeable its component parts, the more difficult it will be to preserve the personal responsibility, as well as the uniform action, of the successive members to the great objects of the public welfare.[2]

§ 567. Lastly. A senate duly constituted would not only operate, as a salutary check upon the representa-

[1] The Federalist, No. 63.

[2] Id. No. 63.

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tives, but occasionally upon the people themselves, against their own temporary delusions and errors. The cool, deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the views of their rulers. But there are particular moments in public affairs, when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures, which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of a body of respectable citizens, chosen without reference to the exciting cause, to check the misguided career of public opinion, and to suspend the blow, until reason, justice, and truth can regain their authority over the public mind.[1] It was thought to add great weight to all these considerations, that history has informed us of no long-lived republic, which had not a senate. Sparta, Rome, Carthage were, in fact, the only states, to whom that character can be applied.[2]

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[1] The Federalist, No. 63.

[2] The Federalist, No. 63. — There are some very striking remarks on this subject in the reasoning of the convention, in the county of Essex, called to consider the constitution proposed for Massachusetts, in 1778,* and which was finally rejected. "The legislative power," said that body, "must not be trusted with one assembly. A single assembly is frequently influenced by the vices, follies, passions, and prejudices of an individual. It is liable to be avaricious, and to exempt itself from the burthens it lays on its constituents. It is subject to ambition; and after a series of years will be prompted to vote itself perpetual. The *long parliament* in England voted itself perpetual, and thereby for a time destroyed the political liberty of the subject. Holland was governed by

* It is contained in a pamphlet, entitled "The Essex Result," and was printed in 1778. I quote the passage from Mr. Savage's valuable Exposition of the Constitution of Massachusetts, printed in the New-England Magazine for March, 1832, p. 9. See also on this subject Paley's Moral Philosophy, B. 6, ch. 7, p. 388; The Federalist, No. 62, 63.

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§ 568. It will be observed, that some parts of the foregoing reasoning apply to the fundamental importance of an actual division of the legislative power; and other parts to the true principles, upon which that division should be subsequently organized, in order to give full effect to the constitutional check. Some parts go to show the value of a senate; and others, what should be its structure, in order to ensure wisdom, experience, fidelity, and dignity in its members. All of it, however, instructs us, that, in order to give it fair play and influence, as a co-ordinate branch of government, it ought to be less numerous, more select, and more durable, than the other branch; and be chosen in a manner, which should combine, and represent different interests with a varied force.[1] How far these objects are attained by the constitution will be better seen, when the details belonging to each department are successively examined.

§ 569. This discussion may be closed by the remark, that in the Roman republic the legislative authority, in the last resort, resided for ages in two distinct political bodies, not as branches of the same legislature, but as distinct and independent legislatures, in each of which an opposite interest prevailed. In one, the patrician;

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one representative assembly, annually elected. They afterwards voted themselves from annual to septennial; then for life; and finally exerted the power of filling up all vacancies, without application to their constituents. The government of Holland is now a tyranny, *though a republic.* The result of a single assembly will be hasty and indigested; and their judgments frequently absurd and inconsistent. There must be a second body to revise with coolness, and wisdom, and to control with firmness, independent upon the first, either for their creation, or existence. Yet the first must retain a right to a similar revision and control over the second."

[1] The Federalist, No. 62, 63.

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in the other, the plebeian predominated. And yet, during the co-existence of these two legislatures, the Roman republic attained to the supposed pinnacle of human greatness.[1]

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[1] The Federalist, No. 34.

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CHAPTER IX.

HOUSE OF REPRESENTATIVES.

§ 570. THE second section of the first article contains the structure and organization of the house of representatives. The first clause is as follows:

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

§ 571. As soon as it was settled, that the legislative power should be divided into two separate and distinct branches, a very important consideration arose in regard to the organization of those branches respectively. It is obvious, that the organization of each is susceptible of very great diversities and modifications, in respect to the principles of representation; the qualification of the electors, and the elected; the term of service of the members; the ratio of representation; and the number, of which the body should be composed.

§ 572. First; the principle of representation. The American people had long been in the enjoyment of the privilege of electing, at least, one branch of the legislature; and, in some of the colonies, of electing all the branches composing the legislature. A house of representatives, under various denominations, such as a house of delegates, a house of commons, or, simply, a house of representatives, emanating directly from, and responsible to, the people, and possessing a distinct and independent legislative authority, was familiar to all the colonies, and was held by them in the highest rever-

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ence and respect. They justly thought, that as the government in general should always have a common interest with the people, and be administered for their good; so it was essential to their rights and liberties, that the most numerous branch should have an immediate dependence upon, and sympathy with, the people.[1] There was no novelty in this view. It was not the mere result of a state of colonial dependence, in which their jealousy was awake to all the natural encroachments of power in a foreign realm. They had drawn their opinions and principles from the practice of the parent country. They knew the inestimable value of the house of commons, as a component branch of the British parliament; and they believed, that it had at all times furnished the best security against the oppressions of the crown, and the aristocracy. While the power of taxation, of revenue, and of supplies, remained in the hands of a popular branch, it was difficult for usurpation to exist for any length of time without check; and prerogative must yield to that necessity, which controlled at once the sword and the purse. No reasoning, therefore, was necessary to satisfy the American people of the advantages of a house of representatives, which should emanate directly from themselves; which should guard their interests, support their rights, express their opinions, make known their wants, redress their grievances, and introduce a pervading popular influence throughout all the operations of the government. Experience, as well as theory, had settled it in their minds, as a fundamental principle of a free government, and especially of a republican government, that no laws

[1] The Federalist, No. 52; 1 Black. Comm. 158, 159; Paley's Moral Philosophy, B. 6, ch. 7; 1 Wilson's Law Lect. 429 to 433; 2 Wilson's Law Lect. 122 to 132.

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ought to be passed without the co-operation and consent of the representatives of the people; and that these representatives should be chosen by themselves without the intervention of any other functionaries to intercept, or vary their responsibility.[1]

§473. The principle, however, had been hitherto applied to the political organization of the state legislatures only; and its application to that of the federal government was not without some diversity of opinion. This diversity had not its origin in any doubt of the correctness of the principle itself, when applied to simple republics; but, the propriety of applying it to cases of confederated republics was affected by other independent considerations. Those, who might wish to retain a very large portion of state sovereignty, in its representative character, in the councils of the Union, would naturally desire to have the house of representatives elected by the state in its political character, as under the old confederation. Those, on the other hand, who wished to impart to the government a national character, would as naturally desire an independent election by the people themselves in their primary meetings. Probably these circumstances had some operation upon the votes given on the question in the convention itself. For it appears, that upon the original proposition in the convention, "That the members of the first branch of the national legislature ought to be elected by the *people* of the several states, six states voted for it, two against it, and two were divided.[2] And upon a subsequent motion to strike out the word "people," and insert in its place the word "legislatures,"

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1 1 Tucker's Black. Comm. App. 28.

2 Journal of Convention, May 31, 1787, p. 85, 86, 135; 4 Elliot's Debates, (Yates's Minutes,) 58.

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three states voted in the affirmative and eight in the negative.[1] At a subsequent period a motion, that the representatives should be appointed in such manner as the legislature of each state should direct, was negatived, six states voting in the affirmative, three in the negative, and one being divided; and the final vote in favour of an election by the people was decided by the vote of nine states in the affirmative, one voting in the negative, and one being divided.[2] The result was not therefore obtained without much discussion and argument; though at last an entire unanimity prevailed.[3] It is satisfactory to know, that a fundamental principle of public liberty has been thus secured to ourselves and our posterity, which will for ever indissolubly connect the interests of the people with the interests of the Union.[4] Under the confederation, though the delegates to congress might have been elected by the people, they were, in fact, in all the states except two, elected by the state legislature.[5]

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[1] Journal of Convention, May 31, 1787, p. 103, 104; 4 Elliot's Debates, (1 Yates's Minutes,) 62, 63, 90, 91.

[2] Journal of Convention, June 21, 1787, p. 140, 141, 215; 4 Elliot's Debates, 90, 91, (Yates's Minutes.)

[3] Journal of Convention, p. 216, 233.

[4] Mr. Burke, in his Reflections on the French Revolution, has treated the subject of the mischiefs of an *indirect* choice only by the people of their representatives in a masterly manner. He has demonstrated, that such a system must remove all real responsibility to the people from the representative. Mr. Jefferson has expressed his approbation of the principle of a direct choice in a very qualified manner. He says, "I approve of the greater house being chosen by the people directly. For, though I think a house so chosen will be very inferior to the present congress, *will be very ill qualified to legislate for the Union*, for foreign nations, &c.; yet this evil does not weigh against the good of preserving inviolate the fundamental principle, that the people ought not to be taxed but by representatives chosen immediately by themselves." 2 Jefferson's Corresp. p. 273.

[5] The Federalist, No. 40.

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§ 574. We accordingly find, that in the section under consideration, the house of representatives is required to be composed of representatives chosen by the people of the several states. The choice, too, is to be made immediately by them; so that the power is direct; the influence direct; and the responsibility direct. If any intermediate agency had been adopted, such as a choice through an electoral college, or by official personages, or by select and specially qualified functionaries *pro hac vice*, it is obvious, that the dependence of the representative upon the people, and the responsibility to them, would have been far less felt, and far more obstructed. Influence would have naturally grown up with patronage; and here, as in many other cases, the legal maxim would have applied, *causa proxima, non remota, spectatur.* The select body would have been at once the patrons and the guides of the representative; and the people themselves have become the instruments of subverting their own rights and power.

§ 575. The *indirect* advantages from this immediate agency of the people in the choice of their representatives are of incalculable benefit, and deserve a brief mention in this place, because they furnish us with matter for most serious reflection, in regard to the actual operations and influences of republican governments. In the first place, the right confers an additional sense of personal dignity and duty upon the mass of the people. It gives a strong direction to the education, studies, and pursuits of the whole community. It enlarges the sphere of action, and contributes, in a high degree, to the formation of the public manners, and national character. It procures to the common people courtesy and sympathy from their superiors, and diffuses a common confidence, as well as a

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common interest, through all the ranks of society. It awakens a desire to examine, and sift, and debate all public proceedings, and thus nourishes a lively curiosity to acquire knowledge, and, at the same time, furnishes the means of gratifying it. The proceedings and debates of the legislature; the conduct of public officers from the highest to the lowest; the character and conduct of the executive and his ministers; the struggles, intrigues, and conduct of different parties; and the discussion of the great public measures and questions, which agitate and divide the community, are not only freely canvassed, and thus improve and elevate conversation; but they gradually furnish the mind with safe and solid materials for judgment upon all public affairs; and check that impetuosity and rashness, to which sudden impulses might otherwise lead the people, when they are artfully misguided by selfish demagogues, and plausible schemes of change.[1]

§ 576. But this fundamental principle of an immediate choice by the people, however important, would alone be insufficient for the public security, if the right of choice had not many auxiliary guards and accompaniments. It was indispensable, secondly, to provide for the qualifications of the electors. It is obvious, that even when the principle is established, that the popular branch of the legislature shall emanate directly from the people, there still remains a very serious question, by whom and in what manner the choice shall be made. It is a question vital to the system, and in a practical sense decisive, as to the durability and efficiency of the powers of government. Here, there is much room for doubt, and ingenious speculation, and theoretical inqui-

[1] I have borrowed these views from Dr. Paley, and fear only, that by abridging them I have lessened their force. Paley's Moral Philosophy, B. 6, ch. 6. See also 2 Wilson's Law Lect. 124 to 128.

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ry; upon which different minds may arrive, and indeed have arrived, at very different results. To whom ought the right of suffrage, in a free government, to be confided? Or, in other words, who ought to be permitted to vote in the choice of the representatives of the people? Ought the right of suffrage to be absolutely universal? Ought it to be qualified and restrained? Ought it to belong to many, or few? If there ought to be restraints and qualifications, what are the true boundaries and limits of such restraints and qualifications?

§ 577. These questions are sufficiently perplexing and disquieting in theory; and in the practice of different states, and even of free states, ancient as well as modern, they have assumed almost infinite varieties of form and illustration. Perhaps they do not admit of any general, much less of any universal answer, so as to furnish an unexceptionable and certain rule for all ages and all nations. The manners, habits, institutions, characters, and pursuits of different nations; the local position of the territory, in regard to other nations; the actual organizations and classes of society; the influences of peculiar religious, civil, or political institutions; the dangers, as well as the difficulties, of the times; the degrees of knowledge or ignorance pervading the mass of society; the national temperament, and even the climate and products of the soil; the cold and thoughtful gravity of the north; and the warm and mercurial excitability of tropical or southern regions; all these may, and probably will, introduce modifications of principle, as well as of opinion, in regard to the right of suffrage, which it is not easy either to justify or to overthrow.[1]

[1] 1 Black. Comm. 171, 172. — Mr. Justice Blackstone* has remarked,

* 1 Black. Comm. 171.

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§ 578. The most strenuous advocate for universal suffrage has never yet contended, that the right should be absolutely universal. No one has ever been sufficiently visionary to hold, that all persons, of every age, degree, and character, should be entitled to vote in all elections of all public officers. Idiots, infants, minors, and persons insane or utterly imbecile, have been, without scruple, denied the right, as not having the sound judgment and discretion fit for its exercise. In many countries, persons guilty of crimes have also been denied the right, as a personal punishment, or as a security to society. In most countries, females, whether married or single, have been purposely excluded from voting, as interfering with sound policy, and the harmony of social life. In the few cases, in which they have been permitted to vote, experience has not justified the conclusion, that it has been attended with any correspondent advantages, either to the public, or to themselves. And yet it would be extremely difficult, upon any mere theoretical reasoning, to establish any satisfactory principle,

"That the true reason of requiring any qualification with regard to property in voters is to exclude such persons, as are in so mean a situation, that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man a larger share in elections, than is consistent with general liberty. If it were probable, that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications, whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose will may be supposed independent, more thoroughly upon a level with each other." Similar reasoning might be employed to justify other exclusions, besides those founded upon a want of property.

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upon which the one half of every society has thus been systematically excluded by the other half from all right of participating in government, which would not, at the same time, apply to and justify many other exclusions. If it be said, that all men have a natural, equal, and unalienable right to vote, because they are all born free and equal; that they all have common rights and interests entitled to protection, and therefore have an equal right to decide, either personally or by their chosen representatives, upon the laws and regulations, which shall control, measure, and sustain those rights and interests; that they cannot be compelled to surrender, except by their free consent, what, by the bounty and order of Providence, belongs to them in common with all their race; — what is there in these considerations, which is not equally applicable to females, as free, intelligent, moral, responsible beings, entitled to equal rights, and interests, and protection, and having a vital stake in all the regulations and laws of society? And if an exception, from the nature of the case, could be felt in regard to persons, who are idiots, infants, and insane; how can this apply to persons, who are of more mature growth, and are yet deemed minors by the municipal law? Who has an original right to fix the time and period of pupilage, or minority? Whence was derived the right of the ancient Greeks and Romans to declare, that women should be deemed never to be of age, but should be subject to perpetual guardianship? Upon what principle of natural law did the Romans, in after times, fix the majority of females, as well as of males, at twenty-five years?[1] Who has a right to say, that in England it shall, for some purposes, be at fourteen, for others, at seventeen, and for all, at twenty-one years; while, in

[1] 1 Black. Comm. 463, 464.

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France, a person arrives, for all purposes, at majority, only at thirty years, in Naples at eighteen, and in Holland at twenty-five?[1] Who shall say, that one man is not as well qualified, as a voter, at eighteen years of age, as another is at twenty-five, or a third at forty; and far better, than most men are at eighty? And if any society is invested with authority to settle the matter of the age and sex of voters, according to its own view of its policy, or convenience, or justice, who shall say, that it has not equal authority, for like reasons, to settle any other matter regarding the rights, qualifications, and duties of voters?[2]

§ 579. The truth seems to be, that the right of voting, like many other rights, is one, which, whether it has a fixed foundation in natural law or not, has always been treated in the practice of nations, as a strictly civil right, derived from, and regulated by each society, according to its own circumstances and interests.[3] It is difficult, even in the abstract, to conceive how it could have otherwise been treated. The terms and conditions, upon which any society is formed and organized, must essentially depend upon the will of those, who are associated; or at least of those, who constitute a majority, actually controlling the rest. Originally, no man could have any right but to act for himself; and the power to choose a chief magistrate or other officer to exercise dominion or authority over others, as well as himself, could arise only upon a joint consent of the others to such appointment; and their consent might be qualified exactly according to their

[1] 1 Black. Comm. 463, 464. [2] Id. 171.

[3] 1 Black. Comm. 171; 2 Wilson's Law Lect. 130; Montesquieu's Spirit of Laws, B. 11. ch. 6; 1 Tucker's Black. Comm. App. 52, 53.

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own interests, or power, or policy. The choice of representatives to act in a legislative capacity is not only a refinement of much later stages of actual association and civilization, but could scarcely occur, until the society had assumed to itself the right to introduce such institutions, and to confer such privileges, as it deemed conducive to the public good, and to prohibit the existence of any other. In point of fact, it is well known, that representative legislative bodies, at least in the form now used, are the peculiar invention of modern times, and were unknown to antiquity. If, then, every well organized society has the right to consult for the common good of the whole, and if, upon the principles of natural law, this right is conceded by the very union of society, it seems difficult to assign any limit to this right, which is compatible with the due attainment of the end proposed. If, therefore, any society shall deem the common good and interests of the whole society best promoted under the particular circumstances, in which it is placed, by a restriction of the right of suffrage, it is not easy to state any solid ground of objection to its exercise of such an authority. At least, if any society has a clear right to deprive females, constituting one half of the whole population, from the right of suffrage, (which, with scarcely an exception, has been uniformly maintained,) it will require some astuteness to find upon what ground this exclusion can be vindicated, which does justify, or at least excuse, many other exclusions.[1] Government (to use the pithy language of Mr. Burke) has been deemed a practical thing, made for the happiness of mankind,

[1] See Paley's Moral Philosophy, B. 6, ch. 7, p. 392; 1 Black. Comm. 171; Montesquieu's Spirit of Laws, B. 11. ch. 6.

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and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians.[1]

§ 580. Without laying any stress upon this theoretical reasoning, which is brought before the reader, not so much because it solves all doubts and objections, as because it presents a view of the serious difficulties attendant upon the assumption of an original and unalienable right of suffrage, as originating in natural law, and independent of civil law, it may be proper to state, that every civilized society has uniformly fixed, modified, and regulated the right of suffrage for itself, according to its own free will and pleasure. Every constitution of government in these United States has assumed, as a fundamental principle, the right of the people of the state to alter, abolish, and modify the form of its own government, according to the sovereign pleasure of the people.[2] In fact, the people of each state have gone much farther, and settled a far more critical question, by deciding, who shall be the voters, entitled to approve and reject the constitution framed by a delegated body under their direction. In the adoption of no state constitution has the assent been asked of any but the qualified voters; and women, and minors, and other persons, not recognised as voters by existing laws, have been studiously excluded. And yet the constitution has been deemed entirely obligatory upon them, as well as upon the minority, who voted against it. From this it will be seen, how little, even in the most free of republican governments, any abstract right of suffrage, or any original and indefeasible privilege, has been recognised in practice. If this consideration

[1] Burke's Letter to the Sheriffs of Bristol in 1777.

[2] See Locke on Government, p. 2, § 149, 227.

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does not satisfy our minds, it at least will prepare us to presume, that there may be an almost infinite diversity in the established right of voting, without any state being able to assert, that its own mode is exclusively founded in natural justice, or is most conformable to sound policy, or is best adapted to the public security. It will teach us, that the question is necessarily complex and intricate in its own nature, and is scarcely susceptible of any simple solution, which shall rigidly apply to the circumstances and conditions, the interests and the feelings, the institutions and the manners of all nations.[1] What may best promote the public weal, and secure the public liberty, and advance the public prosperity in one age or nation, may totally fail of similar results under local, physical, or moral predicaments essentially different.

§ 581. It would carry us too far from the immediate object of these Commentaries to take a general survey of the various modifications, under which the right of suffrage, either in relation to laws, or magistracy, or even judicial controversies, has appeared in different nations in ancient and modern times. The examples of Greece and Rome, in ancient times, and of England in modern times, will be found most instructive.[2] In England, the qualifications of voters, as also the modes of representation, are various, and framed upon no common principle. The counties are represented by knights, elected by the proprietors of lands, who are freeholders;[3] the boroughs and cities are represented

[1] Dr. Lieber's Encyclopædia Americana, art. *Constitution.*

[2] See 3 Adams's Amer. Constitut. Letter 6, p. 263, &c. p. 440, &c. 1 Black. Comm. 171, 172, 173; Montesquieu's Spirit of Laws, Book 11, ch. 13; Id. B. 2, ch. 2.

[3] 1 Black. Comm. 172, 173; Paley's Moral Philosophy, B. 6, ch. 7; The Federalist, No. 57.

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by citizens and burgesses, or others chosen by the citizens or burgesses, according to the qualifications prescribed by custom, or by the respective charters and by-laws of each borough, or city.[1] In these, the right of voting is almost infinitely varied and modified.[2] In the American colonies, under their charters and laws, no uniform rules in regard to the right of suffrage existed. In some of the colonies the course of the parent country was closely followed, so that freeholders alone were voters;[3] in others a very near approach was made to universal suffrage among the males of competent age; and in others, again, a middle principle was adopted, which made taxation and voting dependent upon each other, or annexed to it the qualification of holding some personal estate, or the privilege of being a freeman, or the eldest son of a freeholder of the town or corporation.[4] When the revolution brought about the separation of the colonies, and they formed themselves into independent states, a very striking diversity was observable in the original constitutions adopted by them;[5] and a like diversity has pervaded all the constitutions of the new states, which have since grown up, and all the revised constitutions of the old states, which have received the final ratification of the people. In some of the states the right of suffrage

[1] 1 Black. Comm. 172 to 175; 1 Tuck. Black. Comm. App. 209 to 212. See also Burke's Reflections on the French Revolution.

[2] See Dr. Lieber's Encyclopædia Americana, art. *Election; Great Britain, Constitution of.*

[3] See Jefferson's Notes on Virginia, 191; 1 Tucker's Black. Comm. App. 96 to 100.

[4] See Charter of Rhode-Island, 1663, and Rhode-Island Laws, (edit. 1798,) p. 114. See also Connecticut Charter, 1662, and Massachusetts Charters, 1628 and 1692.

[5] 2 Wilson's Law Lect. 132 to 138; 2 Pitkin's Hist. ch. 19, p. 294 to 316.

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depends upon a certain length of residence, and payment of taxes; in others, upon mere citizenship and residence; in others, upon the possession of a freehold, or some estate of a particular value, or upon the payment of taxes, or performance of some public duty, such as service in the militia, or on the highways.[1] In no two of these state constitutions will it be found, that the qualifications of the voters are settled upon the same uniform basis.[2] So that we have the most abundant proofs, that among a free and enlightened people, convened for the purpose of establishing their own forms of government, and the rights of their own voters, the question, as to the due regulation of the qualifications, has been deemed a matter of mere state policy, and varied to meet the wants, to suit the prejudices, and to foster the interests of the majority. An absolute, indefeasible right to elect or be elected, seems never to have been asserted on one side, or denied on the other; but the subject has been freely canvassed, as one of mere civil polity, to be arranged upon such a basis, as the majority may deem expedient with reference to the moral, physical, and intellectual condition of the particular state.[3]

§ 582. It was under this known diversity of constitutional provisions in regard to state elections, that the convention, which framed the constitution of the Union,

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[1] 2 Wilson's Law Lect. 132 to 138. — Mr. Hume, in his Idea of a Perfect Commonwealth, proposes, that the representatives should be freeholders of 20*l* a year, and householders worth 500*l*. 1 Hume's Essays, Essay 16, p. 526.

[2] See The Federalist, No. 54; 2 Wilson's Law Lectures, 132 to 138; 2 Pitkin's Hist. 294 to 316.

[3] Dr. Lieber's Encyclopædia Americana, art. *Constitution of the United States.* The Federalist, No. 52 to 54.

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was assembled. The definition of the right of suffrage is very justly regarded, as a fundamental article of a republican government. It was incumbent on the convention, therefore, to define and establish this right in the constitution. To have left it open for the occasional regulation of congress would have been improper, for the reason just mentioned. To have submitted it to the legislative discretion of the states, would have been improper, for the same reason; and for the additional reason, that it would have rendered too dependent on the state governments, that branch of the federal government, which ought to be dependent on the people alone.[1] Two modes of providing for the right of suffrage in the choice of representatives were presented to the consideration of that body. One was to devise some plan, which should operate uniformly in all the states, on a common principle; the other was to conform to the existing diversities in the states, thus creating a mixed mode of representation. In favour of the former course, it might be urged, that all the states ought, upon the floor of the house of representatives, to be represented equally; that this could be accomplished only by the adoption of a uniform qualification of the voters, who would thus express the same public opinion of the same body of citizens throughout the Union; that if freeholders alone in one state chose the representatives; and in another all male citizens of competent age; and in another all freemen of particular towns or corporations; and in another all taxed inhabitants; it would be obvious, that different interests and classes would obtain exclusive representations in different states; and thus the great objects of the

[1] The Federalist, No. 52.

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constitution, the promotion of the general welfare and common defence, might be unduly checked and obstructed; that a uniform principle would at least have this recommendation, that it could create no well-founded jealousies among the different states, and would be most likely to satisfy the body of the people by its perfect fairness, its permanent equality of operation, and its entire independence of all local legislation, whether in the shape of state laws, or of amendments to state constitutions.

§ 583. On the other hand, it might be urged in favour of the latter course, that the reducing of the different qualifications, already existing in the different states, to one uniform rule, would have been a very difficult task, even to the convention itself, and would be dissatisfactory to the people of different states.[1] It would not be very easy for the convention to frame any rule, which would satisfy the scruples, the prejudices, or the judgments of a majority of its own members. It would not be easy to induce Virginia to give up the exclusive right of freeholders to vote; or Rhode-Island, or Connecticut, the exclusive right of freemen to vote; or Massachusetts, the right of persons possessing a given value of personal property to vote; or other states, the right of persons paying taxes, or having a fixed residence, to vote. The subject itself was not susceptible of any very exact limitations upon any general reasoning. The circumstances of different states might create great diversities in the practical operation of any uniform system. And the natural attachments, which long habit and usage had sanctioned, in regard to the exercise of the

[1] The Federalist, No. 52.

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right, would enlist all the feelings, and interests, and opinions of every state against any substantial change in its own institutions. A great embarrassment would be thus thrown in the way of the adoption of the constitution itself, which perhaps would be thus put at hazard, upon the mere ground of theoretical propriety.[1]

§ 584. Besides; it might be urged, that it is far from being clear, upon reasoning or experience, that uniformity in the composition of a representative body is either desirable or expedient, founded in sounder policy, or more promotive of the general good, than a mixed system, embracing, and representing, and combining distinct interests, classes, and opinions.[2] In England the house of commons, as a representative body, is founded upon no uniform principle, either of numbers, or classes, or

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[1] Rawle on the Constitution, ch. 4, p. 40.

[2] Mr. Burke manifestly thought, that no system of representative government could be safe without a large admixture of different persons and interests. "Nothing," says he, "is a due and adequate representation of a state, that does not represent its ability, as well as its property. But as ability is a vigorous and active principle, and as property is sluggish, inert, and timid, it can never be safe from the invasion of ability, unless it be, out of all proportion, predominant in the representation." * In a subsequent page of his Reflections on the French Revolution, he discusses the then favorite theory of representation proposed for the constitution of France, upon the triple basis of territory, population, and taxation, and demonstrates, with great clearness, its inconvenience, inequality, and inconsistency. The representatives, too, were to be chosen indirectly, by electors appointed by electors, who were again chosen by other electors. "The member," says Mr. Burke, "who goes to the National Assembly, is not chosen by the people, nor accountable to them. There are three elections before he is chosen; two sets of magistrates intervene between him and the primary assembly, so as to render him, as I have said, an ambassador of a state, and not the representative of the people within a state." So much for mere theory in the hands of visionary and speculative statesmen.

* Burke's Reflections on the French Revolution. See also Paley's Moral Philosophy, B. 6, ch. 7.

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places.[1] The representation is made up of persons chosen by electors having very different, and sometimes very discordant qualifications; in some cases, property is exclusively represented; in others, particular trades and pursuits; in others, inhabitancy and corporate privileges; in others, the reverse. In some cases, the representatives are chosen by very numerous voters; in others, by very few; in some cases, a single patron possesses the exclusive power of choosing representatives, as in nomination boroughs; in others, very populous cities have no right to choose any representatives at all; in some cases, a select body, forming a very small part of the inhabitants, has the exclusive right of choice; in others, non-residents can control the whole election; in some places a half million of inhabitants possess the right to choose no more representatives, than are assigned to the most insignificant borough, with scarcely an inhabitant to point out its local limits.[2] Yet this inequality has never, of itself, been deemed an exclusive evil in Great Britain.[3] And in every system of reform, which has found public favour in that country, many of these diversities have been embodied from choice, as important checks upon undue legislation, as facilitating the representation of different interests, and

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[1] Paley's Moral Philosophy, B. 6, ch. 7, p. 380, 381 to 394; DeLolme, Const. of England, B. 1, ch. 4, p. 61, 62; 1 Kent's Comm. 219; 1 Tuck. Black. App. 209, 210, 211; 1 Wilson's Law Lect. 431.

[2] Mr. Jefferson, in his Notes on Virginia, insists with great earnestness upon the impropriety of allowing to different counties in that state, the same number of representatives, without any regard to their relative population.* And yet in the new constitution adopted in 1830–1831, Virginia has adhered to the same system in principle, and her present representation is apportioned upon an arbitrary and unequal basis.

[3] Burke's Reflections on the French Revolution.

* Jefferson's Notes, 122.

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different opinions; and as thus securing, by a well-balanced and intelligent representation of all the various classes of society, a permanent protection of the public liberties of the people, and a firm security of the private rights of persons and property.[1] Without, therefore, asserting, that such a mixed representation is absolutely, and under all circumstances, the best, it might be safely affirmed, that the existence of various elements in the composition of the representative body is not necessarily inexpedient, unjust, or insecure; and, in many cases, may promote a wholesome restraint upon partial plans of legislation, and ensure a vigorous growth to the general interests of the Union. The planter, the farmer, the mechanic, the merchant, and the manufacturer might thus be brought to act together, in a body representing each; and thus superior intelligence, as well as mutual good-will and respect, be diffused through the whole of the collective body.[2]

§ 585. In the judgment of the convention, this latter reasoning seems to have obtained a decisive influence,

[1] Mr. Wilson in his Lectures, considers the inequality of representation in the house of commons, as a prominent defect in the British government. But his objections are mainly urged against the mode of apportioning the representation, and not against the qualifications of the voters.* In the reform now under the consideration of parliament, there is a very great diversity of electoral qualifications allowed, and apparently supported by all parties. Mr. Burke in his Reflections on the French Revolution, holds doctrines essentially different in many points from Mr. Wilson. See also in Winne's Eunomus, Dialogue 3, § 18, 19, 20, an ingenious defence of the existing system in Great-Britain.

[2] See Paley's Moral Philosophy, B. 6, ch. 7, p. 380; Id. 394. See also Franklin's Remarks; 2 Pitk. Hist. 242. — Dr. Paley has placed the inequalities of representation in the house of commons in a strong light; and he has attempted a vindication of it, which, whether satisfactory or not, is at least urged with great skill and ingenuity of reasoning. Paley's Moral Philosophy, B. 6, ch. 7, p. 391 to 400. See also 2 Pitk. Hist. 242.

* 1 Wilson's Lect. 430 to 433.

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and to have established the final result; and it was accordingly declared, in the clause under consideration, that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." [1] Upon this clause (which was finally adopted by a unanimous vote) the Federalist has remarked, "the provision made by the convention appears to be the best, that lay within their option. It must be satisfactory to every state, because it is conformable to the standard already established by the state itself. It will be safe to the United States, because, being fixed by the state constitutions, it is not alterable by the state governments; and it cannot be feared, that the people of the states will alter this part of their constitutions in such a manner, as to abridge the rights secured to them by the federal constitution." [2] The remark, in a general sense, is true; but the provision has not, in fact, and may not have, all the security against alteration by the state governments, which is so confidently affirmed. At the time, when it was made, Connecticut and Rhode-Island were acting under the royal charters of 1662 and 1663; and their legislatures possessed the power of modifying, from time to time, the right of suffrage. Rhode-Island yet continues without any written constitution, unless the charter of 1663 is to be deemed such. In Maryland successive legislatures may change the form of government; and in other states amendments may be, and indeed have been adopted,

[1] Journal of Convention, 216, 233. — The clause, however, did not pass without opposition; a motion to strike out was made and negatived, seven states voting in the negative, one in the affirmative, and one being divided. Journ. of Convention, 7 Aug. p. 233.

[2] The Federalist, No. 52. See also 2 Elliot's Debates, 38; 2 Wilson's Law Lect. 123, 130, 131.

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materially varying the rights of suffrage.[1] So that absolute stability is not to be predicated of the existing modes of suffrage ; though there is little practical danger of any changes, which would work unfavourably to popular rights.

§ 586. In the third place, the term of service of representatives. In order to ensure permanent safety to the liberties of the people, other guards are indispensable, besides those, which are derived from the exercise of the right of suffrage and representation. If, when the legislature is once chosen, it is perpetual, or may last during the life of the representatives; and in case of death, or resignation only, the vacancy is to be supplied by the election of new representatives ; it is easy to perceive, that in such cases there will be but a very slight check upon their acts, on the part of the people. In such cases, if the legislative body should be once corrupted, the evil would be past all remedy, at least without some violent revolution, or extraordinary calamity.[2] But, when different legislative bodies are to succeed each other at short intervals, if the people disapprove of the present, they may rectify its faults, by the silent exercise of their power in the succeeding election. Besides, a legislative assembly, which is sure to be separated again, and its members soon return to private life, will feel its own interests, as well as duties, bound up with those of the community at large.[3] It may, therefore, be safely laid down, as a fundamental axiom of republican governments, that there must be a dependence on, and responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon

[1] See 2 Wilson's Law Lect. note (d,) 136, 137.
[2] 1 Black. Comm. 189 ; Montesquieu's Spirit of Laws, B. 11, ch. 6.
[3] 1 Black. Comm. 189.

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his acts and opinions, and produce a sympathy between him and his constituents.[1] If, when he is once elected, he holds his place for life, or during good behaviour, or for a long period of years, it is obvious, that there will be little effective control exercised upon him; and he will soon learn to disregard the wishes, the interests, and even the rights of his constituents, whenever they interfere with his own selfish pursuits and objects. When appointed, he may not, indeed, consider himself, as exclusively their representative, bound by their opinions, and devoted to their peculiar local interests, although they may be wholly inconsistent with the good of the Union. He ought rather to deem himself a representative of the nation, and bound to provide for the general welfare, and to consult for the general safety.[2] But still, in a just sense, he ought to feel his responsibility to them, and to act for them in common with the rest of the people; and to deem himself, in an emphatic manner, their defender, and their friend.[3]

§ 587. Frequent elections are unquestionably the soundest, if not the sole policy, by which this depend-

[1] The Federalist, No. 52, 57.

[2] 1 Black. Comm. 159. See also Dr. Franklin's Remarks; 2 Pitk. Hist. 242; Rawle on Const. 38, 39. But see 1 Tucker's Black. Comm. App. 193; 4 Elliot's Debates, 209. — Mr. Burke in his Speech to the Electors of Bristol, in 1774, has treated this subject with great candour, and dignity, and ability. "Parliament," said he, "is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates. But parliament is a deliberative assembly of one nation with one interest, that of the whole; where not local purposes, not local prejudices, ought to guide; but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a member of parliament." See, on this subject, 1 Tuck. Black. Comm. App. 193; 2 Lloyd's Deb. in 1789, p. 199 to 217.

[3] See Burke's Speech to the Electors of Bristol in 1774.

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ence and sympathy and responsibility can be effectually secured.[1] But the question, what degree of frequency is best calculated to accomplish that object is not susceptible of any precise and universal answer, and must essentially depend upon very different considerations in different nations, and vary with their size, their age, their conditions, their institutions, and their local peculiarities.[2]

§ 588. It has been a current observation, that "where annual elections end, tyranny begins."[3] But this remark, like many others of a general nature, is open to much question. There is no pretence, that there is any natural connexion between the period of a year, or any other exact revolution of time, and the political changes fit for governments or magistrates. Why is the election of a magistrate or representative more safe for one year, than for two years? For one year, more than for six months? For six months, more than for three months? It is certainly competent for a state to elect its own rulers, daily, or weekly, or monthly, or annual-

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[1] The Federalist, No. 52, 57.

[2] Dr. Paley, with his usual practical sense, has remarked, in regard to the composition, and tenure of office, of the British house of commons, that, "the number, the fortune, and quality of the members; the variety of interests and characters among them; *above all, the temporary duration of their power*, and the change of men, which every new election produces, are so many securities to the public, as well against the subjection of their judgments to any external dictation, as against the formation of a junto in their own body, sufficiently powerful to govern their decisions. The representatives are so intermixed with the constituents, and the constituents with the rest of the people, that they cannot, without a partiality too flagrant to be endured, impose any burthen upon the subject, in which they do not share themselves. Nor scarcely can they adopt an advantageous regulation, in which their own interests will not participate of the advantage." Paley's Moral Philosophy, B. 6, ch. 7.

[3] The Federalist, No. 53. See Montesquieu's Spirit of Laws, B. 2, ch. 3.

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ly, or for a longer period, if it is deemed expedient. In this respect, it must be, or ought to be, governed by its own convenience, interests, and safety. It is, therefore, a question of sound policy, dependent upon circumstances, and not resolvable into any absolute elements dependent upon the revolution or return of natural seasons.[1] The aim of every political constitution is, or ought to be, first to obtain for rulers men, who possess most wisdom to discern, and most virtue to pursue the common good of the society; and, in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue their public trust.[2] Various means may be resorted to for this purpose; and doubtless one of the most efficient is the frequency of elections. But who is there, that will not perceive, upon the slightest examination of the subject, what a wide space there is for the exercise of discretion, and for diversity of judgment.

§ 589. Without pretending to go into a complete survey of the subject, in all its bearings, the frequency of elections may be materially affected, as matter of policy, by the extent of the population and territory of a country, the concentration or sparseness of the population, the nature of the pursuits, and employments, and engagements of the people; and by the local and political situation of the nation in regard to contiguous nations. If the government be of small extent, or be concentrated in a single city, it will be far more easy for the citizens to choose their rulers frequently, and to change them without mischief, than it would be, if the territory were large, the population sparse, and the means

[1] The Federalist, No. 52, 53; Montesquieu's Spirit of Laws, B. 2, ch. 3; 1 Elliot's Debates, 30, 31, 39.

[2] The Federalist, No. 57; 2 Elliot's Debates, 42.

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of intercourse few and liable to interruption. If all the inhabitants, who are to vote, reside in towns and villages, there will be little inconvenience in assembling together at a short notice to make a choice. It will be far otherwise, if the inhabitants are scattered over a large territory, and are engaged in agricultural pursuits, like the planters and farmers of the southern and western states, who must meet at a distance from their respective homes, and at some common place of assembling. In cases of this sort, the sacrifice of time necessary to accomplish the object, the expenses of the journey, the imperfect means of communication, the slow progress of interchanges of opinion, would naturally diminish the exercise of the right of suffrage. There would be great danger, under such circumstances, that there would grow up a general indifference or inattention to elections, if they were frequent, since they would create little interest, and would involve heavy charges and burthens. The nature of the pursuits and employments of the people must also have great influence in settling the question. If the mass of the citizens are engaged in employments, which take them away for a long period from home, such as employments in the whale and cod fisheries, in the fur-trade, in foreign and distant commerce, in periodical caravans, or in other pursuits, which require constant attention, or long continued labours at particular seasons; it is obvious, that frequent elections, which should interfere with their primary interests and objects, would be at once inconvenient, oppressive, and unequal. They would enable the few to obtain a complete triumph and ascendency in the affairs of the state over the many. Besides, the frequency of elections must be subject to other considerations, affecting the general comfort and convenience, as well

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of rulers, as of electors. In the bleak regions of Lapland, and the farther north, and in the sultry and protracted heats of the south, a due regard must be had to the health of the inhabitants, and to the ordinary means of travelling. If the territory be large, the representatives must come from great distances, and are liable to be retarded by all the varieties of climate, and geological features of the country; by drifts of impassable snows; by sudden inundations; by chains of mountains; by extensive prairies; by numerous streams; by sandy deserts.[1]

§ 590. The task of legislation, too, is exceedingly different in a small state, from what it is in a large one; in a state engaged in a single pursuit, or living in pastoral simplicity, from what it is in a state engaged in the infinitely varied employments of agriculture, manufacture, and commerce, where enterprise and capital rapidly circulate; and new legislation is constantly required by the new fortunes of society. A single week might suffice for the ordinary legislation of a state of the territorial extent of Rhode-Island; while several months would scarcely suffice for that of New-York. In Great-Britain a half year is consumed in legislation for its diversified interests and occupations; while a week would accomplish all, that belongs to that of Lapland or Greenland, of the narrow republic of Geneva, or of the subordinate principalities of Germany. Athens might legislate, without obstructing the daily course of common business, for her own meagre territory; but when Rome had become the mistress of the world, the year seemed too short for all the exigencies of her sovereignty. When she deliberated for a world, she

[1] 1 Elliot's Debates, 33, Ames's Speech.

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felt, that legislation, to be wise or safe, must be slow and cautious; that knowledge, as well as power, was indispensable for the true government of her provinces.

§ 591. Again; the local position of a nation in regard to other nations may require very different courses of legislation, and very different intervals of elections, from what would be dictated by a sense of its own interest and convenience under other circumstances. If it is surrounded by powerful and warlike neighbours, its own government must be invested with proportionately prompt means to act, and to legislate, in order to repel aggressions, and secure its own rights. Frequent changes in the public councils might not only leave it exposed to the hazard of having no efficient body in existence to act upon any sudden emergency, but also, by the fluctuations of opinion, necessarily growing out of these changes, introduce imbecility, irresolution, and the want of due information into those councils. Men, to act with vigour and effect, must have time to mature measures, and judgment and experience, as to the best method of applying them. They must not be hurried on to their conclusions by the passions, or the fears of the multitude. They must deliberate, as well as resolve. If the power drops from their hands before they have an opportunity to carry any system into full effect, or even to put it on its trial, it is impossible, that foreign nations should not be able, by intrigues, by false alarms, and by corrupt influences, to defeat the wisest measures of the best patriots.

§ 592. One other consideration of a general nature deserves attention. It is, that while, on the one hand, constantly recurring elections afford a great security to public liberty, they are not, on the other hand, without some dangers and inconveniences of a formidable

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nature. The very frequency of elections has a tendency to create agitations and dissensions in the public mind; to nourish factions, and encourage restlessness, to favour rash innovations in domestic legislation and public policy; and to produce violent and sudden changes in the administration of public affairs, founded upon temporary excitements and prejudices.[1]

§ 593. It is plain, that some of the considerations, which have been stated, must apply with very different force to the condition and interests of different states; and they demonstrate, if not the absurdity, at least the impolicy of laying down any general maxim, as to the frequency of elections to legislative, or other offices.[2] There is quite as much absurdity in laying down, as a general rule, that where annual elections end, tyranny begins, as there is in saying, that the people are free only while they are choosing their representatives, and slaves during the whole period of their service.

§ 594. If we examine this matter by the light of history, or at least of that portion of it, which is best entitled to instruct us on the point, it will be found, that there is no uniformity of practice, or principle, among free nations in regard to elections. In England it is not easy to trace out any very decided course. The history of parliament, after magna charta, proves, that that body had been accustomed usually to assemble once a year; but, as these sessions were dependent upon the good pleasure and discretion of the crown, very long and inconvenient intermissions occasionally

[1] See Mr. Ames's Speech, 1 Elliot's Debates, 31, 33; Ames's Works, 20, 24.

[2] Montesquieu's Spirit of Laws, B. 2, ch. 3; 1 Elliot's Debates, 30 to 42.

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occurred, from royal contrivance, ambition, or policy.[1] But, even when parliament was accustomed to sit every year, the members were not chosen every year. On the contrary, as the dissolution of parliament was solely dependent on the will of the crown, it might, and formerly it sometimes did happen, that a single parliament lasted through the whole life of the king, who convened it.[2] To remedy these grievances, it was provided by a statute, passed in the reign of Charles the Second, that the intermissions should not be protracted beyond the period of three years; and by a subsequent statute of William and Mary, that the same parliament should not sit longer than three years, but be, at the end of that period, dissolved, and a new one elected. This period was, by a statute of George the First, prolonged to seven years, after an animated debate; and thus septennial became a substitute for triennial parliaments.[3] Notwithstanding the constantly increasing influence of the house of commons, and its popular cast of opinion and action, more than a century has elapsed without any successful effort, or even any general desire, to change the duration of parliament. So that, as the English constitution now stands, the parliament must expire, or die a natural death, at the end of the seventh year, and not sooner, unless dissolved by the royal prerogative.[4] Yet no man, tolerably well acquainted with the history of Great Britain for the last century, would venture to affirm, that the people had not enjoyed a higher degree of liberty and

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1 The Federalist, No. 52.

2 1 Black. Comm. 189, and note.

3 1 Black. Comm. 189; The Federalist, No. 52, 53; 1 Elliot's Debates, 37, 39; 2 Elliot's Debates, 42.

4 1 Black. Comm. 189; The Federalist, No. 52.

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influence in all the proceedings of the government, than ever existed in any antecedent period.

§ 595. If we bring our inquiries nearer home, it will be found, that the history of the American colonies before the revolution affords an equally striking proof of the diversity of opinion and usage. It is very well known, that the principle of representation in one branch of the legislature was (as has been already stated) established in all the colonies. But the periods of election of the representatives were very different. They varied from a half-year to seven years. In Virginia the elections were septennial; in North and South-Carolina, biennial; in Massachusetts, annual; in Connecticut and Rhode-Island, semi-annual.[1] It has been very justly remarked by the Federalist, that there is not any reason to infer, from the spirit and conduct of the representatives of the people prior to the revolution, that biennial elections would have been dangerous to the public liberties. The spirit, which every where displayed itself at the commencement of the struggle, and which vanquished the obstacles to independence, is the best of proofs, that a sufficient portion of liberty had been every where enjoyed to inspire both a sense of its worth, and a zeal for its proper enlargement. This remark holds good, as well with regard to the then colonies, whose elections were least frequent, as to those, whose elections were most frequent. Virginia was the colony, which stood first in resisting the parliamentary encroachments of Great Britain; it was the first also in espousing, by a public act, the resolution of independence. Yet her house of representatives

[1] The Federalist, No. 52; 1 Elliot's Debates, 41, 42; 2 Elliot's Debates, 42; 3 Elliot's Debates, 40.

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was septennial.[1] When, after the revolution, the states freely framed and adopted their own constitutions of government, a similar, though not so marked a diversity of opinion, was exhibited. In Connecticut, until her recent constitution, the representatives were chosen semi-annually; in Rhode-Island they are still chosen semi-annually; in South-Carolina, Tennessee, Missouri, Illinois, and Louisiana they are chosen biennially; and in the rest of the states annually.[2] And it has been justly observed in the Federalist,[3] that it would not be easy to show, that Connecticut or Rhode-Island is better governed, or enjoys a greater share of rational liberty, than South-Carolina, (or any of the other states having biennial elections;) or, that either the one or the other of these states is distinguished, in these respects, and by these causes, from the states, whose elections are different from both.

§ 596. These remarks are sufficient to establish the futility of the maxim alluded to, respecting the value of annual elections. The question, how frequent elections should be, and what should be the term of service of representatives, cannot be answered in any universal form, applicable to all times, and all nations.[4] It is very complex in its nature, and must ultimately resolve itself into a question of policy and sound discretion, with reference to the particular condition and circumstances of each nation, to which it is sought to be applied. The same fundamental principles of government may require very different, if not entirely opposite practices in different states. There is great wis-

[1] The Federalist, No. 52.

[2] Dr. Lieber's Encycl. Americana, art. *Constitutions of the United States*; 3 Elliot's Debates, 260; 1 Kent. Comm. 215.

[3] The Federalist, No. 53; 3 Elliot's Debates, 260.

[4] 1 Elliot's Debates, 40, 41, 42.

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dom in the observations of one of our eminent statesmen on this subject. "It is apparent," said he, "that a delegation for a very short period, as for a single day, would defeat the design of representation. The election in that case would not seem to the people to be of any importance, and the person elected would think as lightly of his appointment. The other extreme is equally to be avoided. An election for a long term of years, or for life, would remove the member too far from the control of the people, would be dangerous to liberty, and in fact repugnant to the purposes of the delegation. The truth, as usual, is placed somewhere between the extremes, and, I believe, is included in this proposition; the term of election must be so long, that the representative may understand the interests of the people; and yet so limited, that his fidelity may be secured by a dependence upon their approbation." [1]

§ 597. The question, then, which was presented to the consideration of the convention, was, what duration of office, on the part of the members of the house of representatives, was, with reference to the structure of the other branches of the legislative department of the general government, best adapted to preserve the public liberty and to promote the general welfare. I say, with reference to the structure of the other branches of the legislative department of the general government, because it is obvious, that the duration of office of the president and senate, and the nature and extent of the powers to be confided to congress, must most materially affect the decision upon this point. Absolute unanimity upon such a subject could hardly be expected; and accordingly it will be found, that no

[1] Mr. Ames's Speech, 1 Elliot's Debates, 30, 31; Ames's Works, 21; 2 Elliot's Debates, 44, 46.

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inconsiderable diversity of opinion was exhibited in the discussions in the convention. It was, in the first instance, decided in a committee of the whole, that the period should be three years, seven states voting in the affirmative, and four in the negative.[1] That period was afterwards struck out by a vote of the convention, seven states voting in the affirmative, three in the negative, and one being divided, and the word "two" was *unanimously* inserted in its stead.[2] In the subsequent revision the clause took the shape, in which it now stands in the constitution.

§ 598. The reasons, which finally prevailed in the convention and elsewhere in favour of biennial elections in preference to any other period, may be arranged under the following heads:

§ 599. In the first place, an argument might properly be drawn from the extent of the country to be governed. The territorial extent of the United States would require the representatives to travel from great distances, and the arrangements, rendered necessary by that circumstance, would furnish much more serious objections with men fit for this service, if limited to a single year, than if extended to two years.[3] Annual elections might be very well adapted to the state legislatures from the facility of convening the members, and from the familiarity of the people with all the general objects of local legislation, when they would be highly inconvenient for the legislature of the Union. If, when convened, the term of congress was of short duration, there would scarcely be time properly to examine and mature

[1] Journal of the Convention, p. 67, 115, 116, 135; 4 Elliot's Debates, (Yates's Minutes,) 70, 71.

[2] Journal of the Convention, p. 141, 207, 216; 1 Elliot's Debates, 30; 4 Elliot's Debates, (Yates's Minutes,) 91, 92.

[3] The Federalist, No. 53; 1 Elliot's Debates, 30, 40, 41, 42.

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measures. A new election might intervene before there had been an opportunity to interchange opinions and acquire the information indispensable for wise and salutary action.[1] Much of the business of the national legislature must necessarily be postponed beyond a single session; and if new men are to come every year, a great part of the information already accumulated will be lost, or be unavoidably open for re-examination before any vote can be properly had.

§ 600. In the next place, however well founded the maxim might be, that where no other circumstances affect the case, the greater the power is, the shorter ought to be its duration; and conversely, the smaller the power, the more safely its duration may be protracted;[2] that maxim, if it applied at all to the government of the Union, was favourable to the extension of the period of service beyond that of the state legislatures. The powers of congress are few and limited, and of a national character; those of the state legislatures are general, and have few positive limitations. If annual elections are safe for a state; biennial elections would not be less safe for the United States. No just objection, then, could arise from this source, upon any notion, that there would be a more perfect security for public liberty in annual than in biennial elections.

§ 601. But a far more important consideration grows out of the nature and objects of the powers of congress. The aim of every political constitution is, or ought to be, first, to obtain for rulers men, who possess most wisdom to discern, and most virtue to pursue, the common good of society; and, in the next place, to take the most effectual precautions for keeping them virtu-

[1] The Federalist, No. 53; 1 Elliot's Debates, 40, 41, 42.
[2] The Federalist, No. 52; Montesquieu's Spirit of Laws, B. 2, ch. 3.

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ous, whilst they continue to hold their public trust. Frequent elections have, without question, a tendency to accomplish the latter object. But too great a frequency will, almost invariably, defeat the former object, and, in most cases, put at hazard the latter. As has been already intimated, it has a tendency to introduce faction, and rash counsels, and passionate appeals to the prejudices, rather than to the sober judgment of the people. And we need not to be reminded, that faction and enthusiasm are the instruments, by which popular governments are destroyed.[2] It operates also, as a great discouragement upon suitable candidates offering themselves for the public service. They can have little opportunity to establish a solid reputation, as statesmen or patriots, when their schemes are liable to be suddenly broken in upon by demagogues, who may create injurious suspicions, and even displace them from office, before their measures are fairly tried.[3] And they are apt to grow weary of continued appeals to vindicate their character and conduct at the polls, since success, however triumphant, is of such short duration, and confidence is so easily loosened. These considerations, which are always of some weight, are especially applicable to services in a national legislature, at a distance from the constituents, and in cases, where a great variety of information, not easily accessible, is indispensable to a right understanding of the conduct and votes of representatives.

§ 602. But the very nature and objects of the national government require far more experience and knowledge, than what may be thought requisite in the

[1] The Federalist, No. 57; 1 Kent's Comm. 215.
[2] Ames's Speech; 1 Elliot's Debates, 33.
[3] 1 Kent's Comm. 215.

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members of a state legislature. For the latter a knowledge of local interests and opinions may ordinarily suffice. But it is far different with a member of congress. He is to legislate for the interest and welfare, not of one state only, but of all the states. It is not enough, that he comes to the task with an upright intention and sound judgment, but he must have a competent degree of knowledge of all the subjects, on which he is called to legislate; and he must have skill, as to the best mode of applying it. The latter can scarcely be acquired, but by long experience and training in the national councils. The period of service ought, therefore, to bear some proportion to the variety of knowledge and practical skill, which the duties of the station demand.[1]

§ 603. The most superficial glance at the relative duties of a member of a state legislature and of those of a member of congress, will put this matter in a striking light. In a single state, the habits, manners, institutions, and laws, are uniform, and all the citizens are more or less conversant with them. The relative bearings of the various pursuits and occupations of the people are well understood, or easily ascertained. The general affairs of the state lie in a comparatively narrow compass, and are daily discussed and examined by those, who have an immediate interest in them, and by frequent communication with each other can interchange opinions.[1] It is very different with the general government. There, every measure is to be discussed with reference to the rights, interests, and pursuits of all the states. When the constitution was adopted, there were thirteen, and there are now twenty-four

[1] The Federalist, No. 53; 1 Elliot's Debates, 30, 37, 39, 40, 41; Id. 220; 2 Elliot's Debates, 42; 1 Kent's Comm. 215.

[2] The Federalist, No. 53, 56.

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states, having different laws, institutions, employments, products, and climates, and many artificial, as well as natural differences in the structure of society, growing out of these circumstances. Some of them are almost wholly agricultural; some commercial; some manufacturing; some have a mixture of all; and in no two of them are there precisely the same relative adjustments of all these interests. No legislation for the Union can be safe or wise, which is not founded upon an accurate knowledge of these diversities, and their practical influence upon public measures. What may be beneficial and politic, with reference to the interests of a single state, may be subversive of those of other states. A regulation of commerce, wise and just for the commercial states, may strike at the foundation of the prosperity of the agricultural or manufacturing states. And, on the other hand, a measure beneficial to agriculture or manufactures, may disturb, and even overwhelm the shipping interest. Large and enlightened views, comprehensive information, and a just attention to the local peculiarities, and products, and employments of different states, are absolutely indispensable qualifications for a member of congress. Yet it is obvious, that if very short periods of service are to be allowed to members of congress, the continual fluctuations in the public councils, and the perpetual changes of members will be very unfavourable to the acquirement of the proper knowledge, and the due application of it for the public welfare. One set of men will just have mastered the necessary information, when they will be succeeded by a second set, who are to go over the same grounds, and then are to be succeeded by a third. So, that inexperience, instead of practical wisdom, hasty legislation, instead of sober deliberation, and imperfect projects,

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instead of well constructed systems, would characterize the national government.[1]

§ 604. Congress has power to regulate commerce with foreign nations and among the several states. How can foreign trade be properly regulated by uniform laws without (I do not say some acquaintance, but) a large acquaintance with the commerce, ports, usages, and regulations of foreign states, and with the pursuits and products of the United States? How can trade between the different states be duly regulated, without an accurate knowledge of their relative situation, and climate, and productions, and facilities of intercourse.[2] Congress has power to lay taxes and imposts; but how can taxes be judiciously imposed, and effectively collected, unless they are accommodated to the local circumstances of the several states? The power of taxation, even with the purest and best intentions, might, without a thorough knowledge of the diversified interests of the states, become a most oppressive and ruinous engine of power.[3] It is true, that difficulties of this sort, will occur more frequently in the first operations of the government, than afterwards.[4] But in a growing community, like that of the United States, whose population has already increased from three to thirteen millions within forty years, there must be a perpetual change of measures to suit the new exigencies of agriculture, commerce, and manufactures, and to ensure the vital objects of the constitution. And, so far is it from being true, that the national government has by its familiarity become more simple and facile in its machinery and operations, that it may be affirmed, that a

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[1] The Federalist, No. 53, 56.
[2] Id. [3] Id. [4] Id.

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far more exact and comprehensive knowledge is now necessary to preserve its adjustments, and to carry on its daily operations, than was required, or even dreamed of, at its first institution. Its very success, as a plan of government, has contributed, in no small degree, to give complexity to its legislation. And the important changes in the world during its existence has required very many developements of its powers and duties, which could hardly have occurred, as practical truths to its enlightened founders.

§ 605. There are other powers belonging to the national government, which require qualifications of a high character. They regard our foreign intercourse and diplomatic policy. Although the house of representatives does not directly participate in foreign negotiations and arrangements; yet, from the necessary connexion between the several branches of public affairs, its co-operation with the other departments of the government will be often indispensable to carry them into full effect. Treaties with foreign nations will often require the sanction of laws, not merely by way of appropriations of money to comply with their stipulations; but also to provide suitable regulations to give them a practical operation. Thus, a purchase of territory, like that of Louisiana, would not only require the house of representatives to vote an appropriation of money; and a treaty, containing clauses of indemnity, like the British treaty of 1794, in like manner require an appropriation to give it effect; but commercial treaties, in an especial manner would require many variations and additions to the existing laws in order to adjust them to the general system, and produce, where it is intended, a just reciprocity.[1] It is hardly necessary to say, that a com-

[1] The Federalist, No. 53.

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petent knowledge of the law of nations is indispensable to every statesman; and, that ignorance may not only involve the nation in embarrassing controversies with other nations; but may also involve it in humiliating sacrifices. Congress alone is entrusted with the power to declare war. What would be said of representatives called upon to exercise this ultimate appeal of sovereignty, who were ignorant of the just rights and duties of belligerent and neutral nations?[1]

§ 606. Besides; the whole diplomacy of the executive department, and all those relations with independent powers, which connect themselves with foreign intercourse, are so intimately blended with the proper discharge of legislative duties, that it is impossible, that they should not be constantly brought under review in the public debates. They must frequently furnish matter for censure or praise; for accusation or vindication; for legislative checks, or legislative aids; for powerful appeals to popular favour, or popular resentment; for the ardent contests of party; and even for the graver exercise of the power of impeachment.

§ 607. And this leads us naturally to another remark; and that is, that a due exercise of some of the powers confided to the house of representatives, even in its most narrow functions, require, that the members should at least be elected for a period of two years. The power of impeachment could scarcely be exerted with effect by any body, which had not a legislative life of such a period. It would scarcely be possible, in ordinary cases, to begin and end an impeachment at a single annual session. And the effect of change of members during its prosecution would be attended with no inconsiderable embarrassment and inconvenience. If the power

[1] The Federalist, No. 53.

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is ever to be exerted, so as to bring great offenders to justice, there must be a prolonged legislative term of office, so as to meet the exigency. One year will not suffice to detect guilt, and to pursue it to conviction.[1]

§ 608. Again; the house of representatives is to be the sole judge of the elections of its own members. Now, if but one legislative session is to be held in a year, and more than one cannot ordinarily be presumed convenient or proper, spurious elections cannot be investigated and annulled in time to have a due effect. The sitting member must either hold his seat during the whole period of the investigation, or he must be suspended during the same period. In either case the public mischief will be very great. The uniform practice has been to allow the member, who is returned, to hold his seat and vote, until he is displaced by the order of the house, after full investigation. If, then, a return can be obtained, no matter by what means, the irregular member is sure of holding his seat, until a long period has elapsed, (for that is indispensable to any thorough investigation of facts arising at great distances;) and thus a very pernicious encouragement is given to the use of unlawful means for obtaining irregular returns, and fraudulent elections.[2]

§ 609. There is one other consideration, not without its weight in all questions of this nature. Where elections are very frequent, a few of the members, as happens in all such assembles, will possess superior talents; will, by frequent re-elections, become members of long standing; will become thoroughly masters of the public business; and thus will acquire a preponderating and undue influence, of which they will naturally be dis-

[1] 1 Elliot's Debates, 34; Mr. Ames's Speech.
[2] The Federalist, No. 53.

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posed to avail themselves. The great bulk of the house will be composed of new members, who will necessarily be inexperienced, diffident, and undisciplined, and thus be subjected to the superior ability and information of the veteran legislators. If biennial elections would have no more cogent effect, than to diminish the amount of this inequality; to guard unsuspecting confidence against the snares, which may be set for it; and to stimulate a watchful and ambitious responsibility, it would have a decisive advantage over mere annual elections.[1]

§ 610. Such were some of the reasons, which produced, on the part of the framers of the constitution, and ultimately of the people themselves, an approbation of biennial elections. Experience has demonstrated the sound policy and wisdom of the provision. But looking back to the period, when the constitution was upon its passage, one cannot but be struck with the alarms, with which the public mind was on this subject attempted to be disturbed. It was repeatedly urged in and out of the state conventions, that biennial elections were dangerous to the public liberty; and that congress might perpetuate itself, and reign with absolute power over the nation.[2]

§ 611. In the next place, as to the qualifications of the elected. The constitution on this subject is as follows:[3] "No person shall be a representative, who "shall not have attained to the age of twenty-five years, "and been seven years a citizen of the United States;

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[1] The Federalist, No. 53. See also 1 Tucker's Black. Comm. App. 229; 2 Wilson's Law Lectures, 151.

[2] 1 Elliot's Debates, 28, 37, 38, 43; Id. 217.

[3] Art. 1, § 2, paragraph 3.

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"and who shall not, when elected, be an inhabitant of "that state, in which he shall be chosen."

§ 612. It is obvious, that the inquiry, as to the due qualifications of representatives, like that, as to the due qualifications of electors in a government, is susceptible, in its own nature, of very different answers, according to the habits, institutions, interests, and local peculiarities of different nations. It is a point, upon which we can arrive at no universal rule, which will accommodate itself to the welfare and wants of every people, with the same proportionate advantages. The great objects are, or ought to be, to secure, on the part of the representatives, fidelity, sound judgment, competent information, and incorruptible independence. The best modes, by which these objects can be attained, are matters of discussion and reasoning, and essentially dependent upon a large and enlightened survey of the human character and passions, as developed in the different stages of civilized society. There is great room, therefore, for diversities of judgment and opinion upon a subject so comprehensive and variable in its elements. It would be matter of surprise, if doctrines essentially different, nay, even opposite to each other, should not, under such circumstances, be maintained by political writers, equally eminent and able. Upon questions of civil policy, and the fundamental structure of governments, there has hitherto been too little harmony of opinion among the greatest men to encourage any hope, that the future will be less fruitful in dissonances, than the past. In the practice of governments, a very great diversity of qualifications has been insisted on, as prerequisites of office; and this alone would demonstrate, that there was not admitted to exist any common stan-

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dard of superior excellence, adapted to all ages, and all nations.

§ 613. In Great-Britain, besides those negative qualifications, which are founded in usage, or positive law, such as the exclusion of persons holding certain offices and pensions, it is required, that every member for a county, or knight of a shire, (as he is technically called,) shall have a clear estate of freehold, or copyhold, to the value of £600 sterling per annum; and every member for a city or borough, to the value of £300, except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members of the two universities.[1]

§ 614. Among the American colonies antecedent to the revolution, a great diversity of qualifications existed; and the state constitutions, subsequently formed, by no means lessen that diversity. Some insist upon a freehold, or other property, of a certain value; others require a certain period of residence, and citizenship only; others require a freehold only; others a payment of taxes, or an equivalent; others, again, mix up all the various qualifications of property, residence, citizenship, and taxation, or substitute some of these, as equivalents for others.[2]

§ 615. The existing qualifications in the states being then so various, it may be thought, that the best course would have been, to adopt the rules of the states respectively, in regard to the most numerous branch of their own legislatures. And this course might not have been open to serious objections. But, as the qualifications of members were thought to be less carefully defined in the state constitutions, and more susceptible of

[1] 1 Black. Comm. 176. See 4 Instit. 46 to 48.

[2] Dr. Lieber's Encycl. Americana, art. *Constitutions of the United States.*

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uniformity, than those of the electors, the subject was thought proper for regulation by the convention.[1] And it is observable, that the positive qualifications are few and simple. They respect only age, citizenship, and inhabitancy.[2]

§ 616. First, in regard to age. The representative must have attained twenty-five years. And certainly to this no reasonable objection can be made.[3] If experience, or wisdom, or knowledge be of value in the national councils, it can scarcely be pretended, that an earlier age could afford a certain guaranty for either. That some qualification of age is proper, no one will dispute. No one will contend, that persons, who are minors, ought to be eligible; or, that those, who have not attained manhood, so as to be entitled by the common law to dispose of their persons, or estates, at their own will, would be fit depositaries of the authority to dispose of the rights, persons, and property of others. Would the mere attainment of twenty-one years of age be a more proper qualification? All just reasoning would be against it. The characters and passions of young men can scarcely be understood at the moment of their majority. They are then new to the rights of self-government; warm in their passions; ardent in their expectations; and, just escaping from pupilage, are strongly tempted to discard the lessons of caution, which riper years inculcate. What they will become, remains to be seen; and four years beyond that period is but a very short space, in which to try their virtues, develope their talents, enlarge their resources, and give them a practical insight into the business of life ade-

[1] The Federalist, No. 295. [2] 1 Tucker's Black. Comm. App. 197.
[3] 1 Tucker's Black. Comm. App. 213, 214; 2 Wilson's Law Lect. 139, 140.

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quate to their own immediate wants and duties. Can the interests of others be safely confided to those, who have yet to learn how to take care of their own? The British constitution has, indeed, provided only for the members of the house of commons not being minors;[1] and illustrious instances have occurred to show, that great statesmen may be formed even during their minority. But such instances are rare, they are to be looked at as prodigies, rather than as examples; as the extraordinary growth of a peculiar education and character, and a hot-bed precocity in a monarchy, rather than as the sound and thrifty growth of the open air, and the bracing hardihood of a republic. In the convention this qualification, as to age, did not pass without a struggle. It was originally carried by a vote of seven states against three, one being divided; though it was ultimately adopted without a division.[2] In the state conventions it does not seem to have formed any important topic of debate.[3]

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[1] 1 Black. Comm. 162, 173, 175; 4 Instit. 46, 47.

[2] Journal of Convention, June 22, p. 143; Id. Aug. 8, p. 235; 4 Elliot's Debates, (Yates's Minutes,) 94.

[3] Lork Coke has with much gravity enumerated the proper qualifications of a parliament-man, drawing the resemblances from the properties of the elephant. First, that he should be without gall; that is, without malice, rancour, heat, and envy. Secondly, that he should be constant, inflexible, and not to be bowed, or turned from the right, either for fear, reward, or favour, nor in judgment respect persons. Thirdly, that he should be of a ripe memory, that remembering perils past, he might remember dangers to come. Fourthly, that though he be of the greatest strength and understanding, yet he be sociable, and go in companies; and fifthly, that he be philanthropic, showing the way to every man.* Whatever one may now think of this quaint analogy, these qualities would not, in our day, be thought a bad enumeration of the proper qualities of a good modern member of parliament, or congress.

* 4 Instit. 3.

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§ 617. Secondly, in regard to citizenship. It is required, that the representative shall have been a citizen of the United States seven years. Upon the propriety of excluding aliens from eligibility, there could scarcely be any room for debate; for there could be no security for a due administration of any government by persons, whose interests and connexions were foreign, and who owed no permanent allegiance to it, and had no permanent stake in its measures or operations. Foreign influence, of the most corrupt and mischievous nature, could not fail to make its way into the public councils, if there was no guard against the introduction of alien representatives.[1] It has accordingly been a fundamental policy of most, if not of all free states, to exclude all foreigners from holding offices in the state. The only practical question would seem to be, whether foreigners, even after naturalization, should be eligible as representatives; and if so, what was a suitable period of citizenship for the allowance of the privilege. In England, all aliens born, unless naturalized, were originally excluded from a seat in parliament; and now, by positive legislation, no alien, though naturalized, is capable of being a member of either house of parliament.[2] A different course, naturally arising from the circumstances of the country, was adopted in the American colonies antecedent to the revolution, with a view to invite emigrations, and settlements, and thus to facilitate the cultivation of their wild and waste lands. A similar policy had since pervaded the state governments, and had been attended with so many advantages, that it would have been

[1] The Federalist, No. 62.
[2] 1 Black. Comm. 162, 175; 4 Inst. 46.

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impracticable to enforce any total exclusion of naturalized citizens from office. In the convention it was originally proposed, that three years' citizenship should constitute a qualification; but that was exchanged for seven years by a vote of ten states to one.[1] No objection seems even to have been suggested against this qualification; and hitherto it has obtained a general acquiescence or approbation. It certainly subserves two important purposes. 1. That the constituents have a full opportunity of knowing the character and merits of their representative. 2. That the representative has a like opportunity of learning the character, and wants, and opinions of his constituents.[2]

§ 618. Thirdly, in regard to inhabitancy. It is required, that the representative shall, when elected, be an inhabitant of the state, in which he shall be chosen. The object of this clause, doubtless, was to secure an attachment to, and a just representation of, the interests of the state in the national councils. It was supposed, that an inhabitant would feel a deeper concern, and possess a more enlightened view of the various interests of his constituents, than a mere stranger. And, at all events, he would generally possess more entirely their sympathy and confidence. It is observable, that the inhabitancy required is within the state, and not within any particular district of the state, in which the member is chosen. In England, in former times, it was required, that all the members of the house of commons should be inhabitants of the places, for which they were chosen. But this was for a long time wholly disregarded in practice, and was at length repealed by

[1] Journal of the Convention, 8 August, 233, 234.
[2] 2 Wilson's Law Lectures, 141.

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statute of 14 Geo. 3, ch. 58.[1] This circumstance is not a little remarkable in parliamentary history; and it establishes, in a very striking manner, how little mere theory can be regarded in matters of government. It was found by experience, that boroughs and cities were often better represented by men of eminence, and known patriotism, who were strangers to them, than by those chosen from their own vicinage. And to this very hour some of the proudest names in English history, as patriots and statesmen, have been the representatives of obscure, and, if one may so say, of ignoble boroughs.

§ 619. An attempt was made in the convention to introduce a qualification of one year's residence before the election; but it failed, four states voting in favour of it, six against it, and one being divided.[2] The omission to provide, that a subsequent non-residence shall be a vacation of the seat, may in some measure defeat the policy of the original limitation. For it has happened, in more than one instance, that a member, after his election, has removed to another state, and thus ceased to have that intimate intercourse with, and dependence upon his constituents, upon which so much value has been placed in all his discussions on this subject.

§ 620. It is observable, that no qualification, in point of estate, has been required on the part of members of the house of representatives.[3] Yet such a qualification is insisted on, by a considerable number of the states, as a qualification for the popular branch of the

[1] 1 Black. Comm. 175; 2 Wilson's Law Lect. 142.
[2] Journal of Convention, 8 August, p. 224, 225.
[3] Journal of Convention, 26 July, p. 204, 205; Id. 212; Id. 241, 242.

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state legislature.[1] The probability is, that it was not incorporated into the constitution of the Union from the difficulty of framing a provision, that would be generally acceptable. Two reasons have, however, been assigned by a learned commentator for the omission, which deserve notice. First, that in a representative government the people have an undoubted right to judge for themselves of the qualification of their representative, and of their opinion if his integrity and ability will supply the want of estate, there is better reason for contending, that it ought not prevail. Secondly, that by requiring a property qualification, it may happen, that men, the best qualified in other respects, might be incapacitated from serving their country.[2] There is, doubtless, weight in each of these considerations. The first, however, is equally applicable to all sorts of qualifications whatsoever; and proceeds upon an inadmissible foundation; and that is, that the society has no just right to regulate for the common good, what a portion of the community may deem for their special good. The other reason has a better foundation in theory; though, generally speaking, it will rarely occur in practice. But it goes very far towards overturning another fundamental guard, which is deemed essential to public liberty; and that is, that the representative should have a common interest in measures with his constituents. Now, the power of taxation, one of the most delicate and important in human society, will rarely be exerted oppressively by those, who are to share the common burthens. The possession of property has in this respect a great value

[1] Dr. Lieber's Encyclopædia Americana, art. *Constitutions of the United States.*

[2] 1 Tucker's Black. Comm. App. 212, 213; 1 Elliot's Debates, 55, 56.

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among the proper qualifications of a representative; since it will have a tendency to check any undue impositions, or sacrifices, which may equally injure his own, as well as theirs.[1]

§ 621. In like manner there is a total absence of any qualification founded on religious opinions. However desirable it may be, that every government should be administered by those, who have a fixed religious belief, and feel a deep responsibility to an infinitely wise and eternal Being; and however strong may be our persuasion of the everlasting value of a belief in Christianity for our present, as well as our immortal welfare; the history of the world has shown the extreme dangers, as well as difficulties, of connecting the civil power with religious opinions. Half the calamities, with which the human race have been scourged, have arisen from the union of church and state; and the people of America, above all others, have too largely partaken of the terrors and the sufferings of persecution for conscience' sake, not to feel an excessive repugnance to the introduction of religious tests. Experience has demonstrated the folly, as well as the injustice, of exclusions from office, founded upon religious opinions. They have aggravated all other evils in the political organization of societies. They carry in their train discord, oppression, and bloodshed.[2] They perpetuate a savage ferocity, and insensibility to human rights and sufferings. Wherever they have been abolished, they have introduced peace and moderation, and enlightened legislation. Wherever they have been perpetuated, they have always checked, and in many

[1] 1 Tucker's Black. Comm. App. 212, 213.
[2] See 4 Black. Comm. 44, 45, 46, 47.

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cases have overturned all the securities of public liberty. The right to burn heretics survived in England almost to the close of the reign of Charles the Second;[1] and it has been asserted, (but I have not been able to ascertain the fact by examination of the printed journals,) that on that occasion the whole bench of bishops voted against the repeal. We all know how slowly the Roman Catholics have recovered their just rights in England and Ireland. The triumph has been but just achieved, after a most painful contest for a half century. In the catholic countries, to this very hour, protestants are, for the most part, treated with a cold and reluctant jealousy, tolerated perhaps, but never cherished. In the actual situation of the United States a union of the states would have been impractible from the known diversity of religious sects, if any thing more, than a simple belief in Christianity in the most general form of expression, had been required. And even to this some of the states would have objected, as inconsistent with the fundamental policy of their own charters, constitutions, and laws. Whatever, indeed, may have been the desire of many persons, of a deep religious feeling, to have embodied some provision on this subject in the constitution, it may be safely affirmed, that hitherto the absence has not been felt, as an evil; and that while Christianity continues to be the belief of the enlightened, and wise, and pure, among the electors, it is impossible, that infidelity can find an easy home in the house of representatives.

§ 622. It has been justly observed, that under the reasonable qualifications established by the constitution, the door of this part of the federal government is open

[1] 4 Black. Comm. 49.

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to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or any particular profession of religious faith.[1]

§ 623. A question, however, has been suggested upon this subject, which ought not to be passed over without notice. And that is, whether the states can superadd any qualifications to those prescribed by the constitution of the United States. The laws of some of the states have already required, that the representative should be a freeholder, and be resident within the district, for which he is chosen.[2] If a state legislature has authority to pass laws to this effect, they may impose any other qualifications beyond those provided by the constitution, however inconvenient, restrictive, or even mischievous they may be to the interests of the Union. The legislature of one state may require, that none but a Deist, a Catholic, a Protestant, a Calvinist, or a Universalist, shall be a representative. The legislature of another state may require, that none shall be a representative but a planter, a farmer, a mechanic, or a manufacturer. It may exclude merchants, and divines, and physicians, and lawyers. Another legislature may require a high monied qualification, a freehold of great value, or personal estate of great amount. Another legislature may require, that the party shall have been born, and always lived in the state, or district; or that he shall be an inhabitant of a particular town or city, free of a corporation, or eldest son. In short, there is no end to the varieties of qualifications, which, without insisting upon extravagant cases, may be imagined. A state may, with the

[1] The Federalist, No. 52.
[2] 1 Tucker's Black. Comm. App. 213.

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sole object of dissolving the Union, create qualifications so high, and so singular, that it shall become impracticable to elect any representative.

§ 624. It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others. And a doubt of this sort seems to have pervaded the mind of a learned commentator.[1] A power to add new qualifications is certainly equivalent to a power to vary them. It adds to the aggregate, what changes the nature of the former requisites. The house of representatives seems to have acted upon this interpretation, and to have held, that the state legislatures have no power to prescribe new qualifications, unknown to the constitution of the United States.[2] A celebrated American statesman,[3] however, with his avowed devotion to state power, has intimated a contrary doctrine. "If," says he, "whenever the constitution assumes a single power out of many, which belong to the same subject, we should consider it as assuming the whole, it would vest the general government with a mass of powers never contemplated. On the contrary, the assumption of particular powers seems an exclusion of all not assumed. This reasoning appears to me to be sound, but on so recent a change of view, caution requires us not to be over confident."[4] He intimates, however, that unless the case be either

[1] 1 Tucker's Black. Comm. App. 213.
[2] 4 Jefferson's Correspondence, 238.
[3] Mr. Jefferson.
[4] Jefferson's Correspondence, 239.

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clear or urgent, it would be better to let it lie undisturbed.[1]

§ 625. It does not seem to have occurred to this celebrated statesman, that the whole of this reasoning, which is avowedly founded upon that amendment to the constitution, which provides, that "the powers not delegated nor prohibited to the states, are reserved to the states respectively, or to the people," proceeds upon a basis, which is inapplicable to the case. In the first place, no powers could be reserved to the states, except those, which existed in the states before the constitution was adopted. The amendment does not profess, and, indeed, did not intend to confer on the states any new powers; but merely to reserve to them, what were not conceded to the government of the Union. Now, it may properly be asked, where did the states get the power to appoint representatives in the national government? Was it a power, that existed at all before the constitution was adopted? If derived from the constitution, must it not be derived exactly under the qualifications established by the constitution, and none others? If the constitution has delegated no power to the states to add new qualifications, how can they claim any such power by the mere adoption of that instrument, which they did not before possess?

§ 626. The truth is, that the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. Each is an officer of the Union, deriving his

[1] 4 Jefferson's Correspondence, p. 239.

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powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. It is no original prerogative of state power to appoint a representative, a senator, or president for the Union. Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people. Before a state can assert the right, it must show, that the constitution has delegated and recognised it. No state can say, that it has reserved, what it never possessed.

§ 627. Besides; independent of this, there is another fundamental objection to the reasoning. The whole scope of the argument is, to show, that the legislature of the state has a right to prescribe new qualifications. Now, if the state in its political capacity had it, it would not follow, that the legislature possessed it. That must depend upon the powers confided to the state legislature by its own constitution. A state, and the legislature of a state, are quite different political beings. Now it would be very desirable to know, in which part of any state constitution this authority, exclusively of a national character, is found delegated to any state legislature. But this is not all. The amendment does not reserve the powers to the states exclusively, as political bodies; for the language of the amendment is, that the powers not delegated, &c. are reserved to the states, or to the *people*. To justify, then, the exercise of the power by a state, it is indispensable to show, that it has not been reserved to the people of the state. The people of the state, by adopting the constitution, have declared what their will is, as to the qualifications for office. And here the maxim, if ever, must apply, *Expressio unius est exclusio alterius*. It might further be urged, that the constitution, being the act of the whole

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people of the United States, formed and fashioned according to their own views, it is not to be assumed, as the basis of any reasoning, that they have given any control over the functionaries created by it, to any state, beyond what is found in the text of the instrument. When such a control is asserted, it is matter of proof, not of assumption; it is matter to be established, as of right, and not to be exercised by usurpation, until it is displaced. The burthen of proof is on the state, and not on the government of the Union. The affirmative is to be established; the negative is not to be denied, and the denial taken for a concession.

§ 628. In regard to the power of a state to prescribe the qualification of inhabitancy or residence in a district, as an additional qualification, there is this forcible reason for denying it, that it is undertaking to act upon the very qualification prescribed by the constitution, as to inhabitancy in the state, and abridging its operation. It is precisely the same exercise of power on the part of the states, as if they should prescribe, that a representative should be forty years of age, and a citizen for ten years. In each case, the very qualification fixed by the constitution is completely evaded, and indirectly abolished.

§ 629. The next clause of the second section of the first article respects the apportionment of the representatives among the states. It is as follows: "Represen- "tatives and direct taxes shall be apportioned among "the several states, which may be included in this "Union, according to their respective numbers, which "shall be determined by adding to the whole number of "free persons, including those bound to service for a "term of years, and excluding Indians not taxed, three- "fifths of all other persons. The actual enumeration

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"shall be ma[illegible] within three years after the first meeting "of the congress of the United States, and within every "subsequent term of ten years, in such manner, as they "shall, by law, direct. The number of representatives "shall not exceed one for every thirty thousand; but "each state shall have at least one representative. "And until such enumeration shall be made, the state "of New-Hampshire shall be entitled to choose three, "Massachusetts eight, Rhode-Island and Providence "Plantations one, Connecticut five, New-York six, New-"Jersey four, Pennsylvania eight, Delaware one, Mary-"land six, Virginia ten, North-Carolina five, South-"Carolina five, and Georgia three."

§ 630. The first apportionment thus made, being of a temporary and fugacious character, requires no commentary.[1] The basis assumed was probably very nearly the same, which the constitution pointed out for all future apportionments, or, at least, of all the free persons in the states.[2]

It is obvious, that the question, how the apportionment should be made, was one, upon which a considerable diversity of judgment might, and probably would, exist. Three leading principles of apportionment would, at once, present themselves. One was to adopt the rule already existing, under the confederation; that is, an equality of representation and vote by each state, thus giving each state a right to send not less than two, nor more than seven representatives, and in the determination of questions, each state to have one vote.[3] This would naturally receive encouragement from all those, who were attached to the confederation, and preferred

[1] Journ. of Convention, 10th July, 165, 166, 167, 171, 172, 179, 216.
[2] Journ. of Convention, 159, note. But see The Federalist, No. 55.
[3] Confederation, Art. 5.

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a mere league of states, to a government in any degree national.[1] And accordingly it formed, as it should seem, the basis of what was called the New-Jersey Plan.[2] This rule of apportionment met, however, with a decided opposition, and was negatived in the convention at an early period, seven states voting against it, three being in its favour, and one being divided.[3]

§ 631. Another principle might be, to apportion the representation of the states according to the relative property of each, thus making property the basis of representation. This might commend itself to some persons, because it would introduce a salutary check into the legislature in regard to taxation, by securing, in some measure, an equalization of the public burthens, by the voice of those, who were called to give most towards the common contributions.[4] That taxation ought to go hand in hand with representation, had been a favourite theory of the American people. Under the confederation, all the common expenses were required to be borne by the states in proportion to the value of the land within each state.[5] But it has been already seen, that this mode of contribution was extremely difficult and embarrassing, and unsatisfactory in practice, under the confederation.[6] There do not, indeed,

[1] Journ. of Convention, 111, 153, 159.

[2] Mr. Patterson's Plan, Journ. of Convention, 123; 4 Elliot's Debates, (Yates's Minutes,) 74; Id. 81; Id. 107 to 113, 116; 2 Pitk. Hist. 228, 229, 232.

[3] Journ. of Convention, 11th June, 111. See also Id. 153, 154; 4 Elliot's Debates, (Yates's Minutes,) 68.

[4] 4 Elliot's Debates, (Yates's Minutes,) 68, 69; Journ. of Convention, 11th June, 111; Id. 5th July, 158; Id. 11th July, 169.

[5] Confederation, Art. 8.

[6] Journals of Congress, 17th Feb. 1783, vol. 8, p. 129 to 133; Id. 27th Sept. 1785, vol. 10, p. 328; Id. 18th April, 1783, vol. 8, p. 188; 1 Elliot's Debates, 56; 2 Elliot's Debates, 113; 1 Tuck. Black. Comm. App. 235, 236, 243 to 246; The Federalist, No. 30; Id. No. 21.

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seem to be any traces in the proceedings of the convention, that this scheme had an exclusive influence with any persons in that body. It mixed itself up with other considerations, without acquiring any decisive preponderance. In the first place, it was easy to provide a remedial check upon undue direct taxation, the only species, of which there could be the slightest danger of unequal and oppressive levies. And it will be seen, that this was sufficiently provided for, by declaring, that representatives and direct taxes should be apportioned by the same ratio.

§ 632. In the next place, although property may not be directly aimed at, as a basis in the representation, provided for by the constitution, it cannot, on the other hand, be deemed to be totally excluded, as will presently be seen. In the next place, it is not admitted, that property alone can, in a free government, safely be relied on, as the sole basis of representation. It may be true, and probably is, that in the ordinary course of affairs, it is not the interest, or policy of those, who possess property, to oppress those, who want it. But, in every well-ordered commonwealth, persons, as well as property, should possess a just share of influence. The liberties of the people are too dear, and too sacred to be entrusted to any persons, who may not, at all times, have a common sympathy and common interest with the people in the preservation of their public rights, privileges, and liberties. Checks and balances, if not indispensable to, are at least a great conservative in, the operations of all free governments. And, perhaps, upon mere abstract theory, it cannot be justly affirmed, that either persons or property, numbers or wealth, can safely be trusted, as the final repositaries of the dele-

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gated powers of government.[1] By apportioning influence among each, vigilance, caution, and mutual checks are naturally introduced, and perpetuated.

§ 633. The third and remaining principle was, to apportion the representatives among the states according to their relative numbers. This had the recommendation of great simplicity and uniformity in its operation, of being generally acceptable to the people, and of being less liable to fraud and evasion, than any other, which could be devised.[2] Besides; although wealth and property cannot be affirmed to be in different states, exactly in proportion to the numbers; they are not so widely separated from it, as, at a hasty glance, might be imagined. There is, if not a natural, at least a very common connexion between them; and, perhaps, an apportionment of taxes according to numbers is as equitable a rule for contributions according to relative wealth, as any, which can be practically obtained.[3]

§ 634. The scheme, therefore, under all the circumstances, of making numbers the basis of the representation of the Union, seems to have obtained more general favour, than any other in the convention, because it had a natural and universal connexion with the rights and liberties of the whole people.[4]

§ 635. But here a difficulty of a very serious nature arose. There were other persons in several of the states, than those, who were free. There were some persons, who were bound to service for a term of years; though these were so few, that they would scarcely

[1] The Federalist, No. 54. [2] Id.

[3] The Federalist, No. 54; Resolve of Congress, 18th April, 1783, (8 Journals of Congress, 188, 194, 198); 1 United States Laws, (Bioren & Duane's edit.) 29, 32, 35.

[4] The Federalist, No. 54.

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vary the result of the general rule, in any important degree. There were Indians, also, in several, and probably in most, of the states at that period, who were not treated as citizens, and yet, who did not form a part of independent communities or tribes, exercising general sovereignty and powers of government within the boundaries of the states. It was necessary, therefore, to provide for these cases, though they were attended with no practical difficulty. There seems not to have been any objection in including, in the ratio of representation, persons bound to service for a term of years, and in excluding Indians not taxed. The real (and it was a very exciting) controversy was in regard to slaves, whether they should be included in the enumeration, or not.[1] On the one hand, it was contended, that slaves were treated in the states, which tolerated slavery, as property, and not as persons.[2] They were bought and sold, devised and transferred, like any other property. They had no civil rights, or political privileges. They had no will of their own; but were bound to absolute obedience to their masters. There was, then, no more reason for including them in the census of persons, than there would be for including any brute animals whatsoever.[3] If they were to be represented as property, the rule should be extended, so as to embrace all other property. It would be a gross inequality to allow representation for slaves to the southern states; for that, in effect, would be, to allow to their masters a predominant right, founded on mere property. Thus, five thousand free persons, in a slave-state, might possess the same power

1 2 Pitk. Hist. 233 to 245.

2 The Federalist, No. 54; 1 Elliot's Debates, 58 to 60; Id. 204, 212, 213; 4 Elliot's Debates, (Martin's Address,) 24.

3 4 Elliot's Debates, (Yates's Minutes,) 69; Id. 24.

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to choose a representative, as thirty thousand free persons in a non-slave-holding state.[1]

§ 636. On the other hand, it was contended, that slaves are deemed persons, as well as property. They partake of the qualities of both. In being compelled to labour, not for himself, but for his master; in being vendible by one master to another; and, in being subject, at all times, to be restrained in his liberty, and chastised in his body, by the will of another, the slave may appear to be degraded from the human rank, and classed with the irrational animals, which fall under the denomination of property. But, in being protected in his life and limbs against the violence of others, even of the master of his labour and liberty; and in being punishable himself for all violence committed against others; the slave is no less evidently regarded by law, as a member of the society, and not as a part of the irrational creation; as a moral person, and not as a mere article of property.[2] The federal constitution should, therefore, view them in the mixed character of persons and property, which was in fact their true character. It is true, that slaves are not included in the estimate of representatives in any of the states possessing them. They neither vote themselves, nor increase the vote of their masters. But it is also true, that the constitution itself does not proceed upon any ratio of merely qualified voters, either as to representatives, or as to electors of them. If, therefore, those, who are not voters, are to be excluded from the enumeration or census, a similar inequality will exist in the apportionment among the states. For the representatives are to be chosen by those, who are qualified vot-

[1] 4 Elliot's Debates, (Martin's Address,) 24; Id. (Yates's Minutes,) 69.
[2] The Federalist, No. 54; 1 Elliot's Debates, 212, 213.

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ers, for the most numerous branch of the state legislature; and the qualifications in different states are essentially different; and, indeed, are in no two states exactly alike. The constitution itself, therefore, lays down a principle, which requires, that no regard shall be had to the policy of particular states, towards their own inhabitants. Why should not the same principle apply to slaves, as to other persons, who were excluded as voters in the states?[1]

§ 637. Some part of this reasoning may not be very satisfactory; and especially the latter part of it. The distinction between a free person, who is not a voter, but who is, in no sense, property, and a slave, who is not a voter, and who is, in every practical sense, property, is, and for ever must form, a sound ground for discriminating between them in every constitution of government.

§ 638. It was added, that the idea was not entirely a just one, that representation relates to persons only, and not to property. Government is instituted no less for the protection of the property, than of the persons of individuals. The one, as well as the other, may, therefore, be considered as proper to be represented by those, who are charged with the government. And, in point of fact, this view of the subject constituted the basis of some of the representative departments in several of the state governments.[2]

§ 639. There was another reason urged, why the votes allowed in the federal legislature to the people of each state ought to bear some proportion to the comparative wealth of the states. It was, that states

[1] The Federalist, No. 54; 1 Tuck. Black. Comm. App. 190, 191; 1 Elliot's Debates, 213, 214.

[2] The Federalist, No. 54; 1 Elliot's Debates, 213.

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have not an influence over other states, arising from the superior advantages of fortune, as individuals in the same state possess over their needy fellow citizens from the like cause. The richest state in the Union can hardly indulge the hope of influencing the choice of a single representative in any other state; nor will the representatives of the largest and richest states possess any other advantages in the national legislature, than what results from superior numbers alone.[1]

§ 640. It is obvious, that these latter reasons have no just application to the subject. They are not only over-strained, and founded in an ingenious attempt to gloss over the real objections; but they have this inherent vice, that, if well founded, they apply with equal force to the representation of all property in all the states; and if not entitled to respect on this account, they contain a most gross and indefensible inequality in favour of a single species of property (slaves) existing in a few states only. It might have been contended, with full as much propriety, that rice, or cotton, or tobacco, or potatoes, should have been exclusively taken into account in apportioning the representation.

§ 641. The truth is, that the arrangement adopted by the constitution was a matter of compromise and concession, confessedly unequal in its operation, but a necessary sacrifice to that spirit of conciliation, which was indispensable to the union of states having a great diversity of interests, and physical condition, and political institutions.[2] It was agreed, that slaves should be

[1] The Federalist, No. 54.

[2] 1 Elliot's Debates, 212, 213; 2 Pitk. Hist. 233 to 244; Id. 245, 246, 247, 248; 1 Kent's Comm. 216, 217; The Federalist, No. 37, 54; 3 Dall. 171, 177, 178. — It, at the present time, gives *twenty-five* slave representatives in congress.

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represented, under the mild appellation of "other persons," not as free persons, but only in the proportion of three fifths. The clause was in substance borrowed from the resolve, passed by the continental congress on the 18th of April, 1783, recommending the states to amend the articles of confederation in such manner, that the national expenses should be defrayed out of a common treasury, "which shall be supplied by the several states, in proportion to the whole number of white, or other free inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons, not comprehended in the foregoing description, except Indians, not paying taxes, in each state."[1] In order to reconcile the non-slave-holding states to this provision, another clause was inserted, that direct taxes should be apportioned in the same manner as representatives. So, that, theoretically, representation and taxation might go *pari passu*.[2] This provision, however, is more specious than solid; for while, in the levy of direct taxes, it apportions them on three fifths of persons not free, it, on the other hand, really exempts the other two fifths from being taxed at all, as property.[3] Whereas, if direct taxes had been apportioned, as upon principle they ought to be, according to the real value of property within the state, the whole of the slaves would have been taxable, as property. But a far more striking inequality has been disclosed by the practical operations of the government. The principle of representation is

[1] Journals of Congress, 1783, vol. 8, p. 188; 1 Elliot's Debates, 56.

[2] The Federalist, No. 54; Journal of Convention, 12th July, 171, 172; Id. 174, 175, 176, 179, 180, 210; Id. 235; Id. 372; 1 Elliot's Debates, 56, 57, 58, 60; Id. 213.

[3] 1 Tucker's Black. Comm. 190, 191; 1 Elliot's Debates, 58, 59.

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constant, and uniform; the levy of direct taxes is occasional, and rare. In the course of forty years, no more than three direct taxes[1] have been levied; and those only under very extraordinary and pressing circumstances. The ordinary expenditures of the government are, and always have been, derived from other sources. Imposts upon foreign importations have supplied, and will generally supply, all the common wants; and if these should not furnish an adequate revenue, excises are next resorted to, as the surest and most convenient mode of taxation. Direct taxes constitute the last resort; and (as might have been foreseen) would never be laid, until other resources had failed.

§ 642. Viewed in its proper light, as a real compromise, in a case of conflicting interests, for the common good, the provision is entitled to great praise for its moderation, its aim at practical utility, and its tendency to satisfy the people, that the Union, framed by all, ought to be dear to all, by the privileges it confers, as well as the blessings it secures. It had a material influence in reconciling the southern states to other provisions in the constitution, and especially to the power of making commercial regulations by a mere majority, which was thought peculiarly to favour the northern states.[2] It has sometimes been complained of, as a grievance; but he, who wishes well to his country, will adhere steadily to it, as a fundamental policy, which extinguishes some of the most mischievous sources of all political divisions, — those founded on geographical positions, and domestic institutions. It did not, however, pass the convention without objec-

[1] In 1798, 1813, 1815. The last was partially repealed in 1816.
[2] 1 Elliot's Debates, 212, 213.

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tion. Upon its first introduction, it was supported by the votes of nine states against two. In subsequent stages of the discussion, it met with some opposition;[1] and in some of the state conventions it was strenuously resisted.[2] The wish of every patriot ought now to be, *requiescat in pace.*

§ 643. Another part of the clause regards the periods, at which the enumeration or census of the inhabitants of the United States shall be taken, in order to provide for new apportionments of representatives, according to the relative increase of the population of the states. Various propositions for this purpose were laid, at different times, before the convention.[3] It was proposed to have the census taken once in fifteen years, and in twenty years; but the vote finally prevailed in favour of ten.[4] The importance of this provision for a decennial census can scarcely be overvalued. It is the only effectual means, by which the relative power of the several states could be justly represented. If the system first established had been unalterable, very gross inequalities would soon have taken place among the states, from the very unequal increase of their population. The representation would soon have exhibited a system very analogous to that of the house of commons in Great-Britain, where old and decayed boroughs send representatives, not only wholly disproportionate to their importance; but in some cases, with scarcely a single inhabitant, they match the representatives of the most populous counties.[5]

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1 Journal of Convention, 11th June, 111, 112. See also Id. 11th July, 168, 169, 170, 235, 236; 4 Elliot's Debates, (Yates's Minutes,) 69.

2 1 Elliot's Debates, 58, 59, 60, 204, 212, 213, 241.

3 Journal of Convention, 163, 164, 167, 168, 169, 172, 174, 180.

4 Journal of Convention, 12th July, 168, 170, 173, 180.

5 1 Black. Comm. 158, 173, 174; Rawle on Constit. ch. 4, p. 44.

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§ 644. In regard to the United States, the slightest examination of the apportionment made under the first three censuses will demonstrate this conclusion in a very striking manner. The representation of Delaware remains, as it was at the first apportionment; those of New-Hampshire, Rhode-Island, Connecticut, New-Jersey, and Maryland have had but a small comparative increase; whilst that of Massachusetts (including Maine) has swelled from eight to twenty; that of New-York, from six to thirty-four; and that of Pennsylvania, from eight to twenty-six. In the mean time, the new states have sprung into being; and Ohio, which in 1803 was only entitled to one, now counts fourteen representatives.[1] The census of 1831 exhibits still more striking results. In 1790, the whole population of the United States was about three millions nine hundred and twenty-nine thousand; and in 1830, it was about twelve millions eight hundred and fifty-six thousand.[2] Ohio, at this very moment, contains at least one million, and New-York two millions of inhabitants. These facts show the wisdom of the provision for a decennial apportionment; and, indeed, it would otherwise have happened, that the system, however sound at the beginning, would by this time have been productive of gross abuses, and probably have engendered feuds and discontents, of themselves sufficient to have occasioned a dissolution of the Union. We probably owe this provision to those in the convention, who were in favour of a national government, in preference to a mere confederation of states.[3]

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[1] Rawle on Constitution, ch. 4, p. 45.
[2] American Almanac for 1832, p. 162.
[3] See Journal of Convention, 165, 168, 169, 174, 179, 180.

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§ 645. The next part of the clause relates to the total number of the house of representatives. It declares, that "the number of representatives shall not exceed one for every thirty thousand." This was a subject of great interest; and it has been asserted, that scarcely any article of the whole constitution seems to be rendered more worthy of attention by the weight of character, and the apparent force of argument, with which it was originally assailed.[1] The number fixed by the constitution to constitute the body, in the first instance, and until a census was taken, was sixty-five.

§ 646. Several objections were urged against the provision. First, that so small a number of representatives would be an unsafe depositary of the public interests. Secondly, that they would not possess a proper knowledge of the local circumstances of their numerous constituents. Thirdly, that they would be taken from that class of citizens, which would sympathize least with the feelings of the people, and be most likely to aim at a permanent elevation of the few, on the depression of the many. Fourthly, that defective, as the number in the first instance would be, it would be more and more disproportionate by the increase of the population, and the obstacles, which would prevent a correspondent increase of the representatives.[2]

§ 647. Time and experience have demonstrated the fallacy of some, and greatly impaired, if they have not utterly destroyed, the force of all of these objections. The fears, which were at that period so studiously

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[1] The Federalist, No. 55; 2 Amer. Museum, 427; Id. 534; Id. 547; 4 Elliot's Debates, (Yates and Lansing's Letter to Gov. Clinton,) 129, 130.

[2] The Federalist, No. 58; 1 Elliot's Debates, 56; Id. 206, 214, 215, 218, 219, 220, 221 to 225; Id. 226 to 232.

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cherished; the alarms, which were so forcibly spread; the dangers to liberty, which were so strangely exaggerated; and the predominance of aristocratical and exclusive power, which were so confidently predicted, have all vanished into air, into thin air. Truth has silently dissolved the phantoms raised by imaginations, heated by prejudice or controversy; and at the distance of forty years we look back with astonishment at the laborious reasoning, which was employed to tranquillize the doubts, and assuage the jealousies of the people. It is fit, however, even now, to bring this reasoning under review, because it inculcates upon us the important lesson, how little reliance can be placed upon mere theory in any matters of government; and how difficult it is to vindicate the most sound practical doctrines against the specious questioning of ingenuity and hostility.

§ 648. The first objection was, to the smallness of the number composing the house of representatives.[1] It was said, that it was unsafe to deposit the legislative powers of the Union with so small a body of men. It was but the shadow of representation.[2] Under the confederation, congress might consist of ninety-one; whereas, in the first instance, the house would consist of but sixty-five. There was no certainty, that it would ever be increased, as that would depend upon the legislature itself in its future ratio of apportionments; and it was left completely in its discretion, not only to

[1] It is remarkable, that the American writer, whom I have several times cited, takes an opposite objection. He says, "the national house of representatives will be at first too large; and hereafter may be much too large to deliberate and decide upon the best measures." Thoughts upon the Political Situation of the United States of America, (Worcester, 1788.)

[2] 2 Amer. Museum, 247, 534, 547, 551, 554.

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increase, but to diminish the present number.[1] Under such circumstances, there was, in fact, no constitutional security, for the whole depended upon the mere integrity and patriotism of those, who should be called to administer it.[2]

§ 649. In reply to these suggestions it was said, that the present number would certainly be adequate, until a census was taken. Although under the confederation ninety-one members might be chosen, in point of fact a far less number attended.[3] At the very first census, supposing the lowest ratio of thirty thousand were adopted, the number of representatives would be increased to one hundred. At the expiration of twenty-five years it would, upon the same ratio, amount to two hundred; and in fifty years, to four hundred, a number, which no one could doubt would be sufficiently large to allay all the fears of the most zealous admirers of a full representation.[4] In regard to the possible diminution of the number of representatives, it must be purely an imaginary case. As every state is entitled to at least one representative, the standard never would probably be reduced below the population of the smallest state. The population of Delaware, which increases more slowly, than that of any other state, would, under such circumstances, furnish the rule. And, if the other states increase to a very large degree, it is idle to suppose, that they will ever adopt a ratio, which will give the smallest state a greater relative power and influence, than themselves.[5]

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1 1 Elliot's Debates, 56, 57; Id. 204, 205, 206; 2 Elliot's Debates, 53, 54; Id. 99.

2 1 Elliot's Debates, 205; 2 Elliot's Debates, 53, 54, 132, 206; Id. 223, 224.

3 1 Elliot's Debates, 57, 249.

4 The Federalist, No. 55; 1 Elliot's Debates, 214, 215, 227.

5 1 Elliot's Debates, 242, 249.

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§ 650. But the question itself, what is the proper and convenient number to compose a representative legislature, is as little susceptible of a precise solution, as any, which can be stated in the whole circle of politics. There is no point, upon which different nations are more at variance; and the policy of the American states themselves, on this subject, while they were colonies, and since they have become independent, has been exceedingly discordant. Independent of the differences, arising from the population and size of the states, there will be found to be great diversities among those, whose population and size nearly approach each other. In Massachusetts, the house of representatives is composed of a number between three and four hundred; in Pennsylvania, of not more than one fifth of that number; and in New-York, of not more than one fifth. In Pennsylvania the representatives do not bear a greater proportion to their constituents, than one for every four or five thousand. In Rhode-Island and Massachusetts they bear a proportion of at least one for every thousand. And according to the old constitution of Georgia, the proportion may be carried to one for every ten electors.[1]

§ 651. Neither is there any ground to assert, that the ratio between the representatives and the people ought, upon principle, to be the same, whether the latter be numerous or few. If the representatives from Virginia were to be chosen by the standard of Rhode-Island, they would then amount to five hundred; and in twenty or thirty years to one thousand. On the other hand, the ratio of Pennsylvania applied to Delaware would reduce the representative assembly to seven.

[1] The Federalist, No. 55. See also the State Constitutions of that period. 1 Elliot's Debates, 214, 219, 220, 225, 228, 252, 253.

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Nothing can be more fallacious, than to found political calculations on arithmetical principles. Sixty or seventy men may be more properly trusted with a given degree of power, than six or seven. But it does not follow, that six or seven hundred would be proportionably a better depositary. And if the supposition is carried on to six or seven thousand, the whole reasoning ought to be reversed. The truth is, that, in all cases, a certain number seems necessary to secure the benefits of free consultation and discussion; to guard against too easy a combination for improper purposes; and to prevent hasty and ill-advised legislation. On the other hand the number ought to be kept within a moderate limit, in order to avoid the confusion, intemperance, and inconvenience of a multitude.[1] It was a famous saying of Cardinal De Retz, that every public assembly, consisting of more than one hundred members, was a mere mob.[2] But surely this is just as incorrect, as it would be to aver, that every one, which consisted of ten members, would be wise.

§ 652. The question then is, and for ever must be, in every nation, a mixed question of sound policy and discretion, with reference to its size, its population, its institutions, its local and physical condition, and all the other circumstances affecting its own interests and convenience. As a present number, sixty-five was sufficient for all the exigencies of the United States; and it was wisest and safest to leave all future questions of increase to be judged of by the future condition and exigencies of the Union. What ground could there be to suppose, that such a number chosen biennially, and responsible to their constituents, would voluntarily betray

[1] The Federalist, No. 55; 1 Elliot's Debates, 219, 220, 226, 227, 241, 242, 245, 246, 253; 2 Wilson's Law Lect. 150; 1 Kent's Comm. 217.

[2] 2 Wilson's Law Lect. 150.

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their trusts, or refuse to follow the public will? The very state of the country forbade the supposition. They would be watched with the jealousy and the power of the state legislatures.[1] They would have the highest inducements to perform their duty. And to suppose, that the possession of power for so short a period could blind them to a sense of their own interests, or tempt them to destroy the public liberties, was as improbable, as any thing, which could be within the scope of the imagination.[2] At all events, if they were guilty of misconduct, their removal would be inevitable; and their successors would be above all false and corrupt conduct. For to reason otherwise would be equivalent to a declaration of the universal corruption of all mankind, and the utter impracticability of a republican government. The congress, which conducted us through the revolution, was a less numerous body, than their successors will be.[3] They were not chosen by, nor responsible to, the people at large;[4] and though appointed from year to year, and liable to be recalled at pleasure, they were generally continued for three years. They held their consultations in secret. They transacted all our foreign affairs. They held the fate of their country in their hands during the whole war. Yet they never betrayed our rights, or our interests. Nay, calumny itself never ventured to whisper any thing against their purity or patriotism.[5]

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[1] The Federalist, No. 55; 1 Elliot's Debates, 238, 239.

[2] The Federalist, No. 55; 1 Elliot's Debates, 252, 253, 254.

[3] The Federalist, No. 55; 1 Elliot's Debates, 206, 223, 249.

[4] Generally they were chosen by the state legislatures; but in two states, viz. Rhode-Island and Connecticut, they were chosen by the people.*

[5] The Federalist, No. 55; 1 Elliot's Debates, 254.

* The Federalist, No. 40.

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§ 652. The suggestion is often made, that a numerous representation is necessary to obtain the confidence of the people.[1] This is not generally true. Public confidence will be easily gained by a good administration; and it will be secured by no other.[2] The remark, made upon another occasion by a great man, is correct in regard to representatives — *non numerantur, ponderantur*. Delaware has just as much confidence in her representation of twenty-one, as New-York has in hers of sixty-five; and Massachusetts has in hers of more than three hundred.[3]

§ 653. Nothing can be more unfair and impolitic, than to substitute for argument an indiscriminate and unbounded jealousy, with which all reasoning must be vain. The sincere friends of liberty, who give themselves up to the extravagancies of this passion, inflict the most serious injury upon their own cause. As there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust; so there are other qualities in human nature, which justify a certain portion of esteem and confidence. A republican government presupposes, and requires the existence of these qualities in a higher degree, than any other form; and wholly to destroy our reliance on them is to sap all the foundation, on which our liberties must rest.[4]

§ 654. The next objection was, that the house of representatives would be too small to possess a due knowledge of the interests of their constituents. It was said, that the great extent of the United States, the

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[1] 1 Elliot's Debates, 206, 217. [2] Id. 227, 228.

[3] 1 Elliot's Debates, 227, 228, 241, 252, 253, 254; 2 Elliot's Debates, 107, 116.

[4] The Federalist, No. 55; 1 Elliot's Debates, 238, 239.

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variety of its interests, and occupations, and institutions would require a very numerous body in order to bring home information necessary and proper for wise legislation.[1]

§ 655. In answer to this objection, it was admitted, that the representative ought to be acquainted with the interests and circumstances of his constituents. But this principle can extend no farther, than to those interests and circumstances, to which the authority and care of the representative relate. Ignorance of very minute objects, which do not lie within the compass of legislation, is consistent with every attribute necessary to the performance of the legislative trust.[2] If the argument, indeed, required the most minute knowledge, applicable even to all the professed objects of legislation, it would overturn itself; for the thing would be utterly impracticable. No representative, either in the state or national councils, ever could know, or even pretend to know, all arts, and sciences, and trades, and subjects, upon which legislation may operate. One of the great duties of a representative is, to inquire into, and to obtain the necessary information to enable him to act wisely and correctly in particular cases. And this is attained by bringing to the investigation of such cases talents, industry, experience, and a spirit of comprehensive inquiry. No one will pretend, that he, who is to make laws, ought not to be well instructed in their nature, interpretation, and practical results. But what would be said, if, upon such a theory, it was to be seriously urged, that none, but practical lawyers, ought ever to be eligible as legislators? The truth is, that we must rest

[1] 1 Elliot's Debates, 219 220, 228, 232, 233, 241.

[2] The Federalist, No. 55; 1 Elliot's Debates, 228, 229; 1 Kent's Comm. 217.

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satisfied with general attainments; and it is visionary to suppose, that any one man can represent all the skill, and interests, and business, and occupations of all his constituents in a perfect manner, whether they be few or many. The most, that can be done, is, to take a comprehensive survey of the general outlines; and to search, as occasion may require, for that more intimate information, which belongs to particular subjects requiring immediate legislation.

§ 656. It is by no means true, that a large representation is necessary to understand the interests of the people. It is not either theoretically, or practically true, that a knowledge of those interests is augmented in proportion to the increase of representatives.[1] The interests of the state of New-York are probably as well understood by its sixty-five representatives, as those of Massachusetts by its three or four hundred. In fact, higher qualifications will usually be sought and required, where the representatives are few, than where they are many. And there will also be a higher ambition to serve, where the smallness of the number creates a desirable distinction, than where it is shared with many, and of course individual importance is essentially diminished.

§ 657. Besides; in considering this subject, it is to be recollected, that the powers of the general government are limited; and embrace only such objects, as are of a national character. Local information of peculiar local interests is, consequently, of less value and importance, than it would be in a state legislature, where the powers are general.[2] The knowledge required of a national representative is, therefore, necessarily of a

[1] 1 Elliot's Debates, 229.
[2] The Federalist, No. 56.

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more large and comprehensive character, than that of a mere state representative. Minute information, and a thorough knowledge of local interests, personal opinions, and private feelings, are far more important to the latter than the former.[1] Nay, the very devotion to local views, and feelings, and interests, which naturally tends to a narrow and selfish policy, may be a just disqualification and reproach to a member of congress.[2] A liberal and enlightened policy, a knowledge of national rights, duties, and interests, a familiarity with foreign governments, and diplomatic history, and a wide survey of the operations of commerce, agriculture, and manufactures, seem indispensable to a lofty discharge of his functions.[3] A knowledge of the peculiar interests, and products, and institutions of the different states of the Union, is doubtless of great value; but it is rather as it conduces to the performance of the higher functions already spoken of, than as it sympathizes with the local interests and feelings of a particular district, that it is to be estimated.[4] And in regard to those local facts, which are chiefly of use to a member of congress, they are precisely those, which are most easily attainable from the documentary evidence in the departments of the national government, or which lie open to an intelligent man in any part of the state, which he may represent.[5] A knowledge of commerce, and taxation, and manufactures, can be obtained with more certainty by inquiries conducted through many, than through a single channel of communication. The representatives of each state

[1] 1 Elliot's Debates, 228, 229, 253; 2 Lloyd's Debates, (in 1789,) 189; The Federalist, No. 56.

[2] 1 Elliot's Debates, 238.

[3] 1 Elliot's Debates, 228, 229, 253; The Federalist, No. 56.

[4] The Federalist, No, 56; 1 Elliot's Debates, 220, 241, 242, 246, 253.

[5] The Federalist, No. 56; 1 Elliot's Debates, 228, 229, 253.

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will generally bring with them a considerable knowledge of its laws, and of the local interests of their districts. They will often have previously served as members in the state legislatures; and thus have become, in some measure, acquainted with all the local views and wants of the whole state.[1]

§ 658. The functions, too, of a representative in congress require very different qualifications and attainments, from those required in a state legislature. Information relative to local objects is easily obtained in a single state; for there is no difference in its laws, and its interests are but little diversified. But the legislation of congress reaches over all the states; and as the laws and local circumstances of all differ, the information, which is requisite for safe legislation, is far more difficult and various, and directs the attention abroad, rather than at home.[2] Few members, comparatively speaking, will be found ignorant of the local interests of their district or state; but time, and diligence, and a rare union of sagacity and public spirit, are indispensable to avoid egregious mistakes in national measures.

§ 659. The experience of Great Britain upon this subject furnishes a very instructive commentary. Of the five hundred and fifty-eight members of the house of commons one ninth are elected by three hundred and sixty-four persons; and one half by five thousand seven hundred and twenty-three persons.[3] And this half certainly have little or no claim to be deemed the guardians of the interests of the people, and indeed are

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1 The Federalist, No. 56. 2 Id. No. 56; Id. No. 35.

3 See Mr. Christian's note, (34,) to 1 Black. Comm. 174, where he states the number, of which the house of commons has consisted at different periods, from which it appears, that it has been nearly doubled since the beginning of the reign of Henry the Eighth. See also 4 Inst. 1.

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notoriously elected by other interests.[1] Taking the population of the whole kingdom the other half will not average more than one representative for about twenty-nine thousand of the inhabitants.[2] It may be added, that nothing is more common, than to select men for representatives of large and populous cities and districts, who do not reside therein; and cannot be presumed to be intimately acquainted with their local interests and feelings. The choice, however, is made from high motives, a regard to talents, public services, and political sagacity. And whatever may be the defects of the representative system of Great Britain, very few of the defects of its legislation have been imputed to the ignorance of the house of commons of the true interests or circumstances of the people.[3]

§ 660. In the history of the constitution it is a curious fact, that with some statesmen, possessing high political distinction, it was made a fundamental objection against the establishment of any national legislature, that if it "were composed of so numerous a body of men, as to represent the interests of all the inhabitants of the United States in the usual and true ideas of representation, the expense of supporting it would be intolerably burthensome; and that if a few only were vested with a power of legislation, the interests of a great majority of the inhabitants of the United States must be necessarily unknown; or, if known, even in the first stages of the operations of the new government, unattended to."[4] In their view a free government seems to

[1] The Federalist, No. 56; Paley's Moral Philosophy, B. 6, ch. 7.

[2] The Federalist, No. 56, 57.

[3] The Federalist, No. 56. See also Dr. Franklin's Remarks, 2 Pitkin's Hist. 242; 1 Wilson's Law Lect. 431, 432; Paley's Moral Philosophy, B. 6, ch. 7; 1 Kent's Comm. 219.

[4] Letter of Messrs. Yates and Lansing to Gov. Clinton, 1788, (3 Amer. Museum, 156, 158.)

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have been incompatible with a great extent of territory, or population. What, then, would become of Great Britain, or of France, under the present constitution of their legislative departments?

§ 661. The next objection was, that the representatives would be chosen from that class of citizens, which would have the least sympathy with the mass of the people; and would be most likely to aim at an ambitious sacrifice of the many to the aggrandizement of the few.[1] It was said, that the author of nature had bestowed on some men greater capacities, than on others. Birth, education, talents, and wealth, created distinctions among men, as visible, and of as much influence, as stars, garters, and ribbons. In every society men of this class will command a superior degree of respect; and if the government is so constituted, as to admit but few to exercise its powers, it will, according to the natural course of things, be in their hands. Men in the middling class, who are qualified as representatives, will not be so anxious to be chosen, as those of the first; and if they are, they will not have the means of so much influence.[2]

§ 662. It was answered, that the objection itself is of a very extraordinary character; for while it is levelled against a pretended oligarchy, in principle it strikes at the very root of a republican government; for it supposes the people to be incapable of making a proper choice of representatives, or indifferent to it, or utterly corrupt in the exercise of the right of suffrage. It would not be contended, that the first class of society, the men of talents, experience, and wealth, ought to be

[1] The Federalist, No. 57; 1 Elliot's Debates, 220, 221. See also The Federalist, No. 35.

[2] 1 Elliot's Debates, 221, 222.

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constitutionally excluded from office. Such an attempt would not only be unjust, but suicidal; for it would nourish an influence and faction within the state, which, upon the very supposition, would continually exert its whole means to destroy the government, and overthrow the liberties of the people.[1] What, then, is to be done? If the people are free to make the choice, they will naturally make it from that class, whatever it may be, which will in their opinion best promote their interests, and preserve their liberties.[2] Nor are the poor, any more than the rich, beyond temptation, or love of power. Who are to be the electors of the representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the heirs of distinguished families, more than the children of obscurity and unpropitious fortune.[3] The electors are to be the body of the people of the United States, jealous of their rights, and accustomed to the exercise of their power. Who are to be the objects of their choice? Every citizen, whose merit may commend him to the esteem and confidence of his fellow citizens. No qualification of wealth, or birth, or religion, or civil profession, is recognised in the constitution; and consequently, the people are free to choose from any rank of society according to their pleasure.[4]

§ 663. The persons, who shall be elected representatives, must have all the inducement to fidelity, vigilance, and a devotion to the interests of the people, which can possibly exist. They must be presumed to be selected from their known virtues, and estimable

[1] 1 Elliot's Debates, 222, 223.
[2] The Federalist, No. 35; Id. No. 36; Id. No. 57.
[3] The Federalist, No. 57; Id. No. 35; Id. No. 36.
[4] The Federalist, No. 57; Id. No. 35; Id. No. 36.

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qualities, as well as from their talents. They must have a desire to retain, and exalt their reputation, and be ambitious to deserve the continuance of that public favour, by which they have been elevated. There is in every breast a sensibility to marks of honour, of favour, of esteem, and of confidence, which, apart from all considerations of interest, is some pledge for grateful and benevolent returns.[1] But the interest of the representative, which naturally binds him to his constituents, will be strengthened by motives of a selfish character. His election is biennial; and he must soon return to the common rank of a citizen, unless he is re-elected. Does he desire office? Then that very desire will secure his fidelity. Does he feel the value of public distinctions? Then his pride and vanity will equally attach him to a government, which affords him an opportunity to share in its honours and distinctions, and to the people, who alone can confer them.[2] Besides; he can make no law, which will not weigh as heavily on himself and his friends, as on others; and he can introduce no oppression, which must not be borne by himself, when he sinks back to the common level. As for usurpation, or a perpetuation of his authority, independent of the popular will, that is hopeless, until the period shall have arrived, in which the people are ready to barter their liberties, and are ready to become the voluntary slaves of any despot.[3] Whenever that period shall arrive, it will be useless to speak of guardians, or of rights. Where all are corrupt, it is idle to talk of virtue. *Quis custodiet custodes?*

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1 The Federalist, No. 57.
2 The Federalist, No. 57.
3 The Federalist, No. 57; Id. No. 35, 36.

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Who shall keep watch over the people, when they choose to betray themselves?

§ 664. The objection itself is, in truth, utterly destitute of any solid foundation. It applies with the same force to the state legislatures, as to that of the Union. It attributes to talents, and wealth, and ambition an influence, which may be exerted at all times, and everywhere. It speaks in no doubtful language, that republican government is but a shadow, and incapable of preserving life, liberty, or property[1] It supposes, that the people are always blind to their true interests, and always ready to betray them; that they can safely trust neither themselves, nor others. If such a doctrine be maintainable, all the constitutions of America are founded in egregious errors and delusions.

§ 665. The only perceptible difference between the case of a representative in congress, and in the state legislature, as to this point, is, that the one may be elected by five or six hundred citizens, and the other by as many thousands.[2] Even this is true only in particular states; for the representatives in Massachusetts (who are all chosen by the towns) may be elected by six thousand citizens; nay, by any larger number, according to the population of the town. But giving the objection its full force, could this circumstance make any solid objection? Are not the senators in several of the states chosen by as large a number? Have they been found more corrupt, than the representatives? Is the objection supported by *reason?* Can it be said, that five or six thousand citizens are more easily corrupted, than five or six hundred?[3] That the aggregate

[1] The Federalist, No. 57; Id. No. 35, 36.
[2] The Federalist, No. 57. [3] The Federalist, No. 57.

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mass will be more under the influence of intrigue, than a portion of it? Is the *consequence*, deducible from the objection, admissible? If it is, then we must deprive the people of all choice of their public servants in all cases, where numbers are not required.[1] What, then, is to be done in those states, where the governors are by the state constitution to be chosen by the people? Is the objection warranted by *facts?* The representation in the British house of commons (as has been already stated) very little exceeds the proportion of one for every thirty thousand inhabitants.[2] Is it true, that the house of commons have elevated themselves upon the ruin of the many? Is it true, that the representatives of boroughs have been more faithful, or wise, or honest, or patriotic, than those of cities and of counties? Let us come to our own country. The districts in New-Hampshire, in which the senators are chosen immediately by the people, are nearly as large, as will be necessary for her representatives in congress. Those in Massachusetts come from districts having a larger population; and those in New-York from districts still larger. In New-York and Albany the members of assembly are elected by nearly as many voters, as will be required for a member of congress, calculating on the number of sixty-five only. In some of the counties of Pennsylvania the state representatives are elected in districts nearly as large, as those required for the federal representatives. In the city of Philadelphia (composed of sixty thousand inhabitants) every elector has a right to vote for each of the representatives in the state legislature; and actually elects a single member to the executive council.[3] These are facts, which

[1] The Federalist, No. 57. [2] Id. No. 56, 57. [3] Id. No. 57.

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demonstrate the fallacy of the objection; for no one will pretend, that the rights and liberties of these states are not as well maintained, and as well understood by their senators and representatives, as those of any other states in the Union by theirs. There is yet one stronger case, that of Connecticut; for there one branch of the legislature is so constituted, that each member of it is elected by the whole state.[1]

§ 666. The remaining objection was, that there was no security, that the number of members would be augmented from time to time, as the progress of the population might demand.[2]

§ 667. It is obvious, that this objection is exclusively founded upon the supposition, that the people will be too corrupt, or too indifferent, to select proper representatives; or, that the representatives, when chosen, will totally disregard the true interests of their constituents, or wilfully betray them. Either supposition (if the preceding remarks are well founded) is equally inadmissible. There are, however, some additional considerations, which are entitled to great weight. In the first place, it is observable, that the federal constitution will not suffer in comparison with the state constitutions in regard to the security, which is provided for a gradual augmentation of the number of representatives. In many of them the subject has been left to the discretion of the legislature; and experience has thus far demonstrated not only, that the power is safely lodged, but that a gradual increase of representatives (where it could take place) has kept pace with that of the constituents.[3] In the next place, as a new census is to

[1] The Federalist, No. 57.
[2] The Federalist, No. 58; 1 Elliot's Debates, 204, 224.
[3] The Federalist, No. 58.

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take place within every successive ten years, for the avowed purpose of readjusting the representation from time to time, according to the national exigencies, it is no more to be imagined, that congress will abandon its proper duty in this respect, than in respect to any other power confided to it. Every power may be abused; every duty may be corruptly deserted. But, as the power to correct the evil will recur at least biennially to the people, it is impossible, that there can long exist any public abuse or dereliction of duty, unless the people connive at, and encourage the violation.[1] In the next place, there is a peculiarity in the federal constitution, which must favour a constitutional augmentation of the representatives. One branch of the national legislature is elected by the people; the other, by the states. In the former, consequently, the large states will have more weight; in the latter, the smaller states will have the advantage. From this circumstance, it may be fairly inferred, that the larger states, and especially those of a growing population, will be strenuous advocates for increasing the number and weight of that part of the legislature, in which their influence predominates.[2]

§ 668. It may be said, that there will be an antagonist influence in the senate to prevent an augmentation. But, upon a close view, this objection will be found to lose most of its weight. In the first place, the house of representatives, being a co-ordinate branch, and directly emanating from the people, and speaking the known and declared sense of the majority of the people, will, upon every question of this nature, have

[1] 1 Elliot's Debates, 239.

[2] The Federalist, No. 58; 2 Lloyd's Debates, in 1789, p. 192.

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no small advantage, as to the means of influence and resistance. In the next place, the contest will not be to be decided merely by the votes of great states and small states, opposed to each other, but by states of intermediate sizes, approaching the two extremes by gradual advances. They will naturally arrange themselves on the one side, or the other, according to circumstances; and cannot be calculated upon, as identified permanently with either. Besides; in the new states, and those, whose population is advancing, whether they are great or small, there will be a constant tendency to favour augmentations of the representatives; and, indeed, the large states may compel it by making re-apportionments and augmentations mutual conditions of each other.[1] In the third place, the house of representatives will possess an exclusive power of proposing supplies for the support of government; or, in other words, it will hold the purse-strings of the nation. This must for ever give it a powerful influence in the operations of the government; and enable it effectually to redress every serious grievance.[2] The house of representatives will, at all times, have as deep an interest in maintaining the interests of the people, as the senate can have in maintaining that of the states.[3]

§ 669. Such is a brief view of the objections urged against this part of the constitution, and of the answers given to them. Time, as has been already intimated, has already settled them by its own irresistible demonstrations. But it is impossible to withhold our tribute of admiration from those enlightened statesmen, whose

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[1] The Federalist, No. 58.
[2] The Federalist, No. 57; 1 Elliot's Debates, 226, 227.
[3] The Federalist, No. 58.

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profound reasoning, and mature wisdom, enabled the people to see the true path of safety. What was then prophecy and argument has now become fact. At each successive census, the number of representatives has been gradually augmented.[1] In 1792, the ratio adopted was 33.000, which gave an aggregate of one hundred and six representatives. In 1802, the same ratio was adopted, which gave an aggregate of one hundred and forty-one members. In 1811, the ratio adopted was 35.000, which gave an aggregate of one hundred and eighty-one members. In 1822, the ratio adopted was 40.000, which gave an aggregate of two hundred and ten members. In 1832, the ratio adopted was 47.700, which gave an aggregate of two hundred and forty members.[2]

§ 670. In the mean time, the house of representatives has silently acquired vast influence and power over public opinion by its immediate connexion and sympathy with the people. No complaint has been urged, or could now with truth be urged, that it did not understand, or did not represent, the interests of the people, or bring to the public councils a competent knowledge of, and devotion to, the local interests and feelings of its constituents. Nay; so little is, and so little has the force of this objection been felt, that several states have voluntarily preferred to elect their representatives by a general ticket, rather than by districts. And the electors for president and vice-president are more frequently chosen in that, than in any other manner. The representatives are not, and never have

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[1] Act of 1792, ch. 23; Act of 1802, ch. 1; Act of 1811, ch. 9; Act of 1822, ch. 10; 1 Tuck. Black. Comm. App. 190; Rawle on Constitution, 45.

[2] Act of 22d May, 1832, ch. 91.

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been, chosen exclusively from any high, or privileged class of society. At this moment, and at all previous times, the house has been composed of men from almost every rank and class of society; planters, farmers, manufacturers, mechanics, lawyers, physicians, and divines; the rich, and the poor; the educated, and the uneducated men of genius; the young, and the old; the eloquent, and the taciturn; the statesman of a half century, and the aspirant, just released from his academical studies. Merit of every sort has thus been able to assert its claims, and occasionally to obtain its just rewards. And if any complaint could justly be made, it would be, that the choice had sometimes been directed by a spirit of intolerance, that forgot every thing but its own creed; or by a spirit of party, that remembered every thing but its own duty. Such infirmities, however, are inseparable from the condition of human nature; and their occurrence proves nothing more, than that the moral, like the physical world is occasionally visited by a whirlwind, or deluged by a storm.

§ 671. It remains only to take notice of two qualifications of the general principle of representation, which are engrafted on the clause. One is, that each state shall have at least one representative; the other is that already quoted, that the number of representatives shall not exceed one for every 30.000. The former was indispensable in order to secure to each state a just representation in each branch of the legislature; which, as the powers of each branch were not exactly co-extensive, and especially, as the power of originating taxation was exclusively vested in the house of representatives, was indispensable to preserve the equality of the small states, and to reconcile them to a surrender of their sovereignty. This proviso was

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omitted in the first draft of the constitution, though proposed in one of the preceding resolutions.[1] But it was adopted without resistance, when the draft passed under the solemn discussion of the convention.[2] The other was a matter of more controversy. The original limitation proposed was 40.000;[3] and it was not until the very last day of the session of the convention, that the number was reduced to 30.000.[4] The object of fixing some limitation was to prevent the future existence of a very numerous and unwieldy house of representatives. The friends of a national government had no fears, that the body would ever become too small for real, effective, protecting service. The danger was, that from the natural impulses of the popular will, and the desire of ambitious candidates to attain office, the number would be soon swollen to an unreasonable size, so that it would at once generate, and combine factions, obstruct deliberations, and introduce and perpetuate turbulent and rash counsels.[5]

§ 672. On this subject, let the Federalist speak in its own fearless and expressive language. "In all legislative assemblies the greater the number composing them may be, the fewer will the men be, who will, in fact, direct their proceedings.[6] In the first place, the more numerous any assembly may be, of whatever characters composed, the greater is known to be the

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1 Journ. of Convention, 157, 158, 209, 215.

2 Journ. of Convention, 8th Aug. p. 236.

3 Journ. of Convention, 157, 217, 235, 352.

4 Journ. of Convention, 17th Sept. 1787, p. 389.

5 1 Lloyd's Debates in 1789, 427, 434; 2 Lloyd's Debates, 183, 185, 186, 188, 189, 190.

6 The same thought is expressed with still more force in the American pamphlet, entitled, Thoughts upon the Political situation of America. (Worcester, 1788,) 54.

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ascendancy of passion over reason. In the next place, the larger the number, the greater will be the proportion of members of limited information and weak capacities. Now, it is precisely on characters of this description, that the eloquence and address of the few are known to act with all their force. In the ancient republics, where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway, as if a sceptre had been placed in his single hand. On the same principle, the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning; and passion the slave of sophistry and declamation. The people can never err more than in supposing, that in multiplying their representatives beyond a certain limit, they strengthen the barrier against the government of a few. Experience will for ever admonish them, that, on the contrary, after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy, they will counteract their own views by every addition to their representatives. The countenance of the government may become more democratic; but the soul, that animates it, will be more oligarchic. The machine will be enlarged, but the fewer, and often the more secret, will be the springs, by which its motions are directed." [1]

[1] The Federalist, No. 58. — Mr. Ames, in a debate in congress, in 1789, on amending the constitution in regard to representation, observed, "By enlarging the representation, we lessen the chance of selecting men of the greatest wisdom and abilities; because small districts may be conducted by intrigue; but in large districts nothing but real dignity of character can secure an election." * Unfortunately, the experience of

* 2 Lloyd's Debates, 183.

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§ 673. As a fit conclusion of this part of the subject it may be remarked, that congress, at its first session in 1789, in pursuance of a desire expressed by several of the state conventions, in favour of further declaratory and restrictive amendments to the constitution, proposed twelve additional articles. The first was on the very subject now under consideration, and was expressed in the following terms: "After the first enumeration required by the first article of the constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which the proportion shall be so regulated by congress, that there shall not be less than one hundred representatives, nor less than one for every forty thousand persons, until the number of representatives shall amount to two hundred; after which, the proportion shall be so regulated by congress, that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand."[1] This amendment was never ratified by a competent number of the states to be incorporated into the constitution.[2] It was probably thought, that the whole subject was safe, where it was already lodged; and that congress ought to be left free to exercise a sound discretion, according to the future exigencies of the nation, either to increase, or diminish the number of representatives.

§ 674. There yet remain two practical questions of no inconsiderable importance, connected with the

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the United States has not justified the belief, that large districts will always choose men of the greatest wisdom, abilities, and real dignity.

[1] Journ. of Convention, &c. Suppt. 466 to 481.

[2] The debates in congress on this amendment will be found in 2 Lloyd's Debates, 182 to 194; Id. 250.

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clause of the constitution now under consideration. One is, what are to be deemed direct taxes within the meaning of the clause. The other is, in what manner the apportionment of representatives is to be made. The first will naturally come under review in examining the powers of congress, and the constitutional limitations upon those powers; and may, therefore, for the present, be passed over. The other was a subject of much discussion at the time, when the first apportionment was before congress after the first census was taken; and has been recently revived with new and increased interest and ability. It deserves, therefore, a very deliberate examination.

§ 675. The language of the constitution is, that "representatives and direct taxes shall be apportioned "among the several states, &c. according to their "respective numbers;" and at the first view it would not seem to involve the slightest difficulty. A moment's reflection will dissipate the illusion, and teach us, that there is a difficulty intrinsic in the very nature of the subject. In regard to direct taxes, the natural course would be to assume a particular sum to be raised, as three millions of dollars; and to apportion it among the states according to their relative numbers. But even here, there will always be a very small fractional amount incapable of exact distribution, since the numbers in each state will never exactly coincide with any common divisor, or give an exact aliquot part for each state without any remainder. But, as the amount may be carried through a long series of descending money fractions, it may be ultimately reduced to the smallest fraction of any existing, or even imaginary coin.

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§ 676. But the difficulty is far otherwise in regard to representatives. Here, there can be no subdivision of the unit; each state must be entitled to an entire representative, and a fraction of a representative is incapable of apportionment. Yet it will be perceived at once, that it is scarcely possible, and certainly is wholly improbable, that the relative numbers in each state should bear such an exact proportion to the aggregate, that there should exist a common divisor for all, which should leave no fraction in any state. Such a case never yet has existed; and in all human probability it never will. Every common divisor, hitherto applied, has left a fraction greater, or smaller, in every state;[1] and what has been in the past must continue to be for the future. Assume the whole population to be three, or six, or nine, or twelve millions, or any other number; if you follow the injunctions of the constitution, and attempt to apportion the representatives according to the numbers in each state, it will be found to be absolutely impossible. The theory, however true, becomes practically false in its application. Each state may have assigned a relative proportion of representatives up to a given number, the whole being divisible by some common divisor; but the fraction of population belonging to each beyond that point is left unprovided for. So that the apportionment is, at best, only an approximation to the rule laid down by the constitution, and not a strict compliance with the rule. The fraction in one state may be ten times as great, as that in another; and so may differ in each state in any assignable mathematical proportion. What then is to be done? Is the constitution to be wholly disre-

[1] See 5 Marshall's Life of Washington, ch. 5, p. 319.

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garded on this point? Or is it to be followed out in its true spirit, though unavoidably differing from the letter, by the nearest approximation to it? If an additional representative can be assigned to one state beyond its relative proportion to the whole population, it is equally true, that it can be assigned to all, that are in a similar predicament. If a fraction admits of representation in any case, what prohibits the application of the rule to all fractions? The only constitutional limitation seems to be, that no state shall have more than one representative for every thirty thousand persons. Subject to this, the truest rule seems to be, that the apportionment ought to be the nearest practical approximation to the terms of the constitution; and the rule ought to be such, that it shall always work the same way in regard to all the states, and be as little open to cavil, or controversy, or abuse, as possible.

§ 677. But it may be asked, what are the first steps to be taken in order to arrive at a constitutional apportionment? Plainly, by taking the aggregate of population in all the states, (according to the constitutional rule,) and then ascertain the relative proportion of the population of each state to the population of the whole. This is necessarily so in regard to direct taxes;[1] and

[1] "By the constitution," says Mr. Chief Justice Marshall in delivering the opinion of the court, "direct taxation, in its application to states, shall be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every 30,000 souls, one state had been found to contain 59,000 and another 60,000, the first would have been entitled to only one representative, and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty." * This is perfectly correct, because the constitution prohibits more than one representative for every 30,000. But if one state contain 100,000 souls, and another

* *Loughborough* v. *Blake*, 5 Wheaton's R. 317, 320.

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there is no reason to say, that it can, or ought to be otherwise in regard to representatives; for that would be to contravene the very injunctions of the constitution, which require the like rule of apportionment in each case. In the one, the apportionment may be run down below unity; in the other, it cannot. But this does not change the nature of the rule, but only the extent of its application.

§ 678. In 1790, a bill was introduced into the house of representatives, giving one representative for every thirty thousand, and leaving the fractions unrepresented; thus producing an inequality, which was greatly complained of. It passed the house; and was amended in the senate by allowing an additional representative to the states having the largest fractions. The house finally concurred in the amendment, after a warm debate. The history of these proceedings is summarily stated by the biographer of Washington, as follows: — "Construing," says he, "the constitution to authorize a process, by which the whole number of representatives should be ascertained on the whole population of the United States, and afterwards apportioned among the several states according to their respective numbers, the senate applied the number thirty thousand, as a divisor, to the total population, and taking the quotient, which was one hundred and twenty, as the number of representatives given by the ratio, which had been adopted in the house, where the bill originated, they apportioned that number among the several states by that ratio, until as many representatives, as it

200,000, there is no logic, which, consistently with common sense, or justice, could, upon any constitutional apportionment, assign three representatives to one, and seven to the other, any more than it could of a direct tax the proportion of three to one, and seven to the other.

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would give, were allotted to each. The residuary members were then distributed among the states having the highest fractions. Without professing the principle, on which this apportionment was made, the amendment of the senate merely allotted to the states respectively the number of members, which the process just mentioned would give.[1] The result was a more equitable apportionment of representatives to population, and a still more exact accordance, than was found in the original bill, with the prevailing sentiment, which, both within doors and without, seemed to require, that the popular branch of the legislature should consist of as many members, as the fundamental laws of the government would admit. If the rule of construing that instrument was correct, the amendment removed objections, which were certainly well founded, and was not easily assailable by the advocates of a numerous representative body. But the rule was novel, and overturned opinions, which had been generally assumed, and were supposed to be settled. In one branch of the legislature, it had been already rejected; and in the other, the majority in its favour was only one."[2]

§ 679. The debate in the two houses, however, was purely political, and the division of the votes purely geographical; the southern states voting against it, and the northern in its favour.[3] The president returned the bill with two objections. "1. That the constitu-

[1] The words of the bill were, "That from and after the the third day of March, 1793, the house of representatives shall be composed of one hundred and twenty-seven members, elected within the several states according to the following apportionment, that is to say, within the state of New-Hampshire, five, within the state of Massachusetts, sixteen," &c. &c. enumerating all the states.

[2] 5 Marshall's Life of Washington, ch. 5, p. 321, 322.

[3] 4 Jefferson's Correspondence, 466.

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tion has prescribed, that representatives shall be apportioned among the several states according to their respective numbers; and there is no proportion or divisor, which, applied to the respective numbers of the states, will yield the number and allotment of representatives proposed by the bill. 2. The constitution has also provided, that the number of representatives shall not exceed one for thirty thousand, which restriction is by the context, and by fair and obvious construction, to be applied to the several and respective numbers of the states, and the bill has allotted to eight of the states more than one for thirty thousand."[1] The bill was accordingly lost, two thirds of the house not being in its favour. It is understood, that the president's cabinet was greatly divided on the question.[2]

§ 680. The second reason assigned by the president against the bill was well founded in fact, and entirely conclusive. The other, to say the least of it, is as open to question, as any one, which can well be imagined in a case of real difficulty of construction. It assumes, as its basis, that a common ratio, or divisor, is to be taken, and applied to each state, let the fractions and inequalities left be whatever they may. Now, this is a plain departure from the terms of the constitution. It is not there said, that any such ratio shall be taken. The language is, that the representatives shall be apportioned among the several states according to their respective numbers, that is, according to the proportion of the whole population of each state to the aggregate of all the states. To apportion according to a ratio, short of the whole number in a state, is not an apportionment according to the respective

[1] 5 Marshall's Life of Washington, ch. 5, p. 324, note.
[2] Id. p. 323; 4 Jefferson's Correspondence, 466.

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numbers of the state. If it is said, that it is impracticable to follow the meaning of the terms literally, that may be admitted; but it does not follow, that they are to be wholly disregarded, or language substituted essentially different in its import and effect. If we must depart, we must depart as little as practicable. We are to act on the doctrine of *cy pres*, or come as nearly as possible to the rule of the constitution. If we are at liberty to adopt a rule varying from the terms of the constitution, arguing *ab inconvenienti*, then it is clearly just as open to others to reason on the other side from opposing inconvenience and injustice.

§ 681. This question, which a learned commentator has supposed to be now finally at rest,[1] has been (as has been already intimated) recently revived and discussed with great ability. Instead of pursuing my own reasoning upon this subject it will be far more satisfactory to give to the reader, in a note, the arguments on each side, as they are found collected in the leading reports and documents now forming a portion of contemporary history.[2]

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[1] Rawle on Constitution, 43; 5 Marshall's Life of Washington, 324.

[2] Mr. Jefferson's opinion, given on the apportionment bill in 1792, presents all the leading reasons against the doctrine of apportioning the representatives in any other manner than by a ratio without regard to fractions. It is as follows:

"The constitution has declared that 'representatives and direct taxes shall be apportioned among the several states according to their respective numbers;' that 'the number of representatives shall not exceed one for every 30,000, but each state shall have, at least, one representative; and, until such enumeration shall be made, the state of New-Hampshire shall be entitled to choose three, Massachusetts,' &c.

"The bill for apportioning representatives among the several states, without explaining any principle at all, which may show its conformity with the constitution, or guide future apportionments, says, that New-Hampshire shall have three members, Massachusetts sixteen, &c. We are, therefore, to find by experiment what has been the principle of the

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§ 682. The next clause of the second section of the first article, is: "When vacancies happen in the repre-"sentation of any state, the executive authority thereof "shall issue writs of election to fill such vacancies."

§ 683. The propriety of adopting this clause does not seem to have furnished any matter of discussion, either in, or out of the convention.[1] It was obvious, that the power ought to reside somewhere; and must be exercised, either by the state or national government, or by some department thereof. The friends of state powers would naturally rest satisfied with leaving it with the state executive; and the friends of the national

bill; to do which, it is proper to state the federal or representable numbers of each state, and the members allotted to them by the bill. They are as follows:

Vermont,	85,532	3	It happens that this representation, whether tried as between great and small states, or as between north and south, yields, in the present instance, a tolerably just result, and consequently could not be objected to on that ground, if it were obtained by the process prescribed in the constitution; but, if obtained by any process out of that, it becomes inadmissible.
New-Hampshire,	141,823	5	
Massachusetts,	475,327	16	
Rhode-Island,	68,444	2	
Connecticut,	235,941	8	
New-York,	352,915	11	
New-Jersey,	179,556	6	
Pennsylvania,	432,880	14	
Delaware,	55,538	2	
Maryland,	278,513	9	
Virginia,	630,558	21	
Kentucky,	68,705	2	
North Carolina,	353,521	11	
South Carolina,	206,236	7	
Georgia,	70,843	2	
	3,636,312	120	

"The first member of the clause of the constitution above cited, is express — that representatives shall be apportioned among the several states according to their *respective numbers*; that is to say, they shall be apportioned by some common ratio, for *proportion* and ratio are equivalent words; and it is the definition of *proportion among numbers*, that they have a *ratio common to all*, or, in other words, a *common divisor*. Now, trial will show that there is no *common ratio*, or *divisor*, which, applied to the numbers of each state, will give to them the number of re-

[1] Journal of Convention, 217, 237, 352.

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government would acquiesce in that arrangement, if other constitutional provisions existed sufficient to preserve its due execution. The provision, as it stands has the strong recommendation of public convenience, and facile adaptation to the particular local circum-

presentatives allotted in this bill; for, trying the several ratios of 29, 30, 31, 32, 33, the allotments would be as follows:

	29	30	31	32	33	The bill.	
Vermont,	2	2	2	2	2	3	Then the bill reverses the constitutional precept; because, by it, 'representatives are *not* apportioned among the several states according to their respective numbers.'
New-Hampshire,	4	4	4	4	4	5	
Massachusetts,	16	15	15	14	14	16	
Rhode-Island,	2	2	2	2	2	2	
Connecticut,	8	7	7	7	7	8	
New-York,	12	11	11	11	10	11	
New-Jersey,	6	5	5	5	5	6	
Pennsylvania,	14	14	13	13	13	14	
Delaware,	1	1	1	1	1	2	
Maryland,	9	9	8	8	8	9	
Virginia,	21	21	20	19	19	21	
Kentucky,	2	2	2	2	2	2	
North Carolina,	12	11	11	11	10	12	
South Carolina,	7	6	6	6	6	7	
Georgia,	2	2	2	2	2	2	
	118	112	109	107	105	120	

"It will be said, that, though for *taxes* there may always be found a divisor, which will apportion them among the states according to numbers exactly, without leaving any remainder; yet, for *representatives*, there can be no such common ratio, or divisor, which, applied to the several numbers, will divide them exactly, without a remainder or fraction. I answer, then, that *taxes* must be divided *exactly*, and *representatives* as *nearly* as the *nearest ratio* will admit, and the fractions must be neglected; because the constitution wills, absolutely, that there be an *apportionment*, or *common ratio*; and if any fractions result from the operation, it has left them unprovided for. In fact, it could not but foresee that such fractions would result, and it meant to submit to them. It knew they would be in favour of one part of the Union at one time, and of another part of it at another, so as, in the end, to balance occasional inequalities. But, instead of such a *single* common ratio, or uniform divisor, as prescribed by the constitution, the bill has applied *two ratios*, at least, to the different states, to wit, that of 30,026 to the seven following: Rhode-Island, New-York, Pennsylvania, Maryland, Virginia, Kentucky, and Georgia; and that of 27,770 to the eight others; namely,

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stances of each state. Any general regulation would have worked with some inequality.

§ 684. The next clause is, that "the house of representatives shall choose their speaker, and other

Vermont, New-Hampshire, Massachusetts, Connecticut, New-Jersey, Delaware, North Carolina, and South Carolina. As follows:

		Divided by 30,026, give		And		Divided by 27,770, give	
Rhode Island, -	68,444		2	Vermont, - -	85,532		3
New York, -	352,915		11	New-Hampshire,	141,823		5
Pennsylvania, -	432,880		14	Massachusetts, -	475,327		16
Maryland, - -	278,513		9	Connecticut, -	235,941		8
Virginia, - -	630,558		21	New-Jersey, -	179,556		6
Kentucky, - -	68,705		2	Delaware, -	55,538		2
Georgia, - -	70,843		2	North Carolina, -	353,521		2
				South Carolina, -	206,236		7

"And if *two* ratios may be applied, then *fifteen* may, and the distribution become arbitrary, instead of being apportioned to numbers.

"Another member of the clause of the constitution, which has been cited, says, 'the number of representatives shall not exceed one for every 30,000, but each state shall have, at least, one representative.' This last phrase proves that it had in contemplation, that all fractions, or *numbers below the common ratio*, were to be unrepresented; and it provides specially, that, in the case of a state whose whole number shall be below the common ratio, one representative shall be given to it. This is the single instance where it allows representation to any smaller number than the common ratio, and, by providing specially for it in this, shows it was understood, that, without special provision, the smaller number would, in this case, be involved in the general principle.

"The first phrase of the above citation, that 'the number of representatives shall not exceed one for every 30,000,' is violated by this bill, which has given to eight states a number exceeding one for every 30,000, to wit, one for every 27,770.

"In answer to this, it is said, that this phrase may mean either the thirty thousands *in each state*, or the thirty thousands *in the whole Union*; and that, in the latter case, it serves only to find the amount of the whole representation, which, in the present state of population, is one hundred and twenty members. Suppose the phrase might bear both meanings, which will common sense apply to it? Which did the universal understanding of our country apply to it? Which did the senate and representatives apply to it during the pendency of the first bill, and even till an advanced stage of this second bill, when an ingenious gentleman found out the doctrine of fractions — a doctrine so difficult and inobvious, as to be rejected, at first sight, by the very persons who afterwards be-

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"officers, and shall have the sole power of impeach-
"ment."

§ 685. Each of these privileges is of great practical value and importance. In Great Britain the house of

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came its most zealous advocates? The phrase stands in the midst of a number of others, every one of which relates to states in their separate capacity. Will not plain common sense, then, understand it, like the rest of its context, to relate to states in their separate capacities?

"But if the phrase of one for 30,000, is only meant to give the aggregate of representatives, and not at all to influence their apportionment among the states, then the one hundred and twenty being once found, in order to apportion them, we must recur to the former rule, which does it *according to the numbers of the respective states*; and we must take the *nearest common divisor* as the ratio of distribution, that is to say, that divisor, which, applied to every state, gives to them such numbers as, added together, come nearest to 120. This nearest common ratio will be found to be 28,858, and will distribute 119 of the 120 members, leaving only a single residuary one. It will be found, too, to place 96,648 fractional numbers in the eight northernmost states, and 105,582, in the southernmost. The following table shows it:

		Ratio of 28,858.	Fractions.	
Vermont, - -	85,532	2	27,816	
New-Hampshire - -	141,823	4	26,391	
Massachusetts - -	475,327	16	13,599	
Rhode-Island - -	68,444	2	10,728	
Connecticut - -	235,941	8	5,077	
New-York - -	352,915	12	6,619	
New-Jersey - -	179,556	6	6,408	
Pennsylvania - -	432,880	15	10	
				96,648
Delaware - -	55,538	1	26,680	
Maryland - -	278,513	9	18,791	
Virginia - -	630,558	21	24,540	
Kentucky - -	68,705	2	10,989	
North Carolina - -	353,521	12	7,225	
South Carolina - -	206,236	7	4,230	
Georgia - -	70,843	2	13,127	105,582
	3,636,312	119	202,230	202,230

"Whatever may have been the intention, the effect of rejecting the nearest divisor, (which leaves but one residuary member,) and adopting a distant one, (which leaves eight,) is merely to take a member from New-York and Pennsylvania each, and give them to Vermont and New-

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commons elect their own speaker; but he must be approved by the king.[1] This approval is now altogether a matter of course; but anciently, it seems, the king intimated his wish previously, in order to avoid the necessity of a refusal; and it was acceded to.[2] The very language used by the speakers in former times, in order to procure the approval of the crown, was such as would not now be tolerated; and indicated, at least,

Hampshire. But it will be said, 'this is giving more than one for 30,000.' True; but has it not been just said, that the one for 30,000 is prescribed only to fix the aggregate number, and that we are not to mind it when we come to apportion them among the states; that for this we must recur to the former rule, which distributes them according to the numbers in each state? Besides, does not the bill itself, apportion among seven of the states by the ratio of 27,770, which is much more than one for 30,000?

"Where a phrase is susceptible of two meanings, we ought certainly to adopt that which will bring upon us the fewest inconveniences. Let us weigh those resulting from both constructions.

"From that giving to each state a member for every 30,000 in that state, results the single inconvenience, that there may be large fractions unrepresented. But it being a mere hazard on which states this will fall, hazard will equalize it in the long run.

"From the other, results exactly the same inconvenience. A thousand cases may be imagined to prove it. Take one; suppose eight of the states had 45,000 inhabitants each, and the other seven 44,999 each, that is to say, each one less than each of the others, the aggregate would be 674,993, and the number of representatives, at one for 30,000 of the aggregate, would be 22. Then, after giving one member to each state, distribute the seven residuary members among the seven highest fractions; and, though the difference of population be only an unit, the representation would be the double. Here a single inhabitant the more would count as 30,000. Nor is this case imaginable only; it will resemble the real one, whenever the fractions happen to be pretty equal through the whole states. The numbers of our census happen, by accident, to give the fractions all very small or very great, so as to produce the strongest case of inequality that could possibly have occurred, and which may never occur again. The probability is, that the fractions will generally descend gradually from 29,999 to 1. The inconvenience, then, of large unrepresented fractions attends both constructions; and,

[1] 1 Black. Comm. 181.

[2] Com. Dig. Parliament, E. 5; 4 Inst. 8, Lex. Parl. ch. 12, p. 74.

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a disposition to undue subserviency.[1] A similar power of approval existed in the royal governors in many of the colonies before the revolution. The exclusive

while the most obvious construction is liable to no other, that of the bill incurs many and grievous ones.

			Fractions.
1st - - - -	45,000	2	15,000
2d - - - -	45,000	2	15,000
2d - - - -	45,000	2	15,000
4th - - - -	45,000	2	15,000
5th - - - -	45,000	2	15,000
6th - - - -	45,000	2	15,000
7th - - - -	45,000	2	15,000
8th - - - -	45,000	2	15,000
9th - - - -	44,999	1	14,999
10th - - - -	44,999	1	14,999
11th - - - -	44,999	1	14,999
12th - - - -	44,999	1	14,999
13th - - - -	44,999	1	14,999
14th - - - -	44,999	1	14,999
15th - - - -	44,999	1	14,999
	674,993		

"1. If you permit the large fraction in one state to choose a representative for one of the small fractions in another state, you take from the latter its election, which constitutes real representation, and substitute a virtual representation of the disfranchised fractions; and the tendency of the doctrine of virtual representation has been too well discussed and appreciated by reasoning and resistance, on a former great occasion, to need developement now.

"2. The bill does not say, that it has given the residuary representatives *to the greatest fractions*; though, in fact, it has done so. It seems to have avoided establishing that into a rule, lest it might not suit on another occasion. Perhaps it may be found the next time more convenient to distribute them *among the smaller states*; at another time *among the larger states*; at other times according to any other crotchet, which ingenuity may invent, and the combination of the day give strength to carry; or they may do it arbitrarily, by open bargain and cabal. In short, this construction introduces into congress a scramble, or a vendue for the surplus members. It generates waste of time, hot blood, and may, at some time, when the passions are high, extend a disagreement between the two houses, to the perpetual loss of the thing, as happens

[1] See Christian's Note to 1 Black. Comm. 181; Com. Dig. *Parliament*, E. 5.; 1 Wilson's Law Lect. 159, 160; 4 Co. Inst. 8.

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right of choosing a speaker, without any appeal to, or approval by any other department of the government, is an improvement upon the British system. It secures

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now in Pennsylvania assembly: whereas the other construction reduces the apportionment always to an arithmetical operation, about which no two men can possibly differ.

"3. It leaves in full force the violation of the precept which declares, that representatives shall be *apportioned* among the states according to their numbers, that is, by some common ratio.

"Viewing this bill either as a *violation of the constitution*, or as giving an *inconvenient exposition to its words*, is it a case wherein the president ought to interpose his negative? I think it is.

"1. The non-user of his negative begins already to excite a belief, that no president will ever venture to use it; and, consequently, has begotten a desire to raise up barriers in the state legislatures against congress throwing off the control of the constitution.

"2. It cann ever be used more pleasingly to the public, than in the protection of the constitution.

"3. No invasions of the constitution are so fundamentally dangerous, as the tricks played on their own numbers, apportionment, and other circumstances respecting themselves, and affecting their legal qualifications to legislate for the Union.

"4. The majorities, by which this bill has been carried, (to wit, of one in the senate, and two in the house of representatives,) show how divided the opinions were there.

"5. The whole of both houses admit the constitution will bear the other exposition; whereas the minorities in both deny it will bear that of the bill.

"6. The application of any one ratio is intelligible to the people, and will, therefore, be approved; whereas the complex operations of this bill will never be comprehended by them; and, though they may acquiesce, they cannot approve, what they do not understand."

Mr. Webster's report on the same subject, in the senate in April, 1832, presents the leading arguments on the other side.

"This bill, like all laws on the same subject, must be regarded, as of an interesting and delicate nature. It respects the distribution of political power among the states of the Union. It is to determine the number of voices, which, for ten years to come, each state is to possess in the popular branch of the legislature. In the opinion of the committee, there can be few or no questions, which it is more desirable should be settled on just, fair, and satisfactory principles, than this; and, availing themselves of the benefit of the discussion, which the bill has already undergone in the senate, they have given to it a renewed and anxious consideration. The result is, that, in their opinion, the bill ought to be

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a more independent and unlimited choice on the part of the house, according to the merits of the individual, and their own sense of duty. It avoids those incon-

amended. Seeing the difficulties, which belong to the whole subject, they are fully convinced, that the bill has been framed and passed in the other house, with the sincerest desire to overcome those difficulties, and to enact a law, which should do as much justice as possible to all the states. But the committee are constrained to say, that this object appears to them not to have been obtained. The unequal operation of the bill on some of the states, should it become a law, seems to the committee most manifest; and they cannot but express a doubt, whether its actual apportionment of the representative power among the several states can be considered, as conformable to the spirit of the constitution. The bill provides, that, from and after the third of March, 1833, the house of representatives shall be composed of members, elected agreeably to a ratio of one representative for every forty-seven thousand and seven hundred persons in each state, computed according to the rule prescribed by the constitution. The addition of the seven hundred to the forty-seven thousand, in the composition of this ratio, produces no effect whatever in regard to the constitution of the house. It neither adds to, nor takes from, the number of members assigned to any state. Its only effect is, a reduction of the apparent amount of the fractions, as they are usually called, or residuary numbers, after the application of the ratio. For all other purposes, the result is precisely the same, as if the ratio had been 47,000.

"As it seems generally admitted, that inequalities do exist in this bill, and that injurious consequences will arise from its operation, which it would be desirable to avert, if any proper means of averting them, without producing others equally injurious, could be found, the committee do not think it necessary to go into a full and particular statement of these consequences. They will content themselves with presenting a few examples only of these results, and such as they find it most difficult to reconcile with justice, and the spirit of the constitution.

"In exhibiting these examples, the committee must necessarily speak of particular states; but it is hardly necessary to say, that they speak of them as examples only, and with the most perfect respect, not only for the states themselves, but for all those, who represent them here.

"Although the bill does not commence by fixing the whole number of the proposed house of representatives, yet the process adopted by it brings out the number of two hundred and forty members. Of these two hundred and forty members, forty are assigned to the state of New-York, that is to say, precisely one sixth part of the whole. This assignment would seem to require, that New-York should contain one sixth part of the whole population of the United States; and would be bound

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veniences and collisions, which might arise from the interposition of a negative in times of high party excitement. It extinguishes a constant source of jealousy

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to pay one sixth part of all her direct taxes. Yet neither of these is the case. The whole representative population of the United States is 11,929,005; that of New-York is 1,918,623, which is less than one sixth of the whole, by nearly 70,000. Of a direct tax of two hundred and forty thousand dollars, New-York would pay only $38.59. But if, instead of comparing the numbers assigned to New-York with the whole numbers of the house, we compare her with other states, the inequality is still more evident and striking.

"To the state of Vermont, the bill assigns five members. It gives, therefore, eight times as many representatives to New-York, as to Vermont; but the population of New-York is not equal to eight times the population of Vermont, by more than three hundred thousand. Vermont has five members only for 280,657 persons. If the same proportion were to be applied to New-York, it would reduce the number of her members from forty to *thirty-four* — making a difference more than equal to the whole representation of Vermont, and more than sufficient to overcome her whole power in the house of representatives.

"A disproportion, almost equally striking, is manifested, if we compare New-York with Alabama. The population of Alabama is 262,208; for this, she is allowed five members. The rule of proportion, which gives to her but five members for her number, would give to New-York but thirty-six for her number. Yet New-York receives forty. As compared with Alabama, then, New-York has an excess of representation equal to four fifths of the whole representation of Alabama; and this excess itself will give her, of course, as much weight in the house, as the whole delegation of Alabama, within a single vote. Can it be said, then, that representatives are apportioned to these states *according to their respective numbers*?

"The ratio assumed by the bill, it will be perceived, leaves large fractions, so called, or residuary numbers, in several of the small states, to the manifest loss of a part of their just proportion of representative power. Such is the operation of the ratio, in this respect, that New-York, with a population less than that of New-England by thirty or thirty-five thousand, has yet two more members, than all the New-England states; and there are seven states in the Union, whose members amount to the number of 123, being a clear majority of the whole house, whose aggregate fractions altogether amount only to fifty-three thousand; while Vermont and New-Jersey, having together but eleven members, have a joint fraction of seventy-five thousand.

"Pennsylvania by the bill will have, as it happens, just as many members as Vermont, New-Hampshire, Massachusetts, and New-Jersey;

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and heart-burning; and a disposition on one side to exert an undue influence, and on the other, to assume a hostile opposition. It relieves the executive depart-

but her population is not equal to theirs by a hundred and thirty thousand; and the reason of this advantage, derived to her from the provisions of the bill, is, that her fraction, or residuum, is twelve thousand only, while theirs is a hundred and forty-four.

"But the subject is capable of being presented in a more exact and mathematical form. The house is to consist of two hundred and forty members. Now the precise proportion of power, out of the whole mass represented by the numbers two hundred and forty, which New-York would be entitled to according to her population, is 38.59; that is to say, she would be entitled to thirty-eight members, and would have a residuum, or fraction; and, even if a member were given her for that fraction, she would still have but thirty-nine; but the bill gives her forty.

"These are a part, and but a part, of those results produced by the bill in its present form, which the committee cannot bring themselves to approve. While it is not to be denied, that, under any rule of apportionment, some degree of relative inequality must always exist, the committee cannot believe, that the senate will sanction inequality and injustice to the extent, in which they exist in this bill, if they can be avoided. But recollecting the opinions, which had been expressed in the discussions of the senate, the committee have diligently sought to learn, whether there was not some other number, which might be taken for a ratio, the application of which would work out more justice and equality. In this pursuit the committee have not been successful. There are, it is true, other numbers, the adoption of which would relieve many of the states, which suffer under the present; but this relief would be obtained only by shifting the pressure on to other States, thus creating new grounds of complaint in other quarters. The number forty-four thousand has been generally spoken of, as the most acceptable substitute for forty-seven thousand seven hundred; but should this be adopted, great relative inequality would fall on several states, and, among them, on some of the new and growing states, whose relative disproportion, thus already great, would be constantly increasing. The committee, therefore, are of opinion, that the bill should be altered in the mode of apportionment. They think, that the process, which begins by assuming a ratio, should be abandoned, and that the bill ought to be framed on the principle of the amendment, which has been the main subject of discussion before the senate. The fairness of the principle of this amendment, and the general equity of its results, compared with those, which flow from the other process, seem plain and undeniable. The main question has been, whether the principle itself be constitutional; and this question the committee proceeded to exam-

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ment from all the embarrassments of opposing the popular will; and the house from all the irritation of not consulting the cabinet wishes.

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ine, respectfully asking of those, who have doubted its constitutional propriety, to deem the question of so much importance, as to justify a second reflection.

"The words of the constitution are, 'representatives and direct taxes shall be apportioned among the several states, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner, as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative.'

"There would seem to be little difficulty in understanding these provisions. The terms used are designed, doubtless, to be received in no peculiar or technical sense, but according to their common and popular acceptation. To *apportion*, is to distribute by right measure; to set off in just parts; to assign in due and proper proportion. These clauses of the constitution respect, not only the portions of power, but the portions of the public burden, also, which should fall to the several states; and the same language is applied to both. Representatives are to be apportioned among the states according to their respective numbers, and direct taxes are to be apportioned by the same rule. The end aimed at is, that representation and taxation should go hand in hand; that each state should be represented in the same extent, to which it is made subject to the public charges by direct taxation. But, between the apportionment of representatives and the apportionment of taxes there necessarily exists one essential difference. Representation, founded on numbers, must have some limit; and being, from its nature, a thing not capable of indefinite subdivision, it cannot be made precisely equal. A tax, indeed, cannot always, or often be apportioned with perfect exactness; as, in other matters of account, there will be fractional parts of the smallest coins, and the smallest denomination of money of account, yet, by the usual subdivisions of the coin, and of the denomination of money, the apportionment of taxes is capable of being made so exact, that the inequality becomes minute and invisible. But representation cannot be thus divided. Of representation, there can be nothing less than one representative; nor by our constitution, more representatives than one for every thirty thousand. It is quite obvious, therefore, that the apportionment of representative power can never be precise and

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§ 686. The other power, the sole power of impeachment, has a far wider scope and operation. An impeachment, as described in the common law of England,

perfect. There must always exist some degree of inequality. Those, who framed, and those, who adopted the constitution, were, of course, fully acquainted with this necessary operation of the provision. In the senate, the states are entitled to a fixed number of senators; and, therefore, in regard to their representation, in that body, there is no consequential or incidental inequality arising. But, being represented in the house of representatives according to their respective numbers of people, it is unavoidable, that, in assigning to each state its number of members, the exact proportion of each, out of a given number, cannot always or often be expressed in whole numbers; that is to say, it will not often be found, that there belongs to a state exactly one tenth, or one twentieth, or one thirtieth of the whole house; and, therefore, no number of representatives will exactly correspond with the right of such state, or the precise share of representation, which belongs to it, according to its population.

"The constitution, therefore, must be understood, not as enjoining an absolute relative equality — because that would be demanding an impossibility — but as requiring of congress to make the apportionment of representatives among the several states, according to their respective numbers, *as near as may be*. That, which cannot be done perfectly, must be done in a manner as near perfection, as can be. If exactness cannot, from the nature of things, be attained, then the greatest practicable approach to exactness ought to be made.

"Congress is not absolved from all rule, merely because the rule of perfect justice cannot be applied. In such a case, approximation becomes a rule; it takes the place of that other rule, which would be preferable, but which is found inapplicable, and becomes, itself, an obligation of binding force. The nearest approximation to exact truth, or exact right, when that exact truth, or that exact right cannot itself be reached, prevails in other cases, not as matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind; a rule of no less binding force in cases, to which it is applicable, and no more to be departed from, than any other rule or obligation.

"The committee understand the constitution, as they would have understood it, if it had said, in so many words, that representatives should be apportioned among the states, according to their respective numbers, *as near as may be*. If this be not its true meaning, then it has either given, on this most delicate and important subject, a rule, which is always impracticable, or else it has given no rule at all; because, if the rule be, that representatives shall be apportioned *exactly* according

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is a presentment by the house of commons, the most solemn grand inquest of the whole kingdom, to the house of lords, the most high and supreme court of

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to numbers, it is impracticable in every case; and if, for this reason, that cannot be the rule, then there is no rule whatever, unless the rule be, that they shall be apportioned, *as near as may be.*

"This construction, indeed, which the committee adopt, has not, to their knowledge, been denied; and they proceed in the discussion of the question before the senate, taking for granted, that such is the true and undeniable meaning of the constitution.

"The next thing to be observed is, that the constitution prescribes no particular process, by which this apportionment is to be wrought out. It has plainly described the end to be accomplished, viz. the nearest approach to relative equality of representation among the states; and whatever accomplishes this end, and nothing else, is the true process. In truth, if, without any process whatever, whether elaborate or easy, congress could perceive the exact proportion of representative power rightfully belonging to each state, it would perfectly fulfil its duty by conferring that portion on each, without reference to any process whatever. It would be enough, that the proper end had been attained. And it is to be remarked further, that, whether this end be attained best by one process or by another, it becomes, when each process has been carried through, not matter of opinion, but matter of mathematical certainty. If the whole population of the United States, the population of each state, and the proposed number of the house of representatives, be all given, then, between two bills apportioning the members among the several states, it can be told, with absolute certainty, which bill assigns to any and every state the number nearest to the exact proportion of that state; in other words, which of the two bills, if either, apportions the representatives according to the number of the states, respectively, *as near as may be.* If, therefore, a particular process of apportionment be adopted, and objection be made to the injustice or inequality of its result, it is, surely, no answer to such objection to say, that the inequality necessarily results from the nature of the process. Before such answer could avail, it would be necessary to show, either that the constitution prescribes such process, and makes it necessary, or that there is no other mode of proceeding, which would produce less inequality and less injustice. If inequality, which might have otherwise been avoided, be produced by a given process, then that process is a wrong one. It is not suited to the case, and should be rejected.

"Nor do the committee perceive how it can be matter of constitutional propriety or validity, or in any way a constitutional question, whether the process, which may be applied to the case, be simple or compound, one process or many processes; since, in the end, it may

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criminal jurisdiction of the kingdom.[1] The articles of impeachment are a kind of bill of indictment found by the commons, and tried by the lords, who are, in cases

always be seen, whether the result be that, which has been aimed at, namely, the nearest practicable approach to precise justice and relative inequality. The committee, indeed, are of opinion, in this case, that the simplest, and most obvious way of proceeding, is also the true and constitutional way. To them it appears, that in carrying into effect this part of the constitution, the first thing naturally to be done is, to decide on the whole number, of which the house is to be composed; as when, under the same clause of the constitution, a tax is to be apportioned among the states, the amount of the whole tax is, in the first place, to be settled.

"When the whole number of the proposed house is thus ascertained, and fixed, it becomes the entire representative power of all the people in the Union. It is then a very simple matter to ascertain how much of this representative power each state is entitled to by its numbers. If, for example, the house is to contain 240 members, then the number 240 expresses the representative power of all the states; and a plain calculation readily shows how much of this power belongs to each state. This portion, it is true, will not always, nor often, be expressed in whole numbers, but it may always be precisely exhibited by a decimal form of expression. If the portion of any state be seldom, or never, one exact tenth, one exact fifteenth, or one exact twentieth, it will still always be capable of precise decimal expression, as one tenth and two hundredths, one twelfth and four hundredths, one fifteenth and six hundredths, and so on; and the exact portion of the state, being thus decimally expressed, will always show, to mathematical certainty, what integral number comes nearest to such exact portion. For example, in a house consisting of two hundred and forty members, the exact mathematical proportion, to which her numbers entitle the state of New-York, is 38.59; it is certain, therefore, that thirty-nine is the integral or whole number, nearest to her exact proportion of the representative power of the Union. Why, then, should she not have thirty-nine? and why should she have forty? She is not quite entitled to thirty-nine; that number is something more than her right. But, allowing her thirty-nine, from the necessity of giving her whole numbers, and because that is the nearest whole number, is not the constitution fully obeyed, when she has received the thirty-ninth number? Is not her proper number of representatives then apportioned to her, as near as may be? And is not the constitution disregarded, when the bill goes further, and gives

[1] 2 Hale's Pl. Comm. 150; 4 Black. Comm. 259; 2 Wilson's Law Lect. 165, 166.

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of misdemeanors, considered, not only as their own peers, but as the peers of the whole nation.[1] The origin and history of the jurisdiction of parliament, in

her a fortieth member? For what is such a fortieth member given? Not for her absolute numbers; for her absolute numbers do not entitle her to thirty-nine. Not for the sake of apportioning her members to her numbers, as near as may be, because thirty-nine is a nearer apportionment of members to numbers than forty. But it is given, say the advocates of the bill, because the *process*, which has been adopted, gives it. The answer is, no such process is enjoined by the constitution.

"The case of New York may be compared or contrasted with that of Missouri. The exact proportion of Missouri, in a general representation of two hundred and forty, is two and six tenths; that is to say, it comes nearer to three members, than to two, yet it is confined to two. But why is not Missouri entitled to that number of representatives, which comes nearest to her exact proportion? Is the constitution fulfilled as to her, while that number is withheld, and while, at the same time, in another state, not only is that nearest number given, but an additional member given also? Is it an answer, with which the people of Missouri ought to be satisfied, when it is said, that this obvious injustice is the necessary result of the process adopted by the bill? May they not say, with propriety, that since three is the nearest whole number to their exact right, to that number they are entitled, and the process, which deprives them of it, must be a wrong process? A similar comparison might be made between New-York and Vermont. The exact proportion, to which Vermont is entitled, in a representation of two hundred and forty, is 5.646. Her nearest whole number, therefore, would be six. Now, two things are undeniably true: first, that to take away the fortieth member from New-York would bring her representation nearer to her exact proportion, than it stands by leaving her that fortieth member. Secondly, that giving the member, thus taken from New-York, to Vermont, would bring her representation nearer to her exact right, than it is by the bill. And both these propositions are equally true of a transfer of the twenty-eighth member assigned by the bill to Pennsylvania, to Delaware, and of the thirteenth member assigned to Kentucky, to Missouri; in other words, Vermont has, by her numbers, more right to six members, than New-York has to forty. Delaware, by her numbers, has more right to two members, than Pennsylvania has to twenty-eight; and Missouri, by her numbers, has more right to three members, than Kentucky has to thirteen. Without disturbing the proposed number of the house, the mere changing of these three members, from and to the six states respectively, would

[1] 4 Black. Comm. 260.

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cases of impeachment, are summarily given by Mr. Woodeson; but little can be gathered from it, which is now of much interest, and, like most other legal anti-

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bring the representation of each of the whole six nearer to their due proportion, according to their respective numbers, than the bill, in its present form makes it. In the face of this indisputable truth, how can it be said, that the bill apportions these members among those states, according to their respective number, *as near as may be*?

"The principle, on which the proposed amendment is founded, is an effectual corrective for these, and all other equally great inequalities. It may be applied, at all times, and in all cases, and its result will always be the nearest approach to perfect justice. It is equally simple and impartial. As a rule of apportionment, it is little other than a transcript of the words of the constitution, and its results are mathematically certain. The constitution, as the committee understand it, says, representatives shall be apportioned among the states, according to their respective numbers of people, as near as may be. The rule adopted by the committee says, out of the whole number of the house, that number shall be apportioned to each state, which comes nearest to its exact right, according to its number of people.

"Where is the repugnancy between the constitution and the rule? The arguments against the rule seem to assume, that there is a necessity of instituting some process adopting some number as the ratio, or as that number of people, which each member shall be understood to represent; but the committee see no occasion for any other process whatever, than simply the ascertainment of that *quantum*, out of the whole mass of the representative power, which each state may claim.

"But it is said, that, although a state may receive a number of representatives, which is something less than its exact proportion of representation, yet, that it can, in no case, constitutionally receive more. How is this proposition proved? How is it shown, that the constitution is less perfectly fulfilled by allowing a state a small excess, than by subjecting her to a large deficiency? What the constitution requires, is the nearest practicable approach to precise justice. The rule is approximation; and we ought to approach, therefore, on whichever side we can approach nearest.

"But there is still a more conclusive answer to be given to this suggestion. The whole number of representatives, of which the house is to be composed, is, of necessity, limited. This number, whatever it is, is that which is to be apportioned, and nothing else can be apportioned. This is the whole sum to be distributed. If, therefore, in making the apportionment, some state receive less than their just share, it must necessarily follow, that some other states have received more than their

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quities, it is involved in great obscurity.[1] To what classes of offenders it applies, will be more properly an inquiry hereafter. In the constitution of the United

just share. If there be one state in the Union with less than its right, some other state has more than its right, so that the argument, whatever be its force, applies to the bill in its present form, as strongly as it can ever apply to any bill.

"But the objection most usually urged against the principle of the proposed amendment is, that it provides for the representation of fractions. Let this objection be examined and considered. Let it be ascertained, in the first place, what these fractions, or fractional numbers, or residuary numbers, really are, which, it is said, will be represented, should the amendment prevail.

"A fraction is the broken part of some integral number. It is, therefore, a relative or derivative idea. It implies the previous existence of some fixed number, of which it is but a part, or remainder. If there be no necessity for fixing or establishing such previous number, then the fraction, resulting from it, is itself no matter of necessity, but matter of choice or of accident. Now the argument, which considers the plan proposed in the amendment, as a representation of fractions, and therefore unconstitutional, assumes, as its basis, that, according to the constitution, every member of the house of representatives represents, or ought to represent, the same, or nearly the same, number of constituents: that this number is to be regarded, as an integer; and any thing less than this is, therefore, called a fraction, or a residuum, and cannot be entitled to a representative. But all this is not the provision of the constitution of the United States. That constitution contemplates no integer, or any common number for the constituents of a member of the house of representatives. It goes not at all into these subdivisons of the population of a state. It provides for the apportionment of representatives *among the several states*, according to their respective numbers, and stops there. It makes no provision for the representation of districts, of states, or for the representation of any portion of the people of a state, less than the whole. It says nothing of ratios or of constituent numbers. All these things it leaves to state legislation. The right, which each state possesses to its own due portion of the representative power, is a state right, strictly; it belongs to the state, as a state; and it is to be used and exercised, as the state may see fit, subject only to the constitutional qualifications of electors. In fact, the states do make, and always have made, different provisions for the exercise of this power. In some, a single member is chosen for a certain defined district; in others, two or three members are chosen

[1] 2 Woodeson's Lect. 40, p. 596, &c.

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States, the house of representatives exercises the functions of the house of commons in regard to impeachments; and the senate (as we shall hereafter see) the

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for the same district; and, in some again, as New-Hampshire, Rhode-Island, Connecticut, New-Jersey, and Georgia, the whole representation of the state is exerted, as a joint, undivided representation. In these last-mentioned states, every member of the house of representatives has for his constituents all the people of the state; and all the people of those states are consequently represented in that branch of congress. If the bill before the senate should pass into a law, in its present form, whatever injustice it might do to any of those states, it would not be correct to say of them, nevertheless, that any portion of their people was unrepresented. The well-founded objection would be, as to some of them at least, that they were not adequately, competently, fairly represented; that they had not as many voices and as many votes in the house of representatives, as they were entitled to. This would be the objection. There would be no unrepresented fractions; but the state, as a state, as a whole, would be deprived of some part of its just rights.

"On the other hand, if the bill should pass, as it is now proposed to be amended, there would be no representation of fractions in any state; for a fraction supposes a division and a remainder. All, that could justly be said, would be, that some of these states, as states, possessed a portion of legislative power, a little larger than their exact right; as it must be admitted, that, should the bill pass unamended, they would possess, of that power, much less than that exact right. The same remarks are substantially true, if applied to those states, which adopt the district system, as most of them do. In Missouri, for example, there will be no fraction unrepresented, should the bill become a law in its present form; nor any member for a fraction, should the amendment prevail; because the mode of apportionment, which assigns to each state that number, which is nearst to its exact right, applies no assumed ratios, makes no subdivisions, and, of course, produces no fractions. In the one case, or in the other, the state, as a state, will have something more, or something less, than its exact proportion of representative power; but she will part out this power among her own people, in either case, in such mode, as she may choose, or exercise it altogether, as an entire representation of the people of the state.

"Whether the subdivision of the representative power within any state, if there be a subdivision, be equal or unequal, or fairly or unfairly made, congress cannot know, and has no authority to inquire. It is enough, that the state presents her own representation on the floor of congress in the mode she chooses to present it. If a state were to give

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functions of the house of lords in relation to the trial of the party accused. The principles of the common law, so far as the jurisdiction is to be exercised, are

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to one portion of her territory a representative for every twenty-five thousand persons, and to the rest a representative only for every fifty thousand, it would be an act of unjust legislation, doubtless, but it would be wholly beyond redress by any power in congress; because the constitution has left all this to the state itself.

"These considerations, it is thought, may show, that the constitution has not, by any implication, or necessary construction, enjoined that, which it certainly has not ordained in terms, viz. that every member of the house shall be supposed to represent the same number of constituents; and therefore, that the assumption of a ratio, as representing the common number of constituents, is not called for by the constitution. All that congress is at liberty to do, as it would seem, is to divide the whole representative power of the Union into twenty-four parts, assigning one part to each state, as near as practicable, according to its right, and leaving all subsequent arrangement, and all subdivisions, to the state itself.

"If the view thus taken of the rights of the states, and the duties of congress, be the correct view, then the plan proposed in the amendment is, in no just sense, a representation of fractions. But suppose it was otherwise; suppose a direct division were made for allowing a representative to every state, in whose population, it being first divided by a common ratio, there should be found a fraction exceeding half the amount of that ratio, what constitutional objection could be fairly urged against such a provision? Let it be always remembered, that the case here supposed provides only for a fraction exceeding the moiety of the ratio; for the committee admit, at once, that the representation of fractions, less than a moiety, is unconstitutional; because, should a member be allowed to a state for such a fraction, it would be certain, that her representation would not be so near her exact right, as it was before. But the allowance of a member for a major fraction is a direct approximation towards justice and equality. There appears to the committee to be nothing, either in the letter or the spirit of the constitution, opposed to such a mode of apportionment. On the contrary, it seems entirely consistent with the very object, which the constitution contemplated, and well calculated to accomplish it. The argument commonly urged against it is, that it is necessary to apply some one common divisor, and to abide by its results.

"If, by this, it be meant, that there must be some common rule, or common measure, applicable, and applied impartially to all the states, it is quite true. But, if that which is intended, be, that the population of each

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deemed of primary obligation and government. The object of prosecutions of this sort in both countries is to reach high and potent offenders, such as might be

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state must be divided by a fixed ratio, and all resulting fractions, great or small, disregarded, this is but to take for granted the very thing in controversy. The question is, whether it be unconstitutional to make approximation to equality, by allowing representatives for major fractions. The affirmative of this question is, indeed, denied; but it is not disproved, by saying, that we must abide by the operation of division, by an assumed ratio, and disregard fractions. The question still remains, as it was before; and it is still to be shown, what there is in the constitution, which rejects approximation, as the rule of apportionment. But suppose it to be necessary to find a divisor, and to abide its results. What is a divisor? Not necessarily a simple number. It may be composed of a whole number and a fraction; it may itself be the result of a previous process; it may be any thing, in short, which produces accurate and uniform division: whatever does this, is a common rule, a common standard, or, if the word be important, a common divisor. The committee refer, on this part of the case, to some observations by Professor Dean, with a table, both of which accompany this report.

"As it is not improbable, that opinion has been a good deal influenced on this subject by what took place on the passing of the first act, making an apportionment of representatives among the states, the committee have examined and considered that precedent. If it be in point to the present case, it is certainly entitled to very great weight; but if it be of questionable application, the text of the constitution, even if it were doubtful, could not be explained by a doubtful commentary. In the opinion of the committee, it is only necessary, that what was said on that occasion should be understood in connexion with the subject-matter then under consideration; and, in order to see what that subject-matter really was, the committee think it necessary to state, shortly, the case.

"The two houses of congress passed a bill, after the first enumeration of the people, providing for a house of representatives, which should consist of one hundred and twenty members. The bill expressed no rule or principle, by which these members were assigned to the several states. It merely said, that New-Hampshire should have five members, Massachusetts ten, and so on; going through all the states, and assigning the whole number of one hundred and twenty. Now, by the census, then recently taken, it appeared, that the whole representative population of the United States was 3,615,920; and it was evidently the wish of congress to make the house as numerous, as the constitution would allow. But the constitution has said, that there should not be

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presumed to escape punishment in the ordinary tribunals, either from their own extraordinary influence, or from the imperfect organization and powers of those

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more than one member for every thirty thousand persons. This prohibition was, of course, to be obeyed; but did the constitution mean, that no states should have more than one member for every thirty thousand persons? or did it only mean, that the whole house, as compared with the whole population of the United States, should not contain more than one member for every thirty thousand persons? If this last were the true construction, then the bill, in that particular, was right; if the first were the true construction, then it was wrong; because so many members could not be assigned to the states, without giving to some of them more members than one for every thirty thousand. In fact, the bill did propose to do this in regard to several states.

"President Washington adopted that construction of the constitution, which applied its prohibition to each state individually. He thought, that no state could, constitutionally, receive more than one member for every thirty thousand of her own population. On this, therefore, his main objection to the bill was founded. That objection he states in these words:

"'The constitution has also provided, that the number of representatives shall not exceed one for every thirty thousand; which restriction is, by the context, and by fair and obvious construction, to be applied to the separate and respective numbers of the states; and the bill has allotted to eight of the states more than one for every thirty thousand.'

"It is now necessary to see what there was further objectionable in this bill. The number of one hundred and twelve members was all that could be divided among the states, without giving to some of them more than one member for thirty thousand inhabitants. Therefore, having allotted these one hundred and twelve, there still remained eight of the one hundred and twenty to be assigned; and these eight the bill assigned to the states having the largest fractions. Some of these fractions were large, and some were small. No regard was paid to fractions over a moiety of the ratio, any more than to fractions under it. There was no rule laid down, stating what fractions should entitle the states, to whom they might happen to fall, or in whose population they might happen to be found, to a representative therefor. The assignment was not made on the principle, that each state should have a member for a fraction greater than half the ratio; or that all the states should have a member for a fraction, in all cases where the allowance of such member would bring her representation nearer to its exact proportion than its disallowance. There was no common measure, or common

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tribunals.[1] These prosecutions are, therefore, conducted by the representatives of the nation, in their public capacity, in the face of the nation, and upon a

rule, adopted, but the assignment was matter of arbitrary discretion. A member was allowed to New-Hampshire, for example, for a fraction of less than one half the ratio, thus placing her representation further from her exact proportion, than it was without such additional member; while a member was refused to Georgia, whose case closely resembled that of New-Hampshire, both having what were thought large fractions, but both still under a moiety of the ratio, and distinguished from each other only by a very slight difference of absolute numbers. The committee have already fully expressed their opinion on such a mode of apportionment.

"In regard to this character of the bill, President Washington said: 'The constitution has prescribed, that representatives shall be apportioned among the several states according to their respective numbers; and there is no one proportion, or divisor, which, applied to the respective numbers of the states, will yield the number and allotment of representatives proposed by the bill.'

"This was all undoubtedly true, and was, in the judgment of the committee, a decisive objection against the bill. It is nevertheless to be observed, that the other objection completely covered the whole ground. There could, in that bill, be no allowance for a fraction, great or small; because congress had taken for the ratio the lowest number allowed by the constitution, viz. thirty thousand. Whatever fraction a state might have less than that ratio, no member could be allowed for it. It is scarcely necessary to observe, that no such objection applies to the amendment now proposed. No state, should the amendment prevail, will have a greater number of members than one for every thirty thousand; nor is it likely, that that objection will ever again occur. The whole force of the precedent, whatever it be, in its application to the present case, is drawn from the other objection. And what is the true import of that objection? Does it mean any thing more than, that the apportionment was not made on a common rule or principle, applicable, and applied alike to all the states?

"President Washington's words are, 'there is no one proportion or divisor, which, applied to the respective numbers of the states, will yield the number and allotment of representatives proposed by the bill.'

"If, then, he could have found a common proportion, it would have removed this objection. He required a proportion or divisor. These

[1] 4 Black. Comm. 260; Rawle on the Constitution, ch. 22, p. 210, 211; 2 Woodeson's Lect. 40, p. 596, &c.

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responsibility, which is at once felt, and reverenced by the whole community.[1] The notoriety of the proceedings; the solemn manner, in which they are conducted;

words he evidently uses, as explanatory of each other. He meant by *divisor*, therefore, no more than by *proportion*. What he sought was, some common and equal rule, by which the allotment had been made among the several states; he did not find such common rule; and on that ground, he thought the bill objectionable.

"In the opinion of the committee, no such objection applies to the amendment recommended by them. That amendment gives a rule, plain, simple, just, uniform, and of universal application. The rule has been frequently stated. It may be clearly expressed in either of two ways. Let the rule be, that the whole number of the proposed house shall be apportioned among the several states according to their respective numbers, giving to each state that number of members, which comes nearest to her exact mathematical part or proportion; or, let the rule be, that the population of each state shall be divided by a common divisor, and that, in addition to the number of members resulting from such division, a member shall be allowed to each state, whose fraction exceeds a moiety of the divisor.

"Either of these is, it seems to the committee, a fair and just rule, capable of uniform application, and operating with entire impartiality. There is no want of a common proportion, or a common divisor; there is nothing left to arbitrary discretion. If the rule, in either of these forms, be adopted, it can never be doubtful how every member of any proposed number for a house of representatives ought to be assigned. Nothing will be left in the discretion of congress; the right of each state will be a mathematical right, easily ascertained, about which there can be neither doubt nor difficulty; and, in the application of the rule, there will be no room for preference, partiality, or injustice. In any case, in all time to come, it will do all, that human means can do, to allot to every state in the Union its proper and just proportion of representative power. And it is because of this, its capability of constant application, as well as because of its impartiality and justice, that the committee are earnest in recommending its adoption to congress. If it shall be adopted, they believe it will remove a cause of uneasiness and dissatisfaction, recurring, or liable to recur, with every new census, and place the rights of the states, in this respect, on a fixed basis, of which none can with reason complain. It is true, that there may be some numbers assumed for the composition of the house of representatives, to which, if the rule were applied, the result might give a member to the

[1] Rawle on the Constitution, ch. 22, p. 209.

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the deep extent, to which they affect the reputations of the accused; the ignominy of a conviction, which is to be known through all time; and the glory of an acquittal, which ascertains and confirms innocence; — these are all calculated to produce a vivid and lasting interest in the public mind; and to give to such prosecutions, when necessary, a vast importance, both as a check to crime, and an incitement to virtue.

§ 687. This subject will be resumed hereafter, when the other provisions of the constitution, in regard to impeachments, come under review. It does not appear, that the vesting of the power of impeachment in the house of representatives was deemed a matter of serious doubt or question, either in the convention, or with the people.[1] If the true spirit of the constitution is consulted, it would seem difficult to arrive at any other conclusion, than of its fitness. It is designed, as a method of national inquest into the conduct of public men. If such is the design, who can so properly be the inquisitors

house more than was proposed. But it will be always easy to correct this, by altering the proposed number by adding one to it, or taking one from it; so that this can be considered no objection to the rule.

"The committee, in conclusion, cannot admit, that it is sufficient reason for rejecting this mode of apportionment, that a different process has heretofore prevailed. The truth is, the errors and inequalities of that process were at first not obvious and startling. But they have gone on increasing; they are greatly augmented and accumulated every new census; and it is of the very nature of the process itself, that its unjust results must grow greater and greater in proportion as the population of the country enlarges. What was objectionable, though tolerable yesterday, becomes intolerable to-morrow. A change, the committee are persuaded, must come, or the whole just balance and proportion of representative power among the states will be disturbed and broken up."

Mr. Everett also made a very able speech on the same subject, in which he pressed some additional arguments with great force on the same side. See his printed Speech of 17th May, 1832.

[1] Journal of Convention, p. 69, 121, 137, 225, 226, 236; 3 Elliot's Debates, 43, 44, 45, 46.

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for the nation, as the representatives of the people themselves? They must be presumed to be watchful of the interests, alive to the sympathies, and ready to redress the grievances, of the people. If it is made their duty to bring official delinquents to justice, they can scarcely fail of performing it without public denunciation, and political desertion, on the part of their constituents.

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CHAPTER X.

THE SENATE.

§ 688. THE third section of the first article relates to the organization and powers of the senate.

§ 689. In considering the organization of the senate, our inquiries naturally lead us to ascertain; first, the nature of the representation and vote of the states therein; secondly, the mode of appointment; thirdly, the number of the senators; fourthly, their term of service; and fifthly, their qualifications.

§ 690. The first clause of the third section is in the following words: "The senate of the United States "shall be composed of two senators from each state, "chosen by the legislature thereof for six years; and "each senator shall have one vote."

§ 691. In the first place, the nature of the representation and vote in the senate. Each state is entitled to two senators; and each senator is entitled to one vote. This, of course, involves in the very constitution of this branch of the legislature a perfect equality among all the states, without any reference to their respective size, population, wealth, or power. In this respect there is a marked contrast between the senate and the house of representatives. In the latter, there is a represenation of the people according to the relative population of each state upon a given basis; in the former, each state in its political capacity is represented upon a footing of perfect equality, like a congress of sovereigns, or ambassadors, or like an assembly of peers. The only difference between it and the continental congress under the old confederation is, that in this

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the vote was by states; in the senate, each senator has a single vote. So that, though they represent states, they vote as individuals. The vote of the senate thus may, and often does, become a mixed vote, embracing a part of the senators from some of the states on one side, and another part on the other.

§ 692. It is obvious, that this arrangement could only arise from a compromise between independent states; and it must have been less the result of theory, than "of a spirit of amity, and of mutual deference and concession, which the peculiarity of the situation of the United States rendered indispensable."[1] It constituted one of the great struggles between the large and the small states, which was constantly renewed in the convention, and impeded it in every step of its progress in the formation of the constitution.[2] The struggle applied to the organization of each branch of the legislature. The small states insisted upon an equality of vote and representation in each branch; and the large states upon a vote in proportion to their relative importance and population. Upon this vital question there was so near a balance of the states, that a union in any form of government, which provided either for a perfect equality or inequality of the states in both branches of the legislature, became utterly hopeless.[3] If the basis of the senate was an equality of representation, the basis of the house must be in proportion to the relative population of the states.[4] A compromise was, therefore, in-

1 Letter of the Convention, 17th Sept. 1787; 1 Kent. Comm. § 11, p. 210, 211.

2 2 Pitkin's Hist. 233, 245, 247, 248; Yates's Minutes, 4 Elliot's Debates, 68, 74, 75, 81, 89, 90, 91, 92; Id. 99, 100, 101; Id. 107, 108, 112 to 124; Id. 125, 126, 127; 1 Elliot's Debates, 66.

3 2 Pitkin's Hist. 233, 245; Journal of the Convention, 112.

4 On this subject see the Journal of the Convention, 111, 112, 153 to 158, 162, 178, 180, 235, 236, 237, 238; Yate's Minutes, 4 Elliot's Debates, from 68 to 127.

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dispensable, or the convention must be dissolved. The small states at length yielded the point, as to an equality of representation in the house, and acceded to a representation proportionate to the federal numbers. But they insisted upon an equality in the senate. To this the large states were unwilling to assent; and for a time the states were, on this point, equally divided.[1] Finally, the subject was referred to a committee, who reported a scheme, which became, with some amendments, the basis of the representation, as it now stands.[2]

§ 693. The reasoning, by which each party in the convention supported its own project, naturally grew out of the relative situation and interests of their respective states. On the side of the small states, it was urged, that the general government ought to be partly federal, and partly national, in order to secure a just balance of power and sovereignty, and influence among the states. This is the only means to preserve small communities, when associating with larger, from being overwhelmed, and annihilated. The large states, under other circumstances, would naturally pursue their own interests, and by combinations usurp the prerogatives, or disregard the rights of the smaller. Hitherto, all the states had held a footing of equality; and no one would now be willing to surrender it. The course now proposed would allay jealousies, and produce tranquillity. Any other would only perpetuate discontents, and lead to disunion. There never was a confederacy formed, where an equality of voice was not a fundamental principle. It would be a novel thing in politics, in such

[1] 2 Pitkin's Hist. 245; Journal of Convention, 2d July, p. 156, 158; Id. 162, 175, 178, 180, 211; Yates's Minutes, 4 Elliot's Debates, 124 to 127; 2 Amer. Museum, 379.

[2] 1 Elliot's Debates, 67; Journal of Convention, 157.

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cases, to permit the few to control the many. The large states, upon the present plan, have a full security. The small states must possess the power of self-defence, or they are ruined.

§ 694. On the other hand, it was urged, that to give an equality of vote to all the states, was adopting a principle of gross injustice and inequality. It is not true, that all confederacies have been founded upon the principle of equality. It was not so in the Lycian confederacy. Experience has shown, that the old confederation is radically defective, and a national government is indispensable. The present plan will defeat that object. Suppose the first branch grants money; the other branch (the senate) might, from mere state views, counteract it. In congress, the single state of Delaware prevented an embargo at the time, when all the other states thought it absolutely necessary for the support of the army. In short, the senate will have the power by its negative of defeating all laws. If this plan prevails, seven states will control the whole; and yet these seven states are, in point of population and strength, less than one third of the Union. So, that two thirds are compellable to yield to one third. There is no danger to the small states from the combination of the large ones. A rivalry, rather than a confederacy, will exist among them. There can be no monarchy; and an aristocracy is more likely to arise from a combination of the small states. There are two kinds of bad governments; the one, which does too much, and is therefore oppressive; and the other, which does too little, and is therefore weak. The present plan will fasten the latter upon the country. The only reasonable principle, on which to found a general government, is, that the decision shall be by a majority of members,

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and not of states. No advantage can possibly be proposed by the large states by swallowing up the smaller. The like fear existed in Scotland at the time of the union with England; but it has turned out to be wholly without foundation. Upon the present plan, the smaller states may swallow up the larger. It was added by one most distinguished statesman,[1] (what has hitherto proved prophetically too true,) that the danger was not between the small and the large states. "The great danger to our general government is, the great southern and northern interests of this continent being opposed to each other. Look to the votes in congress, and most of them stand divided by the geography of the country, not according to the size of the states."[2]

§ 695. Whatever may now be thought of the reasoning of the contending parties, no person, who possesses a sincere love of country, and wishes for the permanent union of the states, can doubt, that the compromise actually made was well founded in policy, and may now be fully vindicated upon the highest principles of political wisdom, and the true nature of the government, which was intended to be established.

§ 696. It may not be unprofitable to review a few of the grounds, upon which this opinion is hazarded. In the first place, the very structure of the general government contemplated one partly federal, and partly national. It not only recognised the existence of the state governments; but perpetuated them, leaving them

[1] Mr. Madison.

[2] This summary is abstracted principally from Yates's Minutes of the Debates, and Luther Martin's Letter and Speech, January 27, 1788. See Martin's Letter in 4 Elliot's Debates, 1 to 55. See Yates's Minutes in 4 Elliot's Debates, 68; Id. 74, 75, 81, 89 to 92, 99 to 102, 107, 108, 112 to 127; 2 Pitkin's Hist. 233 to 248. See also The Federalist, No. 22.

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in the enjoyment of a large portion of the rights of sovereignty, and giving to the general government a few powers, and those only, which were necessary for national purposes. The general government was, therefore, upon the acknowledged basis, one of limited and circumscribed powers; the states were to possess the residuary powers. Admitting, then, that it is right, among a people thoroughly incorporated into one nation, that every district of territory ought to have a proportional share of the government; and that among independent states, bound together by a simple league, there ought, on the other hand, to be an equal share in the common councils, whatever might be their relative size or strength, (both of which propositions are not easily controverted;) it would follow, that a compound republic, partaking of the character of each, ought to be founded on a mixture of proportional, and of equal representation.[1] The legislative power being that, which is predominant in all governments, ought to be, above all, of this character; because there can be no security for the general government, or the state governments, without an adequate representation, and an adequate check of each in the functions of legislation. Whatever basis, therefore, is assumed for one branch of the legislature, the antagonist basis should be assumed for the other. If the house is to be proportional to the relative size, and wealth, and population of the states, the senate should be fixed upon an absolute equality, as the representative of state sovereignty. There is so much reason, and justice, and security in such a course, that it can with difficulty be overlooked by those, who sincerely consult the public good, without

[1] The Federalist, No. 62; 2 Amer. Museum, 376, 379.

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being biassed by the interests or prejudices of their peculiar local position. The equal vote allowed in the senate is, in this view, at once a constitutional recognition of the sovereignty remaining in the states, and an instrument for the preservation of it. It guards them against (what they meant to resist, as improper) a consolidation of the states into one simple republic;[1] and, on the other hand, the weight of the other branch counterbalances an undue preponderance of state interests, tending to disunion.

§ 697. Another and most important advantage arising from this ingredient is, the great difference, which it creates in the elements of the two branches of the legislature; which constitutes a great desideratum in every practical division of the legislative power.[2] In fact, this division (as has been already intimated) is of little or no intrinsic value, unless it is so organised, that each can operate, as a real check upon undue and rash legislation. If each branch is substantially framed upon the same plan, the advantages of the division are shadowy and imaginative; the visions and speculations of the brain, and not the waking thoughts of statesmen, or patriots. It may be safely asserted, that for all the purposes of liberty, and security, of stable laws, and of solid institutions, of personal rights, and of the protection of property, a single branch is quite as good, as two, if their composition is the same, and their spirits and impulses the same. Each will act, as the other does; and each will be led by the same common influence of ambition, or intrigue, or passion, to the same disregard

[1] The Federalist, No. 62; Rawle on Constit. 36, 37; 1 Kent. Comm. Lect. 11, p. 210, 211; 2 Amer. Museum, 376, 379; 1 Tucker's Black. Comm. App. 195.

[2] 2 Wilson's Law Lect. 146, 147, 148.

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of the public interests, and the same indifference to, and prostration of private rights. It will only be a duplication of the evils of oppression and rashness, with a duplication of obstructions to effective redress. In this view, the organization of the senate becomes of inestimable value. It represents the voice, not of a district, but of a state; not of one state, but of all; not of the interest of one state, but of all; not of the chosen pursuits of a predominant population in one state, but of all the pursuits in all the states.

§ 698. It is a misfortune incident to republican governments, though in a less degree than to other governments, that those, who administer it, may forget their obligations to their constituents, and prove unfaithful to their trusts. In this point of view, a senate, as a second branch of legislative power, distinct from, and dividing power with the first, must always operate as a salutary check. It doubles the security to the people, by requiring the concurrence of two distinct bodies in any scheme of usurpation or perfidy, where otherwise the ambition of a single body would be sufficient. The improbability of sinister combinations will always be in proportion to the dissimilarity of the genius of the two bodies; and therefore every circumstance, consistent with harmony in all proper measures, which points out a distinct organization of the component materials of each, is desirable.[1]

§ 699. No system could, in this respect, be more admirably contrived to ensure due deliberation and inquiry, and just results in all matters of legislation. No law or resolution can be passed without the concurrence, first of a majority of the people, and then of

[1] The Federalist, No. 62.

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a majority of the states. The interest, and passions, and prejudices of a district are thus checked by the influence of a whole state; the like interests, and passions, and prejudices of a state, or of a majority of the states, are met and controlled by the voice of the people of the nation.[1] It may be thought, that this complicated system of checks may operate, in some instances, injuriously, as well as beneficially. But if it should occasionally work inequally, or injuriously, its general operation will be salutary and useful.[2] The disease most incident to free governments is the facility and excess of law-making;[3] and while it never can be the permanent interest of either branch to interpose any undue restraint upon the exercise of all fit legislation, a good law had better occasionally fail, rather than bad laws be multiplied with a heedless and mischievous frequency. Even reforms, to be safe, must, in general, be slow; and there can be little danger, that public opinion will not sufficiently stimulate all public bodies to changes, which are at once desirable, and politic. All experience proves, that the human mind is more eager and restless for changes, than tranquil and satisfied with existing institutions. Besides; the large states will always be able, by their power over the supplies, to defeat any unreasonable exertions of this prerogative by the smaller states.

§ 700. This reasoning, which theoretically seems entitled to great weight, has, in the progress of the government, been fully realized. It has not only been demonstrated, that the senate, in its actual or-

[1] The Federalist, No. 27.

[2] The Federalist, No. 62; Yates's Minutes, 4 Elliot's Debates, 63, 64; 2 Wilson's Law Lect. 146, 147, 148.

[3] The Federalist, No. 62; 1 Kent's Comm. Lect. 11, p. 212, 213.

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ganization, is well adopted to the exigencies of the nation; but that it is a most important and valuable part of the system, and the real balance-wheel, which adjusts, and regulates its movements.[1] The other auxiliary provisions in the same clause, as to the mode of appointment and duration of office, will be found to conduce very largely to the same beneficial end.[2]

§ 701. Secondly; the mode of appointment of the senators. They are to be chosen by the legislature of each state. Three schemes presented themselves, as to the mode of appointment; one was by the legislature of each state; another was by the people thereof; and a third was by the other branch of the national legislature, either directly, or out of a select nomination. The last scheme was proposed in the convention, in what was called the Virginia scheme, one of the resolutions, declaring, "that the members of the *second* branch (the senate) ought to be elected by those of the *first* (the house of representatives) out of a proper number nominated by the individual legislatures" (of the states.) It met, however, with no decided support, and was negatived, no state voting in its favour, nine states voting against it, and one being divided.[3] The second scheme, of an election by the people in districts, or otherwise, seems to have met with as little favour.[4] The first scheme, that of an election by the legislature, finally prevailed by an unanimous vote.[5]

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1 2 Wilson's Law Lect. 148.

2 The Federalist, No. 62.

3 See Mr. Randolph's fifth Resolution, Journ. of Convention, 67, 86; Yates's Minutes, 4 Elliot's Debates, 58, 59.

4 Journ. of Convention, 105, 106, 130; Yates's Minutes, 4 Elliot's Debates, 58, 59, 63, 64, 99 to 103.

5 Journ. of Convention, 105, 106, 147, 207, 217, 238; Yates's Minutes, 4 Elliot's Debates, 63, 64.

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§ 702 The reasoning, by which this mode of appointment was supported, does not appear at large in any contemporary debates. But it may be gathered from the imperfect lights left us, that the main grounds were, that it would immediately connect the state governments with the national government, and thus harmonize the whole into one universal system; that it would introduce a powerful check upon rash legislation, in a manner not unlike that created by the different organizations of the house of commons, and the house of lords in Great Britain; and that it would increase public confidence by securing the national government from undue encroachments on the powers of the states.[1] The Federalist notices the subject in the following brief and summary manner, which at once establishes the general consent to the arrangement, and the few objections, to which it was supposed to be obnoxious. "It is unnecessary to dilate on the appointment of senators by the state legislatures. Among the various modes, which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favouring a select appointment, and of giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former, and may form a convenient link between the two systems."[2] This is very subdued praise; and indicates more doubts, than experience has, as yet, justified.[3]

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[1] Yates's Minutes, 4 Elliot's Debates, 62, 63, 64; 3 Elliot's Debates, 49.
[2] The Federalist, No. 62, 27; 1 Kent's Comm. Lect. 11, p. 211.
[3] See also The Federalist, No. 27.

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§ 703. The constitution has not provided for the manner, in which the choice shall be made by the state legislatures, whether by a joint, or by a concurrent vote; the latter is, where both branches form one assembly, and give a united vote numerically; the former is, where each branch gives a separate and independent vote.[1] As each of the state legislatures now consists of two branches, this is a very important practical question. Generally, but not universally, the choice of senators is made by a concurrent vote.[2] Another question might be suggested, whether the executive constitutes a part of the legislature for such a purpose, in cases where the state constitution gives him a qualified negative upon the laws. But this has been silently and universally settled against the executive participation in the appointment.

§ 704. Thirdly; the number of senators. Each state is entitled to two senators. It is obvious, that to ensure competent knowledge and ability to discharge all the functions entrusted to the senate, (of which more will be said hereafter,) it is indispensable, that it should consist of a number sufficiently large to ensure a sufficient variety of talents, experience, and practical skill, for the discharge of all their duties. The legislative power alone, for its enlightened and prudent exercise, requires (as has been already shown) no small share of patriotism, and knowledge, and ability. In proportion to the extent and variety of the labours of

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1 Rawle on Const, 37; 1 Kent's Comm. Lect. 11, p. 211, 212.

2 1 Kent's Comm. Lect. 11, p. 211, 212. – Mr. Chancellor Kent says, in his Commentaries,* that in New-York the senators are elected by a joint vote, if the two houses do not separately concur. But his own opinion is, that the true construction of the constitution upon principle is, that it should be by a concurrent vote.

* 1 Kent's Comm. Lect. 11, p. 212.

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legislation, there should be members, who should share them, in order, that there may be a punctual and perfect performance of them. If the number be very small, there is danger, that some of the proper duties will be overlooked, or neglected, or imperfectly attended to. No human genius, or industry, is adequate to all the vast concerns of government, if it be not aided by the power and skill of numbers. The senate ought, therefore, on this account alone, to be somewhat numerous, though it need not, and indeed ought not, for other reasons, to be as numerous, as the house. Besides; numbers are important to give to the body a sufficient firmness to resist the influence, which the popular branch will ever be solicitous to exert over them. A very small body is more easy to be overawed, and intimidated, and controlled by external influences, than one of a reasonable size, embracing weight of character, and dignity of talents. Numbers alone, in many cases, confer power; and what is of not less importance, they present more resistance to corruption and intrigue. A body of five may be bribed, or overborne, when a body of fifty would be an irresistible barrier to usurpation.

§ 705. In addition to this consideration, it is desirable, that a state should not be wholly unrepresented in the national councils by mere accident, or by the temporary absence of its representative. If there be but a single representative, sickness or casualty may deprive the state of its vote on the most important occasions. It was on this account, (as well as others,) that the confederation entitled each state to send not less than *two*, nor more than *seven* delegates. In critical cases, too, it might be of great importance to have an opportunity of consulting with a colleague or col-

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leagues, having a common interest and feeling for the state. And if it be not always in the strictest sense true, that in the multitude of counsel there is safety; there is a sufficient foundation in the infirmity of human nature to make it desirable to gain the advantage of the wisdom, and information, and reflection of other independent minds, not labouring under the suspicion of any unfavourable bias. These reasons may be presumed to have had their appropriate weight in the deliberations of the convention. If more than one representative of a state was to be admitted into the senate, the least practicable ascending number was that adopted. At that time a single representative of each state would have made the body too small for all the purposes of its institution, and all the objects before explained. It would have been composed but of thirteen; and supposing no absences, which could not ordinarily be calculated upon, seven would constitute a majority to decide all the measures. Twenty-six was not, at that period, too large a number for dignity, independence, wisdom, experience, and efficiency. And, at the present moment, when the states have grown to twenty-four, it is found, that forty-eight is a number quite small enough to perform the great national functions confided to it, and to embody the requisite skill and ability to meet the increased exigencies, and multiplied duties of the office.[1] There is probably no legislative body on earth, whose duties are more various, and interesting, and important to the public wel-

[1] Mr. Tucker, (the learned Commentator on Blackstone,) in 1803, said: "The whole number of senators is at present limited to thirty-two. It is not probable, that it will ever exceed fifty." * How strangely has our national growth already outstripped all human calculation!

* 1 Tuck. Black. Comm. App. 223.

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fare; and none, which calls for higher talents, and more comprehensive attainments, and more untiring industry, and integrity.

§ 706. In the convention there was a considerable diversity of opinion, as to the number, of which the senate should consist, and the apportionment of the number among the states. When the principle of an equality of representation was decided, the only question seems to have been, whether each state should have three, or two members. Three was rejected by a vote of nine states against one; and two inserted by a vote of nine states against one.[1] It does not appear, that any proposition was ever entertained for a less number than two; and the silence of all public discussion on this subject seems to indicate, that the public opinion decidedly adopted the lowest number under the confederation to be the proper number, if an equality of representation was to be admitted into the senate. Whatever may be the future increase of states in the Union, it is scarcely probable, that the number will ever exceed that, which will fit the senate for the best performance of all its exalted functions. The British house of lords, at this moment, probably exceeds any number, which will ever belong to the American senate; and yet, notwithstanding the exaggerated declamation of a few ardent minds, the sober sense of the nation has never felt, that its number was either a burthen, or an infirmity inherent in the constitution.[2]

§ 707. Fourthly; the term of service of the senators. It is for six years; although, as will be present-

[1] Journal of Convention, 23d July, 189. See also Id. 156, 162, 175, 178, 180, 198.

[2] See the Remarks quoted in 1 Tucker's Black. Comm. App. 223; 2 Wilson's Law Lect. 150. In 1803 the house of lords was said to be composed of about 220; it now probably exceeds 350.

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ly seen, another element in the composition of that body is, that one third of it is changed every two years.

What would be the most proper period of office for senators, was an inquiry, admitting of a still wider range of argument and opinion, than what would be the most proper for the members of the house of representatives. The subject was confessedly one full of intricacy, and doubt, upon which the wisest statesmen might well entertain very different views, and the best patriots might well ask for more information, without, in the slightest degree, bringing into question their integrity, their love of liberty, or their devotion to a republican government. If, in the present day, the progress of public opinion, and the lights of experience, furnish us with materials for a decided judgment, we ought to remember, that the question was then free to debate, and the fit conclusion was not easily to be seen, or justly to be measured. The problem to be solved by the great men of that day was, what organization of the legislative power, in a republican government, is best adapted to give permanency to the Union, and security to public liberty. In the convention, a great diversity of judgment was apparent among those, whose purity and patriotism were above all suspicion, and whose talents and public services were equally unquestionable. Various propositions were entertained; that the period of service of senators should be during good behaviour; for nine years; for seven years; for six years; for five years; for four years; for three years.[1] All these propositions successively failed, except that for seven years, which was eventually abandoned for six years with the addi-

[1] Journal of Convention, 118, 130, 147, 148; Yates's Minutes, 4 Elliot's Debates, 70, 71, 103, 104, 105, 106.

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tional limitation, that one third should go out biennially.[1]

§ 708. No inconsiderable array of objections was brought to bear against this prolonged term of service of the senators beyond that fixed for the members of the house of representatives, both in the convention, and before the people, when the constitution was under their advisement.[2] Perhaps some of those objections still linger in the minds of many, who entertain a general jealousy of the powers of the Union; and who easily persuade themselves on that account, that power should frequently change hands in order to prevent corruption and tyranny. The perpetuity of a body (it has been said) is favourable to every stride it may be

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1 Journal of Convention, 67, 72, 118, 130, 147, 148, 149, 207, 217, 238, 353, 373; Yates's Minutes, 4 Elliot's Debates, 70, 71, 103, 104, 105, 106. — Montesquieu seems to have been decidedly of opinion, that a senate ought to be chosen for life, as was the custom at Rome, at Sparta, and even at Athens.* It is well known, that this was Gen. Hamilton's opinion, or rather his proposition was, that the senators should be chosen to serve during good behaviour. (Journ. of Convention, p. 130; North American Review, Oct. 1827, p. 266.) It appears to have been that of Mr. Jay. (North American Review, Oct. 1827, p. 263.) Mr. Madison's original opinion seems to have been, to have a senate chosen for a longer term, than the house of representatives.† But in the convention, it is said, that he was favourably inclined to Mr. Hamilton's plan.‡ In a question of so much difficulty and delicacy, as the due formation of a government, it is not at all surprising, that such opinions should have been held by them, and many others of the purest and most enlightened patriots. They wished durability and success to a republican government, and were, therefore, urgent to secure it against the imbecility resulting from what they deemed too frequent changes in the administration of its powers. To hold such opinions was not then deemed a just matter of reproach, though from the practical operations of the constitution they may now be deemed unsound.

2 2 American Museum, 547.

* Montesquieu's Spirit of Laws, B. 5. ch. 7.
† North American Review, Oct. 1827, p. 265.
‡ 2 Pitkin's Hist. 259, note.

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disposed to make towards extending its own power and influence in the government. Such a tendency is to be discovered in all bodies, however constituted, and to which no effectual check can be opposed, but frequent dissolutions and elections.[1] The truth of this remark may be admitted; but there are many circumstances, which may justly vary its force and application. While, on the one hand, perpetuity in a body may be objectionable, on the other hand, continual fluctuations may be no less so, with reference to its duties and functions, its powers, and its efficiency. There are dangers arising from too great frequency in elections, as well as from too small. The path of true wisdom is probably best attained by a moderation, which avoids either extreme. It may be said of too much jealousy, and of too much confidence, that, when either is too freely admitted into public councils, it betrays like treason.

§ 709. It seems paradoxical to assert, (as has been already intimated,) but it is theoretically, as well as practically true, that a deep-felt responsibility is incompatible with great frequency of elections.[2] Men can feel little interest in power, which slips away almost as soon, as it is grasped; and in measures, which they can scarcely do more than begin, without hoping to perfect. Few measures have an immediate and sensible operation, exactly according to their wisdom or policy. For the most part, they are dependent upon other measures, or upon time, and gradual intermixtures with the business of life, and the general institutions of society.[3] The first superficial view may shock popular prejudices, or errors; while the ultimate results may be as admira-

1 Tucker's Black. Comm. App. 196.
2 See ante, § 587, &c. on the same point.
3 The Federalist, No. 63.

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ble and excellent, as they are profound and distant. Who can take much interest in weaving a single thread into a measure, which becomes an evanescent quantity in the main fabric, whose texture requires constant skill, and many adaptations from the same hand, before its perfection can be secured, or even be prophesied?

§ 710. The objections to the senatorial term of office all resolve themselves into a single argument, however varied in its forms, or illustrations. That argument is, that political power is liable to be abused; and that the great security for public liberty consists in bringing home responsibility, and dependence in those, who are entrusted with office; and these are best attained by short periods of office, and frequent expressions of public opinion in the choice of officers. If the argument is admitted in its most ample scope, it still leaves the question open to much discussion, what is the proper period of office, and how frequent the elections should be. This question must, in its nature, be complicated; and may admit, if it does not absolutely require, different answers, as applicable to different functionaries. Without wandering into ingenious speculations upon the topic in its most general form, our object will be to present the reasons, which have been, or may be relied on, to establish the sound policy and wisdom of the duration of office of the senators as fixed by the constitution. In so doing, it will become necessary to glance at some suggestions, which have already occurred in considering the organization of the other branch of the legislature. It may be proper, however, to premise, that the whole reasoning applies to a moderate duration only in office; and that it assumes, as its basis, the absolute necessity of short limitations of office, as constituting indispensable checks to power in all republican governments. It

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would almost be useless to descant upon such a basis, because it is universally admitted in the United States as a fundamental principle of all their constitutions of government.

§ 711. In the first place, then, all the reasons, which apply to the duration of the legislative office generally, founded upon the advantages of various knowledge, and experience in the principles and duties of legislation, may be urged with increased force in regard to the senate. A good government implies two things; first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means, by which that object is to be attained. Some governments are deficient in both these qualities; most are deficient in the first. Some of our wisest statesmen have not scrupled to assert, that in the American governments too little attention has been paid to the latter.[1] It is utterly impossible for any assembly of men, called for the most part from the pursuits of private life, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to the study of the nature and operations of government, to escape from the commission of many errors in the discharge of their legislative functions.[2] In proportion to the extent and variety of these functions, the national interests, which they involve, and the national duties, which they imply, ought to rise the intellectual qualifications, and solid attainments of the members. Even in our domestic concerns, what are our voluminous, and even changing codes, but monu-

[1] The Federalist, No. 62; 2 Wilson's Law Lect. 146, 147, 148.

[2] The Federalist, No. 62; 1 Elliot's Debates, 65, 66; Id. 269 to 284; 3 Elliot's Debates, 50, 51; 2 Wilson's Law Lect. 152; 1 Kent's Comm. Lect. 11, p. 212.

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ments of deficient wisdom, hasty resolves, and still more hasty repeals? What are they, but admonitions to the people of the dangers of rash, and premature legislation,[1] of ignorance, that knows not its own mistakes, or of overweening confidence, which heeds not its own follies?

§ 712. A well constituted senate, then, which should interpose some restraints upon the sudden impulses of a more numerous branch, would, on this account, be of great value.[2] But its value would be incalculably increased by making its term of office such, that with moderate industry, talents, and devotion to the public service, its members could scarcely fail of having the reasonable information, which would guard them against gross errors, and the reasonable firmness, which would enable them to resist visionary speculations, and popular excitements. If public men know, that they may safely wait for the gradual action of a sound public opinion, to decide upon the merit of their actions and measures, before they can be struck down, they will be more ready to assume responsibility, and pretermit present popularity for future solid reputation.[3] If they are designed, by the very structure of the government, to secure the states against encroachments upon their rights and liberties, this very permanence of office adds new means to effectuate the object. Popular opinion may, perhaps, in its occasional extravagant sallies, at the instance of a fawning demagogue, or a favorite chief, incline to overleap the constitutional barriers, in order

[1] The Federalist, No. 62.

[2] The Federalist, No. 63; 1 Elliot's Debates, 259, 260, 261, 269 to 284; 2 Wilson's Law Lect. 146, 147, 148, 152; 1 Kent's Comm. 212.

[3] See 1 Elliot's Debates, 263, 264, 269 to 278; 3 Elliot's Debates, 48 to 51.

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to aid their advancement, or gratify their ambition. But the solid judgment of a senate may stay the evil, if its own duration of power exceeds that of the other branches of the government, or if it combines the joint durability of both. In point of fact, the senate has this desirable limit. It combines the period of office of the executive with that of the members of the house; while at the same time, from its own biennial changes, (as we shall presently see,) it is silently subjected to the deliberate voice of the states.

§ 713. In the next place, mutability in the public councils, arising from a rapid succession of new members, is found by experience to work, even in domestic concerns, serious mischiefs. It is a known fact in the history of the states, that every new election changes nearly or quite one half of its representatives;[1] and in the national government changes less frequent, or less numerous can scarcely be expected. From this change of men, there must unavoidably arise a change of opinions; and with this change of opinions a correspondent change of measures. Now experience demonstrates, that a continual change, even of good measures, is inconsistent with every rule of prudence and every prospect of success.[2] In all human affairs, time is required to consolidate the elements of the best concerted measures, and to adjust the little interferences, which are incident to all legislation. Perpetual changes in public institutions not only occasion intolerable controversies, and sacrifices of private interests; but check the growth of that steady industry and enterprise, which, by wise forecast, lay up the means of future prosperity. Besides; the instability of public councils gives an unrea-

[1] The Federalist, No. 62.

[2] The Federalist, No. 62; 1 Kent's Comm. 212, 213.

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sonable advantage to the sagacious, the cunning, and the monied capitalists. Every new regulation concerning commerce, or revenue, or manufactures, or agriculture, or in any manner affecting the relative value of the different species of property, presents a new harvest to those, who watch the change, and can trace the consequences; a harvest, which is torn from the hand of the honest labourer, or the confiding artisan, to enrich those, who coolly look on to reap profit, where they have sown nothing.[1] In short, such a state of things generates the worst passions of selfishness, and the worst spirit of gaming. However paradoxical it may seem, it is nevertheless true, that in affairs of government, the best measures, to be safe, must be slowly introduced; and the wisest councils are those, which proceed by steps, and reach, circuitously, their conclusion. It is, then, important in this general view, that all the public functionaries should not terminate their offices at the same period. The gradual infusion of new elements, which may mingle with the old, secures a gradual renovation, and a permanent union of the whole.

§ 714. But the ill effects of a mutable government are still more strongly felt in the intercourse with foreign nations. It forfeits the respect and confidence of foreign nations, and all the advantages connected with national character.[2] It not only lays its measures open to the silent operations of foreign intrigue and management; but it subjects its whole policy to be counteracted by the wiser and more stable policy of its foreign rivals and adversaries. One nation is to another, what one individual is to another, with this mel-

[1] The Federalist, No. 62.

[2] The Federalist, No. 62; 1 Elliot's Debates, 268, 269.

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ancholy distinction perhaps, that the former, with fewer benevolent emotions than the latter, are under fewer restraints also from taking undue advantages of the indiscretions of each other.[1] If a nation is perpetually fluctuating in its measures, as to the protection of agriculture, commerce, and manufactures, it exposes all its infirmities of purpose to foreign nations; and the latter with a systematical sagacity will sap all the foundations of its prosperity. From this cause, under the confederation, America suffered the most serious evils. "She finds," said the Federalist,[2] with unusual boldness and freedom, "that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation, which has an interest in speculating on her fluctuating councils, and embarrassed affairs."

§ 715. Further; foreign governments can never safely enter into any permanent arrangements with one, whose councils and government are perpetually fluctuating. It was not unreasonable, therefore, for them to object to the continental congress, that they could not guaranty the fulfilment of any treaty; and therefore it was useless to negotiate any. To secure the respect of foreign nations, there must be power to fulfil engagements; confidence to sustain them; and durability to ensure their execution on the part of the government. National character in cases of this sort is inestimable. It is not sufficient, that there should be a sense of justice, and disposition to act right; but there must be an enlightened permanency in the policy

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[1] The Federalist, No. 62; 1 Elliot's Debates, 269, 270 to 273; 1 Kent. Comm. 212, 213.

[2] The Federalist, No. 62.

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of the government.[1] Caprice is just as mischievous, as folly, and corruption scarcely worse, than perpetual indecision and fluctuation. In this view, independent of its legislative functions, the participation of the senate in the functions of the executive, in appointing ambassadors, and in forming treaties with foreign nations, gives additional weight to the reasoning in favour of its prolonged term of service. A more full survey of its other functions will make that reasoning absolutely irresistible, if the object is, that they should be performed with independence, with judgment, and with scrupulous integrity and dignity.

§ 716. In answer to all reasoning of this sort, it has been strenuously urged, that a senate, constituted, not immediately by the people, for six years, may gradually acquire a dangerous pre-eminence in the government, and eventually transform itself into an aristocracy.[2] Certainly, such a case is possible; but it is scarcely within the range of probability, while the people, or the government, are worthy of protection or confidence. Liberty may be endangered by the abuses of liberty, as well as by the abuses of power. There are quite as numerous instances of the former, as of the latter.[3] Yet, who would reason, that there should be no liberty, because it had been, or it might be, abused? Tyranny itself would not desire a more cogent argument, than that the danger of abuse was a ground for the denial of a right.

§ 717. But the irresistible reply to all such reasoning is, that before such a revolution can be effected, the

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[1] See 1 Elliot's Debates, 269, 272, 273, 274.

[2] See 2 Amer. Museum, 547.

[3] The Federalist, No. 63; 1 Elliot's Debates, 269, 272.

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senate must, in the first place, corrupt itself; it must next corrupt the state legislatures; it must then corrupt the house of representatives; and, lastly, it must corrupt the people at large. Unless all these things are done, and continued, the usurpation of the senate would be as vain, as it would be transient. The periodical change of its members would otherwise regenerate the whole body. And if such universal corruption should prevail, it is quite idle to talk of usurpation and aristocracy; for the government would then be exactly, what the people would choose it to be. It would represent exactly, what they would deem fit. It would perpetuate power in the very form, which they would advise. No form of government ever proposed to contrive a method, by which the will of the people should be at once represented, and defeated; by which it should choose to be enslaved, and at the same time, by which it should be protected in its freedom. Private and public virtue is the foundation of republics; and it is folly, if it is not madness, to expect, that rulers will not buy, what the people are eager to sell. The people may guard themselves against the oppressions of their governors; but who shall guard them against their own oppression of themselves?

§ 718. But experience is, after all, the best test upon all subjects of this sort. Time, which dissolves the frail fabrics of men's opinions, serves but to confirm the judgments of nature. What are the lessons, which the history of our own and other institutions teach us? In Great-Britain, the house of lords is hereditary; and yet it has never hitherto been able successfully to assail the public liberties; and it has not unfrequently preserved, or enforced them. The house of commons is now chosen for seven years. Is it now less an organ

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of the popular opinion, and less jealous of the public rights, than it was during annual, or triennial parliaments? In Virginia, the house of delegates before the revolution, was chosen for seven years; and in some of the other colonies for three years.[1] Were they then subservient to the crown, or faithless to the people? In the present constitutions of the states of America, there is a great diversity in the terms of office, as well as the qualifications, of the state senates. In New-York, Virginia, Pennsylvania, and Kentucky the senate is chosen for four years;[2] in Delaware, Mississippi, and Alabama, for three years; in South-Carolina, Tennessee, Ohio, Missouri, and Louisiana, biennially; in Maryland, for five years; in the other states annually.[3] These diversities are as striking in the constitutions, which were framed as long ago, as the times of the revolution, as in those, which are the growth, as it were, of yesterday. No one, with any show of reason or fact, can pretend, that the liberties of the people have not been quite as safe, and the legislation quite as enlightened and pure in those states, where the senate is chosen for a long, as for a short period.

§ 719. If there were any thing in the nature of the objections, which have been under consideration, or in general theory to warrant any conclusion, it would be, that the circumstances of the states being nearly equal, and the objects of legislation the same, the same duration of office ought to be applied to all. Yet this diversity has existed without any assignable inconvenience in its practical results. It is manifest,

[1] 1 Elliot's Debates, 272.

[2] The Federalist, No. 39.

[3] Dr. Lieber's Encycl. Americana, art. *Constitutions of the States*; The Federalist, No. 39.

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then, that the different manners, habits, institutions, and other circumstances of a society, may admit, if they do not require, many different modifications of its legislative department, without danger to liberty on the one hand, or gross imbecility on the other. There are many guards and checks, which are silently in operation, to fortify the benefits, or to retard the mischiefs of an imperfect system. In the choice of organizations, it may be affirmed, that that is on the whole best, which secures in practice the most zeal, experience, skill, and fidelity in the discharge of the legislative functions. The example of Maryland is perhaps more striking and instructive, than any one, which has been brought under review; for it is more at variance with all the objections raised against the national senate. In Maryland, the senate is not only chosen for five years; but it possesses the exclusive right to fill all vacancies in its own body, and has no rotation during the term.[1] What a fruitful source might not this be of theoretical objections, and colourable alarms, for the safety of the public liberties? Yet, Maryland continues to enjoy all the blessings of good government, and rational freedom, without molestation, and without dread. If examples are sought from antiquity, the illustrations are not less striking. In Sparta, the ephori, the annual representatives of the people, were found an over-match for a senate for life; continually gaining authority; and finally drawing all power into their own hands. The tribunes of Rome, who were the representatives of the people, prevailed, in almost every contest, with the senate for life; and in the end gained a complete triumph over it, notwithstanding unanimity

[1] The Federalist, No. 63.

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among the tribunes was indispensable. This fact proves the irresistible force possessed by that branch of the government, which represents the popular will.[1]

§ 720. Considering, then, the various functions of the senate, the qualifications of skill, experience, and information, which are required to discharge them, and the importance of interposing, not a nominal, but a real check, in order to guard the states from usurpations upon their authority, and the people from becoming the victims of violent paroxysms in legislation; the term of six years would seem to hit the just medium between a duration of office, which would too much resist, and a like duration, which would too much invite those changes of policy, foreign and domestic, which the best interests of the country may require to be deliberately weighed, and gradually introduced. If the state governments are found tranquil, and prosperous, and safe, with a senate of two, three, four, and five years' duration, it would seem impossible for the Union to be in danger from a term of service of six years.[2]

§ 721. But, as if to make assurance doubly sure, and take a bond of fate, in order to quiet the last lingering scruples of jealousy, the succeeding clause of the constitution has interposed an intermediate change in the elements of the body, which would seem to make it absolutely above exception, if reason, and not fear, is to prevail; and if government is to be a reality, and not a vision.

§ 722. It declares, "Immediately after they (the "senators) shall be assembled, in consequence of the "first election, they shall be divided, as equally as may "be, into three classes. The seats of the senators of

[1] The Federalist, No. 63; Id. No. 34.

[2] 1 Elliot's Deb. 64 to 66; Id. 91; 1 Kent's Comm. Lect. 11, p. 212, 213.

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"the first class shall be vacated at the expiration of "the second year; of the second class, at the expira- "tion of the fourth year; and of the third class, at the "expiration of the sixth year, so that one third may be "chosen every second year." A proposition was made in the convention, that the senators should be chosen for nine years, one third to go out biennially, and was lost, three states voting in the affirmative, and eight in the negative; and then the present limitation was adopted by a vote of seven states against four.[1] Here, then, is a clause, which, without impairing the efficiency of the senate for the discharge of its high functions, gradually changes its members, and introduces a biennial appeal to the states, which must for ever prohibit any permanent combination for sinister purposes. No person would probably propose a less duration of office for the senate, than double the period of the house. In effect, this provision changes the composition of two thirds of that body within that period.[2]

§ 723. And here, again, it is proper to remark, that experience has established the fact beyond all controversy, that the term of the senate is not too long, either for its own security, or that of the states. The reasoning of those exalted minds, which framed the constitution, has been fully realized in practice. While the house of representatives has gone on increasing, and deepening its influence with the people with an irresistible power, the senate has, at all times, felt the im-

[1] Journ. of Convention, 26th June, 1787, p. 149; Yates's Minutes, 4 Elliot's Debates, 103 to 106.

[2] 1 Elliot's Deb. 64 to 66; Id. 91, 92; 1 Kent's Comm. Lect. 11, p. 213, 214. — A power to recall the senators was proposed as an amendment in some of the state conventions; but it does not seem to have obtained general favour.* Many potent reasons might be urged against it.

* 1 Elliot's Debates, 257, 258 to 264, 265 to 272; 3 Elliot's Debates, 303.

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pulses of the popular will, and has never been found to resist any solid improvements. Let it be added, that it has given a dignity, a solidity, and an enlightened spirit to the operations of the government, which have maintained respect abroad, and confidence at home.

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

§ 725. As vacancies might occur in the senate during the recess of the state legislature, it became indispensable to provide for that exigency. Accordingly the same clause proceeds to declare: "And if vacancies "happen by resignation, or otherwise, during the recess

[1] Journals of the Senate, 15th May, 1789, p. 25, 26, (edit. 1820.)

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"of the legislature of any state, the executive thereof "may make temporary appointments until the next "meeting of the legislature, which shall then fill such "vacancies." It does not appear, that any strong objection was urged, in the convention, against this proposition, although it was not adopted without some opposition.[1] There seem to have been three courses presented for the consideration of the convention; either to leave the vacancies unfilled until the meeting of the state legislature; or to allow the state legislatures to provide at their pleasure, prospectively for the occurrence; or to confide a temporary appointment to some select state functionary or body. The latter was deemed the most satisfactory and convenient course. Confidence might justly be reposed in the state executive, as representing at once the interests and wishes of the state, and enjoying all the proper measures of knowledge and responsibility, to ensure a judicious appointment.[2]

§ 726. Fifthly; the qualifications of senators. The constitution declares, that "No person shall be a sen-

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[1] Journ. of Convention, 9th Aug. 237, 238.

[2] In the case of Mr. Lanman, a senator from Connecticut, a question occurred, whether the state executive could make an appointment in the recess of the state legislature in anticipation of the expiration of the term of office of an existing senator. It was decided by the senate, that he could not make such an appointment. The facts were, that Mr. Lanman's term of service, as senator, expired on the third of March, 1825. The president had convoked the senate to meet on the fourth of March. The governor of Connecticut in the recess of the legislature, (whose session would be in May,) on the ninth of the preceding February appointed Mr. Lanman, as senator, to sit in the senate after the third of March. The senate, by a vote of 23 to 18, decided, that the appointment could not be constitutionally made, until after the vacancy had actually occurred. See Gordon's Digest of the Laws of the United States, 1827, Appendix, Note 1, B.

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"ator, who shall not have attained the age of thirty "years, and been nine years a citizen of the United "States, and who shall not, when elected, be an inhab- "itant of that state, for which he shall be chosen." As the nature of the duties of a senator require more experience, knowledge, and stability of character, than those of a representative, the qualification in point of age is raised. A person may be a representative at twenty-five; but he cannot be a senator until thirty. A similar qualification of age was required of the members of the Roman senate.[1] It would have been a somewhat singular anomaly in the history of free governments, to have found persons actually exercising the highest functions of government, who, in some enlightened and polished countries, would not be deemed to have arrived at an age sufficiently mature to be entitled to all the private and municipal privileges of manhood. In Rome persons were not deemed at full age until twenty-five; and that continues to be the rule in France, and Holland, and other civil law countries; and in France, by the old law, in regard to marriage full age was not attained until thirty.[2] It has since been varied, and the term diminished.[3]

§ 727. The age of senators was fixed in the constitution at first by a vote of seven states against four; and finally, by an unanimous vote.[4] Perhaps no one, in our day, is disposed to question the propriety of this limitation; and it is, therefore, useless to discuss a point, which is so purely speculative. If counsels are to be wise, the ardour, and impetuosity, and confi-

[1] 1 Kent's Comm. Lect. 11, p. 214. [2] 1 Black. Comm. 463, 464.
[3] Code Civil, art. 388.
[4] Journ. of Convention, 118, 147.

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dence of youth must be chastised by the sober lessons of experience; and if knowledge, and solid judgment, and tried integrity, are to be deemed indispensable qualifications for senatorial service, it would be rashness to affirm, that thirty years is too long a period for a due maturity and probation.[1]

§ 728. The next qualification is citizenship. The propriety of some limitation upon admissions to office, after naturalization, cannot well be doubted. The senate is to participate largely in transactions with foreign governments; and it seems indispensable, that time should have elapsed sufficient to wean a senator from all prejudices, resentments, and partialities, in relation to the land of his nativity, before he should be entrusted with such high and delicate functions.[2] Besides; it can scarcely be presumed, that any foreigner can have acquired a thorough knowledge of the institutions and interests of a country, until he has been permanently incorporated into its society, and has acquired by the habits and intercourse of life the feelings and the duties of a citizen. And if he has acquired the requisite knowledge, he can scarcely feel that devoted attachment to them, which constitutes the great security for fidelity and promptitude in the discharge of official duties. If eminent exceptions could be stated, they would furnish no safe rule; and should rather teach us to fear our being misled by brilliancy of talent, or disinterested patriotism, into a confidence, which might betray, or an acquiescence, which might weaken, that jealousy of foreign influence, which is one of the main supports of republics. In the convention

[1] Rawle on the Constitution, 37; 1 Kent's Comm. Lect. 11, p. 214; 1 Tuck. Black. Comm. App. 223.

[2] The Federalist, No. 62.

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it was at first proposed, that the limitation should be four years; and it was finally altered by a vote of six states against four, one being divided, which was afterwards confirmed by a vote of eight states to three.[1] This subject has been already somewhat considered in another place; and it may be concluded, by adopting the language of the Federalist on the same clause. "The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merit and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence in the national councils."[2]

§ 729. The only other qualification is, that the senator shall, when elected, be an inhabitant of the state, for which he is chosen. This scarcely requires any comment; for it is manifestly proper, that a state should be represented by one, who, besides an intimate knowledge of all its wants and wishes, and local pursuits, should have a personal and immediate interest in all measures touching its sovereignty, its rights, or its influence. The only surprise is, that provision was not made for his ceasing to represent the state in the senate, as soon as he should cease to be an inhabitant. There does not seem to have been any debate in the convention on the propriety of inserting the clause, as it now stands.

§ 730. In concluding this topic, it is proper to remark, that no qualification whatsoever of property is established in regard to senators, as none had been established in regard to representatives. Merit, there-

[1] Journ. of Convention, 218, 238, 239, 248, 249.

[2] The Federalist, No. 62; Rawle on the Constitution, 37; 1 Kent's Comm. Lect. 11, p. 214.

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fore, and talent have the freest access open to them into every department of office under the national government. Under such circumstances, if the choice of the people is but directed by a suitable sobriety of judgment, the senate cannot fail of being distinguished for wisdom, for learning, for exalted patriotism, for incorruptible integrity, and for inflexible independence.[1]

§ 731. The next clause of the third section of the first article respects the person, who shall preside in the senate. It declares, that "the Vice President of the "United States shall be president of the senate; but "shall have no vote, unless they be equally divided;" and the succeeding clause, that "the senate shall choose "their other officers, and also a president pro tempore, "in the absence of the vice president, or when he shall "exercise the office of president of the United States."

§ 732. The original article, as first reported, authorized the senate to choose its own president, and other officers; and this was adopted in the convention.[2] But the same draft authorized the president of the senate, in case of the removal, death, resignation,[3] or disability of the president, to discharge his duties. When at a late period of the convention it was deemed advisable, that there should be a vice president, the propriety of retaining him, as presiding officer of the senate, seems to have met with general favour, eight states voting in the affirmative, and two only in the negative.[4]

§ 733. Some objections have been taken to the appointment of the vice president to preside in the senate. It was suggested in the state conventions,

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1 See the Federalist, No. 27.
2 Journal of Convention, p. 218, 240.
3 Ibid, 225, 226.
4 Journal of Convention, 325, 339.

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that the officer was not only unnecessary, but dangerous; that it is contrary to the usual course of parliamentary proceedings to have a presiding officer, who is not a member; and that the state, from which he comes, may thus have two votes, instead of one.[1] It has also been coldly remarked by a learned commentator, that "the necessity of providing for the case of a vacancy in the office of president doubtless gave rise to the creation of that officer; and for want of something else for him to do, whilst there is a president in office, he seems to have been placed, with no very great propriety, in the chair of the senate."[2]

§ 734. The propriety of creating the office of vice president will be reserved for future consideration, when, in the progress of these commentaries, the constitution of the executive department comes under review.[3] The reasons, why he was authorized to preside in the senate, belong appropriately to this place.

§ 735. There is no novelty in the appointment of a person to preside, as speaker, who is not a constituent member of the body, over which he is to preside. In the house of lords in England the presiding officer is the lord chancellor, or lord keeper of the great seal,

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[1] 2 Elliot's Debates, 359, 361; 3 Elliot's Debates, 37, 38.

[2] 1 Tucker's Black. Comm. Appx., 224; Id. 199, 200. — It is a somewhat curious circumstance in the history of congress, that the exercise of the power of the vice president in defeating a bill for the apportionment of representatives in 1792, has been censured, because such a bill seemed (if any) almost exclusively fit for the house of representatives to decide upon;* and that a like bill, to which the senate interposed a strong opposition, in 1832, has been deemed by some of the states so exceptionable, that this resistance has been thought worthy of high praise. There is some danger in drawing conclusions from a single exercise of any power against its general utility or policy.

[3] See 2 Amer. Museum, 557; The Federalist, No. 68.

* 1 Tuck. Black. Comm. App. 199, 200, 225.

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or other person appointed by the king's commission; and if none such be so appointed, then it is said, that the lords may elect. But it is by no means necessary, that the person appointed by the king should be a peer of the realm or lord of parliament.[1] Nor has this appointment by the king ever been complained of, as a grievance, nor has it operated with inconvenience or oppression in practice. It is on the contrary deemed an important advantage, both to the officer, and to the house of peers, adding dignity and weight to the former, and securing great legal ability and talent in aid of the latter. This consideration alone might have had some influence in the convention. The vice president being himself chosen by the states, might well be deemed, in point of age, character, and dignity, worthy to preside over the deliberations of the senate, in which the states were all assembled and represented. His impartiality in the discharge of its duties might be fairly presumed; and the employment would not only bring his character in review before the public; but enable him to justify the public confidence, by performing his public functions with independence, and firmness, and sound discretion. A citizen, who was deemed worthy of being one of the competitors for the presidency, could scarcely fail of being distinguished by private virtues, by comprehensive acquirements, and by eminent services. In all questions before the senate he might safely be appealed to, as a fit arbiter upon an equal division, in which case alone he is entrusted with a vote.

§ 736. But the strong motive for this appointment was of another sort, founded upon state jealousy, and state equality in the senate. If the speaker of the

[1] 1 Black. Comm. 181; 3 Black. Comm. 47; 1 Tuck. Black. Comm. App., 224.

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senate was to be chosen from its own members, the state, upon whom the choice would fall, might possess either more or less, than its due share of influence. If the speaker were not allowed to vote, except where there was an equal division, independent of his own vote, then the state might lose its own voice;[1] if he were allowed to give his vote, and also a casting vote, then the state might, in effect, possess a double vote. Either alternative would of itself present a predicament sufficiently embarrassing. On the other hand, if no casting vote were allowed in any case, then the indecision and inconvenience might be very prejudicial to the public interests, in case of an equality of votes.[2] It might give rise to dangerous feuds, or intrigues, and create sectional and state agitations. The smaller states might well suppose, that their interests were less secure, and less guarded, than they ought to be. Under such circumstances, the vice president would seem to be the most fit arbiter to decide, because he would be the representative, not of one state only, but of all; and must be presumed to feel a lively interest in promoting all measures for the public good. This reasoning appears to have been decisive in the convention, and satisfactory to the people.[3] It establishes, that there was a manifest propriety in making the arrangement conducive to the harmony of the states, and the dignity of the general government. And as the senate possesses the power to make rules for its own proceedings, there is little danger, that there can ever arise any abuse of the presiding power. The danger, if any, is rather the other way, that the presiding power will be either silently weakened, or openly surrendered, so as to leave

[1] The Federalist, No. 68. [2] The Federalist, No. 68.
[3] 2 Elliot's Debates, 359, 360, 361; 3 Elliot's Debates, 37, 38, 51, 52.

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the office little more, than the barren honour of a place, without influence and without action.

§ 737. A question, involving the authority of the vice president, as presiding officer in the senate, has been much discussed in consequence of a decision recently made by that officer. Hitherto the power of preserving order during the deliberations of the senate in all cases, where the rules of the senate did not specially prescribe another mode, had been silently supposed to belong to the vice president, as an incident of office. It had never been doubted, much less denied, from the first organization of the senate; and its existence had been assumed, as an inherent quality, constitutionally delegated, subject only to such rules, as the senate should from time to time prescribe. In the winter session of 1826, the vice president decided in effect, that, as president of the senate, he had no power of preserving order, or of calling any member to order, for words spoken in the course of debate, upon his own authority, but only so far, as it was given, and regulated by the rules of the senate.[1] This was a virtual surrender of the presiding power (if not universally, at least in that case) into the hands of the senate; and disarmed the officer even of the power of self-protection from insult or abuse, unless the senate should choose to make provision for it. If, therefore, the senate should decline to confer the power of preserving order, the vice president might become a mere pageant and cipher in that body. If, indeed, the vice president had not this power *virtute officii*, there was nothing to prevent the senate from confiding it to any other officer chosen by itself. Nay, if the power to preside had not this incident, it was difficult to perceive, what other

[1] 1 American Annual Register, 86, 87; 3 American Annual Register, 99; 4 Elliot's Debates, 311 to 315.

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incident it had. The power to put questions, or to declare votes, might just as well, upon similar reasoning, be denied, unless it was expressly conferred. The power of the senate to prescribe rules could not be deemed omnipotent. It must be construed with reference to, and in connexion with the power to preside; and the latter, according to the common sense of mankind, and of public bodies, was always understood to include the power to keep order; upon the clear ground, that the grant of a power includes the authority to make it effectual, and also of self-preservation.

§ 738. The subject at that time attracted a good deal of discussion; and was finally, as a practical inquiry, put an end to in 1828, by a rule made by the senate, that "every question of order shall be decided by the president without debate, subject to appeal to the senate."[1] But still the question, as one of constitutional right and duty, liable to be regulated, but not to be destroyed by the senate, deserves, and should receive, the most profound investigation of every man solicitous for the permanent dignity and independence of the vice presidency.[2]

§ 739. The propriety of entrusting the senate with the choice of its other officers, and also of a president pro tempore in the absence of the vice president, or when he exercises the office of president, seems never to have been questioned; and indeed is so obvious, that it is wholly unnecessary to vindicate it. Confidence between the senate and its officers, and the power to make a suitable choice, and to secure a suitable responsibility for the faithful discharge of the duties of office, are so indispensable for the public good,

[1] 3 American Annual Register, 99.
[2] See Jefferson's Manual, § 15, 17.

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that the provision will command universal assent, as soon as it is mentioned. It has grown into a general practice for the vice president to vacate the senatorial chair a short time before the termination of each session, in order to enable the senate to choose a president pro tempore, who might already be in office, if the vice president in the recess should be called to the chair of state. The practice is founded in wisdom and sound policy, as it immediately provides for an exigency, which may well be expected to occur at any time; and prevents the choice from being influenced by temporary excitements or intrigues, arising from the actual existence of a vacancy. As it is useful in peace to provide for war; so it is likewise useful in times of profound tranquillity to provide for political agitations, which may disturb the public harmony.

§ 740. The next clause of the third section of the first article respects the subject of impeachment. It is as follows: "The senate shall have the sole power to "try all impeachments. When sitting for that purpose, "they shall be on oath or affirmation. When the presi- "dent of the United States is tried, the chief justice "shall preside. And no person shall be convicted with- "out the concurrence of two thirds of the members "present."

§ 741. Upon the subject of impeachments something has already been said, in treating of that branch of the constitution, which delegates to the house of representatives the sole power of impeachment. Upon the propriety of delegating the power it is unnecessary to enlarge. But the next inquiry naturally presented is, by what tribunal shall an impeachment be tried? It is obviously incorrect in theory, and against

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the general principles of justice, that the same tribunal should at once be the accusers and the judges; that they should first decide upon the verity of the accusation, and then try the offenders.[1] The first object in the administration of justice is, or ought to be, to secure an impartial trial. This is so fundamental a rule in all republican governments, that it can require little reasoning to support it; and the only surprise is, that it could ever have been overlooked.

§ 742. The practice of impeachments seems to have been originally derived into the common law from the Germans, who, in their great councils, sometimes tried capital accusations relating to the public. *Licet apud concilium accusare, quoque et discrimen capitis intendere.*[2] When it was adopted in England, it received material improvements. In Germany, and also in the Grecian and Roman republics, the people were, at the same time, the accusers and the judges; thus trampling down, at the outset, the best safeguards of the rights and lives of the citizens.[3] But in England, the house of commons is invested with the sole power of impeachment, and the house of lords with the sole power of trial. Thus, a tribunal of high dignity, independence, and intelligence, and not likely to be unduly swayed by the influence of popular opinion, is established to protect the accused, and secure to him a favourable hearing.[4] Montesquieu has deemed such a tribunal worthy of the highest praise.[5] Machiavel has ascribed the ruin of the republic of Florence to the want of a mode of providing by

1 Rawle on Const. ch. 22, p. 209, 210.

2 4 Black. Comm. 260; Tacit. de Morib. Germ. 12.

3 4 Black. Comm. 261; 2 Wilson's Law Lect. 164, 165, 166.

4 4 Black. Comm. 261; but see Paley's Moral Philosophy, B. 6, ch. 8; 1 Wilson's Law Lect. 450, 451.

5 Montesq. Spirit of Laws, B. 11, ch. 6.

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impeachment against those, who offend against the state. An American commentator has hazarded the extraordinary remark, that, "If the want of a proper tribunal for the trial of impeachments can endanger the liberties of the United States, some future Machiavel may perhaps trace their destruction to the same source."[1] The model, from which the national court of impeachments is borrowed, is, doubtless, that of Great Britain; and a similar constitutional distribution of the power exists in many of the state governments.[2]

§ 743. The great objects, to be attained in the selection of a tribunal for the trial of impeachments, are, impartiality, integrity, intelligence, and independence. If either of these is wanting, the trial must be radically imperfect. To ensure impartiality, the body must be in some degree removed from popular power and passions, from the influence of sectional prejudice, and from the more dangerous influence of mere party spirit. To secure integrity, there must be a lofty sense of duty, and a deep responsibility to future times, as well as to God. To secure intelligence, there must be age, experience, and high intellectual powers, as well as attainments. To secure independence, there must be numbers, as well as talents, and a confidence resulting at once from permanency of place, and dignity of station, and enlightened patriotism. Does the senate combine, in a suitable degree, all these qualifications? Does it combine them more perfectly, than any other tribunal, which could be constituted? What other tribunal could be entrusted with the authority? These are questions of the highest importance, and of the most frequent occurrence. They arose in the convention, and underwent

[1] 1 Tucker's Black. Comm. App. 348.
[2] The Federalist, No. 65, 66.

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a full discussion there. They were again deliberately debated in the state conventions; and they have been at various times since agitated by jurists and statesmen, and political bodies. Few parts of the constitution have been assailed with more vigour; and few have been defended with more ability. A learned commentator, at a considerable distance of time after the adoption of the constitution, did not scruple to declare, that it was a most inordinate power, and in some instances utterly incompatible with the other functions of the senate;[1] and a similar opinion has often been propagated with an abundance of zeal.[2] The journal of the convention bears testimony also to no inconsiderable diversity of judgment on the subject in that body.

§ 744. The subject is itself full of intrinsic difficulty in a government purely elective. The jurisdiction is to be exercised over offences, which are committed by public men in violation of their public trust and duties. Those duties are, in many cases, political; and, indeed, in other cases, to which the power of impeachment will probably be applied, they will respect functionaries of a high character, where the remedy would otherwise be wholly inadequate, and the grievance be incapable of redress. Strictly speaking, then, the power partakes of a political character, as it respects injuries to the society in its political character; and, on this account, it requires to be guarded in its exercise against the spirit of faction, the intolerance of party, and the sudden movements of popular feeling. The prosecution will seldom fail to agitate the passions of the whole community, and to

[1] 1 Tucker's Black. Comm App. 200; Id. 335, 336, 337.

[2] 2 Amer. Museum, 549; 3 Amer. Museum, 71; The Federalist, No. 65, 66; 1 Tuck. Black. Comm. App. 337; Jour. of Convention, Supplement, p. 425, 437.

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divide it into parties, more or less friendly, or hostile to the accused. The press, with its unsparing vigilance, will arrange itself on either side, to control, and influence public opinion; and there will always be some danger, that the decision will be regulated more by the comparative strength of parties, than by the real proofs of innocence or guilt.[1]

§ 745. On the other hand, the delicacy and magnitude of a trust, which so deeply concerns the political existence and reputation of every man engaged in the administration of public affairs, cannot be overlooked.[2] It ought not to be a power so operative and instant, that it may intimidate a modest and conscientious statesman, or other functionary from accepting office; nor so weak and torpid, as to be capable of lulling offenders into a general security and indifference. The difficulty of placing it rightly in a government, resting entirely on the basis of periodical elections, will be more strikingly perceived, when it is considered, that the ambitious and the cunning will often make strong accusations against public men the means of their own elevation to office; and thus give an impulse to the power of impeachment, by pre-occupying the public opinion. The convention appears to have been very strongly impressed with the difficulty of constituting a suitable tribunal; and finally came to the result, that the senate was the most fit depositary of this exalted trust. In so doing, they had the example before them of several of the best considered state constitutions; and the example, in some measure, of Great Britain. The most strenuous opponent cannot, therefore, allege, that it was a rash and novel experiment; the most unequivocal friend

[1] The Federalist, No. 65.

[2] The Federalist, No. 65; 2 Wilson's Law Lect. 165.

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must, at the same time, admit, that it is not free from all plausible objections.[1]

§ 746. It will be well, therefore, to review the ground, and ascertain, how far the objections are well founded; and whether any other scheme would have been more unexceptionable. The principal objections were as follows: (1.) That the provision confounds the legislative and judiciary authorities in the same body, in violation of the well known maxim, which requires a separation of them. (2.) That it accumulates an undue proportion of power in the senate, which has a tendency to make it too aristocratic. (3.) That the efficiency of the court will be impaired by the circumstances, that the senate has an agency in appointment to office. (4.) That its efficiency is still further impaired by its participation in the functions of the treaty-making power.[1]

§ 747. The first objection, which relates to the supposed necessity of an entire separation of the legislative and judicial powers, has been already discussed in its most general form in another place. It has been shown, that the maxim does not apply to partial intermixtures of these powers; and that such an intermixture is not only unobjectionable, but is, in many cases, indispensable for the purpose of preserving the due independence of the different departments of government, and their harmony and healthy operation in the advancement of the public interests, and the preservation of the public liberties.[2] The question is not so much, whether any intermixture is allowable, as whether the intermixture of the authority to try impeachments with the other functions of the senate is salutary

[1] The Federalist, No. 65, 66. [2] Id. No. 66.
[3] Ante, vol. ii. § 524 to 540; Rawle on Constitution, ch. 22, p. 212.

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and useful. Now, some of these functions constitute a sound reason for the investment of the power in this branch. The offences, which the power of impeachment is designed principally to reach, are those of a political, or of a judicial character. They are not those, which lie within the scope of the ordinary municipal jurisprudence of a country. They are founded on different principles; are governed by different maxims; are directed to different objects; and require different remedies from those, which ordinarily apply to crimes.[1] So far as they are of a judicial character, it is obviously more safe to the public to confide them to the senate, than to a mere court of law. The senate may be presumed always to contain a number of distinguished lawyers, and probably some persons, who have held judicial stations. At the same time they will not have any undue and immediate sympathy with the accused from that common professional, or corporation spirit, which is apt to pervade those, who are engaged in similar pursuits and duties.

§ 748. In regard to political offences, the selection of the senators has some positive advantages. In the first place, they may be fairly presumed to have a more enlarged knowledge, than persons in other situations, of political functions, and their difficulties, and embarrassments; of the nature of diplomatic rights and duties; of the extent, limits, and variety of executive powers and operations; and of the sources of involuntary error, and undesigned excess, as contradistinguished from those of meditated and violent disregard of duty and right. On the one hand, this very experience and knowledge will bring them to the trial with a spirit of candour and intelligence, and an ability to comprehend,

[1] 1 Wilson's Law Lect. 451, 452.

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and scrutinize the charges against the accused; and, on the other hand, their connection with, and dependence on, the states, will make them feel a just regard for the defence of the rights, and the interests of the states and the people. And this may properly lead to another remark; that the power of impeachment is peculiarly well fitted to be left to the final decision of a tribunal composed of representatives of all the states, having a common interest to maintain the rights of all; and yet, beyond the reach of local and sectional prejudices. Surely, it will not readily be admitted by the zealous defenders of state rights and state jealousies, that the power is not safe in the hands of all the states, to be used for their own protection and honour.

§ 749. The next objection regards the undue accumulation of power in the senate from this source connected with other sources. So far as any other powers are incompatible with, and obstructive of, the proper exercise of the power of impeachment, they will fall under consideration under another head. But it is not easy to perceive, what the precise nature and extent of the objection is. What is the due measure or criterion of power to be given to the senate? What is the standard, which is to be assumed? If we are to regard theory, no power in any department of government is undue, which is safe and useful in its actual operations, which is not dangerous in its form, or too wide in its extent. It is incumbent, then, on those, who press the objection, to establish, by some sound reasoning, that the power is not safe, but mischievous or dangerous.[1] Now, the power of impeachment is not one expected in any government to be in constant or frequent exercise. It is rather intended for occasional and extraor-

[1] The Federalist, No. 66.

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dinary cases, where a superiour power, acting for the whole people, is put into operation to protect their rights, and to rescue their liberties from violation. Such a power cannot, if its actual exercise is properly guarded, in the hands of functionaries, responsible and wise, be justly said to be unsafe or dangerous; unless we are to say, that no power, which is liable to abuse, should be, under any circumstances, delegated. The senators cannot be presumed in ordinary decency, not to be a body of sufficient wisdom to be capable of executing the power; and their responsibility arises from the moderate duration of their office, and their general stake in the interests of the community, as well as their own sense of duty and reputation. If, passing from theory, resort is had to the history of other governments, there is no reason to suppose, that the possession of the power of trying impeachments has ever been a source of undue aristocratical authority, or of dangerous influence. The history of Great Britain has not established, that the house of lords has become a dangerous depositary of influence of any sort from its being a high court of impeachments. If the power of impeachment has ever been abused, it has not trampled upon popular rights. If it has struck down high victims, it has followed, rather than led, the popular opinion. If it has been an instrument of injustice, it has been from yielding too much, and not too little. If it has sometimes suffered an offender to escape, it has far more frequently purified the fountains of justice, and brought down the favourite of courts, and the perverter of patronage to public humiliation and disgrace. And to bring the case home to our own state governments, the power in our state senates has hitherto been without danger, though certainly not without efficiency.

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§ 750. The next objection is, that the power is not efficient or safe in connexion with the agency of the senate in appointments. The argument is, that senators, who have concurred in an appointment, will be too indulgent judges of the conduct of the men, in whose efficient creation they have participated.[1] The same objection lies with equal force against all governments, which entrust the power of appointment to any persons, who have a right to remove them at pleasure. It might in such cases be urged, that the favouritism of the appointor would always screen the misbehaviour of the appointees. Yet no one doubts the fitness of entrusting such a power; and confidence is reposed, and properly reposed, in the character and responsibility of those, who make the appointment.[2] The objection is greatly diminished in its force by the consideration, that the senate has but a slight participation in the appointments to office. The president is to nominate and appoint; and the senate are called upon merely to confirm, or reject the nomination. They have no right of choice; and therefore must feel less solicitude, as to the individual, who is appointed.[3] But, in fact, the objection is itself not well founded; for it will rarely occur, that the persons, who have concurred in the appointment, will be members of the senate at the time of the trial. As one third is, or may be, changed every two years, the case is highly improbable; and still more rarely can the fact of the appointment operate upon the minds of any considerable number of the senators. What possible operation could it have upon the judgment of a man of reasonable intelligence and integrity, that he had assented to the ap-

[1] The Federalist, No. 66. Id. [2] No. 66. [3] Id. No. 66.

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pointment of any individual, of whom he ordinarily could have little, or no personal knowledge, and in whose appointment he had concurred upon the judgment and recommendation of others? Such an influence is too remote to be of much weight in human affairs; and if it exists at all, it is too common to form a just exception to the competency of any forum.

§ 751. The next objection is to the inconvenience of the union of the power with that of making treaties. It has been strongly urged, that ambassadors are appointed by the president, with the concurrence of the senate; and if he makes a treaty, which is ratified by two thirds of the senate, however corrupt or exceptionable his conduct may have been, there can be little chance of redress by an impeachment. If the treaty be ratified, and the minister be impeached for concluding it, because it is derogatory to the honour, the interest, or perhaps to the sovereignty of the nation, who (it is said) are to be his judges? The senate, by whom it has been approved and ratified? If the president be impeached for giving improper instructions to the minister, and for ratifying the treaty pursuant to his instructions, who are to be his judges? The senate, to whom the treaty has been submitted, and by whom it has been approved and ratified?[1] This would be to constitute the senators their own judges in every case of a corrupt or perfidious execution of their trust.[2]

§ 752. Such is the objection pressed with unusual earnestness, and certainly having a more plausible foundation, than either of the preceding. It pre-supposes, however, a state of facts of a very extraordinary character, and having put an extreme case, argues from

[1] 1 Tucker's Black. Comm. App. 335, 336. [2] The Federalist, No. 66.

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it against the propriety of any delegation of the power, which in such a case might be abused. This is not just reasoning in any case; and least of all in cases respecting the polity and organization of governments; for in all such cases there must be power reposed in some person or body; and wherever it is reposed, it may be abused. Now, the case put is either one, where the senate has ratified an appointment or treaty, innocently believing it to be unexceptionable, and beneficial to the country; or where the senate has corruptly ratified it, and basely betrayed their trust. In the former case, the senate having acted with fidelity, according to their best sense of duty, would feel no sympathy for a corrupt executive or minister, who had acted with fraud or dishonour unknown to them. If the treaty were good, they might still desire to punish those, who had acted basely or corruptly in negotiating it. If bad, they would feel indignation for the imposition practised upon them by an executive, or minister, in whom they placed confidence, instead of sympathy for his misconduct. They would feel, that they had been betrayed into an error; and would rather have a bias against, than in favour of the deceiver.

§ 753. If, on the other hand, the senate had corruptly assented to the appointment and treaty, it is certain, that there would remain no effectual remedy by impeachment, so long as the same persons remained members of the senate. But even here, two years might remove a large number of the guilty conspirators; and public indignation would probably compel the resignation of all. But is such a case supposable? If it be, then there are others quite within the same range of supposition, and equally mischievous, for which there can be no remedy. Suppose a majority of the senate,

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or house of representatives, corruptly pass any law, or violate the constitution, where is the remedy? Suppose the house of representatives carry into effect and appropriate money corruptly in aid of such a corrupt treaty, where is the remedy? Why might it not be as well urged, that the house of representatives ought not to be entrusted with the power of impeachment, because they might corruptly concur with the executive in an injurious or unconstitutional measure? or might corruptly aid the executive in negotiating a treaty by public resolves, or secret instructions? The truth is, that all arguments of this sort, which suppose a combination of the public functionaries to destroy the liberty of the people, and the powers of the government, are so extravagant, that they go to the overthrow of all delegated power; or they are so rare, and remote in practice, that they ought not to enter, as elements, into any structure of a free government. The constitution supposes, that men may be trusted with power under reasonable guards. It presumes, that the senate and the executive will no more conspire to overthrow the government, than the house of representatives. It supposes the best pledges for fidelity to be in the character of the individuals, and in the collective wisdom of the people in the choice of agents. It does not in decency presume, that the two thirds of the senate, representing the states, will corruptly unite with the executive, or abuse their power. Neither does it suppose, that a majority of the house of representatives will corruptly refuse to impeach, or corruptly pass a law.[1]

§ 754. But passing by, for the present, this general reasoning on the objections stated, let us see, if any

[1] The Federalist, No. 66.

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other and better practical scheme for the trial of impeachments can be devised. One scheme might be to entrust it to the Supreme Court of the United States; another, to entrust it to that court, and the senate jointly; a third, to entrust it to a special tribunal appointed permanently, or temporarily for the purpose. If it shall appear, that to all of these schemes equally strong objections may be made, (and probably none more unexceptionable could be suggested,) the argument in favour of the senate will acquire more persuasive cogency.

§ 755. First, the entrusting of the trial of impeachments to the Supreme Court. This was, in fact, the original project in the convention.[1] It was at first agreed, that the jurisdiction of the national judiciary should extend to impeachments of national officers.[2] Afterwards this clause was struck out;[3] and the power to impeach was given to the house of representatives;[4] and the jurisdiction of the trial of impeachments was also given to the Supreme Court.[5] Ultimately, the same jurisdiction was assigned to the senate by the vote of nine states against two.[6]

§ 756. The principal reasons, which prevailed in the convention in favour of the final decision, and against vesting the jurisdiction in the Supreme Court, may fairly be presumed to have been those, which are stated in the Federalist. Its language is as follows: "Where else, than in the senate, could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confidence enough in its own situation, to preserve, unawed and

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[1] Journal of Convention, 69, 121, 137, 189, 217, 226, 324, 325, 326, 344, 346.

[2] Id. 69, 121, 137. [3] Id. 189. [4] Id. 217, 236. [5] Id. 226.

[6] Journal of Convention, 324, 326, 346.

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uninfluenced, the necessary impartiality between an individual accused, and the representatives of the people, his accusers? Could the Supreme Court have been relied upon, as answering this description? It is much to be doubted, whether the members of that tribunal would, at all times, be endowed with so eminent a portion of fortitude, as would be called for in the exercise of so difficult a task. And it is still more to be doubted, whether they would possess a degree of credit and authority, which might, on certain occasions, be indispensable towards reconciling the people to a decision, which should happen to clash with an accusation brought by their immediate representatives. A deficiency in the first would be fatal to the accused; in the last, dangerous to the public tranquillity. The hazard in both these respects could only be avoided by rendering that tribunal more numerous, than would consist with a reasonable attention to economy. The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down to such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favour of personal security. There will be no jury to stand between the judges, who are to pronounce the sentence of the law, and the party, who is to receive, or suffer it. The awful discretion, which a court of impeachments must necessarily have, to doom to honour or to infamy the most confidential, and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons. These considerations seem alone to authorize a conclusion, that the Supreme Court would have been an improper substitute for the senate, as a court of impeachments.

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§ 757. "There remains a further consideration, which will not a little strengthen this conclusion. It is this. The punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem, and confidence, and honours, and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper, that the persons, who had disposed of his fame, and his most valuable rights, as a citizen, in one trial, should, in another trial, for the same offence, be also the disposers of his life and fortune? Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision? Those, who know any thing of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those, who might happen to be the objects of prosecution, would, in a great measure, be deprived of the double security intended them by a double trial. The loss of life and estate would often be virtually included in a sentence, which in its terms imported nothing more, than dismission from a present, and disqualification for a future office. It may be said, that the intervention of a jury in the second instance would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life

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and his estate upon a verdict of a jury acting under the auspices of judges, who had predetermined his guilt?"[1]

§ 758. That there is great force in this reasoning all persons of common candour must allow; that it is in every respect satisfactory and unanswerable, has been denied, and may be fairly questioned. That part of it, which is addressed to the trial at law by the same judges might have been in some degree obviated by confiding the jurisdiction at law over the offence (as in fact it is now confided) to an inferior tribunal, and excluding any judge, who sat at the impeachment, from sitting in the court of trial. Still, however, it cannot be denied, that even in such a case the prior judgment of the Supreme Court, if an appeal to it were not allowable, would have very great weight upon the minds of inferior Judges. But that part of the reasoning, which is addressed to the importance of numbers in giving weight to the decision, and especially that, which is addressed to the public confidence and respect, which ought to follow upon a decision, are entitled to very great weight. It is fit, however, to give the answer to the whole reasoning by the other side in the words of a learned commentator, who has embodied it with no small share of ability and skill. The reasoning "seems," says he, "to have forgotten, that senators may be discontinued from their seats, merely from the effect of popular disapprobation, but that the judges of the Supreme Court cannot. It seems also to have forgotten, that whenever the president of the United States is impeached, the constitution expressly requires, that the chief justice of the Supreme Court shall preside at the

[1] The Federalist, No. 65. — But see Rawle on the Constitution, ch. 22, p. 211, 212.

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trial. Are all the confidence, all the firmness, and all the impartiality of that court, supposed to be concentred in the chief justice, and to reside in his breast only? If that court could not be relied on for the trial of impeachments, much less would it seem worthy of reliance for the determination of any question between the United States and a particular state; much less to decide upon the life and death of a person, whose crimes might subject him to impeachment, but whose influence might avert a conviction. Yet the courts of the United States, are by the constitution regarded, as the proper tribunals, where a party, convicted upon an impeachment, may receive that condign punishment, which the nature of his crimes may require; for it must not be forgotten, that a person, convicted upon an impeachment, will nevertheless be liable to indictment, trial, judgment, and punishment according to law, &c. The question, then, might be retorted; can it be supposed, that the senate, a part of whom must have been either *particeps criminis* with the person impeached, by advising the measure, for which he is to be tried, or must have joined the opposition to that measure, when proposed and debated in the senate, would be a more independent, or a more unprejudiced tribunal, than a court, composed of judges, holding their offices during good behaviour; and who could neither be presumed to have participated in the crime, nor to have prejudged the criminal?"[1]

§ 759. This reasoning also has much force in it; but in candour also it must be admitted to be not wholly unexceptionable. That part, which is addressed to the circumstance of the chief justice's presiding at the trial of the president of the United States, was (as

[1] 1 Tuck. Black. Comm. App. 237.

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we shall hereafter see) not founded on any supposition, that the chief justice would be superior in confidence, and firmness, and impartiality, to the residue of the judges, (though in talents and public respect, and acquirements, he might fairly be presumed their superior;) but on the necessity of excluding the vice president from the chair, when he might have a manifest interest, which would destroy his impartiality. That part, which is addressed to the supposition of the senators being *participes criminis*, is still more exceptionable; for it is not only incorrect to affirm, that the senators *must* be, in such a predicament, but in all probability the senators would, in almost all cases, be without any participation in the offence. The offences, which would be generally prosecuted by impeachment, would be those only of a high character, and belonging to persons in eminent stations,—such as a head of department, a foreign minister, a judge, a vice president, or a president. Over the conduct of such persons the senate could ordinarily have no control; and a corrupt combination with them, in the discharge of the duties of their respective offices, could scarcely be presumed. Any of these officers might be bribed, or commit gross misdemeanours, without a single senator having the least knowledge, or participation in the offence. And, indeed, very few of the senators could, at any time, be presumed to be in habits of intimate personal confidence, or connexion with many of these officers. And so far, as public responsibility is concerned, or public confidence is required, the tenure of office of the judges would have no strong tendency to secure the former, or to assuage public jealousies, so as peculiarly to encourage the latter. It is, perhaps, one of the circumstances, most

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important in the discharge of judicial duties, that they rarely carry with them any strong popular favour, or popular influence. The influence, if any, is of a different sort, arising from dignity of life and conduct, abstinence from political contests, exclusive devotion to the advancement of the law, and a firm administration of justice; circumstances, which are felt more by the profession, than they can be expected to be praised by the public.

§ 760. Besides; it ought not to be overlooked, that such an additional accumulation of power in the judicial department would not only furnish pretexts for clamour against it, but might create a general dread of its influence; which could hardly fail to disturb the salutary effects of its ordinary functions.[1] There is nothing, of which a free people are so apt to be jealous, as of the existence of political functions, and political checks, in those, who are not appointed by, and made directly responsible to themselves. The judicial tenure of office during good behaviour, though in some respects most favourable for an independent discharge of these functions and checks, is at the same time obnoxious to some strong objections, as a remedy for impeachable offences.

§ 761. There are, however, reasons of great weight, besides those, which have been already alluded to, which fully justify the conclusion, that the Supreme Court is not the most appropriate tribunal to be invested with authority to try impeachments.

§ 762. In the first place, the nature of the functions to be performed. The offences, to which the power of impeachment has been, and is ordinarily applied, as a remedy, are of a political character. Not but that

[1] The Federalist, No. 65.

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crimes of a strictly legal character fall within the scope of the power, (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanours are expressly within it;) but that it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty. They must be judged of by the habits, and rules, and principles of diplomacy, of departmental operations and arrangements, of parliamentary practice, of executive customs and negotiations, of foreign, as well as of domestic political movements; and in short, by a great variety of circumstances, as well those, which aggravate, as those, which extenuate, or justify the offensive acts, which do not properly belong to the judicial character in the ordinary administration of justice, and are far removed from the reach of municipal jurisprudence. They are duties, which are easily understood by statesmen, and are rarely known to judges. A tribunal, composed of the former, would therefore be far more competent, in point of intelligence and ability, than the latter, for the discharge of the functions, all other circumstances being equal. And surely, in such grave affairs, the competency of the tribunal to discharge the duties in the best manner is an indispensable qualification.

§ 763. In the next place, it is obvious, that the strictness of the forms of proceeding in cases of offen-

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ces at common law are ill adapted to impeachments. The very habits growing out of judicial employments; the rigid manner, in which the discretion of judges is limited, and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents; and the adherence to technical principles, which, perhaps, distinguishes this branch of the law, more than any other, are all ill adapted to the trial of political offences in the broad course of impeachments. And it has been observed with great propriety, that a tribunal of a liberal and comprehensive character, confined, as little as possible, to strict forms, enabled to continue its session as long, as the nature of the law may require, qualified to view the charge in all its bearings and dependencies, and to appropriate on sound principles of public policy the defence of the accused, seems indispensable to the value of the trial.[1] The history of impeachments, both in England and America, justifies the remark. There is little technical in the mode of proceeding; the charges are sufficiently clear, and yet in a general form; there are few exceptions, which arise in the application of the evidence, which grow out of mere technical rules, and quibbles. And it has repeatedly been seen, that the functions have been better understood, and more liberally and justly expounded by statesmen, than by mere lawyers. An illustrious instance of this sort is upon record in the case of the trial of Warren Hastings, where the question, whether an impeachment was abated by a dissolution of parliament, was decided in the negative by the house of lords, as well as the house of commons, against what seemed to be the weight of professional opinion.[2]

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1 Rawle on the Constitution, ch. 22, p. 212.

2 4 Black. Comm, 400, Christian's Note.

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§ 764. In the next place, the very functions, involving political interests and connexions, are precisely those, which it seems most important to exclude from the cognizance and participation of the judges of the Supreme Court. Much of the reverence and respect, belonging to the judicial character, arise from the belief, that the tribunal is impartial, as well as enlightened; just, as well as searching. It is of very great consequence, that judges should not only be, in fact, above all exception in this respect; but that they should be generally believed to be so. They should not only be pure; but, if possible, above suspicion. Many of the offences, which will be charged against public men, will be generated by the heats and animosities of party; and the very circumstances, that judges should be called to sit, as umpires, in the controversies of party, would inevitably involve them in the common odium of partizans, and place them in public opinion, if not in fact, at least in form, in the array on one side, or the other. The habits, too, arising from such functions, will lead them to take a more ardent part in public discussions, and in the vindication of their own political decisions, than seems desirable for those, who are daily called upon to decide upon the private rights and claims of men, distinguished for their political consequence, zeal, or activity, in the ranks of party. In a free government, like ours, there is a peculiar propriety in withdrawing, as much as possible, all judicial functionaries from the contests of mere party strife. With all their efforts to avoid them, from the free intercourse, and constant changes in a republican government, both of men and measures, there is, at all times, the most imminent danger, that all classes of society will be drawn into the vortex of politics. Whatever shall have

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a tendency to secure, in tribunals of justice, a spirit of moderation and exclusive devotion to juridical duties is of inestimable value. What can more surely advance this object, than the exemption of them from all participation in, and control over, the acts of political men in their official duties? Where, indeed, those acts fall within the character of known crimes at common law, or by positive statute, there is little difficulty in the duty, because the rule is known, and equally applies to all persons in and out of office; and the facts are to be tried by a jury, according to the habitual course of investigation in common cases. The remark of Mr. Woodeson on this subject is equally just and appropriate. After having enumerated some of the cases, in which impeachments have been tried for political offences, he adds, that from these "it is apparent, how little the ordinary tribunals are calculated to take cognizance of such offences, or to investigate and reform the general polity of the state."[1]

§ 765. In the next place, the judges of the Supreme Court are appointed by the executive; and will naturally feel some sympathy and attachment for the person, to whom they owe this honour, and for those, whom he selects, as his confidential advisers in the departments. Yet the president himself, and those confidential advisers, are the very persons, who are eminently the objects to be reached by the power of impeachment. The very circumstance, that some, perhaps a majority of the court, owe their elevation to the same chief magistrate, whose acts, or those of his confidential advisers, are on trial, would have some tendency to diminish the public confidence in the impartiality and independence of the tribunal.

[1] 2 Woodeson, Lect. 40, p. 602.

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§ 766. But, in the next place, a far more weighty consideration is, that some of the members of the judicial department may be impeached for malconduct in office; and thus, that spirit, which, for want of a better term, has been called the corporation spirit of organized tribunals and societies, will naturally be brought into play. Suppose a judge of the Supreme Court should himself be impeached; the number of his triers would not only be diminished; but all the attachments, and partialities, or it may be the rivalries and jealousies of peers on the same bench, may be, or (what is practically almost as mischievous) may be suspected to be put in operation to screen or exaggerate the offence. Would any person soberly decide, that the judges of the Supreme Court would be the safest and the best of all tribunals for the trial of a brother judge, taking human feelings, as they are, and human infirmity, as it is? If not, would there not be, even in relation to inferior judges, a sense of indulgence, or a bias of opinion, upon certain judicial acts and practices, which might incline their minds to undue extenuation, or to undue harshness? And if there should be, in fact, no danger from such a source, is there not some danger, under such circumstances, that a jealousy of the operations of judicial tribunals over judicial offences, would create in the minds of the community a broad distinction in regard to convictions and punishments, between them and merely political offences? Would not the power of impeachment cease to possess its just reverence and authority, if such a distinction should prevail; and especially, if political victims rarely escaped, and judicial officers as rarely suffered? Can it be desirable thus to create any tendency in the public mind

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towards the judicial department, which may impair its general respect and daily utility ?[1]

§ 767. Considerations of this sort cannot be overlooked in inquiries of this nature; and if to some minds they may not seem wholly satisfactory, they, at least, establish, that the Supreme Court is not a tribunal for the trial of impeachment, wholly above all reasonable exceptions. But if, to considerations of this sort, it is added, that the common practice of free governments, and especially of England, and of the states composing the Union, has been, to confide this power to one department of the legislative body, upon the accusation of another; and that this has been found to work well, and to adjust itself to the public feelings and prejudices, to the dignity of the legislature, and to the tranquillity of the state, the inference in its favour cannot but be greatly strengthened and confirmed.

§ 768. To those, who felt difficulties in confiding to the Supreme Court alone the trial of impeachments, the scheme might present itself, of uniting that court with the senate jointly for this purpose. To this union many of the objections already stated, and especially those, founded on the peculiar functions of the judicial department, would apply with the same force, as they do to vesting the Supreme Court with the exclusive jurisdiction. In some other respects there would result advantages from the union; but they would scarcely overbalance the disadvantages.[2] If the judges, compared with the whole body of the senate, were few in number, their weight would scarcely be felt in that body. The habits of co-operation in common daily duties

[1] But see Rawle on the Constitution, ch. 22, p. 214.
[2] The Federalist, No. 65.

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would create among the senators an habitual confidence, and sympathy with each other; and the same habits would produce a correspondent influence among the judges. There would, therefore, be two distinct bodies, acting together *pro re nata*, which were in a great measure strangers to each other, and with feelings, pursuits, and modes of reasoning wholly distinct from each other. Great contrariety of opinion might naturally be presumed under such circumstances to spring up, and, in all probability, would become quite marked in the action of the two bodies. Suppose, upon an impeachment, the senators should be on one side, and the judges on the other; suppose a minority composed of all the judges, and a considerable number of the senators; or suppose a majority made by the co-operation of all the judges; in these, and many other cases, there might be no inconsiderable difficulty in satisfying the public mind, as to the result of the impeachment. Judicial opinion might go urgently one way, and political character and opinion, as urgently another way. Such a state of things would have little tendency to add weight, or dignity to the court, in the opinion of the community. And perhaps a lurking suspicion might pervade many minds, that one body, or the other, had possessed an undue preponderance of influence in the actual decision. Even jealousies and discontents might grow up in the bosoms of the component bodies themselves, from their own difference of structure, and habits, and occupations, and duties. The practice of governments has not hitherto established any great value, as attached to the intermixture of different bodies for single occasions, or temporary objects.

§ 769. A third scheme might be, to entrust the trial of impeachments to a special tribunal, constituted for

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that sole purpose. But whatever arguments may be found in favour of such a plan, there will be found to be correspondent objections and difficulties. It would tend to increase the complexity of the political machine, and add a new spring to the operations of the government, the utility of which would be at least questionable, and might clog its just movements.[1] A court of this nature would be attended with heavy expenses; and might, in practice, be subject to many casualties and inconveniences. It must consist either of permanent officers, stationary at the seat of government, and of course entitled to fixed and regular stipends; or of national officers, called to the duties for the occasion, though previously designated by office, or rank; or of officers of the state governments, selected when the impeachment was actually depending.[2] Now, either of these alternatives would be found full of embarrassment and intricacy, when an attempt should be made to give it a definite form and organization. The court, in order to be efficient and independent, ought to be numerous. It ought to possess talents, experience, dignity, and weight of character, in order to obtain, or to hold, the confidence of the nation. What national officers, not belonging to either of the great departments of the government, legislative, executive, or judicial, could be found, embracing all these requisite qualifications? And if they could be, what compensation is to be made to them, in order to maintain their characters and importance, and to secure their services? If the court is to be selected from the state functionaries, in what manner is this to be accomplished? How can their acceptance, or performance of the duties, be

[1] The Federalist, No. 64. [2] Id. No. 65.

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either secured, or compelled? Does it not at once submit the whole power of impeachment to the control of the state governments, and thus surrender into their hands all the means of making it efficient and satisfactory? In political contests it cannot be supposed, that either the states, or the state functionaries, will not become partisans, and deeply interested in the success, or defeat of measures, in the triumph, or the ruin of rivals, or opponents. Parties will naturally desire to screen a friend, or overwhelm an adversary; to secure the predominance of a local policy, or a state party; and if so, what guarantee is there for any extraordinary fidelity, independence, or impartiality, in a tribunal so composed, beyond all others? Descending from such general inquiries to more practical considerations, it may be asked, how shall such a tribunal be composed? Shall it be composed of state executives, or state legislators, or state judges, or of a mixture of all, or a selection from all? If the body is very large, it will become unwieldy, and feeble from its own weight. If it be a mixture of all, it will possess too many elements of discord and diversities of judgment, and local and professional opinion. If it be homogeneous in its character, as if it consist altogether of one class of men, as of the executives of all the states, or the judges of the Supreme Courts of all the states, can it be supposed, (even if an equality in all other respects could be certainly obtained,) that persons, selected mainly by the states for local and peculiar objects, could best administer the highest and most difficult functions of the national government?

§ 770. The Federalist has spoken with unusual freedom and directness on this subject. "The first scheme," (that is, of vesting the power in some per-

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manent national officers,) "will be reprobated by every man, who can compare the extent of the public wants with the means of supplying them. The second," (that is, of vesting it in state officers,) "will be espoused with caution by those, who will seriously consider the difficulties of collecting men dispersed over the whole Union; the injury to the innocent from the procrastinated determination of the charges, which might be brought against them; the advantage to the guilty from the opportunites, which delay would afford for intrigue and corruption; and in some cases the detriment to the state from the prolonged inaction of men, whose firm and faithful execution of their duty might have exposed them to the persecution of an intemperate or designing majority in the house of representatives. Though this latter supposition may seem harsh, and might not be likely often to be verified; yet it ought not to be forgotten, that the demon of faction will, at certain seasons, extend his sceptre over all numerous bodies of men." And the subject is concluded with the following reflection. "If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert." [1]

§ 771. A scheme somewhat different from either of the foregoing has been recommended by a learned commentator,[2] drawn from the Virginia constitution, by which, in that state, all impeachments are to be tried in the courts of law, "according to the laws of the land;" and by the state laws the facts, as in other cases, are to be tried by a jury. But the objections to this course

[1] The Federalist, No. 65.
[2] 1 Tucker's Black. Comm. App. 337, 338.

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would be very serious, not only from the considerations already urged, but from the difficulty of impanneling a suitable jury for such purposes. From what state or states is such a jury to be drawn? How is it to be selected, or composed? What are to be the qualifications of the jurors? Would it be safe to entrust the political interests of a whole people to a common panel? Would any jury in times of party excitement by found sufficiently firm to give a true verdict, unaffected by the popularity or odium of the measure, when the nation was the accuser? These questions are more easily put, than they can be satisfactorily answered. And, indeed, the very circumstance, that the example of Virginia has found little favour in other states, furnishes decisive proof, that it is not deemed better than others, to which the national constitution bears the closest analogy.

§ 772 When the subject was before the state conventions, although here and there an objection was started against the plan, three states only formally proposed any amendment. Virginia and North-Carolina recommended, "that some tribunal, other than the senate, be provided for trying impeachments of *senators*,"[1] leaving the provision in all other respects, as it stood. New-York alone recommended an amendment, that the senate, the judges of the Supreme Court, and the first or senior judge of the highest state court of general or ordinary common law jurisdiction in each state should constitute a court for the trial of impeachments.[2] This recommendation does not change the posture of a single objection. It received no support elsewhere; and the subject has since silently slept without any effort to revive it.

[1] Journ. of Convention, Supp. 425, 448. [2] Id. 437.

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§ 773. The conclusion, to which, upon a large survey of the whole subject, our judgments are naturally led, is, that the power has been wisely deposited with the senate.[1] In the language of a learned commentator, it may be said, that of all the departments of the government, "none will be found more suitable to exercise this peculiar jurisdiction, than the senate. Although, like their accusers, they are representatives of the people; yet they are by a degree more removed, and hold their stations for a longer term. They are, therefore, more independent of the people, and being chosen with the knowledge, that they may, while in office, be called upon to exercise this high function, they bring with them the confidence of their constituents, that they will faithfully execute it, and the implied compact on their own part, that it shall be honestly discharged. Precluded from ever becoming accusers themselves, it is their duty not to lend themselves to the animosities of party, or the prejudices against individuals, which may sometimes unconsciously induce the house of representatives to the acts of accusation. Habituated to comprehensive views of the great political relations of the country, they are naturally the best qualified to decide on those charges, which may have any connexion with transactions abroad, or great political interests at home. And although we cannot say, that, like the English house of lords, they form a distinct body, wholly uninfluenced by the passions, and remote from the interests, of the people; yet we can discover in no other division of the government a greater probability of impartiality and independence."[2]

§ 774. The remaining parts of the clause of the constitution now under consideration will not require an

[1] The Federalist, No. 65.

[2] Rawle on the Const. ch. 22, p. 212, 213.

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elaborate commentary. The first is, that the senate, when sitting as a court of impeachment, "shall be on oath or affirmation;" a provision, which, as it appeals to the conscience and integrity of the members by the same sanctions, which apply to judges and jurors, who sit in other trials, will commend itself to all persons, who deem the highest trusts, rights, and duties, worthy of the same protection and security, at least, as those of the humblest order. It would, indeed, be a monstrous anomaly, that the highest officers might be convicted of the worst crimes, without any sanction being interposed against the exercise of the most vindictive passions; while the humblest individual has a right to demand an oath of fidelity from those, who are his peers, and his triors. In England, however, upon the trial of impeachments, the house of lords are not under oath; but only make a declaration upon their honour.[1] This is a strange anomaly, as in all civil and criminal trials by a jury, the jurors are under oath; and there seems no reason, why a sanction equally obligatory upon the consciences of the triors should not exist in trials for capital or other offences before every other tribunal. What is there in the honour of a peer, which necessarily raises it above the honour of a commoner? The anomaly is rendered still more glaring by the fact, that a peer cannot give testimony, as a witness, except on oath; for, here, his honour is not trusted. The maxim of the law, in such a case, is *in judicio non creditur, nisi juratis.*[2] Why should the obligation of a judge be less solemn, than the obligation of a witness? The truth is, that it is a privilege of power, conceded in barbarous times, and founded on feudal sovereignty, more than on justice, or principle.

[1] 1 Black. Comm. 402; 4 Inst. 49; 3 Elliot's Debates, 53.
[2] 1 Black. Comm. 402.

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§ 775. The next provision is: "When the president "of the United States is tried, the chief justice shall "preside." The reason of this clause has been already adverted to. It was to preclude the vice president, who might be supposed to have a natural desire to succeed to the office, from being instrumental in procuring the conviction of the chief magistrate.[1] Under such circumstances, who could be deemed more suitable to preside, than the highest judicial magistrate of the Union. His impartiality and independence could be as little suspected, as those of any person in the country. And the dignity of his station might well be deemed an adequate pledge for the possession of the highest accomplishments.

§ 776. It is added, "And no person shall be convict- "ed, without the concurrence of two thirds of the "members present." Although very numerous objections were taken to the constitution, none seems to have presented itself against this particular quorum required for a conviction; and yet it might have been fairly thought to be open to attack on various sides from its supposed theoretical inconvenience and incongruity. It might have been said with some plausibility, that it deserted the general principles even of courts of justice, where a mere majority make the decision; and, of all legislative bodies, where a similar rule is adopted; and, that the requisition of two thirds would reduce the power of impeachment to a mere nullity. Besides; upon the trial of impeachments in the house of lords the conviction or acquittal is by a mere majority;[2] so that there is a failure of any analogy to support the precedent.

[1] Rawle on Const. ch. 22, p. 216.

[2] Com. Dig. Parliament, L. 16, 17; 2 Woodeson Lect. 40, p. 612.

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§ 777. It does not appear from any authentic memorials, what were the precise grounds, upon which this limitation was interposed. But it may well be conjectured, that the real grounds were, to secure an impartial trial, and to guard public men from being sacrificed to the immediate impulses of popular resentment or party predominance. In England, the house of lords, from its very structure and hereditary independence, furnishes a sufficient barrier against such oppression and injustice. Mr. Justice Blackstone has remarked, with manifest satisfaction, that the nobility "have neither the same interests, nor the same passions, as popular assemblies; and, that "it is proper, that the nobility should judge, to insure justice to the accused; as it is proper, that the people should accuse, to insure justice to the commonwealth."[1] Our senate is, from the very theory of the constitution, founded upon a more popular basis; and it was desirable to prevent any combination of a mere majority of the states to displace, or to destroy a meritorious public officer. If a mere majority were sufficient to convict, there would be danger, in times of high popular commotion or party spirit, that the influence of the house of representatives would be found irresistible. The only practicable check seemed to be, the introduction of the clause of two thirds, which would thus require an union of opinion and interest, rare, except in cases where guilt was manifest, and innocence scarcely presumable. Nor could the limitation be justly complained of; for, in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of the jury is indispensable. Here, an intermediate scale is adopted between unanimity, and a mere majority. And if the

[1] 4 Black. Comm. 261.

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guilt of a public officer cannot be established to the satisfaction of two thirds of a body of high talents and acquirements, which sympathizes with the people, and represents the states, after a full investigation of the facts, it must be, that the evidence is too infirm, and too loose to justify a conviction. Under such circumstances, it would be far more consonant to the notions of justice in a republic, that a guilty person should escape, than that an innocent person should become the victim of injustice from popular odium, or party combinations.

§ 778. At the distance of forty years, we may look back upon this reasoning with entire satisfaction. The senate has been found a safe and effective depositary of the trial of impeachments. During that period but four cases have occurred, requiring this high remedy. In three there have been acquittals; and in one a conviction. Whatever may have been the opinions of zealous partisans at the times of their occurrence, the sober judgment of the nation sanctioned these results, at least, on the side of the acquittals, as soon as they became matters of history, removed from the immediate influences of the prosecutions. The unanimity of the awards of public opinion, in its final action on these controversies, has been as great, and as satisfactory, as can be attributed to any, which involve real doubt, or enlist warm prejudices and predilections on either side.[1] No reproach has ever reached he senate for its unfaithful discharge of these high functions; and the voice of a

[1] The trials, here alluded to, were of William Blount in 1799, of Samuel Chase in 1805, of John Pickering in 1803, and of James H. Peck in 1831. The three former are alluded to in Rawle on the Const. ch. 22, p. 215. See also 4 Tuck. Black. Comm. 261, note; Id. App. 57, and Senate Journals of the respective years. Rawle on Const. ch. 22, p. 215; Serjeant on Constitutional Law, ch. 29, p. 363, 364.

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state has rarely, if ever, displaced a single senator for his vote on such an occasion. What more could be asked in the progress of any government? What more could experience produce to justify confidence in the institution?

§ 779. The next clause is, that "Judgment in cases "of impeachment shall not extend further, than to re- "moval from office, and disqualification to hold and "enjoy any office of honour, trust, or profit, under the "United States. But the party convicted shall never- "theless be liable and subject to indictment, trial, judg- "ment, and punishment, according to law."

§ 780. It is obvious, that, upon trials on impeachments, one of two courses must be adopted in case of a conviction; either for the court to proceed to pronounce a full and complete sentence of punishment for the offence according to the law of the land in like cases, pending in the common tribunals of justice, superadding the removal from office, and the consequent disabilities; or, to confine its sentence to the removal from office and other disabilities. If the former duty be a part of the constitutional functions of the court, then, in case of an acquittal, there cannot be another trial of the party for the same offence in the common tribunals of justice, because it is repugnant to the whole theory of the common law, that a man should be brought into jeopardy of life or limb more than once for the same offence.[1] A plea of acquittal is, therefore, an absolute bar against any second prosecution for the same offence. If the court of impeachments is merely to pronounce a sentence of removal from office and the other disabilities; then it is indispensable, that provision should be made, that the common tribunals of jus-

[1] 4 Black. Comm. 335, 361; Hawk. P. C., B. 2, ch. 35.

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tice should be at liberty to entertain jurisdiction of the offence, for the purpose of inflicting the common punishment applicable to unofficial offenders. Otherwise, it might be matter of extreme doubt, whether, consistently with the great maxim above mentioned, established for the security of the life and limbs and liberty of the citizen, a second trial for the same offence could be had, either after an acquittal, or a conviction in the court of impeachments. And if no such second trial could be had, then the grossest official offenders might escape without any substantial punishment, even for crimes, which would subject their fellow citizens to capital punishment.

§ 781. The constitution, then, having provided, that judgment upon impeachments shall not extend further, than to removal from office, and disqualification to hold office, (which, however afflictive to an ambitious and elevated mind, would be scarcely felt, as a punishment, by the profligate and the base,) has wisely subjected the party to trial in the common criminal tribunals, for the purpose of receiving such punishment, as ordinarily belongs to the offence. Thus, for instance, treason, which by our laws is a capital offence, may receive its appropriate punishment; and bribery in high officers, which otherwise would be a mere disqualification from office, may have the measure of its infamy dealt out to it with the same unsparing severity, which attends upon other and humbler offenders.

§ 782. In England, the judgment upon impeachments is not confined to mere removal from office; but extends to the whole punishment attached by law to the offence. The house of lords, therefore, upon a conviction, may, by its sentence, inflict capital punishment; or perpetual banishment; or forfeiture of goods

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and lands; or fine and ransom; or imprisonment; as well as removal from office, and incapacity to hold office, according to the nature and aggravation of the offence.[1]

§ 783. As the offences, to which the remedy of impeachment has been, and will continue to be principally applied, are of a political nature,[2] it is natural to suppose, that they will be often exaggerated by party spirit, and the prosecutions be sometimes dictated by party resentments, as well as by a sense of the public good. There is danger, therefore, that in cases of conviction the punishment may be wholly out of proportion to the offence, and pressed as much by popular odium, as by aggravated crime. From the nature of such offences, it is impossible to fix any exact grade, or measure, either in the offences, or the punishments; and a very large discretion must unavoidably be vested in the court of impeachments, as to both. Any attempt to define the offences, or to affix to every grade of distinction its appropriate measure of punishment, would probably tend to more injustice and inconvenience, than it would correct; and perhaps would render the power at once inefficient and unwieldy. The discretion, then, if confided at all, being peculiarly subject to abuse, and connecting itself with state parties, and state contentions, and state animosities, it was deemed most advisable by the convention, that the power of the senate to inflict punishment should merely reach the right and qualifications to office; and thus take away the temptation in factious times to sacrifice good and great men upon the altar of party. History

[1] Com. Dig. Parliament, L. 44; 2 Woodeson, Lect. 40, p. 611 to 614.

[2] 2 Woodeson, Lect. 40, p. 601, 604.

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had sufficiently admonished them, that the power of impeachment had been thus mischievously and inordinately applied in other ages; and it was not safe to disregard those lessons, which it had left for our instruction, written not unfrequently in blood. Lord Strafford, in the reign of Charles the First, and Lord Stafford, in the reign of Charles the Second, were both convicted, and punished capitally by the house of lords; and both have been supposed to have been rather victims to the spirit of the times, than offenders meriting such high punishments.[1] And other cases have occurred, in which whatever may have been the demerits of the accused, his final overthrow has been the result of political resentments and hatreds, far more than of any desire to promote public justice.[2]

§ 784. There is wisdom, and sound policy, and intrinsic justice in this separation of the offence, at least so far, as the jurisdiction and trial are concerned, into its proper elements, bringing the political part under the power of the political department of the government, and retaining the civil part for presentment and trial in the ordinary forum. A jury might well be entrusted with the latter; while the former should meet its appropriate trial and punishment before the senate. If it should be asked, why separate trials should thus be successively had; and why, if a conviction should take place in a court of law, that court might not be entrusted with the power to pronounce a removal from office, and the disqualification to office, as a part of its sentence, the answer has been already given in the

[1] Rawle on the Constitution, ch. 22, p. 217; 2 Woodeson, Lect. 40, p. 608, 609.

[2] Com. Dig. Parliament, L. 28 to 39; 2 Woodeson, Lect. 40, p. 619, 620.

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reasoning against vesting any court of law with merely political functions. In the ordinary course of the administration of criminal justice, no court is authorized to remove, or disqualify an offender, as a part of its regular judgment. If it results at all, it results as a consequence, and not as a part of the sentence. But it may be properly urged, that the vesting of such a high and delicate power, to be exercised by a court of law at its discretion, would, in relation to the distinguished functionaries of the government, be peculiarly unfit and inexpedient. What could be more embarrassing, than for a court of law to pronounce for a removal upon the mere ground of political usurpation, or malversation in office, admitting of endless varieties, from the slightest guilt up to the most flagrant corruption? Ought a president to be removed from office at the mere will of a court for political misdemeanours? Is not a political body, like the senate, from its superior information in regard to executive functions, far better qualified to judge, how far the public weal might be promoted by such a punishment in a given case, than a mere juridical tribunal? Suppose the senate should still deem the judgment irregular, or unjustifiable, how is the removal to take effect, and how is it to be enforced? A separation of the removing power altogether from the appointing power might create many practical difficulties, which ought not, except upon the most urgent reasons, to be introduced into matters of government. Without attempting to maintain, that the difficulties would be insuperable, it is sufficient to show, that they might be highly inconvenient in practice.

§ 785. It does not appear from the Journal of the Convention, that the provision thus limiting the sentence upon impeachments to removal and disqualifica-

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tion from office, attracted much attention, until a late period of its deliberations.[1] The adoption of it was not, however, without some difference of opinion; for it passed only by the vote of seven states against three.[2] The reasons, on which this opposition was founded, do not appear; and in the state conventions no doubt of the propriety of the provision seems to have been seriously entertained.

§ 786. In order to complete our review of the constitutional provisions on the subject of impeachments, it is necessary to ascertain, who are the persons liable to be impeached; and what are impeachable offences. By some strange inadvertence, this part of the constitution has been taken from its natural connexion, and with no great propriety arranged under that head, which embraces the organization, and rights, and duties of the executive department. To prevent the necessity of again recurring to this subject, the general method prescribed in these commentaries will, in this instance, be departed from, and the only remaining provision on impeachments be here introduced.

§ 787. The fourth section of the second article is as follows: "The president, vice-president, and all civil "officers of the United States, shall be removed from "office on impeachment for, and conviction of, treason, "bribery, or other high crimes and misdemeanours."[3]

§ 788. From this clause it appears, that the remedy

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[1] Journal of the Convention, p. 227, 302, 353.

[2] Journal of the Convention, p, 227, 302. See 3 Elliot's Debates, 43 to 46; Id. 53 to 57; Id. 107, 108.

[3] In the convention, the clause, making the president liable to removal from office on impeachment and conviction, was not unanimously agreed to; but passed by a vote of eight states against two.*

* Journal of Convention, p. 94, 194, 211.

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by impeachment is strictly confined to civil officers of the United States, including the president and vice-president. In this respect, it differs materially from the law and practice of Great-Britain. In that kingdom, all the king's subjects, whether peers or commoners, are impeachable in parliament; though it is asserted, that commoners cannot now be impeached for capital offences, but for misdemeanours only.[1] Such kind of misdeeds, however, as peculiarly injure the commonwealth by the abuse of high offices of trust, are the most proper, and have been the most usual grounds for this kind of prosecution in parliament.[2] There seems a peculiar propriety, in a republican government at least, in confining the impeaching power to persons holding office. In such a government all the citizens are equal, and ought to have the same security of a trial by jury for all crimes and offences laid to their charge, when not holding any official character. To subject them to impeachment would not only be extremely oppressive and expensive, but would endanger their lives and liberties, by exposing them against their wills to persecution for their conduct in exercising their political rights and privileges. Dear as the trial by jury justly is in civil cases, its value, as a protection against the resentment and violence of rulers and factions in criminal prosecutions, makes it inestimable. It is there, and there only, that a citizen, in the sympathy, the impartiality, the intelligence, and incorruptible integrity of his fellows, impanelled to try the accusation, may indulge a well-founded confidence to sustain and cheer him. If he should choose

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[1] 4 Black. Comm. 260, and Christian's note; 2 Woodeson, Lect. 40, p. 601, &c.; Com. Dig. Parliament, L. 28 to 40.

[2] 2 Woodeson, Lect. 40, p. 601, 602.

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to accept office, he would voluntarily incur all the additional responsibility growing out of it. If impeached for his conduct, while in office, he could not justly complain, since he was placed in that predicament by his own choice; and in accepting office he submitted to all the consequences. Indeed, the moment it was decided, that the judgment upon impeachments should be limited to removal and disqualification from office, it followed, as a natural result, that it ought not to reach any but officers of the United States. It seems to have been the original object of the friends of the national government to confine it to these limits; for in the original resolutions proposed to the convention, and in all the subsequent proceedings, the power was expressly limited to national officers.[1]

§ 789. Who are "civil officers," within the meaning of this constitutional provision, is an inquiry, which naturally presents itself; and the answer cannot, perhaps, be deemed settled by any solemn adjudication. The term "civil" has various significations. It is sometimes used in contradistinction to *barbarous*, or *savage*, to indicate a state of society reduced to order and regular government. Thus, we speak of civil life, civil society, civil government, and civil liberty; in which it is nearly equivalent in meaning to *political*.[2] It is sometimes used in contradistinction to *criminal*, to indicate the private rights and remedies of men, as members of the community, in contrast to those, which are public, and relate to the government. Thus, we speak of civil process and criminal process, civil jurisdiction and

[1] Journal of Convention, 69, 121, 137, 226.

[2] Johnson's Dictionary, *Civil*; 1 Black. Comm. 6, 125, 251; Montesq. Spirit of Laws, B. 1, ch. 3; Rutherforth's Inst. B. 2, ch. 2, p. 23; Id. ch. 3, p. 52; Id. ch. 8, p. 359; Heinec. Elem. Juris. Nat. B. 2, ch. 6.

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criminal jurisdiction. It is sometimes used in contradistinction to *military* or *ecclesiastical*, to *natural* or *foreign*. Thus, we speak of a civil station, as opposed to a military or ecclesiastical station; a civil death, as opposed to a natural death; a civil war, as opposed to a foreign war. The sense, in which the term is used in the constitution, seems to be in contradistinction to *military*, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government. It is in this sense, that Blackstone speaks of the laity in England, as divided into three distinct states; the civil, the military, and the maritime; the two latter embracing the land and naval forces of the government.[1] And in the same sense the expenses of the civil list of officers are spoken of, in contradistinction to those of the army and navy.[2]

§ 790. All officers of the United States, therefore, who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or in the lowest departments of the government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the constitution, and liable to impeachment.[3] The reason for excepting military and naval officers is, that they are subject to trial and punishment according to a peculiar military code, the laws, rules, and usages of war. The very nature and efficiency of military duties and discipline require this summary and exclusive jurisdiction; and the promptitude of its operations are not only better suited to the notions of military men;

[1] 1 Black. Comm. 396, 408, 417; De Lolme, B. 2, ch. 17, p. 446.
[2] 1 Black. Comm. 332.
[3] Rawle on the Constitution, ch. 22, p. 213.

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but they deem their honour and their reputation more safe in the hands of their brother officers, than in any merely civil tribunal. Indeed, in military and naval affairs it is quite clear, that the senate could scarcely possess competent knowledge or experience to decide upon the acts of military men; so much are these acts to be governed by mere usage, and custom, by military discipline, and military discretion, that the constitution has wisely committed the whole trust to the decision of courts-martial.

§ 791. A question arose upon an impeachment before the senate in 1799, whether a senator was a civil officer of the United States, within the purview of the constituiton; and it was decided by the senate, that he was not;[1] and the like principle must apply to the members of the house of representatives. This decision, upon which the senate itself was greatly divided, seems not to have been quite satisfactory (as it may be gathered) to the minds of some learned commentators.[2] The reasoning, by which it was sustained in the senate, does not appear, their deliberations having been private. But it was probably held, that "civil officers of the United States" meant such, as derived their appointment from, and under the national government, and not those persons, who, though members of the government, derived their appointment from the states, or the people of the states. In this view, the enumeration of the president and vice president, as impeachable officers, was indispensable; for they derive, or may derive, their

[1] The decision was made by a vote of 14 against 11. See Senate Journal, 10 January, 1799; 4 Tuck. Black. Comm. App. 57, 58; Rawle on Const. ch. 22, p. 213, 214.

[2] 4 Tuck. Black. Comm. App. 57, 58; Rawle on the Const. ch. 22, p. 213, 214, 218, 219.

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office from a source paramount to the national government. And the clause of the constitution, now under consideration, does not even affect to consider them officers of the United States. It says, "the president, vice-president, and *all civil officers* (not all *other* civil officers) shall be removed," &c. The language of the clause, therefore, would rather lead to the conclusion, that they were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States. Other clauses of the constitution would seem to favour the same result; particularly the clause, respecting appointment of officers of the United States by the executive, who is to "commission all the officers of the United States;" and the 6th section of the first article, which declares, that "no person, *holding any office under the United States*, "shall be a member of either house during *his continuance in office;*" and the first section of the second article, which declares, that "no senator or representative, or *person holding an office of trust or profit* "under the United States, shall be appointed an elector." [1] It is far from being certain, that the convention itself ever contemplated, that senators or representatives should be subjected to impeachment; [2] and it is very far from being clear, that such a subjection would have been either politic or desirable.

§ 792. The reasoning of the Federalist on this subject, in answer to some objections to vesting the trial of impeachments in the senate, does not lead to the conclusion, that the learned author thought the senators liable to impeachment. Some parts of it would rather

[1] See Blount's Trial, p. 34, 35; Id. 49, 50, 51, 52.

[2] But see South-Carolina Debates on the Constitution, January, 1788, (printed in Charleston, 1831,) p. 11, 12, 13.

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incline the other way. "The convention might *with propriety*," it is said, "have meditated the punishment of the executive for a deviation from the instructions of the senate, or a want of integrity in the conduct of the negotiations committed to him. They might also have had in view the punishment of a few leading individuals in the senate, who should have prostituted their influence in that body, as the mercenary instruments of foreign corruption. But they could not with more, or with equal propriety, have contemplated the impeachment and punishment of two-thirds of the senate, consenting to an improper treaty, *than of a majority of that*, or of the *other branch of the legislature*, consenting to a pernicious or unconstitutional law; *a principle, which I believe has never been admitted into any government*," &c. "And yet, what reason is there, that a majority of the house of representatives, sacrificing the interests of the society by an unjust and tyrannical act of legislation, should escape with impunity, more than two-thirds of the senate sacrificing the same interests in an injurious treaty with a foreign power? The truth is, that in all such cases, it is essential to the freedom, and to the necessary independence of the deliberations of the body, *that the members of it should be exempt from punishment for acts done in a collective capacity;* and the security to the society must depend on the care, which is taken, to confide the trust to proper hands; to make it their interest to execute it with fidelity; and to make it as difficult, as possible, for them to combine in any interest, opposite to that of the public good."[1] And it is certain, that in some of the state conventions the members of congress were admitted by the friends of

[1] The Federalist, No. 66.

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the constitution, not to be objects of the impeaching power.[1]

§ 793. It may be admitted, that a breach of duty is as reprehensible in a legislator, as in an executive, or judicial officer; but it does not follow, that the same remedy should be applied in each case; or that a remedy applicable to the one may not be unfit, or inconvenient in the other. Senators and representatives are at short periods made responsible to the people, and may be rejected by them. And for personal offences, not purely political, they are responsible to the common tribunals of justice, and the laws of the land. If a member of congress were liable to be impeached for conduct in his legislative capacity, at the will of a majority, it might furnish many pretexts for an irritated and predominant faction to destroy the character, and intercept the influence of the wisest and most exalted patriots, who were resisting their oppressions, or developing their profligacy. It is, therefore, with great reason urged, that a legislator should be above all fear and influence of this sort in his public conduct. The impeachment of a legislator, for his official acts, has hitherto been unacknowledged, as matter of right, in the annals of England and America. A silence of this sort is conclusive, as to the state of public opinion in relation to the impolicy and danger of conferring the power.[2]

§ 794. The next inquiry is, what are impeachable offences? They are "treason, bribery, or other high crimes and misdemeanours." For the definition of treason,

[1] 3 Elliot's Debates, 43, 44, 45, 46, 56, 57.

[2] The arguments of counsel, for and against a senator's being an impeachable officer, will be found at large, in the printed trial of William Blount, on his impeachment. (Philad. 1799.)

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resort may be had to the constitution itself; but for the definition of bribery, resort is naturally and necessarily had to the common law; for that, as the common basis of our jurisprudence, can alone furnish the proper exposition of the nature and limits of this offence. The only practical question is, what are to be deemed high crimes and misdemeanours? Now, neither the constitution, nor any statute of the United States has in any manner defined any crimes, except treason and bribery, to be high crimes and misdemeanours, and as such impeachable. In what manner, then, are they to be ascertained? Is the silence of the statute book to be deemed conclusive in favour of the party, until congress have made a legislative declaration and enumeration of the offences, which shall be deemed high crimes and misdemeanours? If so, then, as has been truly remarked,[1] the power of impeachment, except as to the two expressed cases, is a complete nullity; and the party is wholly dispunishable, however enormous may be his corruption or criminality.[2] It will not be sufficient to say, that in the cases, where any offence is punished by any statute of the United States, it may, and ought to be, deemed an impeachable offence. It is not every

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1 Rawle on the Constitution, ch. 29, p. 273.

2 Upon the trial of Mr. Justice Chase, in 1805, it was contended in his answer and defence, that no civil officer was impeachable, but "for treason, bribery, corruption, or some high crime or misdemeanour, *consisting in some act done or omitted, in violation of law*, forbidding or commanding it." "Hence it clearly results, that no civil officer of the United States can be impeached, except for some offence, for which he may be indicted at law: and that no evidence can be received on an impeachment, except such, as, on an indictment at law for the same offence, would be admissible." * The same doctrine was insisted on by his counsel. †

* 1 Chase's Trial, p. 47, 48.

† 2 Chase's Trial, p. 9 to 18; 4 Elliot's Debates, 262.

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offence, that by the constitution is so impeachable. It must not only be an offence, but a *high* crime and misdemeanour. Besides; there are many most flagrant offences, which, by the statutes of the United States, are punishable only, when committed in special places, and within peculiar jurisdictions, as, for instance, on the high seas, or in forts, navy-yards, and arsenals ceded to the United States. Suppose the offence is committed in some other, than these privileged places, or under circumstances not reached by any statute of the United States, would it be impeachable?

§ 795. Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it. What, for instance, could positive legislation do in cases of impeachment like the charges against Warren Hastings, in 1788? Resort, then, must be had either to parliamentary practice, and the common law, in order to ascertain, what are high crimes and misdemeanours; or the whole subject must be left to the arbitrary discretion of the senate, for the time being. The latter is so incompatible with the genius of our institutions, that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice, which might make that a crime at one time, or in one person, which would be deemed innocent at another time, or in another person. The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties

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And however much it may fall in with the political theories of certain statesmen and jurists, to deny the existence of a common law belonging to, and applicable to the nation in ordinary cases, no one has as yet been bold enough to assert, that the power of impeachment is limited to offences positively defined in the statute book of the Union, as impeachable high crimes and misdemeanours.

§ 796. The doctrine, indeed, would be truly alarming, that the common law did not regulate, interpret, and control the powers and duties of the court of impeachment. What, otherwise, would become of the rules of evidence, the legal notions of crimes, and the application of principles of public or municipal jurisprudence to the charges against the accused? It would be a most extraordinary anomaly, that while every citizen of every state, originally composing the Union, would be entitled to the common law, as his birth-right, and at once his protector and guide; as a citizen of the Union, or an officer of the Union, he would be subjected to no law, to no principles, to no rules of evidence. It is the boast of English jurisprudence, and without it the power of impeachment would be an intolerable grievance, that in trials by impeachment the law differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments prevail. For impeachments are not framed to alter the law; but to carry it into more effectual execution, where it might be obstructed by the influence of too powerful delinquents, or not easily discerned in the ordinary course of jurisdiction, by reason of the peculiar quality of the alleged crimes.[1] Those, who

[1] 2 Woodeson, Lect. 40, p. 611, 612; 4 Black. Comm. 261, Christian's note, (2.)

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believe, that the common law, so far as it is applicable, constitutes a part of the law of the United States in their sovereign character, as a nation, not as a source of jurisdiction, but as a guide, and check, and expositor in the administration of the rights, duties, and jurisdiction conferred by the constitution and laws, will find no difficulty in affirming the same doctrines to be applicable to the senate, as a court of impeachments. Those, who denounce the common law, as having any application or existence in regard to the national government, must be necessarily driven to maintain, that the power of impeachment is, until congress shall legislate, a mere nullity, or that it is despotic, both in its reach, and in its proceedings.[1] It is remarkable, that the first congress, assembled in October, 1774, in their famous declaration of the rights of the colonies, asserted, "that the respective colonies are entitled to the common law of England;" and "that they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization, and which they have by experience respectively found to be applicable to their several local and other circumstances."[2] It would be singular enough, if, in framing a national government, that common law, so justly dear to the colonies, as their guide and protection, should cease to have any exist-

[1] It is not my design in this place to enter upon the discussion of the much controverted question, whether the common law constitutes a part of the *national* jurisprudence, in contradistinction to that of the states. The learned reader will find the subject amply discussed in the works, to which he has been already referred, viz. 1 Tuck. Black. Comm. App. Note E. p. 378, &c.; in the Report of the Virginia Legislature of 1799, 1800; in Rawle on the Constit. ch. 30, p. 258, &c., and in Duponceau on Jurisdiction, and the authorities there cited. 1 Kent. Comm. Lect. 16, p. 311 *et seq.*; North American Review, July, 1825; Mr. Bayard's Speech, Debate on the Judiciary in 1802, p. 372.

[2] 1 Journal of Congress, Oct. 1774, p. 29.

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ence, as applicable to the powers, rights, and privileges of the people, or the obligations, and duties, and powers of the departments of the national government. If the common law has no existence, as to the Union, as a rule or guide, the whole proceedings are completely at the arbitrary pleasure of the government, and its functionaries in all its departments.

§ 797. Congress have unhesitatingly adopted the conclusion, that no previous statute is necessary to authorize an impeachment for any official misconduct; and the rules of proceeding, and the rules of evidence, as well as the principles of decision, have been uniformly regulated by the known doctrines of the common law and parliamentary usage. In the few cases of impeachment, which have hitherto been tried, no one of the charges has rested upon any statutable misdemeanours.[1] It seems, then, to be the settled doctrine of the high court of impeachment, that though the common law cannot be a foundation of a jurisdiction not given by the constitution, or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law; and that, what are, and what are not high crimes and misdemeanours, is to be ascertained by a recurrence to that great basis of American jurisprudence.[2] The reasoning, by which the

[1] It may be supposed, that the first charge in the articles of impeachment against William Blount was a statutable offence; but on an accurate examination of the act of congress, of 1794, it will be found not to have been so.

[2] See Jefferson's Manual, § 53, title, *Impeachment*; Blount's Trial on Impeachment, p. 29 to 31; Id. 75 to 80, (Philadelphia, 1799.) But see Id. p. 42 to 46. — In another clause of the constitution power is given to the president to grant reprieves and pardons *for offences against the United States*, except in cases of impeachment; thus showing, that impeachable offences are deemed offences against the United States. If the senate may then declare, what are offences against the United

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power of the house of representatives to punish for contempts, (which are breaches of privileges, and offences not defined by any positive laws,) has been upheld by the Supreme Court, stands upon similar grounds; for if the house had no jurisdiction to punish for contempts, until the acts had been previously defined, and ascertained by positive law, it is clear, that the process of arrest would be illegal.[1]

§ 798. In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy. Thus, lord chancellors, and judges, and other magistrates, have not only been impeached for bribery, and acting grossly contrary to the duties of their office; but for misleading their sovereign by unconstitutional opinions, and for attempts to subvert the fundamental laws, and introduce arbitrary power.[2] So, where a lord chancellor has been thought to have put the great seal to an ignominious treaty; a lord admiral to have neglected the safe-guard of the sea; an ambassador to have betrayed his trust; a privy counsellor to have propounded, or supported pernicious and dishonourable measures; or a confidential adviser of his sovereign to have obtained exorbitant grants, or incompatible employments; — these have been all deemed impeachable

States by recurrence to the common law, why may not the courts of the United States, under the express delegation of jurisdiction over "all crimes and offences cognizable under the authority of the United States," by the act of 1789, ch. 20, § 11, act in the same manner?

[1] *Dunn* v. *Anderson*, 6 Wheat. R. 204; Rawle on Constit. ch. 29, p. 271, 272.

[2] 2 Woodeson, Lect. 40, p. 602; Com. Dig. title *Parliament*, L. 28 to 40.

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offences.[1] Some of the offences, indeed, for which persons were impeached in the early ages of British jurisprudence, would now seem harsh and severe; but perhaps they were rendered necessary by existing corruptions, and the importance of suppressing a spirit of favouritism, and court intrigue. Thus, persons have been impeached for giving bad counsel to the king; advising a prejudicial peace; enticing the king to act against the advice of parliament; purchasing offices; giving medicine to the king without advice of physicians; preventing other persons from giving counsel to the king, except in their presence; and procuring exorbitant personal grants from the king.[2] But others, again, were founded in the most salutary public justice; such as impeachments for malversations and neglects in office; for encouraging pirates; for official oppression, extortions, and deceits; and especially for putting good magistrates out of office, and advancing bad.[3] One cannot but be struck, in this slight enumeration, with the utter unfitness of the common tribunals of justice to take cognizance of such offences; and with the entire propriety of confiding the jurisdiction over them to a tribunal capable of understanding, and reforming, and scrutinizing the polity of the state,[4] and of sufficient dignity to maintain the independence and reputation of worthy public officers.

§ 799. Another inquiry, growing out of this subject, is, whether, under the constitution, any acts are impeachable, except such, as are committed under colour of office; and whether the party can be impeached

[1] 2 Woodeson, Lect. 40, p. 602; Com. Dig. *Parliament*, L. 28 to 40.
[2] Com. Dig. *Parliament*, L. 28 to 40.
[3] Com. Dig. *Parliament*, L. 28 to 40.
[4] 2 Woodeson, Lect. 40, p. 602.

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therefor, after he has ceased to hold office. A learned commentator seems to have taken it for granted, that the liability to impeachment extends to all, who have been, as well as to all, who are in public office.[1] Upon the other point his language is as follows: "The legitimate causes of impeachment have been already briefly noticed. They can have reference only to public character, and official duty. The words of the text are, 'treason, bribery, and other high crimes and misdemeanours.' The treason contemplated must be against the United States. In general, those offences, which may be committed equally by a private person, as a public officer, are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offences not immediately connected with office, except the two expressly mentioned, are left to the ordinary course of judicial proceeding; and neither house can regularly inquire into them, except for the purpose of expelling a member."[2]

§ 800. It does not appear, that either of these points has been judicially settled by the court having, properly, cognizance of them. In the case of William Blount, the plea of the defendant expressly put both of them, as exceptions to the jurisdiction, alleging, that, at the time of the impeachment, he, Blount, was not a senator, (though he was at the time of the charges laid against him,) and that he was not charged by the articles of impeachment with having committed any crime, or misdemeanour, in the execution of any civil office held under the United States; nor with any malconduct in a civil office, or abuse of any public trust in the

[1] Rawle on Constit. ch. 22, p. 213; Blount's Trial, p. 49, 50, (Philadelphia, 1799.)

[2] Rawle on the Constitution, ch. 22, p. 215.

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execution thereof.[1] The decision, however, turned upon another point, viz., that a senator was not an impeachable officer.[2]

§ 801. As it is declared in one clause of the constitution, that "judgment, in cases of impeachment, shall not extend further, than a removal "from office, and disqualification to hold any office of "honour, trust, or profit, under the United States;" and in another clause, that "the president, vice president, and all civil officers of the United States, shall "be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes or "misdemeanours;" it would seem to follow, that the senate, on the conviction, were bound, in all cases, to enter a judgment of removal from office, though it has a discretion, as to inflicting the punishment of disqualification.[3] If, then, there must be a judgment of removal from office, it would seem to follow, that the constitution contemplated, that the party was still in office at the time of the impeachment. If he was not, his offence was still liable to be tried and punished in the ordinary tribunals of justice. And it might be argued with some force, that it would be a vain exercise of authority to try a delinquent for an impeachable offence, when the most important object, for which the remedy was given, was no longer necessary, or attainable. And although a judgment of disqualification might still be pronounced, the language of the constitution

[1] See Senate Journal, 14th Jan. 1799; 4 Tucker's Black. Comm. App. 57, 58.

[2] Sergeant on Const. Law, ch. 29, p. 363.

[3] Upon the impeachment and conviction of John Pickering (12th of March, 1804,) the only punishment awarded by the senate was a removal from office. See also Blount's Trial, 64 to 66; Id. 79, 82, 83, (Philad. 1799;) Sergeant on Const. Law, ch. 29, p. 364.

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may create some doubt, whether it can be pronounced without being coupled with a removal from office.[1] There is also much force in the remark, that an impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender, as to secure the state against gross official misdemeanors. It touches neither his person, nor his property; but simply divests him of his political capacity.[2]

§ 802. The other point is one of more difficulty. In the argument upon Blount's impeachment, it was pressed with great earnestness, that there is not a syllable in the constitution, which confines impeachments to official acts, and it is against the plainest dictates of common sense, that such restraint should be imposed upon it. Suppose a judge should countenance, or aid insurgents in a meditated conspiracy or insurrection against the government. This is not a judicial act; and yet it ought certainly to be impeachable. He may be called upon to try the very persons, whom he has aided.[3] Suppose a judge or other officer to receive a bribe not connected with his judicial office; could he be entitled to any public confidence? Would not these reasons for his removal be just as strong, as if it were a case of an official bribe? The argument on the other side was, that the power of impeachment was strictly confined to civil officers of the United States, and this necessarily implied, that it must be limited to malconduct in office.[4]

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[1] See Blount's Trial, 47, 48; Id. 64 to 68, (Philad. 1799;) Id. 82.

[2] Mr. Bayard. Blount's Trial, 28, (Philad. 1799.) See Id. 80, 81.

[3] Blount's Trial, 39, 40, (Phila. 1799;) Id. 80.

[4] Blount's Trial, 46 to 49; Id 62, 64 to 68, (Philadelphia, 1799.) — William Blount was expelled from the senate a few days before this impeachment, (being then a member,) and on that occasion he was, by a resolution of the senate,* declared to be "guilty of a *high misde-*

* Yeas, 25; Nay, 1.

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§ 803. It is not intended to express any opinion in these commentaries, as to which is the true exposition of the constitution on the points above stated. They are brought before the learned reader, as matters still *sub judice*, the final decision of which may be reasonably left to the high tribunal, constituting the court of impeachment, when the occasion shall arise.

§ 804. This subject may be concluded by a summary statement of the mode of proceeding in the institution and trial of impeachments, as it is of rare occurrence, and not governed by the formalities of the ordinary prosecutions in courts at law.

§ 805. When, then, an officer is known or suspected to be guilty of malversation in office, some member of the house of representatives usually brings forward a resolution to accuse the party, or for the appointment of a committee, to consider and report upon the charges laid against him. The latter is the ordinary course; and the report of the committee usually contains, if adverse to the party, a statement of the charges, and recommends a resolution, that he be impeached) therefor. If the resolution is adopted by the house, a committee is then appointed to impeach the party at the bar of the senate, and to state, that the articles against him will be exhibited in due time, and made good before the senate; and to demand, that the senate take order for the appearance of the party to answer to the impeach-

meanor entirely inconsistent with his public trust and duty, as a senator." The offence charged was not defined by any statute of the United States. It was for an attempt to seduce an United States' Indian interpreter from his duty, and to alienate the affections and confidence of the Indians from the public officers residing among them, &c. Journ. of Senate, 8th July, 1797; Sergeant on Const. Law, ch. 28, p. 286, 287.

[1] Com. Dig. *Parliament*, L. 20; 2 Woodeson, Lect. 40, p. 603, 604; Jefferson's Manual, sect. 53.

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ment.[1] This being accordingly done, the senate signify their willingness to take such order; and articles are then prepared by a committee, under the direction of the house of representatives, which, when reported to, and approved by the house, are then presented in the like manner to the senate; and a committee of managers are appointed to conduct the impeachment.[2] As soon as the articles are thus presented, the senate issue a process, summoning the party to appear at a given day before them, to answer the articles.[3] The process is served by the sergeant-at-arms of the senate, and due return is made thereof under oath.

§ 806. The articles thus exhibited need not, and indeed do not, pursue the strict form and accuracy of an indictment.[4] They are sometimes quite general in the form of the allegations; but always contain, or ought to contain, so much certainty, as to enable the party to put himself upon the proper defence, and also, in case of an acquittal, to avail himself of it, as a bar to another impeachment. Additional articles may be exhibited, perhaps, at any stage of the prosecution.[5]

§ 807. When the return day of the process for appearance has arrived, the senate resolve themselves into a court of impeachment, and the senators are at that time, or before, solemnly sworn, or affirmed, to do impartial justice upon the impeachment, according to the constitution and laws of the United States. The

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1 Com. Dig. *Parliament*, L. 20; 2 Woodeson, Lect. 40, p. 603, 604; Jefferson's Manual, sect. 53.

2 Com. Dig. *Parliament*, L. 21; Jefferson's Manual, sect. 53.

3 Com. Dig. *Parliament*, L. 14, 18, 19, 20; Jefferson's Manual, sect. 53.

4 2 Woodeson, Lect. 40, p. 605, 606; Com. Dig. *Parliament*, L. 21; Foster on Crown Law, 389, 390.

5 Rawle on Const. ch. 22, p. 216.

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person impeached is then called to appear and answer the articles. If he does not appear in person, or by attorney, his default is recorded, and the senate may proceed *ex parte* to the trial of the impeachment. If he does appear in person, or by attorney, his appearance is recorded. Counsel for the parties are admitted to appear, and to be heard upon an impeachment.[1]

§ 808. When the party appears, he is entitled to be furnished with a copy of the articles of impeachment, and time is allowed him to prepare his answer thereto. The answer, like the articles, is exempted from the necessity of observing great strictness of form. The party may plead, that he is not guilty, as to part, and make a further defence, as to the residue; or he may, in a few words, saving all exceptions, deny the whole charge or charges;[2] or he may plead specially, in justification or excuse of the supposed offences, all the circumstance attendant upon the case. And he is also indulged with the liberty of offering argumentative reasons, as well as facts, against the charges in support, and as part, of his answer, to repel them. It is usual to give a full and particular answer separately to each article of the accusation.[3]

§ 809. When the answer is prepared and given in, the next regular proceeding is, for the house of representatives to file a replication to the answer in writing, in substance denying the truth and validity of the defence stated in the answer, and averring the truth and sufficiency of the charges, and the readiness of the house to prove them at such convenient time and place,

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1 Jefferson's Manual, sect. 53.

2 2 Woodeson, Lect. 40, p. 606, 607; Com. Dig. *Parliament*, L. 23.

3 2 Woodeson, Lect. 40, p. 607; Jefferson's Manual, sect. 53.

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as shall be appointed for that purpose by the senate.[1] A time is then assigned for the trial; and the senate, at that period or before, adjust the preliminaries and other proceedings proper to be had, before and at the trial, by fixed regulations; which are made known to the house of representatives, and to the party accused.[2] On the day appointed for the trial, the house of representatives appear at the bar of the senate, either in a body, or by the managers selected for that purpose, to proceed with the trial.[3] Process to compel the attendance of witnesses is previously issued at the request of either party, by order of the senate; and at the time and place appointed, they are bound to appear and give testimony. On the day of trial, the parties being ready, the managers to conduct the prosecution open it on behalf of the house of representatives, one or more of them delivering an explanatory speech, either of the whole charges, or of one or more of them. The proceedings are then conducted substantially, as they are upon common judicial trials, as to the admission or rejection of testimony, the examination and cross-examination of witnesses, the rules of evidence, and the legal doctrines, as to crimes and misdemeanours.[4] When the whole evidence has been gone through, and the parties on each side have been fully heard, the senate then proceed to the consideration of the case. If any debates arise, they are conducted in secret; if none arise, or after they are ended, a day is assigned for a final public decision by yeas and nays upon each separate charge in the articles of impeachment. When the court is assembled for this purpose, the question is

1 See 2 Woodeson, Lect. 40, p. 607; Com. Dig. *Parliament*, L. 24.
2 See 2 Woodeson, Lect. 40, p. 610.
3 Jefferson's Manual, sect. 53.
4 2 Woodeson, Lect. 611; Jefferson's Manual, sect. 53.

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propounded to each member of the senate by name, by the president of the senate, in the following manner, upon each article, the same being first read by the secretary of the senate. "Mr. ——, how say you, is the respondent guilty, or not guilty of a high crime and misdemeanour, as charged in the —— article of impeachment?" Whereupon the member rises in his place, and answers guilty, or not guilty, as his opinion is. If upon no one article two thirds of the senate decide, that the party is guilty, he is then entitled to an acquittal, and is declared accordingly to be acquitted by the president of the senate. If he is convicted of all, or any of the articles, the senate then proceed to fix, and declare the proper punishment.[1] The pardoning power of the president does not, as will be presently seen, extend to judgments upon impeachment; and hence, when once pronounced, they become absolute and irreversible.[2]

§ 810. Having thus gone through the whole subject of impeachments, it only remains to observe, that a close survey of the system, unless we are egregiously deceived, will completely demonstrate the wisdom of the arrangements made in every part of it. The jurisdiction to impeach is placed, where it should be, in the possession and power of the immediate representatives of the people. The trial is before a body of great dignity, and ability, and independence, possessing the requisite knowledge and firmness to act with vigour,

[1] This summary, when no other authority is cited, has been drawn up from the practice, in the cases of impeachment already tried by the senate of the United States, viz. of William Blount, in 1798; of John Pickering, in 1804; of Samuel Chase, in 1804; and of James H. Peck, in 1831. See the Senate Journals of those Trials. See also Jefferson's Manual, sect. 202.

[2] Art. 2, sect. 2, clause, 1.

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and to decide with impartiality upon the charges. The persons subjected to the trial are officers of the national government; and the offences are such, as may affect the rights, duties, and relations of the party accused to the public in his political or official character, either directly or remotely. The general rules of law and evidence, applicable to common trials, are interposed, to protect the party against the exercise of wanton oppression, and arbitrary power. And the final judgment is confined to a removal from, and disqualification for, office; thus limiting the punishment to such modes of redress, as are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries. In other respects the offence is left to be disposed of by the common tribunals of justice, according to the laws of the land, upon an indictment found by a grand jury, and a trial by a jury of peers, before whom the party is to stand for his final deliverance, like his fellow citizens.

§ 811. In respect to the impeachment of the president, and vice president, it may be remarked, that they are, upon motives of high state policy, made liable to impeachment, while they yet remain in office. In England the constitutional maxim is, that the king can do no wrong. His ministers and advisers may be impeached and punished; but he is, by his prerogative, placed above all personal amenability to the laws for his acts.[1] In some of the state constitutions, no explicit provision is made for the impeachment of the chief magistrate; and in Delaware and Virginia, he was not (under their old constitutions) impeachable, until he was out of office.[2] So that no immediate remedy in

[1] 1 Black. Comm. 246, 247.

[2] The Federalist, No. 39.

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those states was provided for gross malversations and corruptions in office; and the only redress lay in the elective power, followed up by prosecutions after the party had ceased to hold his office. Yet cases may be imagined, where a momentary delusion might induce a majority of the people to re-elect a corrupt chief magistrate; and thus the remedy would be at once distant and uncertain. The provision in the constitution of the United States, on the other hand, holds out a deep and immediate responsibility, as a check upon arbitrary power; and compels the chief magistrate, as well as the humblest citizen, to bend to the majesty of the laws.

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CHAPTER XI.

ELECTIONS AND MEETINGS OF CONGRESS.

§ 812. THE first clause of the fourth section of the first article is as follows: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof. But the congress may, at any time, by law, make or alter such regulations, except as to the place of choosing senators."

§ 813. This clause does not appear to have attracted much attention, or to have encountered much opposition in the convention, at least so far, as can be gathered from the journal of that body.[1] But it was afterwards assailed by the opponents of the constitution, both in and out of the state conventions, with uncommon zeal and virulence. The objection was not to that part of the clause, which vests in the state legislatures the power of prescribing the times, places, and manner of holding elections; for, so far, it was a surrender of power to the state governments. But it was, to the superintending power of congress to make, or alter such regulations. It was said, that such a superintending power would be dangerous to the liberties of the people, and to a just exercise of their privileges in elections. Congress might prescribe the times of election so unreasonably, as to prevent the attendance of the electors; or the place at so inconvenient a distance from the body of the electors, as to prevent a due exercise of the right of choice. And congress might contrive the *manner* of holding elections, so as to exclude all but their own

[1] Journal of Convention, 218, 240; Id. 354, 374.

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favourites from office. They might modify the right of election, as they please; they might regulate the number of votes by the quantity of property, without involving any repugnancy to the constitution.[1] These, and other suggestions of a similar nature, calculated to spread terror and alarm among the people, were dwelt on with peculiar emphasis.

§ 814. In answer to all such reasoning, it was urged, that there was not a single article in the whole system more completely defensible. Its propriety rested upon this plain proposition, that every government ought to contain in itself the means of its own preservation.[2] If, in the constitution, there were some departures from this principle, (as it might be admitted there were,) they were matters of regret, and dictated by a controlling moral or political necessity; and they ought not to be extended. It was obviously impracticable to frame, and insert in the constitution an election law, which would be applicable to all possible changes in the situation of the country, and convenient for all the states. A discretionary power over elections must be vested somewhere. There seemed but three ways, in which it could be reasonably organized. It might be lodged either wholly in the national legislature; or wholly in the state legislatures; or primarily in the latter, and ultimately in the former. The last was the mode adopted by the convention. The regulation of elections is submitted, in the first instance, to the local governments, which, in ordinary cases, and when no improper views prevail, may both conveniently and satisfactorily

[1] 1 Elliot's Debates, 43 to 50; Id. 53 to 68; 2 Elliot's Debates, 38, 39, 72, 149, 150; 3 Elliot's Debates, 57 to 74; 2 American Museum, 438; Id. 435; Id. 545; 3 American Museum, 423; 2 Elliot's Debates, 277.

[2] The Federalist, No. 59; 2 Elliot's Debates, 276, 277.

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be by them exercised. But, in extraordinary circumstances, the power is reserved to the national government; so that it may not be abused, and thus hazard the safety and permanence of the Union.[1] Nor let it be thought, that such an occurrence is wholly imaginary. It is a known fact, that, under the confederation, Rhode-Island, at a very critical period, withdrew her delegates from congress; and thus prevented some important measures from being carried.[2]

§ 815. Nothing can be more evident, than that an exclusive power in the state legislatures to regulate elections for the national government would leave the existence of the Union entirely at their mercy. They could, at any time, annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is no sufficient answer, that such an abuse of power is not probable. Its possibility is, in a constitutional view, decisive against taking such a risk; and there is no reason for taking it. The constitution ought to be safe against fears of this sort; and against temptations to undertake such a project. It is true, that the state legislatures may, by refusing to choose senators, interrupt the operations of the national government, and thus involve the country in general ruin. But, because, with a view to the establishment of the constitution, this risk was necessarily taken, when the appointment of senators was vested in the state legislatures; still it did not follow, that a power so dangerous ought to be conceded in cases, where the same necessity did not exist. On the contrary, it became the duty of the convention, on this very account, not to multiply the chances of mischievous attempts of this sort. The risk, too, would be

[1] The Federalist, No. 59; 2 Elliot's Debates, 38, 39; Id. 276, 277.
[2] 1 Elliot's Debates, 44, 45; The Federalist, No. 22.

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much greater in regard to an exclusive power over the elections of representatives, than over the appointment of senators. The latter are chosen for six years; the representatives for two years. There is a gradual rotation of office in the senate, every two years, of one third of the body; and a quorum is to consist of a mere majority. The result of these circumstances would naturally be, that a combination of a few states, for a short period, to intermit the appointment of senators would not interrupt the operations or annihilate the existence of that body. And it is not against permanent, but against temporary combinations of the states, that there is any necessity to provide. A temporary combination might proceed altogether from the sinister designs and intrigues of a few leading members of the state legislatures. A permanent combination could only arise from the deep-rooted disaffection of a great majority of the people; and, under such circumstances, the existence of such a national government would neither be desirable, nor practicable.[1] The very shortness of the period of the elections of the house of representatives might, on the other hand, furnish means and motives to temporary combinations to destroy the national government; and every returning election might produce a delicate crisis in our national affairs, subversive of the public tranquillity, and encouraging to every sort of faction.[2]

§ 816. There is a great distinction between the objects and interests of the people, and the political objects and interests of their rulers. The people may be warmly attached to the Union, and its powers, and its operations; while their representatives, stimulated by the natural rivalship of power, and the hopes of personal

[1] The Federalist, No. 59. [2] Id.

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aggrandizement, may be in a very opposite temper, and artfully using all their influence to cripple, or destroy the national government.[1] Their motives and objects may not, at first, be clearly discerned; but time and reflection will enable the people to understand their own true interests, and to guard themselves against insidious factions. Besides; there will be occasions, in which the people will be excited to undue resentments against the national government. With so effectual a weapon in their hands, as the exclusive power of regulating elections for the national government, the combination of a few men in some of the large states might, by seizing the opportunity of some casual disaffection among the people, accomplish the destruction of the Union. And it ought not to be overlooked, that as a solid government will make us more and more an object of jealousy to the nations of Europe, so there will be a perpetual temptation, on their part, to generate intrigues of this sort for the purpose of subverting it.[2]

§ 817. There is, too, in the nature of such a provision, something incongruous, if not absurd. What would be said of a clause introduced into the national constitution to regulate the state elections of the members of the state legislatures? It would be deemed a most unwarrantable transfer of power, indicating a premeditated design to destroy the state governments.[3] It would be deemed so flagrant a violation of principle, as to require no comment. It would be said, and justly, that the state governments ought to possess the power of self-existence and self-organization, independent of

[1] The Federalist, No. 59; 1 Elliot's Debates, 43 to 55; Id. 67, 68; 3 Elliot's Debates, 65.

[2] The Federalist, No. 59.

[3] Id.

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the pleasure of the national government. Why does not the same reasoning apply to the national government? What reason is there to suppose, that the state governments will be more true to the Union, than the national government will be to the state governments?

§ 818. If, then, there is no peculiar fitness in delegating such a power to the state legislatures; if it might be hazardous and inconvenient; let us see, whether there are any solid dangers from confiding the superintending and ultimate power over elections to the national government. There is no pretence to say, that the power in the national government can be used, so as to exclude any state from its share in the representation in congress. Nor can it be said, with correctness, that congress can, in any way, alter the rights, or qualifications of voters. The most, that can be urged, with any show of argument, is, that the power might, in a given case, be employed in such a manner, as to promote the election of some favourite candidate, or favourite class of men, in exclusion of others, by confining the places of election to particular districts, and rendering it impracticable for the citizens at large to partake in the choice. The whole argument proceeds upon a supposition the most chimerical. There are no rational calculations, on which it can rest, and every probability is against it. Who are to pass the laws for regulating elections? The congress of the United States, composed of a senate chosen by the state legislatures, and of representatives chosen by the people of the states. Can it be imagined, that these persons will combine to defraud their constituents of their rights, or to overthrow the state authorities, or the state influence? The very attempt would rouse universal indignation, and produce an immediate revolt among the great mass of the peo-

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ple, headed and directed by the state governments.[1] And what motive could there be, in congress, to produce such results? The very dissimilarity in the ingredients, composing the national government, forbid even the supposition of any effectual combination for such a purpose. The interests, the habits, the institutions, the local employments, the state of property, the genius, and the manners, of the people of the different states, are so various, and even opposite, that it would be impossible to bring a majority of either house to agree upon any plan of elections, which should favour any particular man, or class of men, in any state. In some states, commerce is, or may be, the predominant interest; in others, manufactures; in others, agriculture. Physical, as well as moral causes will necessarily nourish, in different states, different inclinations and propensities on all subjects of this sort. If there is any class, which is likely to have a predominant influence, it must be either the commercial, or the landed class. If either of these could acquire such an influence, it is infinitely more probable, that it would be acquired in the state, than in the national, councils.[2] In the latter, there will be such a mixture of all interests, that it will be impracticable to adopt any rule for all the states, giving any preference to classes or interests, founded upon sectional or personal considerations. What might suit a few states well, would find a general resistance from all the other states.

§ 819. If it is said, that the elections might be so managed, as to give a predominant influence to the wealthy, and the well-born, (as they are insidiously called,) the supposition is not less visionary. What possible mode is there to accomplish such a purpose?

[1] The Federalist, No. 60. [2] Id.

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The wealthy and the well-born are not confined to any particular spots in any state; nor are their interests permanently fixed any where. Their property may consist of stock, or other personal property, as well as of land; of manufactories on great streams, or on narrow rivulets, or in sequestered dells. Their wealth may consist of large plantations in the bosom of the country, or farms on the borders of the ocean. How vain must it be, to legislate upon the regulation of elections with reference to circumstances so infinitely varied, and so infinitely variable. The very suggestion is preposterous. No possible method of regulating the time, mode, or place of elections, could give to the rich, or elevated, a general, or permanent advantage in the elections. The only practical mode of accomplishing it, (that of a property qualification of voters, or candidates,) is excluded in the scheme of the national government.[1] And if it were possible, that such a design could be accomplished to the injury of the people at a single election, it is certain, that the unpopularity of the measure would immediately drive the members from office, who aided in it; and they would be succeeded by others, who would more justly represent the public will and the public interests. A cunning, so shallow, would be easily detected; and would be as contemptible from its folly, as it would be difficult in its operations.

§ 820. Other considerations are entitled to great weight. The constitution gives to the state legislatures the power to regulate the time, place, and manner of holding elections; and this will be so desirable a boon in their possession, on account of their ability to adapt the regulation, from time to time, to the peculiar local, or political convenience of the states, that its represen-

[1] The Federalist, No. 60.

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tatives in congress will not be brought to assent to any general system by congress, unless from an extreme necessity, or a very urgent exigency. Indeed, the danger rather is, that when such necessity or exigency actually arises, the measure will be postponed, and perhaps defeated, by the unpopularity of the exercise of the power. All the states will, under common circumstances, have a local interest, and local pride, in preventing any interference by congress; and it is incredible, that this influence should not be felt, as well in the senate, as in the house. It is not too much, therefore, to presume, that it will not be resorted to by congress, until there has been some extraordinary abuse, or danger in leaving it to the discretion of the states respectively. And it is no small recommendation of this supervising power, that it will naturally operate, as a check upon undue state legislation; since the latter might precipitate the very evil, which the popular opinion would be most solicitous to avoid. A preventive of this sort, addressed *a priori* to state jealousy, and state interest, would become a most salutary remedy, not from its actual application, but from its moral influence.

§ 821. It was said, that the constitution might have provided, that the elections should be in counties. This was true; but it would, as a general rule, afford very little relief against a possible abuse; for counties differ greatly in size, in roads, and in accommodations for elections; and the argument, from possible abuse, is just as strong, even after such a provision should be made, as before. If an elector were compellable to go thirty, or fifty miles, it would discourage his vote, as much, as if it were one hundred, or five hundred miles.[1]

[1] The Federalist, No. 61. — The full force of this reasoning will not be perceived, without adverting to the fact, that though in New-England

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The truth is, that congress could never resort to a measure of this sort for purposes of oppression, or party triumph, until that body had ceased to represent the will of the states and the people; and if, under such circumstances, the members could still hold office, it would be, because a general and irremediable corruption, or indifference pervaded the whole community. No republican constitution could pretend to afford any remedy for such a state of things.[1]

§ 822. But why did not a similar objection occur against the state constitutions? The subject of elections, the time, place, and manner of holding them, is in many cases left entirely to legislative discretion. In New-York, the senators are chosen from four districts of great territorial extent, each comprehending several counties; and it is not defined, where the elections shall be had. Suppose the legislature should compel all the electors to come to one spot in the district, as, for instance, to Albany, the evil would be great; but the measure would not be unconstitutional.[2] Yet no one practically entertains the slightest dread of such legislation. In truth, all reasoning from such extreme possible cases is ill adapted to convince the judgment, though it may alarm our prejudices. Such a legislative discretion is not deemed an infirmity in the delegation of constitutional power. It is deemed safe, because it can never be used oppressively for any length of time,

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the voters generally give their votes in the townships, where they reside. In the southern and western states, there are few towns, and the elections are held in the counties, where the population is sparse, and spread over large plantation districts.*

[1] 2 Elliot's Debates, 38, 39.

[2] The Federalist, No. 61.

* 1 Elliot's Debates, 68.

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unless the people themselves choose to aid in their own degradation.

§ 823. The objections, then, to the provision are not sound, or tenable. The reasons in its favour are, on the other hand, of great force and importance. In the first place, the power may be applied by congress to correct any negligence in a state in regard to elections, as well as to prevent a dissolution of the government by designing and refractory states, urged on by some temporary excitements. In the next place, it will operate as a check in favour of the people against any designs of a federal senate, and their constituents, to deprive the people of the state of their right to choose representatives. In the next place, it provides a remedy for the evil, if any state, by reason of invasion, or other cause, cannot have it in its power to appoint a place, where the citizens can safely meet to choose representatives.[1] In the last place, (as the plan is but an experiment,) it may hereafter become important, with a view to the regular operations of the general government, that there should be a uniformity in the time and manner of electing representatives and senators, so as to prevent vacancies, when there may be calls for extraordinary sessions of congress. If such a time should occur, or such a uniformity be hereafter desirable, congress is the only body possessing the means to produce it.[2]

§ 824. Such were the objections, and such was the reasoning, by which they were met, at the time of the adoption of the constitution. A period of forty years has since passed by, without any attempt by congress

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[1] See 1 Elliot's Debates, 44, 47, 48, 49; Id. 55; Id. 67.

[2] The Federalist, No. 61; 2 Elliot's Debates, 38, 39.

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to make any regulations, or interfere in the slightest degree with the elections of members of congress. If, therefore, experience can demonstrate any thing, it is the entire safety of the power in congress, which it is scarcely possible (reasoning from the past) should be exerted, unless upon very urgent occasions. The states now regulate the time, the place, and the manner of elections, in a practical sense, exclusively. The manner is very various; and perhaps the power has been exerted, in some instances, under the influence of local or party feelings, to an extent, which is indefensible in principle and policy. There is no uniformity in the choice, or in the mode of election. In some states the representatives are chosen by a general ticket for the whole state; in others they are chosen singly in districts; in others they are chosen in districts composed of a population sufficient to elect two or three representatives; and in others the districts are sometimes single, and sometimes united in the choice. In some states the candidate must have a majority of all the votes to entitle him to be deemed elected; in others (as it is in England) it is sufficient, if he has a plurality of votes. In some of the states the choice is by the voters *viva voce*, (as it is in England;) in others it is by ballot.[1] The times of the elections are quite as various; sometimes before, and sometimes after the regular period, at which the office becomes vacant. That this want of uniformity, as to the time and mode of election, has been productive of some inconveniences to the public service, cannot be doubted; for it has sometimes occurred, that at an extra session a whole state has been deprived of its vote; and at the regular ses-

[1] 1 Tucker's Black. Comm. App. 192.

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sions some districts have failed of being represented upon questions vital to their interests. Still, so strong has been the sense of congress of the importance of leaving these matters to state regulation, that no effort has been hitherto made to cure these evils; and public opinion has almost irresistibly settled down in favour of the existing system.[1]

§ 825. Several of the states, at the time of adopting the constitution, proposed amendments on this subject; but none were ever subsequently proposed by congress to the people; so that the public mind ultimately acquiesced in the reasonableness of the existing provision. It is remarkable, however, that none of the amendments proposed in the state conventions purported to take away entirely the superintending power of congress; but only restricted it to cases, where a state neglected, refused, or was disabled to exercise the power of regulating elections.[2]

§ 826. It remains only to notice an exception to the power of congress in this clause. It is, that congress cannot alter, or make regulations, "as to the place of choosing senators." This exception is highly reasonable. The choice is to be made by the state legislature; and it would not be either necessary, or becoming in congress to prescribe the place, where it should sit. This exception was not in the revised draft of the constitution; and was adopted almost at the close of the convention; not, however, without some opposition, for nine states were in its favour, one against it, and one was divided.[3]

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[1] 1 Tucker's Black. Comm. App. 191, 192.

[2] See Journal of Convention, Supplement, p. 402, 411, 418, 425, 433, 447, 454.

[3] Journal of Convention, 354, 374.

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§ 827. The second clause of the fourth section of the first article is as follows: "The congress shall assemble at "least once in every year; and such meeting shall be on "the first Monday in December, unless they shall by law "appoint a different day." This clause, for the first time, made its appearance in the revised draft of the constitution near the close of the convention; and was silently adopted, and, so far as can be perceived, without opposition. Annual parliaments had been long a favourite opinion and practice with the people of England; and in America, under the colonial governments, they were justly deemed a great security to public liberty. The present provision could hardly be overlooked by a free people, jealous of their rights; and therefore the constitution fixed a constitutional period, at which congress should assemble in every year, unless some other day was specially prescribed. Thus, the legislative discretion was necessarily bounded; and annual sessions were placed equally beyond the power of faction, and of party, of power, and of corruption. In two of the states a more frequent assemblage of the legislature was known to exist. But it was obvious, that from the nature of their duties, and the distance of their abodes, the members of congress ought not to be brought together at shorter periods, unless upon the most pressing exigencies. A provision, so universally acceptable, requires no vindication, or commentary.[1]

§ 828. Under the British constitution, the king has the sole right to convene, and prorogue, and dissolve parliament. And although it is now usual for parliament to assemble annually, the power of prorogation may be applied at the king's pleasure, so as to prevent

[1] The Federalist, No. 52.

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any business from being done. And it is usual for the king, when he means, that parliament should assemble to do business, to give notice by proclamation accordingly; otherwise a prorogation is of course on the first day of the session.[1]

§ 829. The fifth section of the first article embraces provisions principally applicable to the powers, rights, and duties of each house in its separate corporate character. These will not require much illustration or commentary, as they are such, as are usually delegated to all legislative bodies in free governments; and were in practice in Great-Britain at the time of the emigration of our ancestors; and were exercised under the colonial governments, and have been secured and recognised in the present state constitutions.

§ 830. The first clause declares, that "each house "shall be the judge of the elections, returns, and quali- "fications 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 mem- "bers, in such manner, and under such penalties, as "each house may provide."

§ 831. It is obvious, that a power must be lodged somewhere to judge of the elections, returns, and qualifications of the members of each house composing the legislature; for otherwise there could be no certainty, as to who were legitimately chosen members, and any intruder, or usurper, might claim a seat, and thus trample upon the rights, and privileges, and liberties of the people. Indeed, elections would become, under such

[1] 1 Black. Comm. 187, 188, and Christian's Note; 2 Wilson's Law Lect. 154, 155.

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circumstances, a mere mockery; and legislation the exercise of sovereignty by any self-constituted body. The only possible question on such a subject is, as to the body, in which such a power shall be lodged. If lodged in any other, than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes; no other body can be so perpetually watchful to guard its own rights and privileges from infringement, to purify and vindicate its own character, and to preserve the rights, and sustain the free choice of its constituents. Accordingly, the power has always been lodged in the legislative body by the uniform practice of England and America.[1]

§ 832. The propriety of establishing a rule for a quorum for the despatch of business is equally clear; since otherwise the concerns of the nation might be decided by a very small number of the members of each body. In England, where the house of commons consists of nearly six hundred members, the number of forty-five constitutes a quorum to do business.[2] In some of the state constitutions a particular number of the members constitutes a quorum to do business; in others, a majority is required. The constitution of the United States has wisely adopted the latter course; and thus, by requiring a majority for a quorum, has secured the public from any hazard of passing laws by surprise, or against the deliberate opinion of a majority of the representative body.

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[1] 1 Black. Comm. 163, 178, 179; Rawle on the Constitution, ch. 4, p. 46; 1 Kent. Comm. 220; 2 Wilson's Law Lect. 153, 154.

[2] 1 Tucker's Black. Comm. App. 201, 202, 203, 229. — I have not been able to find in any books within my reach, whether any particular quorum is required in the house of lords.

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§ 833. It may seem strange, but it is only one of many proofs of the extreme jealousy, with which every provision in the constitution of the United States was watched and scanned, that though the ordinary quorum in the state legislatures is sometimes less, and rarely more, than a majority; yet it was said, that in the congress of the United States more than a majority ought to have been required; and in particular cases, if not in all, more than a majority of a quorum should be necessary for a decision. Traces of this opinion, though very obscure, may perhaps be found in the convention itself.[1] To require such an extraordinary quorum for the decision of questions would, in effect, be to give the rule to the minority, instead of the majority; and thus to subvert the fundamental principle of a republican government. If such a course were generally allowed, it might be extremely prejudicial to the public interests in cases, which required new laws to be passed, or old ones modified, to preserve the general, in contradistinction to local, or special interests. If it were even confined to particular cases, the privilege might enable an interested minority to screen themselves from equitable sacrifices to the general weal; or, in particular cases, to extort undue indulgences. It would also have a tendency to foster and facilitate the baneful practice of secession, a practice, which has shown itself even in states, where a majority only is required, which is subversive of all the principles of order and regular government, and which leads directly to public convulsions, and the ruin of republican institutions.[2]

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[1] The Federalist, No. 58; Journal of Convention, 218, 242.
[2] The Federalist, No. 22, 58.

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§ 834, But, as a danger of an opposite sort required equally to be guarded against, a smaller number is authorized to adjourn from day to day, thus to prevent a legal dissolution of the body, and also to compel the attendance of absent members.[1] Thus, the interests of the nation, and the despatch of business, are not subject to the caprice, or perversity, or negligence of the minority. It was a defect in the articles of confederation, sometimes productive of great public mischief, that no vote, except for an adjournment, could be determined, unless by the votes of a majority of the states;[2] and no power of compelling the attendance of the requisite number existed.

[1] Journal of Convention, 218, 242; 4 Instit. 43, 49.

[2] Confederation, art. 9; 1 Elliot's Debates, 44, 45; The Federalist, No. 22.

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CHAPTER XII.

PRIVILEGES AND POWERS OF BOTH HOUSES OF CONGRESS.

§ 835. THE next clause is, "each house may deter- "mine the rules of its proceedings, punish its members "for disorderly behaviour, and, with the concurrence of "two thirds, expel a member." No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behaviour, or disobedience to those rules. And as a member might be so lost to all sense of dignity and duty, as to disgrace the house by the grossness of his conduct, or interrupt its deliberations by perpetual violence or clamour, the power to expel for very aggravated misconduct was also indispensable, not as a common, but as an ultimate redress for the grievance. But such a power, so summary, and at the same time so subversive of the rights of the people, it was foreseen, might be exerted for mere purposes of faction or party, to remove a patriot, or to aid a corrupt measure; and it has therefore been wisely guarded by the restriction, that there shall be a concurrence of two thirds of the members, to justify

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an expulsion.[1] This clause, requiring a concurrence of two thirds, was not in the original draft of the constitution, but it was inserted by a vote of ten states, one being divided.[2] A like general authority to expel, exists in the British house of commons; and in the legislative bodies of many of the states composing the Union.

§ 836. What must be the disorderly behaviour, which the house may punish, and what punishment, other than expulsion, may be inflicted, do not appear to have been settled by any authoritative adjudication of either house of congress. A learned commentator supposes, that members can only be punished for misbehaviour committed during the session of congress, either within, or without the walls of the house; though he is also of opinion, that expulsion may be inflicted for criminal conduct committed in any place.[3] He does not say, whether it must be committed during the session of congress or otherwise. In July, 1797, William Blount was expelled from the senate, for "a high misdemeanour, entirely inconsistent with his public trust and duty as a senator." The offence charged against him was an attempt to seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British government among the Indians. It was not a statuteable offence; nor was it committed in his official character; nor was it committed during the session of congress; nor at the seat of government.

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[1] Mr. J. Q. Adams's Report to the senate in the case of John Smith, 31 Dec. 1807; 1 Hall's Law Journ. 459; Sergeant on Const. Law, ch. 28, p. 287. 288.

[2] Journal of Convention, 218, 243.

[3] Rawle on the Constitution, ch. 4, p. 47.

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Yet by an almost unanimous vote[1] he was expelled from that body; and he was afterwards impeached (as has been already stated) for this, among other charges.[2] It seems, therefore, to be settled by the senate upon full deliberation, that expulsion may be for any misdemeanour, which, though not punishable by any statute, is inconsistent with the trust and duty of a senator. In the case of John Smith (a senator) in April, 1808, the charge against him was for participation in the supposed treasonable conspiracy of Colonel Burr. But the motion to expel him was lost by a want of the constitutional majority of two thirds of the members of the senate.[3] The precise ground of the failure of the motion does not appear; but it may be gathered from the arguments of his counsel, that it did not turn upon any doubt, that the power of the senate extended to cases of misdemeanour, not done in the presence or view of the body; but most probably it was decided upon some doubt as to the facts.[4] It may be thought difficult to draw a clear line of distinction between the right to inflict the punishment of expulsion, and any other punishment upon a member, founded on the time, place, or nature of the offence. The power to expel a member is not in the British house of commons confined to offences committed by the party as a member, or during the session of parliament; but it extends to all cases,

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1 Yeas 25, nay 1.

2 See Journal of Senate, 8 July, 1797; Sergeant's Const. Law, ch. 28, p. 286; 1 Hall's Law Journ. 459, 471.

3 Yeas 19. Nays 10.

4 1 Hall's Law Journ. 459, 471; Journ. of Senate, 9 April, 1808; Sergeant's Const. Law, ch. 28, p. 287, 288. See also proceedings of the senate in the case of Humphrey Marshall, 22 March, 1796; Sergeant's Const. Law, ch. 28, p. 285.

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where the offence is such, as, in the judgment of the house, unfits him for parliamentary duties.[1]

§ 837. The next clause is, "each house shall keep "a journal of its proceedings, and from time to time "publish the same, except such parts, as may in their "judgment require secrecy. And the yeas and nays of "the members of either house on any question shall, at "the desire of one fifth of those present, be entered on "the journal."

§ 838. This clause in its actual form did not pass in the convention without some struggle and some propositions of amendment. The first part finally passed by an unanimous vote; the exception was carried by a close vote of six states against four, one being divided; and the remaining clause, after an ineffectual effort to strike out "one fifth," and insert in its stead, "if every member present," was finally adopted by an unanimous vote.[2] The object of the whole clause is to ensure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents. And it is founded in sound policy and deep political foresight. Intrigue and cabal are thus deprived of some of their main resources, by plotting and devising measures in secrecy.[3] The public mind is enlightened by an attentive examination of the public measures; patriotism, and integrity, and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts. Mr. Justice Blackstone seems, indeed, to suppose, that

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[1] 1 Black. Comm. 163, and Christian's note; Id. 167 and note. See also *Rex* v. *Wilkes*, 2 Wilson's R. 251; Com. Dig. *Parliament*, G. 5. See 1 Hall's Law Term, 459, 466.

[2] Journal of the Convention, p. 219, 243, 244, 245, 354, 373.

[3] 1 Tucker's Black. Comm. App. 204, 205; 2 Wilson's Lect. 157, 158.

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votes openly and publicly given are more liable to intrigue and combination, than those given privately and by ballot. "This latter method," says he, "may be serviceable to prevent intrigues and unconstitutional combinations. But it is impossible to be practised with us, at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection."[1]

§ 839. The history of public assemblies, or of private votes, does not seem to confirm the former suggestion of the learned author. Intrigue and combination are more commonly found connected with secret sessions, than with public debates, with the workings of the ballot box, than with the manliness of *viva voce* votes. At least, it may be questioned, if the vote by ballot has, in the opinion of a majority of the American people, obtained any decisive preference over *viva voce* voting, even at elections. The practice in New England is one way, and at the South another way. And as to the votes of representatives and senators in congress, no man has yet been bold enough to vindicate a secret or ballot vote, as either more safe, or more wise, more promotive of independence in the members, or more beneficial to their constituents. So long as known and open responsibility is valuable as a check, or an incentive among the representatives of a free people, so long a journal of their proceedings, and their votes, published in the face of the world, will continue to enjoy public favour, and be demanded by public opinion. When the people become indifferent to the acts of their representatives, they will have ceased to take much interest in the preservation of their liberties.

[1] 1 Black. Comm. 181, 182.

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When the journals shall excite no public interest, it will not be matter of surprise, if the constitution itself is silently forgotten, or deliberately violated.

§ 840. The restriction of calls of the yeas and nays to one fifth is founded upon the necessity of preventing too frequent a recurrence to this mode of ascertaining the votes, at the mere caprice of an individual. A call consumes a great deal of time, and often embarrasses the just progress of beneficial measures. It is said to have been often used to excess in the congress under the confederation;[1] and even under the present constitution it is notoriously used, as an occasional annoyance, by a dissatisfied minority, to retard the passage of measures, which are sanctioned by the approbation of a strong majority. The check, therefore, is not merely theoretical; and experience shows, that it has been resorted to, at once to admonish, and to control members, in this abuse of the public patience and the public indulgence.

§ 841. The next clause is, "neither house, during "the session of congress, shall, without the consent of "the other, adjourn for more than three days, nor to "any other place, than that, in which the two houses "shall be sitting."[2] It is observable, that the duration of each session of congress, (subject to the constitutional termination of their official agency,) depends solely upon their own will and pleasure, with the single exception, as will be presently seen, of cases, in which the two houses disagree in respect to the time of adjournment. In no other case is the president allowed to interfere with the time and extent of their deliberations. And thus their independence is effectually guarded

[1] 1 Tuck. Black. Comm. App. 205, 206.

[2] See Journ. of Convention, 219, 246. See also 2 Elliot's Debates, 276, 277.

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against any encroachment on the part of the executive.[1] Very different is the situation of parliament under the British constitution; for the king may, at any time, put an end to a session by a prorogation of parliament, or terminate the existence of parliament by a dissolution, and a call of a new parliament. It is true, that each house has authority to adjourn itself separately; and this is commonly done from day to day, and sometimes for a week or a month together, as at Christmas and Easter, or upon other particular occasions. But the adjournment of one house is not the adjournment of the other. And it is usual, when the king signifies his pleasure, that both, or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure, and adjourn accordingly; for otherwise a prorogation would certainly follow.[2]

§ 842. Under the colonial governments, the undue exercise of the same power by the royal governors constituted a great public grievance, and was one of the numerous cases of misrule, upon which the declaration of independence strenuously relied. It was there solemnly charged against the king, that he had called together legislative [colonial] bodies at places, unusual, uncomfortable, and distant from the repository of the public records; that he had dissolved representative bodies, for opposing his invasions of the rights of the people; and after such dissolutions, he had refused to reassemble them for a long period of time. It was natural, therefore, that the people of the United States should entertain a strong jealousy on this subject, and should interpose a constitutional barrier against any such abuse

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[1] 1 Tucker's Black. Comm. App. 206, 207.

[2] 1 Black. Comm. 185 to 190; 2 Wilson's Law Lect. 154, 155; Com. Dig. *Parliament*, L. M. N. O. P.

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by the prerogative of the executive. The state constitutions generally contain some provision on the same subject, as a security to the independence of the legislature.

§ 842. These are all the powers and privileges, which are expressly vested in each house of congress by the constitution. What further powers and privileges they incidentally possess has been a question much discussed, and may hereafter be open, as new cases arise, to still further discussion. It is remarkable, that no power is conferred to punish for any contempts committed against either house; and yet it is obvious, that, unless such a power, to some extent, exists by implication, it is utterly impossible for either house to perform its constitutional functions. For instance, how is either house to conduct its own deliberations, if it may not keep out, or expel intruders? If it may not require and enforce upon strangers silence and decorum in its presence? If it may not enable its own members to have free ingress, egress, and regress to its own hall of legislation? And if the power exists, by implication, to require the duty, it is wholly nugatory, unless it draws after it the incidental authority to compel obedience, and to punish violations of it. It has been suggested by a learned commentator, quoting the language of Lord Bacon,[1] that, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated; and hence he deduces the conclusion, that, as the power to punish contempts is not among those enumerated, as belonging to either house, it does not exist.[2] Now, however wise or correct the maxim of Lord Bacon is in a general sense,

[1] Advancement of Learning; 1 Tuck. Black. App. 200, note.
[2] 1 Tucker's Black. 200.

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as a means of interpretation, it is not the sole rule. It is no more true, than another maxim of a directly opposite character, that where the end is required, the means are, by implication, given. Congress are required to exercise the powers of legislation and deliberation. The safety of the rights of the nation require this; and yet, because it is not expressly said, that congress shall possess the appropriate means to accomplish this end, the means are denied, and the end may be defeated. Does not this show, that rules of interpretation, however correct in a general sense, must admit of many qualifications and modifications in their application to the actual business of human life and human laws? Men do not frame constitutions of government to suspend its vital interests, and powers, and duties, upon metaphysical doubts, or ingenious refinements. Such instruments must be construed reasonably, and fairly, according to the scope of their purposes, and to give them effect and operation, not to cripple and destroy them. They must be construed according to the common sense applied to instruments of a like nature; and in furtherance of the fundamental objects proposed to be attained; and according to the known practice and incidents of bodies of a like nature.

§ 843. We may resort to the common law to aid us in interpreting such instruments, and their powers; for that law is the common rule, by which all our legislation is interpreted. It is known, and acted upon, and revered by the people. It furnishes principles equally for civil and criminal justice, for public privileges, and private rights. Now, by the common law, the power to punish contempts of this nature belongs incidentally to courts of justice, and to each house of parliament. No man ever doubted, or denied its existence, as to our

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colonial assemblies in general, whatever may have been thought, as to particular exercises of it.[1] Nor is this power to be viewed in an unfavourable light. It is a privilege, not of the members of either house; but, like all other privileges of congress, mainly intended as a privilege of the people, and for their benefit.[2] Mr. Justice Blackstone has, with great force, said, that "laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power, therefore, in the supreme courts of justice to suppress such contempts, &c., results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal."[3] And the same reasoning has been applied, with equal force, by another learned commentator to legislative bodies. "It would," says he, "be inconsistent with the nature of such a body to deny it the power of protecting itself from injury, or insult. If its deliberations are not perfectly free, its constituents are eventually injured. This power has never been denied in any country, and is incidental to the nature of all legislative bodies. If it possesses such a power in the case of an immediate insult or disturbance, preventing the exercise of its ordinary functions, it is impossible to deny it in other cases, which, although less immediate or violent, partake of the same character, by having a tendency to impair the firm and honest discharge of public duties."[4]

§ 844. This subject has of late undergone a great deal of discussion both in England and America; and

[1] 4 Black. Comm. 283, 284, 285, 286; 1 Black. Comm. 164, 165; Com. Dig. *Parliament*, G. 2, 5; *Burdett* v. *Abbott*, 14 East R. 1; *Burdett* v. *Colman*, 14 East R. 163; S. C. 5 Dow. Parl. Cases, 165, 199.

[2] Christian's note, 1 Black. Comm. 164. [3] 4 Black. Comm. 286.

[4] Rawle on the Constitution, ch. 4, p. 48; 1 Kent's Comm. (2d edit.) Lect. 11, p. 221, 235.

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has finally received the adjudication of the highest judicial tribunals in each country. In each country upon the fullest consideration the result was the same, viz. that the power did exist, and that the legislative body was the proper and exclusive forum to decide, when the contempt existed, and when there was a breach of its privileges; and, that the power to punish followed, as a necessary incident to the power to take cognizance of the offence.[1] The judgment of the

[1] The learned reader is referred to *Burdett* v. *Abbott*, 14 East R. 1; *Burdett* v. *Colman*, 14 East R. 163; S. C. 5 Dow. Parl. R. 165, 199; and *Anderson* v. *Dunn*, 6 Wheat. R. 204. The question is also much discussed in Jefferson's Manual, § 3, and 1 Tuck. Black. Comm. App. note, p. 200 to 205. See also 1 Black. Comm. 164, 165. — Mr. Jefferson, in his Manual, (§ 3,) in commenting on the case of William Duane for a political libel, has summed up the reasoning on each side with a manifest leaning against the power. It presents the strength of the argument on that side, and, on that account, deserves to be cited at large.

"In debating the legality of this order, it was insisted, in support of it, that every man, by the law of nature, and every body of men, possesses the right of self-defence; that all public functionaries are essentially invested with the powers of self-preservation; that they have an inherent right to do all acts necessary to keep themselves in a condition to discharge the trusts confided to them; that whenever authorities are given, the means of carrying them into execution are given by necessary implication; that thus we see the British parliament exercise the right of punishing contempts; all the state legislatures exercise the same power; and every court does the same; that, if we have it not, we sit at the mercy of every intruder, who may enter our doors, or gallery, and, by noise and tumult, render proceeding in business impracticable; that if our tranquillity is to be perpetually disturbed by newspaper defamation, it will not be possible to exercise our functions with the requisite coolness and deliberation; and that we must therefore have a power to punish these disturbers of our peace and proceedings. To this it was answered, that the parliament and courts of England have cognizance of contempts by the express provisions of their law; that the state legislatures have equal authority, because their powers are plenary; they represent their constituents completely, and possess all their powers, except such, as their constitutions have expressly denied them; that the courts of the several states have the same powers by the laws of their states, and those of the federal government by the same state laws

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Supreme Court of the United States, in the case alluded to, contains so elaborate and exact a consideration of the whole argument on each side, that it will be far more satisfactory to give it in a note, as it stands in the printed opinion, than to hazard, by any abridgment, impairing the just force of the reasoning.[1]

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adopted in each state, by a law of congress; that none of these bodies, therefore, derive those powers from natural or necessary right, but from express law; that congress have no such natural or necessary power, or any powers, but such as are given them by the constitution; that that has given them, directly, exemption from personal arrest, exemption from question elsewhere, for what is said in their house, and power over their own members and proceedings; for these no further law is necessary, the constitution being the law; that, moreover, by that article of the constitution, which authorizes them 'to make all laws necessary and proper for carrying into execution the powers vested by the constitution in them,' they may provide by law for an undisturbed exercise of their functions, for example, for the punishment of contempts, of affrays or tumult in their presence, &c; but, till the law be made, it does not exist, and does not exist, from their own neglect; that, in the mean time, however, they are not unprotected, the ordinary magistrates and courts of law being open and competent to punish all unjustifiable disturbances or defamations; and even their own sergeant, who may appoint deputies *ad libitum* to aid him, is equal to small disturbances; that in requiring a previous law, the constitution had regard to the inviolability of the citizen, as well as of the member; as, should one house in the regular form of a bill, aim at too broad privileges, it may be checked by the other, and both by the president; and also as, the law being promulgated, the citizen will know how to avoid offence. But if one branch may assume its own privileges without control; if it may do it on the spur of the occasion, conceal the law in its own breast, and, after the fact committed, makes its sentence both the law and the judgment on that fact; if the offence is to be kept undefined, and to be declared only *ex re nata*, and, according to the passions of the moment, and there be no limitation either in the manner or measure of the punishment, the condition of the citizen will be perilous indeed."

The reasoning of Lord Chief Justice De Grey in *Rex* v. *Brass Crosby*, (3 Wilson's R. 188,) and of Lord Ellenborough in *Burdett* v. *Abbott*, (14 East R. 1,) is exceedingly cogent and striking against that favoured by Mr. Jefferson. It deserves, and will requite an attentive perusal. See also *Burdett* v. *Abbott*, 4 Taunt. R. 401; 4 Dow's Parl. Rep. 165.

[1] It is necessary to premise, that the suit was brought for false imprisonment by a party, who had been arrested under a warrant of the

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§ 845. This is not the only case, in which the house of representatives has exerted the power to arrest, and punish for a contempt committed within the walls of the

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speaker of the house of representatives, by the sergeant-at-arms, for an alleged contempt of the house, (an attempt to bribe a member,) and the cause was decided upon a demurrer to the justification set up by the officer. After a preliminary remark upon the range of the argument by the counsel, Mr. Justice Johnson, in delivering the opinion of the Court proceeded as follows:

"The pleadings have narrowed them down to the simple inquiry, whether the house of representatives can take cognizance of contempts committed against themselves, under any circumstances? The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offence committed. Yet it cannot be denied, that the power to institute a prosecution must be dependent upon the power to punish. If the house of representatives possessed no authority to punish for contempt, the initiating process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it.

"It is certainly true, that there is no power given by the constitution to either house to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either house, or any one co-ordinate branch of the government. Shall we, therefore, decide, that no such power exists?

"It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government, which would have left nothing to implication, it cannot be doubted, that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers, which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

"The idea is utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposite it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

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house. The power was exerted[1] in the case of Robert Randall, in December, 1795, for an attempt to corrupt a member;[2] in 1796, in the case of ——, a chal-

"No one is so visionary, as to dispute the assertion, that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end is not always so direct and palpable, as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science, which has but few fixed principles, and practically consists in little more, than the exercise of a sound discretion, applied to the exigencies of the state, as they arise. It is the science of experiment.

"But if there is one maxim, which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers, which the people have intrusted to them. The interests and dignity of those, who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate, which awaits him; and yet it is no less certain, that the laws, under which he suffers, were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbour's rights.

"That 'the safety of the people is the supreme law,' not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach of insults or pollution.

"It is true, that the courts of justice in the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend. On the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered

[1] By a vote of 78 yeas against 17 nays.

[2] 1 Tuck. Black. Comm. App. 200 to 205, note; Jefferson's Manual, § 3.

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lenge given to a member, which was held a breach of privilege;[1] and in May, 1832, in the case of Samuel Houston, for an assault upon a member for words spoken

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either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempts shall not extend beyond its known and acknowledged limits of fine and imprisonment.

"But it is contended, that if this power in the house of representatives is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; that the executive, and every co-ordinate, and even subordinate, branch of the government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness.

"This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced.

"But what is the alternative? The argument obviously leads to the total annihilation of the power of the house of repsesentatives to guard itself from contempts; and leaves it exposed to every indignity and interruption, that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument, from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all, that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity, which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And accordingly to avoid the pressure of these considerations, it has been argued, that the right of the respective houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to congress within this district, enables them to provide by law against all other insults, against which there is any necessity for providing.

"It is to be observed, that so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favour; for, *non constat*, from the pleadings, but that this warrant issued for an offence committed in the immediate presence of the house.

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[1] Jefferson's Manual, § 3.

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in his place, and afterwards printed, reflecting on the character of Houston.[1] In the former case, the house punished the offence by imprisonment; in the

"Nor is it immaterial to notice, what difficulties the negation of this right in the house of representatives draws after it, when it is considered, that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit: the want of an express grant, and the unrestricted and undefined nature of the power here set up. For why should the house be at liberty to exercise an ungranted, an unlimited, and undefined power within their walls, any more, than without them? If the analogy with individual right and power be resorted to, it will reach no farther, than to exclusion; and it requires no exuberance of imagination to exhibit the ridiculous consequences, which might result from such a restriction, imposed upon the conduct of a deliberative assembly.

"Nor would their situation be materially relieved by resorting to their legislative power within the district. That power may, indeed, be applied to many purposes, and was intended by the constitution to extend to many purposes indispensable to the security and dignity of the general government; but there are purposes of a more grave and general character, than the offences, which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations, which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases, to which the epithet *contempt* might be reasonably applied.

"But although the *offence* be held undefinable, it is justly contended, that the *punishment* need not be indefinite. Nor is it so.

"We are not now considering the extent, to which the punishing power of congress, by a legislative act, may be carried. On that subject, the bounds of their power are to be found in the provisions of the constitution.

"The present question is, what is the extent of the punishing power, which the deliberative assemblies of the Union may assume, and exercise on the principle of self-preservation?

"Analogy, and the nature of the case, furnish the answer — '*the least possible power adequate to the end proposed*;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative, where the individual proves

[1] See the Speeches of Mr. Doddridge and Mr. Burges on this occasion.

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latter, by a reprimand by the speaker. So in 1800, in the case of William Duane, for a printed libel against the senate, the party was held guilty of a contempt, and

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contumacious. And even to the *duration* of imprisonment a period is imposed by the nature of things; since the existence of the power, that imprisons, is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.

"This view of the subject necessarily sets bounds to the exercise of a caprice, which has sometimes disgraced deliberative assemblies, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only, as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions, there is no more danger of their being revived, probably, than in our own.

"But the American legislative bodies have never possessed, or pretended to, the omnipotence, which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment.

"If it be inquired, what security is there, that with an officer avowing himself devoted to their will, the house of representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporeal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press? The reply is to be found in the consideration, that the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things, as they are, to suppose, that any deliberative asembly, constituted under it, would ever assert any other rights and powers, than those, which had been established by long practice, and conceded by public opinion. Melancholy, also, would be that state of distrust, which rests not a hope upon a moral influence. The most absolute tyranny could not subsist, where men could not be trusted with power, because they might abuse it, much less a government, which has no other basis, than the sound morals, moderation, and good sense of those, who compose it. Unreasonable jealousies not only blight the pleasures, but dissolve the very texture of society.

"But it is argued, that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the house

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punished by imprisonment.[1] Nor is there any thing peculiar in the claim under the constitution of the United States. The same power has been claimed, and

of representatives; that the express grant of power to punish their members respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other, than their own members.

"This argument proves too much; for its direct application would lead to the annihilation of almost every power of congress. To enforce its laws upon any subject, without the sanction of punishment, is obviously impossible. Yet there is an express grant of power to punish in one class of cases and one only; and all the punishing power exercised by congress in any cases, except those, which relate to piracy and offences against the laws of nations, is derived from implication. Nor did the idea ever occur to any one, that the express grant in one class of cases repelled the assumption of the punishing power in any other.

"The truth is, that the exercise of the powers given over their own members was of such a delicate nature, that a constitutional provision became necessary to assert, or communicate it. Constituted, as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honour or interests of the state, which sent him.

"In reply to the suggestion, that, on this same foundation of necessity, might be raised a superstructure of implied powers in the executive, and every other department, and even ministerial officer of the government, it would be sufficient to observe, that neither analogy nor precedent, would support the assertion of such powers in any other, than a legislative or judicial body. Even corruption any where else would not contaminate the source of political life. In the retirement of the cabinet, it is not expected, that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive, or any other department, to hold a public deliberative assembly. These are not arguments; they are visions, which mar the enjoyment of actual blessings, with the attack or feint of the harpies of imagination.

"As to the minor points made in this case, it is only necessary to observe, that there is nothing on the face of this record, from which it can appear, on what evidence this warrant was issued. And we are not to presume, that the house of representatives would have issued it without duly establishing the fact charged on the individual. And, as to

[1] Journ. of Senate, 27th March, 1800; Jefferson's Manual, § 3. See also *Burdett* v. *Abbott*, 14 East, 1.

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exercised repeatedly, under the state governments, independent of any special constitutional provision, upon the broad ground stated, by Mr. Chief Justice Shippen, that the members of the legislature are legally, and inherently possessed of all such privileges, as are necessary to enable them, with freedom and safety, to execute the great trust reposed in them by the body of the people, who elected them.[1]

§ 846. The power to punish for contempts, thus asserted both in England and America, is confined to punishment during the session of the legislative body, and cannot be extended beyond it.[2] It seems, that the power of congress to punish cannot, in its utmost extent, proceed beyond imprisonment; and then it terminates with the adjournment, or dissolution of that body.[3] Whether a fine may not be imposed, has been recently[4] made a question in a case of contempt

the distance, to which the process might reach, it is very clear, that there exists no reason for confining its operation to the limits of the District of Columbia. After passing those limits, we know no bounds, that can be prescribed to its range, but those of the United States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or Maine may as probably charge them with bribery and corruption, or attempt, by letter, to induce the commission of either, as the inhabitant of any other section of the Union. If the inconvenience be urged, the reply is obvious: there is no difficulty in observing that respectful deportment, which will render all apprehension chimerical."

See also *Rex* v. *Brass Crosby*, 3 Wilson R. 188. — In the convention a proposition was made and referred to the select committee appointed to draft the constitution giving authority to punish for contempts, and enumerating them. The committee made no report on the subject. Journ. of Convention, 20th Aug. 263, 264.

[1] *Bolton* v. *Martin*, 1 Dall. R. 296. See also House of Delegates in 1784, the case of John Warden, 1 Elliot's Debates, 69; *Coffin* v. *Coffin*, 4 Mass. R. 1, 34, 35.

[2] *Dunn* v. *Anderson*, 6 Wheat. R. 204, 230, 231.

[3] *Dunn* v. *Anderson*, 6 Wheat. R. 204, 230, 231; 1 Kent's Comm. Lect. 11, p. 221.

[4] In 1831.

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before the house of lords; upon which occasion Lord Chancellor Brougham expressed himself in the negative, and the other law lords, Eldon and Tenterden, in the affirmative; but the point was not then solemnly decided.[1] It had, however, been previously affirmed by the house of lords in the case of *Rex* v. *Flower*, (8 T. R. 314,) in case of a libel upon one of the Bishops. Lord Kenyon then said, that in ascertaining and punishing for a contempt of its privileges, the house acted in a judicial capacity.[2]

§ 847. The sixth section of the first article contains an enumeration of the rights, privileges, and disabilities of the members of each house in their personal and individual characters, as contradistinguished from the rights, privileges, and disabilities of the body, of which they are members. It may here, again, be remarked, that these rights and privileges are, in truth, the rights and privileges of their constituents, and for their benefit and security, rather than the rights and privileges of the member for his own benefit and security.[3] In like manner, the disabilities imposed are founded upon the same comprehensive policy; to guard the powers of the representative from abuse, and to secure a wise, impartial, and uncorrupt administration of his duties.

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[1] See a learned article on this subject in the English Law Magazine for July, 1831, p. 1, &c. Parliamentary Debates, 1831.

[2] In *Yates* v. *Lansing*, (9 Johns. R. 417,) Mr. Justice Platt said, that "the right of punishing for contempts by summary conviction is inherent in all courts of justice and legislative assemblies, and is essential to their protection and existence. It is a branch of the common law adopted and sanctioned by our state constitution. The decision involved in this power is in a great measure arbitrary and undefinable; and yet the experience of ages has demonstrated, that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice."

[3] Com. Dig. *Parliament*, D. 17.

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§ 848. The first clause is as follows: "The senators "and representatives shall receive a compensation for "their services, to be ascertained by law, and paid out "of the treasury of the United States. They shall, in "all cases, except treason, felony, and breach of the "peace, be privileged from arrest during their attend- "ance at the session of their respective houses, and in "going to, and returning from, the same. And for any "speech or debate in either house they shall not be "questioned in any other place."

§ 849. In respect to compensation, there is, at present, a marked distinction between the members of the British parliament, and the members of congress; the former not being, at present, entitled to any pay. Formerly, indeed, the members of the house of commons were entitled to receive wages from their constituents; but the last known case is that of Andrew Marvell, who was a member from Hull, in the first parliament after the restoration of Charles the Second. Four shillings sterling a day used to be allowed for a knight of the shire; and two shillings a day for a member of a city or borough; and this rate was established in the reign of Edward the Third. And we are told, that two shillings a day, the allowance to a burgess, was so considerable a sum, in these ancient times, that there are many instances, where boroughs petitioned to be excused from sending members to parliament, representing, that they were engaged in building bridges or other public works, and, therefore, unable to bear so extraordinary an expense.[1] It is believed, that the practice in America during its colonial state was, if not universally, at least generally, to allow a

[1] 1 Black. Comm. 174, and Christian's note, 34; Id. Prynne on 4 Inst. 32; Com. Dig. *Parliament*, D. 16.

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compensation to be paid to members; and the practice is believed to be absolutely universal, under the state constitutions. The members are not, however, always paid out of the public treasury; but the practice still exists, constitutionally, or by usage, in some of the states, to charge the amount of the compensation fixed by the legislature upon the constituents, and levy it in the state tax. That has certainly been the general course in the state of Massachusetts; and it was probably adopted from the ancient practice in England.

§ 850. Whether it is, on the whole, best to allow to members of legislative bodies a compensation for their services, or whether their services should be considered merely honorary, is a question admitting of much argument on each side; and it has accordingly found strenuous advocates, and opponents, not only in speculation, but in practice. It has been already seen, that in England none is now allowed, or claimed; and there can be little doubt, that public opinion is altogether in favour of their present course. On the other hand, in America an opposite opinion prevails among those, whose influence is most impressive with the people on such subjects. It is not surprising, that under such circumstances, there should have been a considerable diversity of opinion manifested in the convention itself. The proposition to allow compensation out of the public treasury, to members of the house of representatives, was originally carried by a vote of eight states against three;[1] and to the senators by a vote of seven states against three, one being divided.[2] At a subsequent period, a motion to strike out the payment out of the public treasury was lost by a vote of four states in

[1] Journal of Convention, 67, 116, 117. [2] Id. 119.

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the affirmative, and five in the negative, two being divided;[1] and the whole proposition, as to representatives, was (as amended) lost by a vote of five states for it, and five against it, one being divided.[2] And as to senators, a motion was made, that they should be paid by their respective states, which was lost, five states voting for it, and six against it; and then the proposition to pay them out of the public treasury was lost by a similar vote.[3] At a subsequent period a proposition was reported, that the compensation of the members of both houses should be made by the state, in which they were chosen;[4] and ultimately the present plan was agreed to by a vote of nine states against two.[5] Such a fluctuation of opinion exhibits in a strong light the embarrassing considerations, which surrounded the subject.[6]

§ 851. The principal reasons in favour of a compensation may be presumed to have been the following. In the first place, the advantage, it secured, of commanding the first talents of the nation in the public councils, by removing a virtual disqualification, that of poverty, from that large class of men, who, though favoured by nature, might not be favoured by fortune. It could hardly be expected, that such men would make the necessary sacrifices in order to gratify their ambition for a public station; and if they did, there was a corresponding danger, that they might be compelled by their necessities, or tempted by their wants, to yield up their independence, and perhaps their integrity, to the allurements of the corrupt, or the opulent.[7] In the

[1] Journ. of Convention, 142. [2] Id. 144. [3] Id. 150, 151.
[4] Id. 219, § 10. [5] Id. 251.
[6] See Yates's Minutes, 4 Elliot's Deb. 92 to 99.
[7] See 2 Elliot's Debates, 279, 280; Yates's Minutes, 4 Elliot's Deb. 92 to 99.

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next place, it would, in a proportionate degree, gratify the popular feeling by enlarging the circle of candidates, from which members might be chosen, and bringing the office within the reach of persons in the middle ranks of society, although they might not possess shining talents; a course best suited to the equality found, and promulgated in a republic. In the next place, it would make a seat in the national councils, as attractive, and perhaps more so, than in those of the state, by the superior emoluments of office. And in the last place, it would be in conformity to a long and well settled practice, which embodied public sentiment, and had been sanctioned by public approbation.[1]

§ 852. On the other hand, it might be, and it was, probably, urged against it, that the practice of allowing compensation was calculated to make the office rather more a matter of bargain and speculation, than of high political ambition. It would operate, as an inducement to vulgar and groveling demagogues, of little talent, and narrow means, to defeat the claims of higher candidates, than themselves; and with a view to the compensation alone to engage in all sorts of corrupt intrigues to procure their own election. It would thus degrade these high trusts from being deemed the reward of distinguished merit, and strictly honorary, to a mere traffic for political office, which would first corrupt the people at the polls, and then subject their liberties to be bartered by their venal candidate. Men of talents in this way would be compelled to degradation, in order to acquire office, or would be excluded by more unworthy, or more cunning candidates, who would feel, that the labourer was worthy of his hire. There is no

[1] See Rawle on the Constitution, ch. 18, p. 181.

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danger, that the want of compensation would deter men of suitable talents and virtues, even in the humbler walks of life, from becoming members; since it could scarcely be presumed, that the public gratitude would not, by other means, aid them in their private business, and increase their just patronage. And if, in a few cases, it should be otherwise, it should not be forgotten, that one of the most wholesome lessons to be taught in republics was, that men should learn suitable economy and prudence in their private affairs; and that profusion and poverty were, with a few splendid exceptions, equally unsafe to be entrusted with the public rights and interests, since, if they did not betray, they would hardly be presumed willing to protect them. The practice of England abundantly showed, that compensation was not necessary to bring into public life the best talents and virtues of the nation. In looking over her list of distinguished statesmen, of equal purity and patriotism, it would be found, that comparatively few had possessed opulence; and many had struggled through life with the painful pressure of narrow resources, the *res augustæ domi*.[1]

§ 853. It does not become the commentator to say, whether experience has as yet given more weight to the former, than to the latter reasons. Certain it is, that the convention, in adopting the rule of allowing a compensation, had principally in view the importance of securing the highest dignity and independence in the discharge of legislative functions, and the justice, as well as duty of a free people, possessing adequate means, to indemnify those, who were employed in their service, against all the sacrifices incident to their

[1] See Yates's Minutes, 4 Elliot's Debates, 92 to 99.

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station. It has been justly observed, that the principle of compensation to those, who render services to the public, runs through the whole constitution.[1]

§ 854. If it be proper to allow a compensation for services to the members of congress, there seems the utmost propriety in its being paid out of the public treasury of the United States. The labour is for the benefit of the nation, and it should properly be remunerated by the nation. Besides; if the compensation were to be allowed by the states, or by the constituents of the members, if left to their discretion, it might keep the latter in a state of slavish dependence, and might introduce great inequalities in the allowance. And if it were to be ascertained by congress, and paid by the constituents, there would always be danger, that the rule would be fixed to suit those, who were the least enlightened, and the most parsimonious, rather than those, who acted upon a high sense of the dignity and the duties of the station. Fortunately, it is left for the decision of congress. The compensation is "to be ascertained by law;" and never addresses itself to the pride, or the parsimony, the local prejudices, or local habits of any part of the Union. It is fixed with a liberal view to the national duties, and is paid from the national purse. If the compensation had been left, to be fixed by the state legislature, the general government would have become dependent upon the governments of the states; and the latter could almost, at their pleasure, have dissolved it.[2] Serious evils were felt from this source under the confederation, by which each state was to maintain its own delegates in congress;[3] for it was found, that the

[1] Rawle on the Constitution, ch. 18, p. 179.
[2] 2 Elliot's Debates, 279.
[3] Articles of Confederation, art. 5.

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states too often were operated upon by local considerations, as contradistinguished from general and national interests.[1]

§ 855. The only practical question, which seems to have been farther open upon this head, is, whether the compensation should have been ascertained by the constitution itself, or left, (as it now is,) to be ascertained from time to time by congress. If fixed by the constitution, it might, from the change of the value of money, and the modes of life, have become too low, and utterly inadequate. Or it might have become too high in consequence of serious changes in the prosperity of the nation.[2] It is wisest, therefore, to have it left, where it is, to be decided by congress from time to time, according to their own sense of justice, and a large view of the national resources. There is no danger, that it will ever become excessive, without exciting general discontent, and then it will soon be changed from the reaction of public opinion. The danger rather is, that public opinion will become too sensitive upon this subject; and refuse to allow any addition to what may be at the time a very moderate allowance. In the actual practice of the government, this subject has rarely been stirred without producing violent excitements at the elections. This alone is sufficient to establish the safety of the actual exercise of the power by the bodies, with which it is lodged, both in the state and national legislatures.[3] It is proper, however, to add, that the omission to provide some constitutional mode of fixing the pay of members of congress, without leaving the subject to their discretion, formed in some minds a strong objection to the constitution.[4]

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[1] 2 Elliot's Debates, 279; 1 Elliot's Debates, 70, 71.

[2] 2 Elliot's Debates, 279, 280, 281, 282. [3] 1 Elliot's Debates, 70, 71.

[4] See Gov. Randolph's Letter; 3 Amer. Mus. 62, 70.

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§ 856. The next part of the clause regards the privilege of the members from arrest, except for crimes, during their attendance at the sessions of congress, and their going to, and returning from them. This privilege is conceded by law to the humblest suitor and witness in a court of justice; and it would be strange, indeed, if it were denied to the highest functionaries of the state in the discharge of their public duties. It belongs to congress in common with all other legislative bodies, which exist, or have existed in America, since its first settlement, under every variety of government; and it has immemorially constituted a privilege of both houses of the British parliament.[1] It seems absolutely indispensable for the just exercise of the legislative power in every nation, purporting to possess a free constitution of government; and it cannot be surrendered without endangering the public liberties, as well as the private independence of the members.[2]

§ 857. This privilege from arrest, privileges them of course against all process, the disobedience to which is punishable by attachment of the person, such as a *subpœna ad respondendum, aut testificandum*, or a summons to serve on a jury; and (as has been justly observed) with reason, because a member has superiour duties to perform in another place. When a representative is withdrawn from his seat by a summons, the people, whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his state loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of no com-

[1] 1 Black. Comm. 164, 165; Com. Dig. *Parliament*, D. 17; Jefferson's Manual, § 3, *Privilege*; *Benyon* v. *Evelyn*, Sir O. Bridg. R. 334.

[2] 1 Kent. Comm. Lect. 11, p. 221; *Bolton* v. *Martin*, 1 Dall. R. 296; *Coffin* v. *Coffin*, 4 Mass. R. 1.

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parison.[1] The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also. And every man must at his peril take notice, who are the members of the house returned of record.[2]

§ 858. The privilege of the peers of the British parliament to be free from arrest, in civil cases, is for ever sacred and inviolable. For other purposes, (as for common process,) it seems, that their privilege did not extend, but from the teste of the summons to parliament, and for twenty days before and after the session. But that period has now, as to all common process but arrest, been taken away by statute.[3] The privilege of the members of the house of commons from arrest is for forty days after every prorogation, and for forty days before the next appointed meeting, which in effect is as long, as the parliament lasts, it seldom being prorogued for more than four score days, at a time.[4] In case of a dissolution of parliament, it does not appear, that the privilege is confined to any precise time; the rule being, that the party is entitled to it for a convenient time, *redeundo.*[5]

§ 859. The privilege of members of parliament formerly extended also to their servants and goods, so that they could not be arrested. But so far, as it went to obstruct the ordinary course of justice in the British courts, it has since been restrained.[6] In the mem-

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1 Jefferson's Manual, § 3. 2 Id. § 3.

3 Com. Dig. *Parliament*, D. 17; 1 Black. Comm. 165, 166.

4 1 Black. Comm. 165; Com. Dig. *Parliament*, D. 17.

5 *Holiday* v. *Pitt*, 2 Str. R. 985; S. C. Cas. Temp. Hard. 28; 1 Black. Comm. 165; Christian's note, 21; *Barnard* v. *Mordaunt*, 1 Kenyon R. 125.

6 Com. Dig. *Parliament*, D. 17; 1 Black. Comm. 165; Jefferson's Manual, § 3.

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bers of congress, the privilege is strictly personal, and does not extend to their servants or property. It is also, in all cases confined to a reasonable time, *eundo, morando, et redeundo*, instead of being limited by a precise number of days. It was probably from a survey of the abuses of privilege, which for a long time defeated in England the purposes of justice, that the constitution has thus marked its boundary with a sedulous caution.[1]

§ 860. The effect of this privilege is, that the arrest of the member is unlawful, and a trespass *ab initio*, for which he may maintain an action, or proceed against the aggressor by way of indictment. He may also be discharged by motion to a court of justice, or upon a writ of *habeas corpus*;[2] and the arrest may also be punished, as a contempt of the house.[3]

§ 861. In respect to the time of going and returning, the law is not so strict in point of time, as to require the party to set out immediately on his return; but allows him time to settle his private affairs, and to prepare for his journey. Nor does it nicely scan his road, nor is his protection forfeited, by a little deviation from that, which is most direct; for it is supposed, that some superior convenience or necessity directed it.[4] The privilege from arrest takes place by force of the election, and before the member has taken his seat, or is sworn.[5]

§ 862. The exception to the privilege is, that it shall not extend to "treason, felony, or breach of the peace."

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[1] Jefferson's Manual, § 3.

[2] Id. § 3; 2 Str. 990; 2 Wilson's R. 151; Cas. Temp. Hard. 28.

[3] 1 Black. Comm. 164, 165, 166; Com. Dig. *Parliament*, D. 17; Jefferson's Manual, § 3.

[4] Jefferson's Manual, § 3; 2 Str. R. 986, 987.

[5] Jefferson's Manual, § 3; but see Com. Dig. *Parliament*, D. 17.

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These words are the same as those, in which the exception to the privilege of parliament is usually expressed at the common law, and was doubtless borrowed from that source.[1] Now, as all crimes are offences against the peace, the phrase "breach of the peace" would seem to extend to all indictable offences, as well those, which are, in fact, attended with force and violence, as those, which are only constructive breaches of the peace of the government, inasmuch as they violate its good order.[2] And so in truth it was decided in parliament, in the case of a seditious libel, published by a member, (Mr. Wilkes,) against the opinion of Lord Camden and the other judges of the Court of Common Pleas;[3] and, as it will probably now be thought, since the party spirit of those times has subsided, with entire good sense, and in furtherance of public justice.[4] It would be monstrous, that any member should protect himself from arrest, or punishment for a libel, often a crime of the deepest malignity and mischief, while he would be liable to arrest, for the pettiest assault, or the most insignificant breach of the peace.

§ 863. The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant, or ineffectual.[5] This privilege also is derived from the practice of the British parliament, and was in full exercise in our colonial legislatures, and now belongs to the legislature of every state in the Union, as matter of constitutional right. In the British parliament it is a claim of immemorial right, and is now farther fortified by an act

1 4 Inst. 25; 1 Black. Comm. 165; Com. Dig. *Parliament*, D. 17.
2 1 Black. Comm. 166.
3 *Rex* v. *Wilkes*, 2 Wilson's R. 151.
4 See 1 Black. Comm. 166, 167.
5 See 2 Wilson's Law Lect. 156.

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of parliament; and it is always particularly demanded of the king in person by the speaker of the house of commons, at the opening of every new parliament.[1] But this privilege is strictly confined to things done in the course of parliamentary proceedings, and does not cover things done beyond the place and limits of duty.[2] Therefore, although a speech delivered in the house of commons is privileged, and the member cannot be questioned respecting it elsewhere; yet, if he publishes his speech, and it contains libellous matter, he is liable to an action and prosecution therefor, as in common cases of libel.[3] And the same principles seem applicable to the privilege of debate and speech in congress. No man ought to have a right to defame others under colour of a performance of the duties of his office. And if he does so in the actual discharge of his duties in congress, that furnishes no reason, why he should be enabled through the medium of the press to destroy the reputation, and invade the repose of other citizens. It is neither within the scope of his duty, nor in furtherance of public rights, or public policy. Every citizen has as good a right to be protected by the laws from malignant scandal, and false charges, and defamatory imputations, as a member of congress has to utter them in his seat. If it were otherwise, a man's character might be taken away without the possibility of redress, either by the malice, or indiscretion, or overweaning self-conceit of a member of congress.[4] It is proper, however, to apprise the learned reader, that it has been recently denied in congress by very distinguished lawyers, that the privilege of speech and debate in con-

[1] 1 Black. Comm. 164, 165. [2] Jefferson's Manual, § 3.
[3] The *King* v. *Creevy*, 1 Maule & Selw. 273.
[4] See the reasoning in *Coffin* v. *Coffin*, 4 Mass. R. 1.

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gress does not extend to publication of his speech. And they ground themselves upon an important distinction arising from the actual differences between English and American legislation. In the former, the publication of the debates is not strictly lawful, except by license of the house. In the latter, it is a common right, exercised and supported by the direct encouragement of the body. This reasoning deserves a very attentive examination.[1]

§ 864. The next clause regards the disqualifications of members of congress; and is as follows: "No sen- "ator or representative shall, during the time, for which "he was elected, be appointed to any civil office under "the authority of the United States, which shall have "been created, or the emoluments whereof shall have "been increased, during such time. And no person, "holding any office under the United States, shall be "a member of either house of congress during his con- "tinuance in office." This clause does not appear to have met with any opposition in the convention, as to the propriety of some provision on the subject, the principal question being, as to the best mode of expressing the disqualifications.[2] It has been deemed by one commentator an admirable provision against venality, though not perhaps sufficiently guarded to prevent evasion.[3] And it has been elaborately vindicated by another with uncommon earnestness.[4] The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments,

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[1] Mr. Doddridge's Speech in the case of Houston, in May, 1832; Mr. Burges's Speech, Ibid.

[2] Journ. of Convention, 214, 319, 320, 322, 323.

[3] 1 Tuck. Black. Comm. App. 198, 214, 215, 375.

[4] Rawle on the Const. ch. 19, p. 184, &c.; 1 Wilson's Law Lect. 446 to 449.

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are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only "during the time, for which he was elected;" thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination. It has sometimes been matter of regret, that the disqualification had not been made co-extensive with the supposed mischief; and thus have for ever excluded members from the possession of offices created, or rendered more lucrative by themselves.[1] Perhaps there is quite as much wisdom in leaving the provision, where it now is.

§ 865. It is not easy, by any constitutional or legislative enactments, to shut out all, or even many of the avenues of undue or corrupt influence upon the human mind. The great securities for society — those, on which it must for ever rest in a free government — are responsibility to the people through elections, and personal character, and purity of principle. Where these are wanting, there never can be any solid confidence, or any deep sense of duty. Where these exist, they become a sufficient guaranty against all sinister influences, as well as all gross offences. It has been remarked with equal profoundness and sagacity, that, as there is a degree of depravity in mankind, which requires a certain degree of circumspection and distrust; so there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of

[1] Rawle on the Constitution, ch. 19. See 1 Tuck. Black. Comm. App. 375.

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these qualities in a higher form, than any other.[1] It might well be deemed harsh to disqualify an individual from any office, clearly required by the exigencies of the country, simply because he had done his duty.[2] And, on the other hand, the disqualification might operate upon many persons, who might find their way into the national councils, as a strong inducement to postpone the creation of necessary offices, lest they should become victims of their high discharge of duty. The chances of receiving an appointment to a new office are not so many, or so enticing, as to bewilder many minds; and if they are, the aberrations from duty are so easily traced, that they rarely, or never escape the public reproaches. And if influence is to be exerted by the executive for improper purposes, it will be quite as easy, and in its operation less seen, and less suspected, to give the stipulated patronage in another form, either of office, or of profitable employment, already existing. And even a general disqualification might be evaded by suffering the like patronage silently to fall into the hands of a confidential friend, or a favourite child or relative. A dishonourable traffic in votes, if it should ever become the engine of party or of power in our country, would never be restrained by the slight network of any constitutional provisions of this sort. It would seek, and it would find its due rewards in the general patronage of the government, or in the possession of the offices conferred by the people, which would bring emolument, as well as influence, and secure power by gratifying favourites. The history of our state governments (to go no farther) will scarcely be thought by any ingenuous mind to afford any proofs, that the ab-

[1] The Federalist, No. 55.

[2] 2 Elliot's Debates, 279.

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sence of such a disqualification has rendered state legislation less pure, or less intelligent; or, that the existence of such a disqualification would have retarded one rash measure, or introduced one salutary scruple into the elements of popular or party strife. History, which teaches us by examples, establishes the truth beyond all reasonable question, that genuine patriotism is too lofty in its honour, and too enlightened in its object, to need such checks; and that weakness and vice, the turbulence of faction, and the meanness of avarice, are easily bought, notwithstanding all the efforts to fetter, or ensnare them.

§ 866. The other part of the clause, which disqualifies persons holding any office under the United States from being members of either house during their continuance in office, has been still more universally applauded; and has been vindicated upon the highest grounds of public policy. It is doubtless founded in a deference to state jealousy, and a sincere desire to obviate the fears, real or imaginary, that the general government would obtain an undue preference over the state governments.[1] It has also the strong recommendation, that it prevents any undue influence from office, either upon the party himself, or those, with whom he is associated in legislative deliberations. The universal exclusion of all persons holding office is (it must be admitted) attended with some inconveniences. The heads of the departments are, in fact, thus precluded from proposing, or vindicating their own measures in the face of the nation in the course of debate; and are compelled to submit them to other men, who are either imperfectly acquainted with the measures, or are indif-

[1] See Rawle on the Constitution, ch. 19; The Federalist, No. 56.

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ferent to their success or failure. Thus, that open and public responsibility for measures, which properly belongs to the executive in all governments, and especially in a republican government, as its greatest security and strength, is completely done away. The executive is compelled to resort to secret and unseen influence, to private interviews, and private arrangements, to accomplish its own appropriate purposes; instead of proposing and sustaining its own duties and measures by a bold and manly appeal to the nation in the face of its representatives. One consequence of this state of things is, that there never can be traced home to the executive any responsibility for the measures, which are planned, and carried at its suggestion. Another consequence will be, (if it has not yet been,) that measures will be adopted, or defeated by private intrigues, political combinations, irresponsible recommendations, and all the blandishments of office, and all the deadening weight of silent patronage. The executive will never be compelled to avow, or to support any opinions. His ministers may conceal, or evade any expression of their opinions. He will seem to follow, when in fact he directs the opinions of congress. He will assume the air of a dependent instrument, ready to adopt the acts of the legislature, when in fact his spirit and his wishes pervade the whole system of legislation. If corruption ever eats its way silently into the vitals of this republic, it will be, because the people are unable to bring responsibility home to the executive through his chosen ministers. They will be betrayed, when their suspicions are most lulled by the executive, under the disguise of an obedience to the will of congress. If it would not have been safe to trust the heads of departments, as representatives, to the choice of the peo-

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ple, as their constituents, it would have been at least some gain to have allowed them a seat, like territorial delegates, in the house of representatives, where they might freely debate without a title to vote. In such an event, their influence, whatever it would be, would be seen, and felt, and understood, and on that account would have involved little danger, and more searching jealousy and opposition; whereas, it is now secret and silent, and from that very cause may become overwhelming.

§ 867. One other reason in favour of such a right is, that it would compel the executive to make appointments for the high departments of government, not from personal or party favourites, but from statesmen of high public character, talents, experience, and elevated services; from statesmen, who had earned public favour, and could command public confidence. At present, gross incapacity may be concealed under official forms, and ignorance silently escape by shifting the labours upon more intelligent subordinates in office. The nation would be, on the other plan, better served; and the executive sustained by more masculine eloquence, as well as more liberal learning.

§ 868. In the British parliament no restrictions of the former sort exist, and few of the latter, except such as have been created by statute.[1] It is true, that an acceptance of any office under the crown is a vacation of a seat in parliament. This is wise; and secures the people from being betrayed by those, who hold office, and whom they do not choose to trust. But generally, they are re-eligible; and are entitled, if the people so choose, again to hold a seat in the house of commons,

[1] See 1 Black. Comm. 175, 176.

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notwithstanding their official character.[1] The consequence is, that the ministers of the crown assume an open public responsibility; and if the representation of the people in the house of commons were, as it is under the national government, founded upon a uniform rule, by which the people might obtain their full share of the government, it would be impossible for the ministry to exercise a controlling influence, or escape (as in America they may) a direct palpable responsibility. There can be no danger, that a free people will not be sufficiently watchful over their rulers, and their acts, and opinions, when they are known and avowed; or, that they will not find representatives in congress ready to oppose improper measures, or sound the alarm upon arbitrary encroachments. The real danger is, when the influence of the rulers is at work in secret, and assumes no definite shape; when it guides with a silent and irresistible sway, and yet covers itself under the forms of popular opinion, or independent legislation; when it does nothing, and yet accomplishes every thing.

§ 869. Such is the reasoning, by which many enlightened statesmen have not only been led to doubt, but even to deny the value of this constitutional disqualification. And even the most strenuous advocates of it are compelled so far to admit its force, as to concede, that the measures of the executive government, so far as they fall within the immediate department of a particular officer, might be more directly and fully explained on the floor of the house.[2] Still, however, the reasoning from the British practice has not been deemed satisfactory by the public; and the guard in-

[1] 1 Black. Comm. 175, 176, Christian's note, 39.
[2] Rawle on the Constitution, ch. 19. p. 187.

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terposed by the constitution has been received with general approbation, and has been thought to have worked well during our experience under the national government.[1] Indeed, the strongly marked parties in the British parliament, and their consequent dissensions have been ascribed to the non-existence of any such restraints; and the progress of the influence of the crown, and the supposed corruptions of legislation, have been by some writers traced back to the same original blemish.[2] Whether these inferences are borne out by historical facts, is a matter, upon which different judgments may arrive at different conclusions; and a work, like the present, is not the proper place to discuss them.

[1] Mr. Rawle's remarks in his Treatise on Constitutional Law, (ch. 19,) are as full on this point, as can probably be found. See also The Federalist, No. 55; 1 Tucker's Black. Comm. App. 198, 214, 215; 2 Elliot's Debates, 278, 279, 280, 281, 282; 1 Wilson's Law Lect. 446 to 449.

[2] 1 Wilson's Law Lect. 446 to 449.

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CHAPTER XIII.

MODE OF PASSING LAWS. PRESIDENT'S NEGATIVE.

§ 870. The seventh section of the first article treats of two important subjects, the right of originating revenue bills, and the nature and extent of the president's negative upon the passing of laws.

§ 871. The first clause declares — "All bills for "raising revenue shall originate in the house of repre- "sentatives; but the senate may propose, or concur "with amendments, as on other bills." This provision, so far as it regards the right to originate what are technically called "money bills," is, beyond all question, borrowed from the British house of commons, of which it is the ancient and indisputable privilege and right, that all grants of subsidies and parliamentary aids shall begin in their house, and are first bestowed by them, although their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature.[1] The general reason given for this privilege of the house of commons is, that the supplies are raised upon the body of the people; and therefore it is proper, that they alone should have the right of taxing themselves. And Mr. Justice Blackstone has very correctly remarked, that this reason would be unanswerable, if the commons taxed none but themselves. But it is notorious, that a very large share of property is in possession of the lords; that this property is equally taxed, as the property of the com-

[1] 1 Black. Comm. 169.

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mons; and therefore the commons, not being the sole persons taxed, this cannot be the reason of their having the sole right of raising and modelling the supply. The true reason seems to be this. The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced, more likely to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would, therefore, be extremely dangerous to give the lords any power of framing new taxes for the subject. It is sufficient, that they have a power of rejecting, if they think the commons too lavish or improvident in their grants.[1]

§ 872. This seems a very just account of the matter, with reference to the spirit of the British constitution; though a different explanation has been deduced from a historical review of the power. It has been asserted to have arisen from the instructions from time to time given by the constituents of the commons, (whether county, city, or borough,) as to the rates and assessments, which they were respectively willing to bear and assent to; and from the aggregate it was easy for the commons to ascertain the whole amount, which the commonalty of the whole kingdom were willing to grant to the king.[2] Be this as it may, so jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any power, but that of rejecting. They will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; and under

[1] 1 Black. Comm. 169; De Lolme on Constitution, ch. 4, 8, p. 66, 84, 85, and note.

[2] 2 Wilson's Law Lect. 161, 162, 163, citing Millar on Constitution, 398. But see 1 Wilson's Law Lect. 444, 445.

See 3 Hall ... 37, 44.

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this appellation are included all bills, by which money is directed to be raised upon the subject for any purpose, or in any shape whatsoever, either for the exigencies of the government, and collected from the kingdom in general, as the land tax, or for private benefit, and collected in any particular district, as turnpikes, parish rates, and the like.[1] It is obvious, that this power might be capable of great abuse, if other bills were tacked to such money bills; and accordingly it was found, that money bills were sometimes tacked to favourite measures of the commons, with a view to ensure their passage by the lords. This extraordinary use, or rather perversion of the power, would, if suffered to grow into a common practice, have completely destroyed the equilibrium of the British constitution, and subjected both the lords and the king to the power of the commons. Resistance was made from time to time to this unconstitutional encroachment; and at length the lords, with a view to give permanent effect to their own rights, have made it a standing order to reject upon sight all bills, that are tacked to money bills.[2] Thus, the privilege is maintained on one side, and guarded against undue abuse on the other.

§ 873. It will be at once perceived, that the same reasons do not exist in the same extent, for the same exclusive right in our house of representatives in regard to money bills, as exist for such right in the British house of commons. It may be fit, that it should possess the exclusive right to originate money bills; since it may be presumed to possess more ample means of local information, and it more directly represents the opinions, feelings, and wishes of the people; and, being

1 1 Black. Comm. 170, and Christian's Note, (26.)
2 De Lolme on Constitution, ch. 17, p. 381, 382.

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directly dependent upon them for support, it will be more watchful and cautious in the imposition of taxes, than a body, which emanates exclusively from the states in their sovereign political capacity.[1] But, as the senators are in a just sense equally representatives of the people, and do not hold their offices by a permanent or hereditary title, but periodically return to the common mass of citizens;[2] and above all, as direct taxes are, and must be, apportioned among the states according to their federal population; and as all the states have a distinct local interest, both as to the amount and nature of all taxes of every sort, which are to be levied, there seems a peculiar fitness in giving to the senate a power to alter and amend, as well as to concur with, or reject all money bills. The due influence of all the states is thus preserved; for otherwise it might happen, from the overwhelming representation of some of the large states, that taxes might be levied, which would bear with peculiar severity upon the interests, either agricultural, commercial, or manufacturing, of others being the minor states; and thus the equilibrium intended by the constitution, as well of power, as of interest, and influence, might be practically subverted.

§ 874. There would also be no small inconvenience in excluding the senate from the exercise of this power of amendment and alteration; since if any, the slightest modification were required in such a bill to make it either palatable or just, the senate would be compelled to reject it, although an amendment of a single line

[1] 2 Wilson's Law Lect. 163, 164; Rawle on Constitution, ch. 6; 4 Elliot's Debates, 141.

[2] 1 Tucker's Black. Comm. App. 215; 2 Wilson's Law Lect. 163, 164; Rawle on Constitution, ch. 6; 4 Elliot's Debates, 141.

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might make it entirely acceptable to both houses.[1] Such a practical obstruction to the legislation of a free government would far outweigh any supposed theoretical advantages from the possession or exercise of an exclusive power by the house of representatives. Infinite perplexities, and misunderstandings, and delays would clog the most wholesome legislation. Even the annual appropriation bills might be in danger of a miscarriage on these accounts; and the most painful dissensions might be introduced.

§ 875. Indeed, of so little importance has the exclusive possession of such a power been thought in the state governments, that some of the state constitutions make no difference, as to the power of each branch of the legislature to originate money bills. Most of them contain a provision similar to that in the constitution of the United States; and in those states, where the exclusive power formerly existed, as, for instance, in Virginia and South-Carolina, it was a constant source of difficulties and contentions.[2] In the revised constitution of South-Carolina, (in 1790,) the provision was altered, so as to conform to the clause in the constitution of the United States.

§ 876. The clause seems to have met with no serious opposition in any of the state conventions; and indeed could scarcely be expected to meet with any opposition, except in Virginia; since the other states were well satisfied with the principle adopted in their own state constitutions; and in Virginia the clause created but little debate.[3]

§ 877. What bills are properly "bills for raising revenue," in the sense of the constitution, has been matter

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[1] 2 Elliot's Debates, 283, 284. [2] Id. [3] Id.

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of some discussion. A learned commentator supposes, that every bill, which indirectly or consequentially may raise revenue, is, within the sense of the constitution, a revenue bill. He therefore thinks, that the bills for establishing the post-office, and the mint, and regulating the value of foreign coin, belong to this class, and ought not to have originated (as in fact they did) in the senate.[1] But the practical construction of the constitution has been against his opinion. And, indeed, the history of the origin of the power, already suggested, abundantly proves, that it has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes, which may incidentally create revenue.[2] No one supposes, that a bill to sell any of the public lands, or to sell public stock, is a bill to raise revenue, in the sense of the constitution. Much less would a bill be so deemed, which merely regulated the value of foreign or domestic coins, or authorized a discharge of insolvent debtors upon assignments of their estates to the United States, giving a priority of payment to the United States in cases of insolvency, although all of them might incidentally bring revenue into the treasury.

§ 878. The next clause respects the power of the president to approve, and negative laws. In the convention there does not seem to have been much diversity of opinion on the subject of the propriety of giving to the president a negative on the laws. The principal points of discussion seem to have been, whether the negative should be absolute, or qualified; and if the latter, by what number of each house the bill should be subsequently passed, in order to become a law; and

[1] Tucker's Black. Comm. App. 261, and note.
[2] See 2 Elliot's Debates, 283, 284.

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whether the negative should in either case be exclusively vested in the president alone, or in him jointly with some other department of the government. The proposition of a qualified negative seems to have obtained general, but not universal support, having been carried by the vote of eight states against two.[1] This being settled, the question, as to the number, was at first unanimously carried in the affirmative in favour of two thirds of each house; at a subsequent period it was altered to three fourths by a vote of six states against four, one being divided; and it was ultimately restored to the two thirds, without any apparent struggle.[2] An effort was also made to unite the supreme national judiciary with the executive in revising the laws, and exercising the negative. But it was constantly resisted, being at first overruled by a vote of four states against three, two being divided, and finally rejected by the vote of eight states against three.[3]

§ 879. Two points may properly arise upon this subject. First, the propriety of vesting the power in the president; and secondly, the extent of the legislative check, to prevent an undue exercise of it. The former also admits of a double aspect, viz. whether the negative should be absolute, or should be qualified. An absolute negative on the legislature appears, at first, to be the natural defence, with which the executive magistrate should be armed. But in a free government, it seems not altogether safe, nor of itself a sufficient defence. On ordinary occasions, it may not be exerted with the requisite firmness; and on extraordinary occasions, it may be perfidiously abused. It

1 Journal of the Convention, 97.
2 Journal of the Convention, 195, 253, 254, 355.
3 Journal of the Convention, 69, 96, 195, 253.

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is true, that the defect of such an absolute negative has a tendency to weaken the executive department. But this may be obviated, or at least counterpoised, by other arrangements in the government; such as a qualified connexion with the senate in making treaties and appointments, by which the latter, being a stronger department, may be led to support the constitutional rights of the former, without being too much detached from its own legislative functions.[1] And the patronage of the executive has also some tendency to create a counteracting influence in aid of his independence. It is true, that in England an absolute negative is vested in the king, as a branch of the legislative power; and he possesses the absolute power of rejecting, rather than of resolving. And this is thought by Mr. Justice Blackstone and others, to be a most important, and indeed indispensable part of the royal prerogative, to guard against the usurpations of the legislative authority.[2] Yet in point of fact this negative of the king has not been once exercised since the year 1692;[3] a fact, which can only be accounted for upon one of two suppositions, either that the influence of the crown has prevented the passage of objectionable measures, or that the exercise of the prerogative has become so odious, that it has not been deemed safe to exercise it, except upon the most pressing emergencies.[4] Probably both

[1] The Federalist, No. 51. [2] 1 Black. Comm. 154.

[3] De Lolme on Constitution, ch. 17, p. 390, 391; 1 Kent's Comm. Lect. 11, p. 226.

[4] 1 Wilson's Law Lect. 448, 449; The Federalist, No. 73; Id. No. 69; 1 Kent's Comm. Lect. 11, p. 226. — Mr. Burke, in his letter to the sheriffs of Bristol,* has treated this subject with his usual masterly power. "The king's negative to bills," says he, "is one of the most undisputed of the royal prerogatives; and it extends to all cases whatsoever. I am

* In 1777.

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motives have alternately prevailed in regard to bills, which were disagreeable to the crown;[1] though, for the last half century, the latter has had the most uniform and decisive operation. As the house of commons becomes more and more the representative of the popular opinion, the crown will have less and less inducement to hazard its own influence by a rejection of any favourite measure of the people. It will be more likely to take the lead, and thus guide and moderate, instead of resisting the commons. And, practically speaking, it is quite problematical, whether a qualified negative may not hereafter in England become a more efficient protection of the crown, than an absolute negative, which makes no appeal to the other legislative bodies, and consequently compels the crown to bear the exclusive odium of a rejection.[2] Be this as it may, the example of England furnishes, on this point, no sufficient authority for America. The whole structure of our government is so entirely different, and the elements, of which it is composed, are so dissimilar from that of England, that no argument can be drawn from the practice of the latter, to assist us in a just arrangement of the executive authority.

§ 880. It has been observed by Mr. Chancellor Kent, with pithy elegance, that the peremptory veto of the Roman Tribunes, who were placed at the door of the Roman senate, would not be reconcileable with the

far from certain, that if several laws, which I know, had fallen under the stroke of that sceptre, that the public would have had a very heavy loss. But it is not the propriety of the exercise, which is in question. The exercise itself is wisely forborne. Its repose may be the preservation of its existence; and its existence may be the means of saving the constiution itself, on an occasion worthy of bringing it forth."

[1] 1 Tuck. Black. Comm. App. 255, 256; 1 Kent's Comm. Lect. 11, p. 226.

[2] See the reasoning in The Federalist, No. 73; Id. No. 51; 1 Wilson's Law Lect. 448, 449.

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spirit of deliberation and independence, which distinguishes the councils of modern times. The French constitution of 1791, a laboured and costly fabric, on which the philosophers and statesmen of France exhausted all their ingenuity, and which was prostrated in the dust in the course of one year from its existence, gave to the king a negative upon the acts of the legislature, with some feeble limitations. Every bill was to be presented to the king, who might refuse his assent; but if the two following legislatures should successively present the same bill in the same terms, it was then to become a law. The constitutional negative, given to the president of the United States, appears to be more wisely digested, than any of the examples, which have been mentioned.[1]

§ 881. The reasons, why the president should possess a qualified negative, if they are not quite obvious, are, at least, when fairly expounded, entirely satisfactory. In the first place, there is a natural tendency in the legislative department to intrude upon the rights, and to absorb the powers of the other departments of government.[2] A mere parchment delineation of the boundaries of each is wholly insufficient for the protection of the weaker branch, as the executive unquestionably is; and hence there arises a constitutional necessity of arming it with powers for its own defence. If the executive did not possess this qualified negative, he would gradually be stripped of all his authority, and become, what it is well known the governors of some states are, a mere pageant and shadow of magistracy.[3]

[1] 1 Kent's Comm. Lect. 11, p. 226, 227.

[2] 1 Kent's Comm. Lect. 11, p. 225, 226; The Federalist, No. 73; Id. No. 51.

[3] The Federalist, No. 51, 73; 1 Tuck. Black. Comm. App. 225, 329; 1 Wilson's Law Lect. 448, 449; 1 Kent's Comm. Lect. 11, p, 225, 226.

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§ 882. In the next place, the power is important, as an additional security against the enactment of rash, immature, and improper laws. It establishes a salutary check upon the legislative body, calculated to preserve the community against the effects of faction, precipitancy, unconstitutional legislation, and temporary excitements, as well as political hostility.[1] It may, indeed, be said, that a single man, even though he be president, cannot be presumed to possess more wisdom, or virtue, or experience, than what belongs to a number of men. But this furnishes no answer to the reasoning. The question is not, how much wisdom, or virtue, or experience, is possessed by either branch of the government, (though the executive magistrate may well be presumed to be eminently distinguished in all these respects, and therefore the choice of the people;) but whether the legislature may not be misled by a love of power, a spirit of faction, a political impulse, or a persuasive influence, local or sectional, which, at the same time, may not, from the difference in the election and duties of the executive, reach him at all, or not reach him in the same degree. He will always have a primary inducement to defend his own powers; the legislature may well be presumed to have no desire to favour them. He will have an opportunity soberly to examine the acts and resolutions passed by the legislature, not having partaken of the feelings or combinations, which have procured their passage, and thus correct, what shall sometimes be wrong from haste and inadvertence, as well as design.[2] His view of them, if not more wise, or more elevated, will, at least, be

[1] The Federalist, No. 73; 1 Wilson's Law Lect. 448, 449, 450.
[2] The Federalist, No. 73.

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independent, and under an entirely different responsibility to the nation, from what belongs to them. He is the representative of the whole nation in the aggregate; they are the representatives only of distinct parts; and sometimes of little more than sectional or local interests.

§ 883. Nor is there any solid objection to this qualified power.[1] If it should be objected, that it may sometimes prevent the passage of good laws, as well as of bad laws, the objection is entitled to but little weight. In the first place, it can never be effectually exercised, if two thirds of both houses are in favour of the law; and if they are not, it is not so easily demonstrable, that the law is either wise or salutary. The presumption would rather be the other way; or, at least, that the utility of it was not unquestionable, or it would receive the requisite support. In the next place, the great evil of all free governments is a tendency to over-legislation, and the mischief of inconstancy and mutability in the laws forms a great blemish in the character and genius of all free governments.[2] The injury, which may possibly arise from the postponement of a salutary law, is far less, than from the passage of a mischievous one, or from a redundant and vacillating legislation.[3] In the next place, there is no practical danger, that this power would be much, if any, abused by the president. The superior weight and influence of the legislative body in a free government, and the hazard to the weight and influence of the executive in a trial of strength, afford a satisfactory security, that the power will generally be employed with great caution; and that there will be more often room for a charge of

[1] 1 Tuck. Black. Comm. 225, 324; 1 Kent's Comm. Lect. 11, p. 225, 226.
[2] The Federalist, No. 73. [3] Id.

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timidity, than of rashness in its exercise.[1] It has been already seen, that the British king, with all his sovereign attributes, has rarely interposed this high prerogative, and that more than a century has elapsed since its actual application. If from the offensive nature of the power a royal hereditary executive thus indulges serious scruples in its actual exercise, surely a republican president, chosen for four years, may be presumed to be still more unwilling to exert it.[2]

§ 884. The truth is, as has been already hinted, that the real danger is, that the executive will use the power too rarely. He will do it only on extraordinary occasions, when a just regard to the public safety, or public interests, or a constitutional obligation, or a necessity of maintaining the appropriate rights and prerogatives of his office compels him to the step;[3] and then it will be a solemn appeal to the people themselves from their own representatives. Even within these narrow limits the power is highly valuable; and it will silently operate as a preventive check, by discouraging attempts to overawe, or to control the executive. Indeed, one of the greatest benefits of such a power is, that its influence is felt, not so much in its actual exercise, as in its silent and secret energy as a preventive. It checks the intention to usurp, before it has ripened into an act.

§ 885. It has this additional recommendation, as a qualified negative, that it does not, like an absolute negative, present a categorical and harsh resistance to the legislative will, which is so apt to engender strife, and nourish hostility. It assumes the character of a mere appeal to the legislature itself, and asks a revision

[1] The Federalist, No. 73. [2] Id. [3] Id.

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of its own judgment.[1] It is in the nature, then, merely of a rehearing, or a reconsideration, and involves nothing to provoke resentment, or rouse pride. A president, who might hesitate to defeat a law by an absolute veto, might feel little scruple to return it for reconsideration upon reasons and arguments suggested on the return. If these were satisfactory to the legislature, he would have the cheering support of a respectable portion of the body in justification of his conduct. If, on the other hand, they should not be satisfactory, the concurrence of two thirds would secure the ultimate passage of the law, without exposing him to undue censure or reproach. Even in such cases his opposition would not be without some benefit. His observations would be calculated to excite public attention and discussion, to lay bare the grounds, and policy, and constitutionality of measures;[2] and to create a continued watchfulness, as to the practical effects of the laws thus passed, so as that it might be ascertained by experience, whether his sagacity and judgment were safer, than that of the legislature.[3] Nothing but a gross abuse of the power upon frivolous, or party pretences, to secure a petty triumph, or to defeat a wholesome restraint, would bring it into contempt, or odium; and then, it would soon be followed by that remedial justice from the people, in the exercise of the right of election, which, first or last, will be found to follow with reproof, or cheer with applause, the acts of their rulers, when passion and prejudice have removed the temporary bandages, which have blinded their judgment. Looking back upon the history of the government for the last forty years, it will be

[1] The Federalist, No. 73.

[2] Rawle on Constitution, ch. 6, p. 61, 62.

[3] 1 Wilson's Lect. 449, 450; The Federalist, No. 73.

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found, that the president's negative has been rarely exerted; and whenever it has been, no instance (it is believed) has occurred, in which the act has been concurred in by two thirds of both houses. If the public opinion has not, in all cases, sustained this exercise of the veto, it may be affirmed, that it has rarely been found that the disapprobation has been violent, or unqualified.

§ 886. The proposition to unite the Supreme Court with the executive in the revision and qualified rejection of laws, failed, as has been seen, in the convention.[1] Two reasons seem to have led to this result, and probably were felt by the people also, as of decisive weight. The one was, that the judges, who are the interpreters of the law, might receive an improper bias from having given a previous opinion in their revisory capacity. The other was, that the judges, by being often associated with the executive, might be induced to embark too far in the political views of that magistrate; and thus a dangerous combination might, by degrees, be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from any other avocation, than that of expounding the laws; and it is peculiarly dangerous to place them in a situation to be either corrupted, or influenced by the executive.[2] To these may be added another, which may almost be deemed a corollary from them, that it would have a tendency to take from the judges that public confidence in their impartiality, independence, and integrity, which seem indispensable to the due administration of public justice. Whatever has a tendency to create suspicion, or provoke jealousy, is mischievous to the judicial department.

1 Journal of Convention, 195, 253.
2 The Federalist, No. 73.

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Judges should not only be pure, but be believed to be so. The moral influence of their judgments is weakened, if not destroyed, whenever there is a general, even though it be an unfounded distrust, that they are guided by other motives in the discharge of their duties than the law and the testimony. A free people have no security for their liberties, when an appeal to the judicial department becomes either illusory, or questionable.[1]

§ 887. The other point of inquiry is, as to the extent of the legislative check upon the negative of the executive. It has been seen, that it was originally proposed, that a concurrence of two thirds of each house should be required; that this was subsequently altered to three fourths; and was finally brought back again to the original number.[2] One reason against the three fourths seems to have been, that it would afford little security for any effectual exercise of the power. The larger the number required to overrule the executive negative, the more easy it would be for him to exert a silent and secret influence to detach the requisite number in order to carry his object. Another reason was, that even, supposing no such influence to be exerted, still, in a great variety of cases of a political nature, and especially such, as touched local or sectional interests, the pride or the power of states, it would be easy to defeat the most salutary measures, if a combination of a few states

[1] It is a remarkable circumstance in the history of Mr. Jefferson's opinions, that he was decidedly in favour of associating the judiciary with the executive in the exercise of the negative on laws, or of investing it separately with a similar power.* At a subsequent period his opinion respecting the value and importance seems to have undergone extraordinary changes.

[2] Journal of the Convention, p. 220, 253, 254, 256.

* 2 Jefferson's Corresp. 274; 2 Pitk. 263.

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could produce such a result. And the executive himself might, from his local attachments or sectional feelings, partake of this common bias. In addition to this, the departure from the general rule, of the right of a majority to govern, ought not to be allowed but upon the most urgent occasions; and an expression of opinion by two thirds of both houses in favour of a measure certainly afforded all the just securities, which any wise, or prudent people ought to demand in the ordinary course of legislation; for all laws thus passed might, at any time, be repealed at the mere will of the majority. It was also no small recommendation of the lesser number, that it offered fewer inducements to improper combinations, either of the great states, or the small states, to accomplish particular objects. There could be but one of two rules adopted in all governments, either, that the majority should govern, or the minority should govern. The president might be chosen by a bare majority of electoral votes, and this majority might be by the combination of a few large states, and by a minority of the whole people. Under such circumstances, if a vote of three fourths were required to pass a law, the voice of two thirds of the states and two thirds of the people might be permanently disregarded during a whole administration. The case put may seem strong; but it is not stronger, than the supposition, that two thirds of both houses would be found ready to betray the solid interests of their constituents by the passage of injurious or unconstitutional laws. The provision, therefore, as it stands, affords all reasonable security; and pressed farther, it would endanger the very objects, for which it is introduced into the constitution.

§ 888. But the president might effectually defeat the wholesome restraint, thus intended, upon his qualified

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negative, if he might silently decline to act after a bill was presented to him for approval or rejection. The constitution, therefore, has wisely provided, that "if any "bill shall not be returned by the president within ten "days (Sundays excepted) after it shall have been pre- "sented to him, it shall be a law, in like manner, as if "he had signed it."[1] But if this clause stood alone, congress might, in like manner, defeat the due exercise of his qualified negative by a termination of the session, which would render it impossible for the president to return the bill. It is therefore added, "unless "the congress, by their adjournment, prevent its return, "in which case it shall not be a law."

§ 889. The remaining clause merely applies to *orders, resolutions, and votes*, to which the concurrence of both houses may be necessary; and as to these, with a single exception, the same rule is applied, as is by the preceding clause applied to *bills*. If this provision had not been made, congress, by adopting the form of an order or resolution, instead of a bill, might have effectually defeated the president's qualified negative in all the most important portions of legislation.[2]

§ 890. It has been remarked by De Lolme, that in most of the ancient free states, the share of the people in the business of legislation was to approve or reject the propositions, which were made to them, and to give the final sanction to the laws. The functions of those persons, or in general, those bodies, who were entrusted with the executive power, was to prepare and frame

[1] The original proposition in the convention was, that the bill should be returned by the president in *seven* days. It was subsequently altered to *ten* days by a vote of nine states against two.*

[2] Journal of Convention, p. 220, 255.

* Journal of Convention, 220, 224, 225.

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the laws, and then to propose them to the people. In a word, they possessed that branch of the legislative power, which may be called the *initiative*, that is, the prerogative of putting that power into action. In the first times of the Roman republic, this initiative power was constantly exercised by the Roman senate. Laws were made *populi jussu, ex authoritate senati*; and, even in elections, the candidates were subject to the previous approbation of the senate. In modern times, in the republics of Venice, Berne, and Geneva, the same power is, in fact, exercised by a select assembly, before it can be acted upon by the larger assembly of the citizens, or their representatives.[1] He has added, that this power is very useful, and perhaps even necessary, in states of a republican form, for giving a permanence to the laws, as well as for preventing political disorders and struggles for power. At the same time, he is compelled to admit, that this expedient is attended with inconveniences of little less magnitude, than the evils it is meant to remedy.[2] The inconveniences are certainly great, but there are evils of a deeper character belonging to such a system. The natural, nay, necessary tendency of it is, ultimately to concentrate all power in the *initiative* body, and to leave to the approving body but the shadow of authority. It is in fact, though not in form, an oligarchy. And, so far from its being useful in a republic, it is the surest means of sapping all its best institutions, and overthrowing the public liberties, by corrupting the very fountains of legislation. De Lolme praises it as a peculiar excellence of the British monarchy. America, no less, vindicates it, as a fundamental principle in all her republican constitutions.

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[1] De Lolme, Eng. Const. B. 2, ch. 4, p. 221, and note. [2] Id.

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§ 891. We have thus passed through all the clauses of the constitution respecting the structure and organization of the legislative department, and the rights, powers, and privileges of the component branches severally, as well as in the aggregate. The natural order of the constitution next leads us to the consideration of the POWERS, which are vested, by the constitution, in the legislative department. Before, however, entering upon this large and important inquiry, it may be useful to state, in a summary manner, the ordinary course of proceedings at each new session of congress, and the mode, in which laws are usually passed, according to the settled usages in congress, under the rules and orders of the two houses. In substance, it does not differ from the manner of conducting the like business in the British parliament.[1]

§ 892. On the day appointed for the assembling of a new congress, the members of each house meet in their separate apartments. The house of representatives then proceed to the choice of a speaker and clerk, and any one member is authorized then to administer the oath of office to the speaker, who then administers the like oath to the other members, and to the clerk. The like oath is administered by any member of the senate, to the president of the senate, who then administers a like oath to all the members, and the secretary of the senate; and this proceeding is had, when, and as often as a new president of the senate, or member, or secretary, is chosen.[2] As soon as these preliminaries are gone through, and a quorum of each house is present, notice is given thereof to the president, who signifies

[1] 1 Tuck. Black. Comm. App. 229, note; 1 Black. Comm. 181; Jefferson's Manual, *passim*; 2 Wilson's Law Lect. 171 to 176.

[2] Act of 1789, ch. 1.

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his intention to address them. This was formerly done by way of speech; but is now done by a written message, transmitted to each house, containing a general exposition of the affairs of the nation, and a recommendation of such measures, as the president may deem fit for the consideration of congress. When the habit was for the president to make a speech, it was in the presence of both houses, and a written answer was prepared by each house, which, when accepted, was presented by a committee. At present, no answer whatsoever is given to the contents of the message. And this change of proceeding has been thought, by many statesmen, to be a change for the worse, since the answer of each house enabled each party in the legislature to express its own views, as to the matters in the speech, and to propose, by way of amendment to the answer, whatever was deemed more correct and more expressive of public sentiment, than was contained in either. The consequence was, that the whole policy and conduct of the administration came under solemn review; and it was animadverted on, or defended, with equal zeal and independence, according to the different views of the speakers in the debate; and the final vote showed the exact state of public opinion on all leading measures. By the present practice of messages, this facile and concentrated opportunity of attack or defence is completely taken away; and the attack or defence of the administration is perpetually renewed at distant intervals, as an incidental topic in all other discussions, to which it often bears very slight, and perhaps no relation. The result is, that a great deal of time is lost in collateral debates, and that the administration is driven to defend itself, in detail, on every leading motion, or measure of the session.[1]

[1] Under President Washington and President John Adams, the prac-

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§ 893. A bill may be introduced by motion of a member, and leave of the house; or it may be introduced by order of the house, on the report of a committee; or it may be reported by a committee. In cases of a general nature, one day's notice is given of a motion to bring in a bill. The bill, however introduced, is drawn out on paper, with a multitude of blanks or void spaces, where any thing occurs, that is dubious, or necessary to be settled by the house; such, especially, as dates of times, sums of money, amount of penalties, and limitations of numbers. It is then read a first time for information; and if any opposition is made to it, the question is then put, whether it shall be rejected. If no opposition is made, or if the question to reject is negatived, the bill goes to a second reading without a question, and it is accordingly read a second time at some convenient distance of time. Every bill must receive three readings in the house previous to its passage; and these readings are on different days, unless upon a special order of the house to the contrary. Upon the second reading of a bill, the speaker states it, as ready for commitment, or engrossment. If committed, it is committed either to a select, or a standing committee, or to a committee of the whole house. If to the latter, the house determine on what day. If the bill is ordered to be engrossed, (that is, copied out in a fair, large, round hand,) the house then appoint the day, when it shall be read the third time. Most of the important bills are committed to a committee of the whole house; and every motion or proposition for a tax or charge upon the people, and for a variation in the sum

tice was, to deliver speeches. President Jefferson discontinued this course, and substituted messages; and this practice has been since invariably followed.

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or quantum of a tax or duty, and for an appropriation of money, is required first to be discussed in a committee of the whole house. The great object of referring any matter to a committee of the whole house is, to allow a greater freedom of discussion, and more times of speaking, than is generally allowed by the rules of the house. It seems, too, that the yeas and nays are not required to be taken upon votes in committee, as they may be in votes in the house.

§ 894. On going into a committee of the whole house, the speaker leaves the chair, and a chairman is appointed by the speaker to preside in committee. Amendments and other proceedings are had in committee much in the same way, as occur in the regular course of the business of the house. Select and standing committees regulate their own times and modes of proceeding according to their own discretion and pleasure, unless otherwise ordered by the house. They make their reports in the same way from time to time to the house, and secure the directions of the latter. When a bill is committed to a committee, it is read in sections; paragraph after paragraph is debated; blanks are filled up; and alterations and amendments, both in form and substance, are proposed, and often made.

§ 895. After the committee have gone through with the whole bill, they report it, with all the alterations and amendments made in it, to the house. It is then, or at some suitable time afterwards, considered by the latter, and the question separately put upon every alteration, amendment, and clause. After commitment and report to the house, and at any time before its passage, any bill may be recommitted at the pleasure of the house. When a bill, either upon a report of a committee, or after full discussion and amendment in the house,

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stands for the next stage of its progress, the question then is, whether it shall be engrossed and read a third time. And this is the proper time commonly chosen by those, who are fundamentally opposed to it, to make their attack upon it, it now being as perfect, as its friends can shape it, and as little exceptionable, as its enemies have been able to make it. Attempts are, indeed, sometimes made at previous stages to defeat it, but they are usually disjointed efforts; because many persons, who do not expect to be in favour of the bill ultimately, are willing to let it go on to its most perfect state, to take time to examine it for themselves, and to hear what can be said in its favour.

§ 896. The two last stages of the bill, viz. on the questions, whether it shall have a third reading, and whether it shall pass, are the strong points of resistance, and defence. The first is usually the most interesting contest, because the subject is more new and engaging, and the trial of strength has not been made; so that the struggle for victory is yet wholly doubtful, and the ardour of debate is proportionally warm and earnest. If the bill is ordered to be engrossed for a third reading, it is, when engrossed, put upon its final passage. Amendments are sometimes made to it at this stage, though reluctantly; and any new clause, thus added, is called a rider. If the vote is, that the bill shall pass, the title is then settled, though a title is always reported with the bill; and that being agreed to, the day of its passage is noted at the foot of it by the clerk. It is then signed by the speaker, and transmitted to the other house for concurrence therein.

§ 897. The bill, when thus transmitted to the other house, goes through similar forms. It is either rejected, committed, or concurred in, with, or without amend-

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ments. If a bill is amended by the house, to which it it transmitted, it is then returned to the other house, in which it originated, for their assent to the amendment. If the amendment is agreed to, the fact is made known to the other house. If not agreed to, the disagreement is in like manner notified. And the like course is adopted, where the amendment is agreed to with an amendment. In either of these cases, the house proposing the amendment may recede from it; or may adopt it with the amendment proposed by the other house. If neither is done, the house then vote to insist on the amendment, or to adhere to it. A vote to insist keeps the question still open. But a vote to adhere requires the other house either to insist, or to recede; for if, on their part, there is a vote to adhere, the bill usually falls without farther effort. But, upon a disagreement between the two houses, a conference by a committee of each is usually asked; and in this manner the matters in controversy are generally adjusted by adopting the course recommended by the committees, or one of them. When a bill has passed both houses, the house last acting on it makes known its passage to the other, and it is delivered to the joint committee of enrolment, who see, that it is truly enrolled in parchment, and being signed by the speaker of the house, and the president of the senate, it is then sent to the president for his signature. If he approves it, he signs it; and it is then deposited among the rolls in the office of the department of state. If he disapproves of it, he returns it to the house, in which it originated, with his objections. Here they are entered at large on the journal, and afterwards the house proceed to a consideration of them.[1]

[1] This summary is abstracted from 1 Black. Comm. 181, 182; 1 Tucker's Black. Comm. App. 229, 230, note; 1 Kent. Comm. Lect. 11, p. 223, 224;

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§ 898. This review of the forms and modes of proceeding in the passing of laws cannot fail to impress upon every mind the cautious steps, by which legislation is guarded, and the solicitude to conduct business without precipitancy, rashness, or irregularity. Frequent opportunities are afforded to each house to review their own proceedings; to amend their own errors; to correct their own inadvertencies; to recover from the results of any passionate excitement; and to reconsider the votes, to which persuasive eloquence, or party spirit has occasionally misled their judgments. Under such circumstances, if legislation be unwise, or loose, or inaccurate, it belongs to the infirmity of human nature in general, or to that personal carelessness and indifference, which is sometimes the foible of genius, as well as the accompaniment of ignorance and prejudice.

§ 899. The structure and organization of the several branches, composing the legislature, have also (unless my judgment has misled me) been shown by the past review to be admirably adapted to preserve a wholesome and upright exercise of their powers. All the checks, which human ingenuity has been able to devise, (at least, all which, with reference to our habits, institutions, and local interests, seemed practicable, or desirable,) to give perfect operation to the machinery of government; to adjust all its movements; to prevent its eccentricities; and to balance its forces; — all these have been introduced, with singular skill, ingenuity, and wisdom, into the structure of the constitution.

§ 900. Yet, after all, the fabric may fall; for the

2 Wilson's Law Lect. 171, 172, 173; Rawle on Constitution, ch. 6, p. 60, &c.; and especially from the rules of both houses, and Jefferson's Manual, (edition at Washington, 1828.)

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work of man is perishable, and must for ever have inherent elements of decay. Nay, it must perish, if there be not that vital spirit in the people, which alone can nourish, sustain, and direct all its movements. It is in vain, that statesmen shall form plans of government, in which the beauty and harmony of a republic shall be embodied in visible order, shall be built up on solid substructions, and adorned by every useful ornament, if the inhabitants suffer the silent power of time to dilapidate its walls, or crumble its massy supporters into dust; if the assaults from without are never resisted, and the rottenness and mining from within are never guarded against. Who can preserve the rights and liberties of the people, when they shall be abandoned by themselves? Who shall keep watch in the temple, when the watchmen sleep at their posts? Who shall call upon the people to redeem their possessions, and revive the republic, when their own hands have deliberately and corruptly surrendered them to the oppressor, and have built the prisons, or dug the graves of their own friends? Aristotle, in ancient times, upon a large survey of the republics of former days, and of the facile manner, in which they had been made the instruments of their own destruction, felt himself compelled to the melancholy reflection, which has been painfully repeated by one of the greatest statesmen of modern times, that a democracy has many striking points of resemblance with a tyranny. "The ethical character," says he, "is the same; both exercise despotism over the better class of citizens; and the decrees are in the one, what ordinances and arrets are in the other. *The demagogue, too, and the court favourite are not unfrequently the same identical men, and always bear a close analogy.* And these have the principal power, each in their re-

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spective governments, favourites with the absolute monarch, and demagogues with a people, such as I have described."[1]

§ 901. This dark picture, it is to be hoped, will never be applicable to the republic of America. And yet it affords a warning, which, like all the lessons of past experience, we are not permitted to disregard. America, free, happy, and enlightened, as she is, must rest the preservation of her rights and liberties upon the virtue, independence, justice, and sagacity of the people. If either fail, the republic is gone. Its shadow may remain with all the pomp, and circumstance, and trickery of government, but its vital power will have departed. In America, the demagogue may arise, as well as elsewhere. He is the natural, though spurious growth of republics; and like the courtier he may, by his blandishments, delude the ears, and blind the eyes of the people to their own destruction. If ever the day shall arrive, in which the best talents and the best virtues shall be driven from office by intrigue or corruption, by the ostracism of the press, or the still more unrelenting persecution of party, legislation will cease to be national. It will be wise by accident, and bad by system.

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[1] Burke on the French Revolution, note; Aristotle Polit. B. 4, ch. 4. See Montesquieu's Spirit of Laws, B. 8, *passim*.

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CHAPTER XIV.

POWERS OF CONGRESS.

§ 902. We have now arrived, in the course of our inquiries, at the eighth section of the first article of the constitution, which contains an enumeration of the principal powers of legislation confided to congress. A consideration of this most important subject will detain our attention for a considerable time; as well, because of the variety of topics, which it embraces, as of the controversies, and discussions, to which it has given rise. It has been, in the past time, it is in the present time, and it will probably in all future time, continue to be the debateable ground of the constitution, signalized, at once, by the victories, and the defeats of the same parties. Here, the advocates of state rights, and the friends of the Union will meet in hostile array. And here, those, who have lost power, will maintain long and arduous struggles to regain the public confidence, and those, who have secured power, will dispute every position, which may be assumed for attack, either of their policy, or their principles. Nor ought it at all to surprise us, if that, which has been true in the political history of other nations, shall be true in regard to our own; that the opposing parties shall occasionally be found to maintain the same system, when in power, which they have obstinately resisted, when out of power. Without supposing any insincerity or departure from principle in such cases, it will be easily imagined, that a very different course of reasoning will force itself on the minds of those, who are responsible for the measures of government, from that, which the ardour

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of opposition, and the jealousy of rivals, might well foster in those, who may desire to defeat, what they have no interest to approve.

§ 903. The first clause of the eighth section is in the following words: "The congress shall have power to "lay and collect taxes, duties, imposts, and excises, to "pay the debts and provide for the common defence, "and general welfare of the United States; but all "duties, imposts, and excises, shall be uniform through-"out the United States."

§ 904. Before proceeding to consider the nature and extent of the power conferred by this clause, and the reasons, on which it is founded, it seems necessary to settle the grammatical construction of the clause, and to ascertain its true reading. Do the words, "to lay and collect taxes, duties, imposts, and excises," constitute a distinct, substantial power; and the words, "to pay debts "and provide for the common defence, and general wel-"fare of the United States," constitute another distinct and substantial power? Or are the latter words connected with the former, so as to constitute a qualification upon them? This has been a topic of political controversy; and has furnished abundant materials for popular declamation and alarm. If the former be the true interpretation, then it is obvious, that under colour of the generality of the words to "provide for the common defence and general welfare," the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, "for the common defence and the "general welfare."

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§ 905. The former opinion has been maintained by some minds of great ingenuity, and liberality of views.[1] The latter has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable. The reading, therefore, which will be maintained in these commentaries, is that, which makes the latter words a qualification of the former; and this will be best illustrated by supplying the words, which are necessarily to be understood in this interpretation. They will then stand thus: "The congress "shall have power to lay and collect taxes, duties, im- "posts, and excises, *in order* to pay the debts, and to "provide for the common defence and general welfare "of the United States;" that is, for the purpose of paying the public debts, and providing for the common defence and general welfare of the United States. In

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[1] See 2 Elliot's Debates, 327, 328. See Dane's App. § 41, p. 48; see also 1 Elliot's Debates, 93; Id. 293; Id. 300; 2 Wilson's Law Lect, 178, 180, 181; 4 Elliot's Debates, 224; 2 U. S. Law Journal, April, 1826, p. 251, 264, 270 to 282. This last work contains, in p. 270 *et seq.* a very elaborate exposition of the doctrine. — Mr. Jefferson has, upon more than one occasion, insisted, that this was the federal doctrine, that is, the doctrine maintained by the federalists, as a party; and that the other doctrine was that of the republicans, as a party.* The assertion is incorrect; for the latter opinion was constantly maintained by some of the most strenuous federalists at the time of the adoption of the constitution, and has since been maintained by many of them.† It is remarkable, that Mr. George Mason, one of the most decided opponents of the constitution in the Virginia convention, held the opinion, that the clause, to provide for the common defence and general welfare,‡ was a substantive power. He added, "That congress should have power to provide for the general welfare of the Union, I grant. But I wish a clause in the constitution in respect to all powers, which are not granted, that they are retained by the states; otherwise the power of providing for the general welfare may be perverted to its destruction."‡

* 4 Jefferson Corresp. 306.
† 2 Elliot's Debates, 170, 183, 195; 3 Elliot's Debates, 269; 2 Amer. Museum, 434; 3 Amer. Museum, 338.
‡ 2 Elliot's Debates, 327, 328.

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this sense, congress has not an unlimited power of taxation; but it is limited to specific objects, — the payment of the public debts, and providing for the common defence and general welfare. A tax, therefore, laid by congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority. In what manner this is to be ascertained, or decided, will be considered hereafter. At present, the interpretation of the words only is before us; and the reasoning, by which that already suggested has been vindicated, will now be reviewed.

§ 906. The constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers. This is apparent, as will be presently seen, from the history of the proceedings of the convention, which framed it; and it has formed the admitted basis of all legislative and judicial reasoning upon it, ever since it was put into operation, by all, who have been its open friends and advocates, as well as by all, who have been its enemies and opponents. If the clause, "to pay the debts and provide for the com- "mon defence and general welfare of the United "States," is construed to be an independent and substantive grant of power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers; but it plainly extends far beyond them, and creates a general authority in congress to pass all laws, which they may deem for the common defence or general welfare.[1] Under such circumstances, the constitution would practically create an unlimited national government. The enumerated pow-

[1] President Monroe's Message, 4th May, 1822, p. 32, 33.

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ers would tend to embarrassment and confusion; since they would only give rise to doubts, as to the true extent of the general power, or of the enumerated powers.

§ 907. One of the most common maxims of interpretation is, (as has been already stated,) that, as an exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated. But, how could it be applied with success to the interpretation of the constitution of the United States, if the enumerated powers were neither exceptions from, nor additions to, the general power to provide for the common defence and general welfare? To give the enumeration of the specific powers any sensible place or operation in the constitution, it is indispensable to construe them, as not wholly and necessarily embraced in the general power. The common principles of interpretation would seem to instruct us, that the different parts of the same instrument ought to be so expounded, as to give meaning to every part, which will bear it. Shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural or common, than first to use a general phrase, and then to qualify it by a recital of particulars. But the idea of an enumeration of particulars, which neither explain, nor qualify the general meaning, and can have no other effect, than to confound and mislead, is an absurdity, which no one ought to charge on the enlightened au-

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thors of the constitution.[1] It would be to charge them either with premeditated folly, or premeditated fraud.

§ 908, On the other hand, construing this clause in connexion with, and as a part of the preceding clause, giving the power to lay taxes, it becomes sensible and operative. It becomes a qualification of that clause, and limits the taxing power to objects for the common defence or general welfare. It then contains no grant of any power whatsoever; but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation.[2]

§ 909. An attempt has been sometimes made to treat this clause, as distinct and independent, and yet as having no real significancy *per se*, but (if it may be so said) as a mere prelude to the succeeding enumerated powers. It is not improbable, that this mode of explanation has been suggested by the fact, that in the revised draft of the constitution in the convention the clause was separated from the preceding exactly in the same manner, as every succeeding clause was, viz. by a semicolon, and a break in the paragraph; and that it now stands, in some copies, and it is said, that it stands in the official copy, with a semicolon interposed.[3] But this circumstance will be found of very little weight, when the origin of the clause, and its progress to its

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[1] The Federalist, No. 41.

[2] See Debates on the Judiciary in 1802, p. 332; Dane's App. § 41; President Monroe's Message on Internal Improvements, 4th May, 1822, p. 32, 33; 1 Tuck. Black. App. 231.

[3] Journ. of Convention, p. 356; Id. 494; 2 United States Law Journal, p. 264, April, 1826, New-York. — In the Federalist, No. 41, the circumstance, that it is separated from the succeeding clauses by a semicolon is noticed. The printed Journal of the Convention gives the revised draft from Mr. Brearly's copy, as above stated. See Journal of Convention, p. 351, 356. See President Monroe's Message on Internal Improvements, 4th May, 1822, p. 16, 32, &c.

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present state are traced in the proceedings of the convention. It will then appear, that it was first introduced as an appendage to the power to lay taxes.[1] But there is a fundamental objection to the interpretation thus attempted to be maintained, which is, that it robs the clause of all efficacy and meaning. No person has a right to assume, that any part of the constitution is useless, or is without a meaning; and *a fortiori* no person has a right to rob any part of a meaning, natural and appropriate to the language in the connexion, in which it stands.[2] Now, the words have such a natural and appropriate meaning, as a qualification of the preceding clause to lay taxes. Why, then, should such a meaning be rejected?

§ 910. It is no sufficient answer to say, that the clause ought to be regarded, merely as containing "general terms, explained and limited, by the subjoined specifications, and therefore requiring no critical attention, or studied precaution;"[3] because it is assuming the very point in controversy, to assert, that the clause is connected with any subsequent specifications. It is not said, to "provide for the common defence, and general welfare, *in manner following, viz.*," which would be the natural expression, to indicate such an intention. But it stands entirely disconnected from every subsequent clause, both in sense and punctuation; and is no more a part of them, than they are of the power to lay taxes. Besides; what suitable application, in such a sense, would there be of the last clause in the enumeration, viz., the clause "to make all laws, necessary and proper for carrying into execution the fore-

[1] Journ. of Convention, p. 323, 324, 326.
[2] President Monroe's Message, 4 May, 1822, p. 32, 33.
[3] President Madison's Letter to Mr. Stevenson, 27 Nov. 1830.

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going powers, &c.?" Surely, this clause is as applicable to the power to lay taxes, as to any other; and no one would dream of its being a mere specification, under the power to provide for the common defence, and general welfare.

§ 911. It has been said in support of this construction, that in the articles of confederation (art. 8) it is provided, that "all charges of war, and all other expenses, that "shall be incurred for the common defence, or general "welfare, and allowed by the United States in con-"gress assembled, shall be defrayed out of a common "treasury, &c;" and that "the similarity in the use of "these same phrases in these two great federal char-"ters may well be considered, as rendering their mean-"ing less liable to misconstruction; because it will "scarcely be said, that in the former they were ever "understood to be either a general grant or power, or "to authorize the requisition or application of money "by the old congress to the common defence and [or][1] "general welfare, except in the cases afterwards enu-"merated, which explained and limited their meaning; "and if such was the limited meaning attached to these "phrases in the very instrument revised and remodelled "by the present constitution, it can never be supposed, "that when copied into this constitution, a different "meaning ought to be attached to them."[2] Without stopping to consider, whether the constitution can in any just and critical sense be deemed a revision and remodelling of the confederation,[3] if the argument here stated be of any value, it plainly estab-

1 "Or" is the word in the article.

2 Virginia Report and Resolutions of 7 January, 1800. See also the Federalist, No. 41.

3 See the Federalist, No. 40.

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lishes, that the words ought to be construed, as a qualification or limitation of the power to lay taxes. By the confederation, all expenses incurred for the common defence, or general welfare, are to be defrayed out of a common treasury, to be supplied by requisitions upon the states. Instead of requisitions, the constitution gives the right to the national government directly to lay taxes. So, that the only difference in this view between the two clauses is, as to the mode of obtaining the money, not as to the objects or purposes, to which it is to be applied. If then the constitution were to be construed according to the true bearing of this argument, it would read thus: congress shall have power to lay taxes for "all charges of "war, and all other expenses, that shall be incurred for "the common defence or general welfare." This plainly makes it a qualification of the taxing power; and not an independent provision, or a general index to the succeeding specifications of power. There is not, however, any solid ground, upon which it can be for a moment maintained, that the language of the constitution is to be enlarged, or restricted by the language of the confederation. That would be to make it speak, what its words do not import, and its objects do not justify. It would be to append it, as a codicil, to an instrument, which it was designed wholly to supercede and vacate.

§ 912. But the argument in its other branch rests on an assumed basis, which is not admitted. It supposes, that in the confederation no expenses, not strictly incurred under some of the subsequent specified powers given to the continental congress, could be properly payable out of the common treasury. Now, that is a proposition to be proved; and is not to be taken for

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granted. The confederation was not finally ratified, so as to become a binding instrument on any of the states, until March, 1781. Until that period there could be no practice or construction under it; and it is not shown, that subsequently there was any exposition to the effect now insisted on. Indeed, after the peace of 1783, if there had been any such exposition, and it had been unfavourable to the broad exercise of the power, it would have been entitled to less weight, than usually belongs to the proceedings of public bodies in the administration of their powers; since the decline and fall of the confederation was so obvious, that it was of little use to exert them. The states notoriously disregarded the rights and prerogatives admitted to belong to the confederacy; and even the requisitions of congress, for objects most unquestionably within their constitutional authority, were openly denied, or silently evaded. Under such circumstances, congress would have little inclination to look closely to their powers; since, whether great or small, large or narrow, they were of little practical value, and of no practical cogency.

§ 913. But it does so happen, that in point of fact, no such unfavourable or restrictive interpretation or practice was ever adopted by the continental congress. On the contrary, they construed their power on the subject of requisitions and taxation, exactly as it is now contended for, as a power to make requisitions on the states for all expenses, which they might deem proper to incur for the common defence and general welfare; and to appropriate all monies in the treasury to the like purposes. This is admitted to be of such notoriety, as to require no proof.[1] Surely, the practice of that body in ques-

[1] Mr. Madison himself, in his Letter to Mr. Stevenson, Nov. 27, 1830,

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tions of this nature must be of far higher value, than the mere private interpretation of any persons in the present times, however respectable. But the practice was conformable to the constitutional authority of congress under the confederation. The ninth article expressly delegates to congress the power "to ascertain "the necessary sums to be raised for the service of "the United States, and to appropriate and apply "the same for defraying the public expenses;" and then provides, that congress shall not "ascertain the

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admits the force of these remarks in their full extent. His language is, "If the practice of the revolutionary congress be pleaded in opposition to this view of the case," (i. e. his view, that the words have no distinct meaning,) "the plea is met by the notoriety, that, on several accounts, the practice of that body is not the expositor of the articles of the confederation. These articles were not in force, until they were finally ratified by Maryland, in 1781. Prior to that event, the power of congress was measured by the exigencies of the war; and derived its sanction from the acquiescence of the states. After that event, habit, and a continued expediency, amounting often to a real, or an apparent necessity, prolonged the exercise of an undefined authority, which was the more readily overlooked, as the members of that body held their seats during pleasure; as its acts, particularly after the failure of the bills of credit, depended for their efficacy on the will of the states, and as its general impotency became manifest. *Examples of departure from the prescribed rule are too well known to require proof.*" So that it is admitted, that the practice, under the confederation, was notoriously such, as allowed appropriations by congress for any objects, which they deemed for the common defence and general welfare. And yet we are now called upon to take a new and modern gloss of that instrument, directly at variance with that practice. See also Mr. Wilson's pamphlet, on the constitutionality of the bank of North America, in 1785. The reason, why he does not allude to the terms "common defence and general welfare," in that argument, probably was, that there was no question respecting appropriations of money involved in that discussion. He strenuously contends, that congress had a right to charter the bank; and he alludes to the fifth article, which, for the convenient management of the *general interests* of the United States, provides for the appointment of delegates from the states. He deduces the power, from its being essentially *national*, and vitally important to the government. 3 Wilson's Law Lect. 397.

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"sums and expenses necessary for the *defence* and "*welfare* of the United States, *or any of them*, &c. "unless nine states assent to the same." So that here we have, in the eighth article, a declaration, that "all "charges of war and all other expenses, that shall be "incurred for the *common defence* or *general* welfare, "&c. shall be defrayed out of a common treasury;" and in the ninth article, an express power to ascertain the necessary sums of money to be raised for the public service; and then, that the necessary sums for the defence and welfare of the United States, (and not of the United States alone, for the words are added,) *or of any of them*, shall be ascertained by the assent of nine states. Clearly therefore, upon the plain language of the articles, the words "common defence and general welfare," in one, and "defence and welfare," in another, and "public service," in another, were not idle words, but were descriptive of the very intent and objects of the power; and not confined even to the defence and welfare of all the states, but extending to the welfare and defence of *any of them*.[1] The power then is, in this view, even larger, than that conferred by the constitution.

§ 914. But there is no ground whatsoever, which authorizes any resort to the confederation, to interpret the power of taxation, which is conferred on congress by the constitution. The clause has no reference whatsoever to the confederation; nor indeed to any other clause of the constitution. It is, on its face, a distinct, substantive, and independent power. Who, then, is at liberty to say, that it is to be limited by other clauses, rather than they to be enlarged by it; since

[1] 2 Elliot's Deb. 195.

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there is no avowed connexion, or reference from the one to the others? Interpretation would here desert its proper office, that, which requires, that "every part "of the expression ought, if possible, to be allowed "some meaning, and be made to conspire to some "common end." [1]

§ 915. It has been farther said, in support of the construction now under consideration, that "whether the phrases in question are construed to authorize every measure relating to the common defence and general welfare, as contended by some; or every measure only, in which there might be an application of money, as suggested by the caution of others; the effect must substantially be the same, in destroying the import and force of the particular enumeration of powers, which follow these general phrases in the constitution. For it is evident, that there is not a single power whatsoever, which may not have some reference to the common defence, or the general welfare; nor a power of any magnitude, which, in its exercise, does not involve, or admit an application of money. The government, therefore, which possesses power in either one, or the other of these extents, is a government without limitations, formed by a particular enumeration of powers; and consequently the meaning and effect of this particular enumeration is destroyed by the exposition given to these general phrases." The conclusion de-

[1] The Federalist, No. 40. — In the first draft, of Dr. Franklin, in 1775, the clause was as follows: "All charges of wars, and all other general expenses, to be incurred for the common welfare, shall be defrayed," &c.—In Mr. Dickinson's draft, in July, 1776, the words were, "All charges of wars, and all other expenses, that shall be incurred for the common defence, or general welfare," &c; and these words were subsequently retained. 1 Secret Jour. of Congress, (printed in 1821,) p. 285, 294, 307, 323 to 325, 354.

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duced from these premises is, that under the confederation, and the constitution, "congress is authorized to provide money for the common defence and general welfare. In both is subjoined to this authority an enumeration of the cases, to which their powers shall extend. Money cannot be applied to the general welfare otherwise, than by an application of it to some particular measure, conducive to the general welfare. Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises, whether the particular measure be within the enumerated authorities vested in the congress. If it be, the money requisite for it may be applied to it; if it be not, no such application can be made. This fair and obvious interpretation coincides with, and is enforced by the clause in the constitution, which declares, that no money shall be drawn from the treasury but in consequence of appropriations by law. An appropriation of money to the general welfare would be deemed rather a mockery, than an observance of this constitutional injunction."[1]

§ 916. Stripped of the ingenious texture, by which this argument is disguised, it is neither more nor less, than an attempt to obliterate from the constitution the whole clause, "to pay the debts, and provide for the "common defence and general welfare of the United "States," as entirely senseless, or inexpressive of any intention whatsoever.[2] Strike them out, and the constitution is exactly what the argument contends for. It is, therefore, an argument, that the words ought not to

[1] Virginia Resolutions, of 8th January, 1800. The same reasoning is in President Madison's Veto message, of 3d of March, 1817. 4 Elliot's Deb. 280, 281.

[2] 4 Elliot's Deb. 236.

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be in the constitution; because if they are, and have any meaning, they enlarge it beyond the scope of certain other enumerated powers, and this is both mischievous and dangerous. Being in the constitution, they are to be deemed, *vox et preterea nihil*, an empty sound and vain phraseology, a finger-board pointing to other powers, but having no use whatsoever, since these powers are sufficiently apparent without.[1] Now, it is not too much to say, that in a constitution of government, framed and adopted by the people, it is a most unjustifiable latitude of interpretation to deny effect to any clause, if it is sensible in the language, in which it is expressed, and in the place, in which it stands. If words are inserted, we are bound to presume, that they have some definite object, and intent; and to reason them out of the constitution upon arguments *ab inconvenienti*, (which to one mind may appear wholly unfounded, and to another wholly satisfactory,) is to make a new constitution, not to construe the old one. It is to do the very thing, which is so often complained of, to make a constitution to suit our own notions and wishes, and not to administer, or construe that, which the people have given to the country.

§ 917. But what is the argument, when it is thoroughly sifted? It reasons upon a supposed dilemma, upon which it suspends the advocates of the two contrasted opinions. If the power to provide for the common defence and general welfare is an independent

[1] In a Debate of 7th of Febuary, 1792. (4 Elliot's Deb. 236.) Mr. Madison puts them, (manifestly as his own construction,) "as a sort of caption, or general description of the specified powers, and as having no further meaning, and giving no further powers, than what is found in that specification." See also, Mr. Madison's Veto message, on the Bank Bonus Bill, 3d March, 1817. 4 Elliot's Deb. 260, 281.

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power, then it is said, that the government is unlimited, and the subsequent enumeration of powers is unnecessary and useless. If it is a mere appendage or qualification of the power to lay taxes, still it involves a power of general appropriation of the monies so raised, which indirectly produces the same result.[1] Now, the former position may be safely admitted to be true by those, who do not deem it an independent power; but the latter position is not a just conclusion from the premises, which it states, that it is a qualified power. It is not a logical, or a practical sequence from the premises; it is a *non sequitur*.

§ 918. A dilemma, of a very different sort, might be fairly put to those, who contend for the doctrine, that the words are not a qualification of the power to lay taxes, and, indeed, have no meaning, or use *per se*. The words are found in the clause respecting taxation, and as a part of that clause. If the power to tax extends simply to the payment of the debts of the United States, then congress has no power to lay any taxes for any other purpose. If so, then congress could not appropriate the money raised to any other purposes; since the restriction is to taxes for payment of the debts of the United States, that is, of the debts *then existing*. This would be almost absurd. If, on the other hand, congress have a right to lay taxes, and appropriate the money to any other objects, it must be, because the words, "to provide for the common defence and general welfare," authorize it, by enlarging the power to those objects; for there are no other words, which belong to the clause. All the other powers are in distinct clauses, and do not touch taxation. No advocate for

[1] 4 Elliot's Deb. 280, 281.

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the doctrine of a restrictive power will contend, that the power to lay taxes to pay *debts*, authorizes the payment of all debts, which the United States may choose to incur, whether for national or constitutional objects, or not. The words, "to pay debts," are therefore, either antecedent debts, or debts to be incurred "for the common defence and general welfare," which will justify congress in incurring any debts for such purposes. But the language is not confined to the payment of debts for the common defence and general welfare. It is not "to pay the debts" merely; but "to *provide for* the common defence and general welfare." That is, congress may lay taxes to provide means for the common defence and general welfare. So that there is a difficulty in rejecting one part of the qualifying clause, without rejecting the whole, or enlarging the words for some purposes, and restricting them for others.

§ 919. A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified purposes is a limited power. A power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them. If the defence proposed by a tax be not the common defence of the United States, if the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the constitution. If the tax be not proposed for the common defence, or general welfare, but for other objects, wholly extraneous, (as for instance, for propagating Mahometanism among the Turks, or giving aids and subsidies to a foreign nation, to build palaces for its kings, or erect monuments to its

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heroes,) it would be wholly indefensible upon constitutional principles. The power, then, is, under such circumstances, necessarily a qualified power. If it is so, how then does it affect, or in the slightest degree trench upon the other enumerated powers? No one will pretend, that the power to lay taxes would, in general, have superseded, or rendered unnecessary all the other enumerated powers. It would neither enlarge, nor qualify them. A power to tax does not include them. Nor would they, (as unhappily the confederation too clearly demonstrated,)[1] necessarily include a power to tax. Each has its appropriate office and objects; each may exist without necessarily interfering with, or annihilating the other. No one will pretend, that the power to lay a tax necessarily includes the power to declare war, to pass naturalization and bankrupt laws, to coin money, to establish post-offices, or to define piracies and felonies on the high seas. Nor would either of these be deemed necessarily to include the power to tax. It might be convenient; but it would not be absolutely indispensable.

§ 920. The whole of the elaborate reasoning upon the propriety of granting the power of taxation, pressed with so much ability and earnestness, both in and out of the convention,[2] as vital to the operations of the national government, would have been useless, and almost absurd, if the power was included in the subsequently enumerated powers. If the power of taxing was to be granted, why should it not be qualified according to the intention of the framers of the constitution? But then, it is said, if congress may lay taxes for the common defence and general welfare, the money may be appro-

[1] See the Federalist, No. 21, 22, 30; 1 Elliot's Deb. 318.
[2] See the Federalist, No. 30 to 37.

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priated for those purposes, although not within the scope of the other enumerated powers. Certainly it may be so appropriated; for if congress is authorized to lay taxes for such purposes, it would be strange, if, when raised, the money could not be applied to them. That would be to give a power for a certain end, and then deny the end intended by the power. It is added, "that there is not a single power whatsoever, which may not have some reference to the common defence or general welfare; nor a power of any magnitude, which, in its exercise, does not involve, or admit an application of money." If by the former language is meant, that there is not any power belonging, or incident to any government, which has not some reference to the common defence or general welfare, the proposition may be peremptorily denied. Many governments possess powers, which have no application to either of these objects in a just sense; and some possess powers repugnant to both. If it is meant, that there is no power belonging, or incident to a good government, and especially to a republican government, which may not have some reference to those objects, that proposition may, or may not be true; but it has nothing to do with the present inquiry. The only question is, whether a mere power to lay taxes, and appropriate money for the common defence and general welfare, does include all the other powers of government; or even does include the other enumerated powers (limited as they are) of the national government. No person can answer in the affirmative to either part of the inquiry, who has fully considered the subject. The power of taxation is but one of a multitude of powers belonging to governments; to the state governments, as well as the national government. Would a power to tax authorize a

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state government to regulate the descent and distribution of estates; to prescribe the form of conveyances; to establish courts of justice for general purposes; to legislate respecting personal rights, or the general dominion of property; or to punish all offences against society? Would it confide to congress the power to grant patent rights for invention; to provide for counterfeiting the public securities and coin; to constitute judicial tribunals with the powers confided by the third article of the constitution; to declare war, and raise armies and navies, and make regulations for their government; to exercise exclusive legislation in the territories of the United States, or in other ceded places; or to make all laws necessary and proper to carry into effect all the powers given by the constitution? The constitution itself upon its face refutes any such notion. It gives the power to tax, as a substantive power; and gives others, as equally substantive and independent.

§ 921. That the same means may sometimes, or often, be resorted to, to carry into effect the different powers, furnishes no objection; for that is common to all governments. That an appropriation of money may be the usual, or best mode of carrying into effect some of these powers, furnishes no objection; for it is one of the purposes, for which, the argument itself admits, that the power of taxation is given. That it is indispensable for the due exercise of all the powers, may admit of some doubt. The only real question is, whether even admitting the power to lay taxes is appropriate for some of the purposes of other enumerated powers, (for no one will contend, that it will, of itself, reach, or provide for them all,) it is limited to such appropriations, as grow out of the exercise of those powers. In other words, whether it is an incident to those powers, or a

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substantive power in other cases, which may concern the common defence and the general welfare. If there are no other cases, which concern the common defence and general welfare, except those within the scope of the other enumerated powers, the discussion is merely nominal and frivolous. If there are such cases, who is at liberty to say, that, being for the common defence and general welfare, the constitution did not intend to embrace them? The preamble of the constitution declares one of the objects to be, to provide for the common defence, and to promote the general welfare; and if the power to lay taxes is in express terms given to provide for the common defence and general welfare, what ground can there be to construe the power, short of the object? To say, that it shall be merely auxiliary to other enumerated powers, and not co-extensive with its own terms, and its avowed objects? One of the best established rules of interpretation, one, which common sense and reason forbid us to overlook, is, that when the object of a power is clearly defined by its terms, or avowed in the context, it ought to be construed, so as to obtain the object, and not to defeat it. The circumstance, that so construed the power may be abused, is no answer. All powers may be abused; but are they then to be abridged by those, who are to administer them, or denied to have any operation? If the people frame a constitution, the rulers are to obey it. Neither rulers, nor any other functionaries, much less any private persons, have a right to cripple it, because it is according to their own views inconvenient, or dangerous, unwise or impolitic, of narrow limits, or of wide influence.

§ 922. Besides; the argument itself admits, that "congress is authorized to provide money for the

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"common defence and general welfare." It is not pretended, that, when the tax is laid, the specific objects, for which it is laid, are to be specified, or that it is to be solely applied to those objects. That would be to insert a limitation, no where stated in the text. But it is said, that it must be applied to the general welfare; and that can only be by an application of it to some *particular measure*, conducive to the general welfare. This is admitted. But then, it is added, that this particular measure must be within the enumerated authorities vested in congress, (that is, within some of the powers not embraced in the first clause,) otherwise the application is not authorized.[1] Why not, since it is for the general welfare? No reason is assigned, except, that not being within the scope of those enumerated powers, it is not given by the constitution. Now, the premises may be true; but the conclusion does not follow, unless the words *common defence* and *general welfare* are limited to the specifications included in those powers. So, that, after all, we are led back to the same reasoning, which construes the words, as having no meaning *per se*, but as dependent upon, and an exponent of, the enumerated powers. Now, this conclusion is not justified by the natural connexion or collocation of the words; and it strips them of all reasonable force and efficacy. And yet we are told, that "this fair and obvious interpretation coincides with, and is enforced by, the clause of the constitution, which provides, that no money shall be drawn from the treasury, but in consequence of appropriations by law;" as if the clause did not equally apply, as a restraint upon drawing money, whichever construction is adopted. Suppose

[1] See also 4 Elliot's Debates, 280, 281.

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congress to possess the most unlimited power to appropriate money for the general welfare; would it not be still true, that it could not be drawn from the treasury, until an appropriation was made by some law passed by congress? This last clause is a limitation, not upon the powers of congress, but upon the acts of the executive, and other public officers, in regard to the public monies in the treasury.

§ 923. The argument in favour of the construction, which treats the clause, as a qualification of the power to lay taxes, has, perhaps, never been presented in a more concise or forcible shape, than in an official opinion, deliberately given by one of our most distinguished statesmen.[1] "To lay taxes to provide for the general welfare of the United States, is," says he, "to lay taxes *for the purpose*, of providing for the general welfare. For the laying of taxes is the *power*, and the general welfare the *purpose*, for which the power is to be exercised. Congress are not to lay taxes *ad libitum*, for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do any thing they please, to provide for the general welfare; but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a pow-

[1] Mr. Jefferson.

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er to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give that, which will allow some meaning to the other parts of the instrument, and not that, which will render all the others useless. Certainly, no such universal power was meant to be given them. It was intended to lace them up strictly within the enumerated powers, and those, without which, as means, those powers could not be carried into effect."[1]

§ 924. The same opinion has been maintained at different and distant times by many eminent statesmen.[2] It was avowed, and apparently acquiesed in, in the state conventions, called to ratify the constitution;[3] and it has been, on various occasions, adopted

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[1] Jefferson's Opinion on the Bank of the United States, 15th February, 1791; 4 Jefferson's Correspondence, 524, 525. — This opinion was deliberately reasserted by Mr. Jefferson on other occasions. There may, perhaps, also be found traces of an opinion still more restrictive in his later writings; but they are very obscure and unsatisfactory. See 4 Jefferson's Correspondence, 306, 416, 457; Message of President Jefferson, 2d December, 1806; 5 Wait's State Papers, 453, 458, 459.

[2] It was maintained by Mr. Hamilton, in his Treasury Report on Manufactures, (5th Dec. 1791,) and in his argument on the constitutionality of a National Bank, 23d Feb. 1791, p. 147, 148; by Mr. Gerry in the debate on the National Bank in Feb. 1791, (4 Elliot's Debates, 226;) by Mr. Ellsworth in a speech in 1788, (3 American Museum, 338;) and by President Monroe, in his Message of the 4th of May, 1822, (p. 33 to 38,) in an elaborate argument, which well deserves to be studied. He contends, that the power to lay taxes is confined to purposes for the common defence and general welfare. And that the power of appropriation of the monies is co-extensive, that is, that it may be applied to any purposes of the common defence or general welfare. Mr. Adams, in his Letter to Mr. Speaker Stevenson, 11th of July, 1832, published since the preparation of these Commentaries, has given a masterly exposition of the clause, to which it may be important hereafter again to recur.

[3] 2 Elliot's Debates, 170, 183, 195, 328, 344; 3 Elliot's Debates, 262; 2 American Museum, 434; 1 Elliot's Debates, 311; Id. 81, 82; 3 Elliot's Debates, 262, 290; 2 American Museum, 544.

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by congress,[1] and may fairly be deemed, that which the deliberate sense of a majority of the nation has at all times supported. This, too, seems to be the construction maintained by the Supreme Court of the United States. In the case of *Gibbons* v. *Ogden*,[2] Mr. Chief Justice Marshall, in delivering the opinion of the court, said, "Congress is authorized to lay and collect taxes, &c. to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power, that is granted to the United States. In imposing taxes for state purposes, they are not doing, what congress is empowered to do. Congress is not empowered to tax for those purposes, which are within the exclusive province of the states. When, then, each government is exercising the power of taxation, neither is exercising the power of the other." Under such circumstances, it is not, perhaps, too much to contend, that it is the truest, the safest, and the most authoritative construction of the constitution.[3]

§ 925. The view thus taken of this clause of the constitution will receive some confirmation, (if it should be thought by any person necessary,) by an historical examination of the proceedings of the convention.

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1 See cases referred to in President Monroe's Message, 4th of May, 1822; 1 Kent's Comm. Lect. p. 250, 251; 4 Elliot's Deb. 226, 243, 244, 279 to 282; Id. 291, 292; 2 United States Law Journal, April, 1826, p. 263 to 280; Webster's Speeches, 389 to 401, 411, 412, 426.

2 9 Wheat. R. 1, 199.

3 1 Kent's Comm. Lect. p. 251; Sergeant on Const. Law, ch. 28, p. 311 to 315; Rawle on the Constitution, ch. 9, p. 104; 2 United States Law Journal, April, 1826, p. 251 to 282.

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The first resolution adopted by the convention on this subject of the powers of the general government, was "that the national legislature ought to be empowered to enjoy the legislative rights vested in congress by the confederation, and moreover to legislate in all cases, to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[1] At a subsequent period, the latter clause was altered, so as to read thus: "And, moreover, to legislate in all cases *for the general interests of the Union*, and also in those, to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[2] When the first draft of the constitution was prepared, in pursuance of the resolutions of the convention, the clause respecting taxation (being the first section of the seventh article) stood thus: "The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises," without any qualification or limitation whatsoever.

§ 926. Afterwards a motion was made to refer certain propositions, and among others a proposition to secure the payment of the public debt, and to appropriate funds exclusively for that purpose, and to secure the public creditors from a violation of the public faith, when pledged by the authority of the legislature, to a select committee, (of five,) which was accordingly done.[3] Another committee (of eleven) was appointed at the same time, to consider the necessity and expediency of the debts of the several states being assumed

[1] Journ. of Convention, 68, 86, 87, 135, 136.
[2] Journ. of Convention, 181, 182, 208.
[3] Journ. of Convention, 261.

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by the United States.[1] The latter committee reported, that "the legislature of the United States shall have power to fulfil the engagements, which have been entered into by congress, and to discharge, as well the debts of the United States, as the debts incurred by the several states during the late war, for the common defence and general welfare." This proposition (it may be presumed) has no reference whatsoever to the clause in the draft of the constitution to lay taxes. The former committee (of five) at a later day reported, that there should be added to the first section of the seventh article (the clause to lay taxes) the following words, "for payment of the debts and the necessary expenses of the United States, provided, that no law for raising any branch of revenue, except what may be specially appropriated for the payment of interest on debts or loans, shall continue in force for more than — years."[2] It was then moved to amend the first clause of the report of the other committee, (on state debts,) so as to read as follows: "The legislature shall fulfil the engagements and discharge the debts of the United States," which (after an ineffectual attempt to amend by striking out the words, "discharge the debts," and inserting the words, "liquidate the claims,") passed unanimously in the affirmative.[3] So, that the provision in the report, to assume the state debts, was struck out. On a subsequent day, it was moved to amend the first section of the seventh article, so as to read: "The legislature shall fulfil the engagements, and discharge the debts of the United States, and shall have power to lay and collect taxes, duties, imposts,

[1] Journ. of Convention, 261.
[2] Id. 277.
[3] Journ. of Convention, 279, 280.

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and excises," which passed in the affirmative;[1] thus incorporating the amendment already stated with the clause respecting taxes in the draft of the constitution. On a subsequent day the following clause was proposed and agreed to: "All debts contracted, and engagements entered into by or under the authority of congress, shall be as valid against the United States, under this constitution, as under the confederation." On the same day, and after the adoption of this amendment, it was proposed to add to the first clause of the first section of the seventh article, (to lay taxes, &c.,) the following words: "for the payment of said debts, and for the defraying the expenses, that shall be incurred for the common defence, and general welfare," which passed in the negative by the vote of ten states against one.[2] So, that the whole clause stood without any further amendment, giving the power of taxation in the same unlimited terms, as it was reported in the original draft of the constitution. This unlimited extent of the power of taxation seems to have been unsatisfactory; and at a later day another committee reported, that the clause respecting taxation should read as follows: "The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence, and general welfare of the United States;" and this passed in the affirmative without any division.[3] And in the final draft the whole clause now stands thus: "The congress, &c. shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States."[4] From this historical survey,

[1] Journ. of Convention, 284.
[2] Id. 291.
[3] Journ. of Convention, 323, 324, 326.
[4] Id. 351, 356.

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it is apparent, that it was first brought forward in connexion with the power to lay taxes; that it was originally adopted, as a qualification or limitation of the objects of that power; and that it was not discussed, as an independent power, or as a general phrase pointing to, or connected with, the subsequent enumerated powers. There was another amendment proposed, which would have created a general power to this effect; but it was never adopted, and seems silently to have been abandoned.[1]

§ 927. Besides; it is impracticable in grammatical propriety to separate the different parts of the latter clause. The words are, "to pay the debts, *and* pro- "vide for the common defence," &c. "To pay the "debts" cannot be construed, as an independent power; for it is connected with the other by the copulative "and." The payment of the antecedent debts of the United States was already provided for by a distinct article;[2] and the power to pay future debts must necessarily be implied to the extent, to which they could constitutionally be contracted; and would fall within the purview of the enumerated power to pass all laws necessary and proper to carry the powers given by the constitution into effect. If, then, these words were and ought to be read, as a part of the preceding power to lay taxes, and in connexion with it, (as this historical review establishes beyond any reasonable controversy,) they draw the other words, "and provide for the common "defence," &c. with them into the same connexion. On the other hand, if this connexion be once admitted, it would be almost absurd to contend, that "to pay "the debts" of the United States was a general phrase,

1 Journ. of Convention, 277.

2 Journ. of Convention, 291. See also the Constitution, art. 6.

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which pointed to the subsequent enumerated powers, and was qualified by them; and yet, as a part of the very clause, we are not at liberty to disregard it. The truth is, (as the historical review also proves,) that after it had been decided, that a positive power to pay the public debts should be inserted in the constitution, and a desire had been evinced to introduce some restriction upon the power to lay taxes, in order to allay jealousies and suppress alarms, it was (keeping both objects in view) deemed best to append the power to pay the public debts to the power to lay taxes; and then to add other terms, broad enough to embrace all the other purposes contemplated by the constitution. Among these none were more appropriate, than the words, "common defence and general welfare," found in the articles of confederation, and subsequently with marked emphasis introduced into the preamble of the constitution. To this course no opposition was made, because it satisfied those, who wished to provide positively for the public debts, and those, who wished to have the power of taxation co-extensive with all constitutional objects and powers. In other words, it conformed to the spirit of that resolution of the convention, which authorized congress "to legislate, in all cases, for the "general interests of the Union."[1]

[1] Journal of Convention, 181, 182, 208. — The letter of Mr. Madison to Mr. Stevenson of 27th November, 1830, contains an historical examination of the origin and progress of this clause substantially the same, as that given above. After perusing it, I perceive no reason to change the foregoing reasoning. In one respect, Mr. Madison seems to labour under a mistake, viz. in supposing, that the proposition of the 25th of August, to add to the power to lay taxes, as previously amended on the 23d of August, the words, "for the payment of the debts and for defraying the expenses, that shall be incurred for the common defence and general welfare," was rejected on account of the generality of the

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§ 928. Having thus disposed of the question, what is the true interpretation of the clause, as it stands in the text of the constitution, and ascertained, that the power

phraseology. The known opinions of some of the states, which voted in the negative (Connecticut alone voted in the affirmative) shows, that it could not have been rejected on this account. It is most probable, that it was rejected, because it contained a restriction upon the power to tax; for this power appears at first to have passed without opposition in its general form.* It may be acceptable to the general reader to have the remarks of this venerable statesman in his own words, and therefore they are here inserted. After giving an historical review of the origin and progress of the whole clause, he says,

"A special provision in this mode could not have been necessary for the debts of the new congress; for a power to provide money, and a power to perform certain acts, of which money is the ordinary and appropriate means, must, of course, carry with them, a power to pay the expense of performing the acts. Nor was any special provision for debts proposed, till the case of the revolutionary debts was brought into view; and it is a fair presumption, from the course of the varied propositions, which have been noticed, that but for the old debts, and their association with the terms, 'common defence and general welfare,' the clause would have remained, as reported in the first draft of a constitution, expressing generally 'a power in congress to lay and collect taxes, duties, imposts, and excises;' without any addition of the phrase 'to provide for the common defence and general welfare.' With this addition, indeed, the language of the clause being in conformity with that of the clause in the articles of confederation, it would be qualified, as in those articles, by the specification of powers subjoined to it. But there is sufficient reason to suppose, that the terms in question would not have been introduced, but for the introduction of the old debts, with which they happened to stand in a familiar, though inoperative, relation. Thus introduced, however, they pass undisturbed through the subsequent stages of the constitution.

"If it be asked, why the terms 'common defence and general welfare,' if not meant to convey the comprehensive power, which, taken literally, they express, were not qualified and explained by some reference to the particular power subjoined, the answer is at hand, that although it might easily have been done, and experience shows it might be well, if it had been done, yet the omission is accounted for by an inattention to the phraseology, occasioned, doubtless, by identity with the harmless character attached to it in the instrument, from which it was borrowed.

"But may it not be asked with infinitely more propriety, and without the possibility of a satisfactory answer, why, if the terms were meant to

* Journal of Convention, p. 220, 257, 284, 291.

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of taxation, though general, as to the subjects, to which it may be applied, is yet restrictive, as to the purposes, for which it may be exercised; it next becomes matter

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embrace, not only all the powers particularly expressed, but the indefinite power, which has been claimed under them, the intention was not so declared; why, on that supposition, so much critical labour was employed in enumerating the particular powers, and in defining and limiting their extent?

"The variations and vicissitudes in the modification of the clause, in which the terms 'common defence and general welfare' appear, are remarkable; and to be no otherwise explained, than by differences of opinion, concerning the necessity or the form of a constitutional provision for the debts of the revolution; some of the members, apprehending improper claims for losses by depreciated bills of credit; others, an evasion of proper claims, if not positively brought within the authorized functions of the new government; and others again, considering the past debts of the United States, as sufficiently secured by the principle, that no change in the government could change the obligations of the nation. Besides the indications in the Journal, the history of the period sanctions this explanation.

"But, it is to be emphatically remarked, that in the multitude of motions, propositions, and amendments, there is not a single one having reference to the terms 'common defence and general welfare,' unless we were so to understand the proposition containing them, made on August 25th, which was disagreed to by all the states, except one.

"The obvious conclusion, to which we are brought, is, that these terms, copied from the articles of confederation, were regarded in the new, as in the old instrument, merely as general terms, explained and limited by the subjoined specifications, and therefore requiring no critical attention or studied precaution.

"If the practice of the revolutionary congress be pleaded in opposition to this view of the case, the plea is met by the notoriety, that on several accounts, the practice of that body is not the expositor of the 'articles of confederation.' These articles were not in force, till they were finally ratified by Maryland in 1781. Prior to that event, the power of congress was measured by the exigencies of the war, and derived its sanction from the acquiescence of the states. After that event, habit, and a continued expediency, amounting often to a real or apparent necessity, prolonged the exercise of an undefined authority, which was the more readily overlooked, as the members of the body held their seats during pleasure, as its acts, particularly after the failure of the bills of credit, depended for their efficacy on the will of the states; and as its general impotency became manifest. Examples of departure from the prescribed rule are too well known to require proof. The

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of inquiry, what were the reasons, for which this power was given, and what were the objections, to which it was deemed liable.

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case of the old bank of North America might be cited, as a memorable one. The incorporating ordinance grew out of the inferred necessity of such an institution to carry on the war, by aiding the finances, which were starving under the neglect or inability of the states to furnish their assessed quotas. Congress was at the time so much aware of the deficient authority, that they recommended it to the state legislatures to pass laws giving due effect to the ordinance, which was done by Pennsylvania and several other states.

"Mr. Wilson, justly distinguished for his intellectual powers, being deeply impressed with the importance of a bank at such a crisis, published a small pamphlet, entitled 'Considerations on the Bank of North America,' in which he endeavoured to derive the power from the nature of the Union, in which the colonies were declared and became independent states; and also from the tenour of the 'articles of confederation' themselves. But what is particularly worthy of notice is, that with all his anxious search in those articles for such a power, he never glanced at the terms, 'common defence and general welfare,' as a source of it. He rather chose to rest the claim on a recital in the text, 'that for the more convenient management of the general interests of the United States, delegates shall be annually appointed to meet in congress,' which he said implied, that the United States had general rights, general powers, and general obligations, not derived from any particular state, nor from all the particular states, taken separately, but 'resulting from the union of the whole;' these general powers, not being controlled by the article declaring, that each state retained all powers not granted by the articles, because 'the individual states never possessed, and could not retain, a general power over the others.'

"The authority and argument here resorted to, if proving the ingenuity and patriotic anxiety of the author, on one hand, show sufficiently on the other, that the terms, 'common defence and general welfare,' could not, according to the known acceptation of them, avail his object.

"That the terms in question were not suspected in the convention, which formed the constitution, of any such meaning, as has been constructively applied to them, may be pronounced with entire confidence. For it exceeds the possibility of belief, that the known advocates in the convention for a jealous grant, and cautious definition of federal powers, should have silently permitted the introduction of words or phrases, in a sense rendering fruitless the restrictions and definitions elaborated by them.

"Consider, for a moment, the immeasurable difference between the constitution, limited in its powers to the enumerated objects; and ex-

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§ 929. That the power of taxation should be, to some extent, vested in the national government, was admitted by all persons, who sincerely desired to escape

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panded, as it would be by the import claimed for the phraseology in question. The difference is equivalent to two constitutions, of characters essentially contrasted with each other; the one possessing powers confined to certain specified cases; the other extended to all cases whatsoever. For what is the case, that would not be embraced by a general power to raise money; a power to provide for the general welfare; and a power to pass all laws necessary and proper to carry these powers into execution; all such provisions and laws superseding at the same time, all local laws and constitutions at variance with them? Can less be said, with the evidence before us, furnished by the Journal of the Convention itself, than that it is impossible, that such a constitution, as the latter, would have been recommended to the states by all the members of that body, whose names were subscribed to the instrument?

"Passing from this view of the sense, in which the terms, 'common defence and general welfare,' were used by the framers of the constitution, let us look for that, in which they must have been understood by the conventions, or rather by the people, who, through their conventions, accepted and ratified it. And here the evidence is, if possible, still more irresistible, that the terms could have been regarded, as giving a scope to federal legislation, infinitely more objectionable, than any of the specified powers, which produced such strenuous opposition, and calls for amendments, which might be safeguards against the dangers apprehended from them.

"Without recurring to the published debates of those conventions, which, as far as they can be relied on for accuracy, would, it is believed, not impair the evidence furnished by their recorded proceedings, it will suffice to consult the lists of amendments proposed by such of the conventions, as considered the powers granted to the government, too extensive, or not safely defined.

"Besides the restrictive and explanatory amendments to the text of the constitution, it may be observed, that a long list was premised under the name, and in the nature of 'Declaration of Rights;' all of them indicating a jealousy of the federal powers, and an anxiety to multiply securities against a constructive enlargement of them. But the appeal is more particularly made to the number and nature of the amendments, proposed to be made specific and integral parts of the constitutional text.

"No less than seven states, it appears, concurred in adding to their ratifications a series of amendments, which they deemed requisite. Of these amendments, nine were proposed by the convention of Massachusetts; five by that of South-Carolina; twelve by that of New-Hamp-

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from the imbecilities, as well as the inequalities of the confederation.[1] Without such a power, it would not be possible to provide for the support of the national

shire; twenty by that of Virginia; thirty-three by that of New-York; twenty-six by that of North-Carolina; and twenty-one by that of Rhode-Island.

"Here are a majority of the states, proposing amendments, in one instance thirty-three by a single state; all of them intended to circumscribe the power granted to the general government, by explanations, restrictions, or prohibitions, without including a single proposition from a single state referring to the terms, 'common defence and general welfare;' which, if understood to convey the asserted power, could not have failed to be the power most strenuously aimed at, because evidently more alarming in its range, than all the powers objected to, put together. And that the terms should have passed altogether unnoticed by the many eyes, which saw danger in terms and phrases employed in some of the most minute and limited of the enumerated powers, must be regarded as a demonstration, that it was taken for granted, that the terms were harmless, because explained and limited, as in the 'articles of confederation,' by the enumerated powers, which followed them.

"A like demonstration, that these terms were not understood in any sense, that could invest congress with powers not otherwise bestowed by the constitutional charter, may be found in what passed in the first session of congress, when the subject of amendments was taken up, with the conciliatory view of freeing the constitution from objections, which had been made to the extent of its powers, or to the unguarded terms employed in describing them. Not only were the terms, 'common defence and general welfare,' unnoticed in the long list of amendments brought forward in the outset; but the Journals of Congress show, that in the progress of the discussions, not a single proposition was made in either branch of the legislature, which referred to the phrase, as admitting a constructive enlargement of the granted powers, and requiring an amendment guarding against it. Such a forbearance and silence on such an occasion, and among so many members, who belonged to the part of the nation, which called for explanatory and restrictive amendments, and who had been elected, as known advocates for them, cannot be accounted for, without supposing, that the terms, 'common defence and general welfare,' were not, at that time, deemed susceptible of any such construction, as has since been applied to them.

"It may be thought, perhaps, due to the subject, to advert to a letter of October 5th, 1787, to Samuel Adams, and another of October 16th, of

[1] See The Federalist, No. 21, 30.

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forces by land or sea, or the national civil list, or the ordinary charges and expenses of government. For these purposes at least, there must be a constant and regular supply of revenue.[1] If there should be a deficiency, one of two evils must inevitably ensue; either the people must be subjected to continual arbitrary plunder; or the government must sink into a fatal atrophy.[2] The former is the fate of Turkey under its sovereigns: the latter was the fate of America under the confederation.[3]

§ 930. If, then, there is to be a real, effective national government, there must be a power of taxation co-extensive with its powers, wants, and duties. The only inquiry properly remaining is, whether the resources of taxation should be specified and limited; or, whether the power in this respect should be general, leaving a full choice to the national legislature. The opponents of the constitution strenuously contended, that

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the same year, to the governor of Virginia, from R. H. Lee, in both of which it is seen, that the terms had attracted his notice, and were apprehended by him 'to submit to congress every object of human legislation.' But it is particularly worthy of remark, that although a member of the senate of the United States, when amendments to the constitution were before that house, and sundry additions and alterations were there made to the list sent from the other, no notice was taken of those terms, as pregnant with danger. It must be inferred, that the opinion formed by the distinguished member, at the first view of the constitution, and before it had been fully discussed and elucidated, had been changed into a conviction, that the terms did not fairly admit the construction he had originally put on them; and therefore needed no explanatory precaution against it."

Against the opinion of Mr. Madison, there are the opinions of men of great eminence, and well entitled to the confidence of their country; and among these may be enumerated Presidents Washington, Jefferson, and Monroe, and Mr. Hamilton. The opinion of the latter upon this very point will be given hereafter in his own words.

[1] 1 Tucker's Black. Comm. App. 235 *et seq.*; Id. 244, 245.

[2] The Federalist, No. 30. [3] Id.

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the power should be restricted; its friends, as strenuously contended, that it was indispensable for the public safety, that it should be general.

§ 931. The general reasoning, by which an unlimited power was sustained, was to the following effect. Every government ought to contain within itself every power requisite to the full accomplishment of the objects committed to its care, and the complete execution of the trusts, for which it is responsible, free from every other control, but a regard to the public good, and to the security of the people. In other words, every power ought to be proportionate to its object. The duties of superintending the national defence, and of securing the public peace against foreign or domestic violence, involve a provision for casualties and dangers, to which no possible limits can be assigned; and therefore the power of making that provision ought to know no other bounds, than the exigencies of the nation, and the resources of the community. Revenue is the essential engine, by which the means of answering the national exigencies must be procured; and therefore the power of procuring it must necessarily be comprehended in that of providing for those exigencies. Theory, as well as practice, the past experience of other nations, as well as our own sad experience under the confederation, conspire to prove, that the power of procuring revenue is unavailing, and a mere mockery, when exercised over states in their collective capacities. If, therefore, the federal government was to be of any efficiency, and a bond of union, it ought to be invested with an unqualified power of taxation for all national purposes.[1] In the history of mankind it has ordinarily

[1] The Federalist, No. 31; Id. No. 30; Id. No. 21.

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been found, that in the usual progress of things the necessities of a nation in every stage of its existence are at least equal to its resources.[1] But, if a more favourable state of things should exist in our own government, still we must expect reverses, and ought to provide against them. It is impossible to foresee all the various changes in the posture, relations, and power of different nations, which might affect the prosperity and safety of our own. We may have formidable foreign enemies. We may have internal commotions. We may suffer from physical, as well as moral calamities; from plagues, famine, and earthquakes; from political convulsions, and rivalries; from the gradual decline of particular sources of industry; and from the necessity of changing our own habits and pursuits, in consequence of foreign improvements and competitions, and the variable nature of human wants and desires. A source of revenue adequate in one age, may wholly or partially fail in another. Commerce, or manufactures, or agriculture may thrive under a tax in one age, which would destroy them in another. The power of taxation, therefore, to be useful, must not only be adequate to all the exigencies of the nation, but it must be capable of reaching from time to time all the most productive sources. It has been observed with no less truth, than point, that "in political arithmetic two and two do not always make four."[2] Constitutions of government are not to be framed upon a calculation of existing exigencies; but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. There ought to be a capacity to provide for future contingencies, as they may happen; and as these are (as has been

[1] The Federalist, No. 30.

[2] The Federalist, No. 21.

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already suggested) illimitable in their nature, so it is impossible safely to limit that capacity.[1]

§ 932. In answer to this reasoning it was objected, that "it is not true, because the exigencies of the Union may not be susceptible of limitation, that its power of taxation ought to be unconfined. Revenue is as requisite to the purposes of the local administrations, as to those of the Union; and the former are at least of equal importance with the latter to the happiness of the people. It is, therefore, as necessary, that the state governments should be able to command the means of supplying their wants, as that the national government should possess the like faculty in respect to the wants of the Union. But an indefinite power in the latter might, and probably would in time, deprive the former of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; and as it is to have power to pass all laws, that may be necessary, for carrying into execution the authorities, with which it is proposed to vest the national government, it might at any time abolish the taxes imposed for state objects upon the pretence of an interference with its own. It might allege a necessity of doing this in order to give efficacy to the national revenue; and thus all the resources of taxation might by degrees become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."[2] The

[1] The Federalist, No. 34; 1 Elliot's Debates, 77 to 89; Id. 303 to 308; Id. 309, 311 to 316, 321 to 329; Id. 337; 2 Elliot's Debates, 95, 96, 118; Id. 198 to 204; 3 Elliot's Debates, 261, 262, 290; 3 Amer. Museum, 334, 338; 1 Tucker's Black. Comm. 234, 235, 236.

[2] The Federalist, No. 31; 1 Elliot's Debates, 77, 78 to 89; Id. 91, 105, 112; Id. 293, 294 to 296; Id. 301, 302, 303; Id. 329 to 333; 2 Elli-

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difficulties arising from this collision between the state and national governments might be easily avoided by a separation and distinction, as to the subjects of taxation, or by other methods, which might be easily devised. Thus, for instance, the general government might be entrusted with the power of external taxation, such as laying duties and imposts on goods imported; and the states remain exclusively in possession of the power of internal taxation. Or power might be given to the general government to lay taxes exclusively upon certain specified subjects; or to lay taxes, if requisitions on the states were not complied with;[1] or, if the specified subjects failed to produce an adequate revenue, resort might be had to requisitions, or even to direct taxes, to supply the deficiency.[2]

§ 933. In regard to these objections it was urged, that it was impossible to rely (as the history of the government under the confederation abundantly proved) upon requisitions upon the states.[3] Direct taxes were exceedingly unequal, and difficult to adjust;[4] and could

ot's Debates, 52, 53, 208; 3 Elliot's Debates, 77 to 91; 1 Tuck. Black. Comm. App. 240; 2 Amer. Museum, 543, 544.

[1] 3 Amer. Museum, 423; 2 Elliot's Debates, 52, 53, 200, 206.

[2] See The Federalist, No. 30; 1 Elliot's Debates, 294; 1 Tucker's Black. Comm. App. 234, 235; 1 Elliot's Debates, 294, 295; 2 Elliot's Debates, 52, 53, 111, 112; Id. 200, 206, 208. — It was moved in the convention, that whenever revenue was required to be raised by direct taxation, it should be apportioned among the states, and then requisitions made upon the states to pay the amount; and in default only of their compliance, congress should be authorized to pass acts directing the mode of collecting it. But this proposition was rejected by a vote of seven states against one, one state being divided.*

[3] The Federalist, No. 30; 1 Elliot's Debates, 303, 304; Id. 325, 326, 327; 2 Elliot's Debates, 198, 199, 204.

[4] The Federalist, No. 21; 1 Elliot's Debates, 81, 82; 2 Elliot's Debates, 105; Id. 199, 204, 236; 1 Tucker's Black. Comm. App. 234, 235, 236; 3 Dall. R. 171, 178.

* Journal of the Convention, p. 274.

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not safely be relied on, as an adequate or satisfactory source of revenue, except as a final resort, when others more eligible failed. The distinction between external and internal taxation was indeed capable of being reduced to practice. But in many emergencies it might leave the national government without any adequate resources, and compel it to a course of taxation ruinous to our trade and industry, and the solid interests of the country. No one of due reflection can contend, that commercial imports are, or could be, equal to all future exigencies of the Union; and indeed ordinarily they may not be found equal to them.[1] Suppose they are equal to the ordinary expenses of the Union; yet, if war should come, the civil list must be entirely overlooked, or the military left without any adequate supply.[2] How is it possible, that a government half supplied and half necessitous can fulfil the purposes of its institution, or can provide for the security, advance the prosperity, or support the reputation of the commonwealth? How can it ever possess either energy or stability, dignity or credit, confidence at home, or respectability abroad? How can its administration be any thing else, than a succession of expedients, temporary, impotent, and disgraceful? How will it be able to avoid a frequent sacrifice of its engagements to immediate necessity? How can it undertake, or execute any liberal or enlarged plans of public good?[3] Who would lend to a

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[1] The Federalist, No. 41. See 1 Elliot's Debates, 303 to 306.

[2] The Federalist, No. 30, 34.—"A government," (said one of our most distinguished statesmen, Mr. Ellsworth, of Connecticut, speaking on this very subject,) "which can command but half its resources, is like a man with but one arm to defend himself." Speech in Connecticut Convention, 7th January, 1788; 3 Amer. Museum, 338.

[3] The Federalist, No. 30.

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government, incapable of pledging any permanent resources to redeem its debts? It would be the common case of needy individuals, who must borrow upon onerous conditions and usury, because they cannot promise a punctilious discharge of their engagements.[1] It would, therefore, not only not be wise, but be the extreme of folly to stop short of adequate resources for all emergencies, and to leave the government entrusted with the care of the national defence in a state of total, or partial incapacity to provide for the protection of the community against future invasions of the public peace by foreign war, or domestic convulsions. If, indeed, we are to try the novel, not to say absurd experiment in politics, of tying up the hands of government from protective and offensive war, founded upon reasons of state, we ought certainly to be able to compel foreign nations to abstain from all measures, which shall injure, or cripple us.[2] We must be able to repress their ambition, and disarm their enmity; to conquer their prejudices, and destroy their rivalries and jealousies. Who is so visionary, as to dream of such a moral influence in a republic over the whole world? It should never be forgotten, that the chief sources of expense in every government have ever arisen from wars and rebellions, from foreign ambition and enmity, or from domestic insurrections and factions. And it may well be presumed, that what has been in the past, will continue to be in the future.

§ 934. Besides; it is manifest, that however adequate commercial imposts might be for the ordinary expenditures of peace, the operations of war might, and indeed ordinarily would, if our adversary possess-

[1] The Federalist, No. 30.

[2] The Federalist, No. 34.

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ed a large naval force, greatly endanger, if it did not wholly cut off our supplies from this source.[1] And if this were the sole reliance of the national government, a naval warfare upon our commerce would, on this very account, be at once the most successful, and the most irresistible means of subduing us, or compelling us to sue for peace. What could Great Britain, or France do in a naval war, if they were compelled to rely on commerce alone, as a resource for taxation to raise armies, or maintain navies? What could America do, in a contest with a rival power, whose navy possessed a superiority, sufficient to blockade all her principal ports?[2] And, independent of any such exigencies, the history of the world shows, that nothing is more fluctuating and capricious than trade. The proudest commercial nations in one age have sunk down to comparative insignificance in another. Look at Venice, and Genoa, and the Hanse Towns, and Holland, and Portugal, and Spain! What is their present, commercial importance; compared with its glory, and success, in past times? Could either of them now safely rely on imposts, as an exclusive source of revenue?

§ 935. There is another, very important view of this

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1 3 Elliot's Debates, 290.

2 In the recent war, of 1812-1813, between Great Britain, and the United States, we had abundant proofs of the correctness, of this reasoning. Notwithstanding the duties upon importations were *doubled*; from the naval superiority of our enemy, our government, were compelled to resort to direct, and internal taxes, to land taxes and excises; and even with all these advantages, it is notorious, that the credit of the government sunk exceedingly low, during the contest; and the public securities were bought and sold, under the very eyes of the administration, at a discount of nearly fifty per cent, from their nominal amount. Nay, at one time, it was impracticable to borrow any money upon the government credit. This event, (let it be remembered,) took place, after twenty years, of unexampled prosperity of the country. It is a sad, but solemn admonition.

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subject. If the power of taxation of the general government were confined to duties on imports, it is evident, that it might be compelled, for want of other adequate resources, to extend these duties to an injurious excess. Trade might become embarrassed, and perhaps oppressed, so as to diminish the receipts, while the duty was increased; smuggling, always facile, and always demoralizing in a republic of a widely extended seacoast, would be most mischievously encouraged.[1] The first effect would be, that commerce would thus gradually change its channels; and if other interests should be (as, indeed, they might be to some extent) aided by such exorbitant duties; the ultimate result would be a great diminution of the revenue, and the ruin of a great branch of industry. It never can be either politic or just, wise or patriotic, to found a government upon principles, which in its ordinary, or even extraordinary operations, must naturally, if not necessarily, lead to such a result. This would be, to create a government, not for the happiness, or prosperity of the whole people; but for oppressions, and inequalities, arising from scanty means, and inadequate powers.

§ 936. In regard to the other part of the objection, founded on the dangers to the state governments from this general power of taxation, it is wholly without any solid foundation. It assumes, that the national government will have an interest to oppress or destroy the state governments; a supposition, wholly inadmissible in principle, and unsupported by fact. There is quite as much reason to presume, that there will be a disposition in the state governments to encroach on that of the union.[2] In truth, no reasoning,

[1] The Federalist, No. 35.

[2] The Federalist, No. 31.

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founded exclusively on either ground, is safe, or satisfactory. There ought to be power in each government to maintain itself, and execute its own powers; but it does not necessarily follow, that either would become dangerous to the other. The objection, indeed, is rather aimed at the structure, and organization of the government, than at its powers; since it is impossible, if the structure and organization be reasonably skilful, that any usurpation or oppression can take place.[1]

§ 937. But waiving this consideration, it will at once be seen, that the state governments have complete means of self-protection, as with the sole exception of duties on imports and exports, (which the constitution has taken from the states, unless it is exercised by the consent of congress,) the power of taxation remains in the states concurrent and co-extensive with that of congress. The slightest attention to the subject will demonstrate this beyond all controversy. The language of the constitution does not, in terms, make it an exclusive power in congress; the existence of a concurrent power is not incompatible with the exercise of it by congress; and the states are not expressly prohibited from using it by the constitution. Under such circumstances, the argument is irresistible, that a concurrent power remains in the states, as a part of their original and unsurrendered sovereignty.[2]

[1] The Federalist, No. 31, 32.

[2] The Federalist, No. 32. See *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 199 to 202. 1 Kent's Comm. Lect. 18, p. 363, 367, 368, 369. — This subject has been already considered in these Commentaries, in the rules of interpretation of the constitution; and a very important illustration, in the Federalist, No. 32, on this very point of taxation, was cited there. It seems, therefore, wholly unnecessary to repeat the reasoning. See also 4 Wheaton's R. 193, 316; 5 Wheaton's R. 22, 24, 28, 45, 49; 9 Wheaton's R. 199, 210, 238; 12 Wheaton's R. 448.

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§ 938. The remarks of the Federalist, on this point, are very full and cogent. "There is, plainly," says that work, "no expression, in the granting clause, which makes that power exclusive in the Union. There is no independent clause, or sentence, which prohibits the states from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is deducible from the restraint laid upon the states, in relation to duties on imports and exports. This restriction implies an admission, that, if it were not inserted, the states would possess the power it excludes; and it implies a further admission, that as to all other taxes the authority of the states remains undiminished. In any other view, it would be both unnecessary and dangerous. It would be unnecessary, because, if the grant to the Union of the power of laying such duties implied the exclusion of the states, or even their subordination in this particular, there would be no need of such a restriction. It would be dangerous, because the introduction of it leads directly to the conclusion, which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended; I mean, that the states in all cases, to which the restriction did not apply, would have a concurrent power of taxation with the Union. The restriction in question amounts to what lawyers call a negative pregnant; that is, a negation of one thing, and an affirmance of another; a negation of the authority of the states to impose taxes on imports and exports; and an affirmance of their authority to impose them on other articles."—"As to a supposition of repugnancy between the power of taxation in the states, and in the Union; it cannot be supported in that sense, which would be requisite to work

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an exclusion of the states. It is indeed possible, that a tax might be laid on a particular article by a state, which might render it inexpedient, that a further tax should be laid on the same article by the Union. But it would not imply a constitutional inability to impose a further tax. The quantity of the imposition, the expediency of an increase, on either side, would be mutually questions of prudence; but there would be involved no direct contradiction of power. The particular policy of the national and state system of finance might, now and then, not exactly coincide, and might require reciprocal forbearance. It is not, however, a mere possibility of inconvenience, in the exercise of powers; but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty."[1]

§ 939. It is true, that the laws of the Union are to be supreme. But, without this, they would amount to nothing. It may be admitted, that a law, laying a tax for the use of the United States, would be supreme in its nature, and legally uncontrollable. Yet a law, abrogating a state tax, or preventing its collection, would be as clearly unconstitutional; and, therefore, not the supreme law. As far as an improper accumulation of taxes on the same thing might tend to render the collection difficult, or precarious, it would be a mutual inconvenience, not arising from superiority, or defect of power on either side, but from an injudicious exercise of it.[2]

[1] The Federalist, No. 32, 36. See also 3 American Museum, 338, 341; 1 Elliot's Deb. 307, 308; Id. 315, 316; Id. 321 to 323; 2 Elliot's Deb. 198 to 204; *M'Culloch* v. *State of Maryland*, 4 Wheat. R. 316, 433 to 436; 9 Wheaton's R. 199, 200, 201; 12 Wheaton's R. 448. — Whether a state can tax an instrument, created by the national government, to accomplish national objects, will be hereafter considered.

[2] The Federalist, No. 33, 36; 1 Elliot's Deb. 307, 308; Id. 321, 322.

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§ 940. The states, with this concurrent power, will be entirely safe, and have ample resources to meet all their wants, whatever they may be, although few public expenses, comparatively speaking, will fall to their lot to provide for. They will be chiefly of a domestic character, and affecting internal polity; whereas, the resources of the Union will cover the vast expenditures, occasioned by foreign intercourse, wars, and other charges necessary for the safety and prosperity of the Union. The mere civil list of any country is always small; the expenses of armies, and navies, and foreign relations unavoidably great. There is no sound reason, why the states should possess any *exclusive* power over sources of revenue, not required by their wants. But there is the most urgent propriety in conceding to the Union all, which may be commensurate by their wants. Any attempt to discriminate between the sources of revenue would leave too much, or too little to the states. If the exclusive power of external taxation were given to the Union, and of external taxation to the states, it would, at a rough calculation, probably give to the states a command of two thirds of the resources of the community, to defray from a tenth to a twentieth of its expenses; and to the Union, one third of the resources of the community, to defray from nine tenths to nineteen twentieths of its expenses. Such an unequal distribution is wholly indefensible. And it may be added, that the resources of the Union would, or might be diminished exactly in proportion to the increase of demands upon its treasury; for (as has been already seen) war, which brings the great expenditures, narrows, or at least may narrow the resources of taxation from duties on imports to a very alarming degree. If we enter any other line of discrimination; it

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will be equally difficult to adjust the proper proportions; for the inquiry itself, in respect to the future wants, as well of the states, as of the Union, and their relative proportion, must involve elements, for ever changing, and incapable of any precise ascertainment. Too much, or too little would for ever be found to belong to the states; and the states, as well as the Union, might be endangered by the very precautions to guard against abuses of power.[1] Any separation of the subjects of revenue, which could have been fallen upon, would have amounted to a sacrifice of the interests of the Union to the power of the individual states; or of a surrender of important functions by the latter, which would have removed them to a mean provincial servitude, and dependence.[2]

§ 941. Other objections of a specious character were urged against confiding to congress a general power of taxation. Among these, none were insisted on with more frequency, and earnestness, than the incapacity of congress to judge of the proper subjects of taxation, considering the diversified interests, and pursuits of the states, and the impracticability of representing in that body all their interests and pursuits.[3] The principal pressure of this argument has been already examined, in the survey already taken of the

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[1] The Federalist, No. 34; 1 Tucker's Black. Comm. App. 234, 235, 236.

[2] The Federalist calculated, that the highest probable sum, required for the ordinary permanent expenses of any state government, would not exceed a million of dollars. But that of the Union, it was supposed, could not be susceptible of any exact measure. The Federalist, No. 34.

[3] The Federalist, No. 35, 36; 1 Elliot's Deb. 297 to 300; Id. 309 to 313. 1 Tucker's Black. Comm. App. 237, 238; 2 Elliot's Deb. 98; Id. 185, 186 to 188; Id. 201, 202, 203; Id. 232, 236; 3 Elliot's Debates, 77 to 91.

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structure and organization of the senate, and house of Representatives. In truth, if it has any real force, or efficacy, it is an argument against any national government, having any efficient national powers; and it is not necessary to repeat the reasoning, on which the expediency, or necessity of such a government has been endeavoured to be demonstrated. And, in respect to the particular subject of taxation, there is quite as much reason to suppose, that there will be an adequate assemblage of experience, knowledge, skill, and wisdom, in congress, and as adequate means of ascertaining the proper bearing of all taxes, whether direct, or indirect, whether affecting agriculture, commerce, or manufactures, as to discharge any other functions delegated to congress. To suppose otherwise, is to suppose the Union impracticable, or mischievous.[1]

§ 942. Other objections were raised on the ground of the multiplied means of influence in the national government, growing out of the appointments to office, necessary in the collection of the revenues; the host of officers, which would swarm over the land, like locusts, to devour its substance; and the terrific oppressions, resulting from double taxes, and harsh, and arbitrary regulations.[2] These objections were answered, as well might be supposed, by appeals to common sense, and common experience; and they are the less necessary now to be refuted, since in the actual practice of the government they have been proved to be visionary, and fallacious, the dreams of speculative statesmen, indulging their love of ingenious paradoxes,

[1] The Federalist, No. 35, 36, 41, 45; 1 Tucker's Black. Comm. App. 244, 245.

[2] The Federalist, No. 36; 2 Elliot's Debates 52, 53, 70; Id. 208; 3 Elliot's Debates, 262, 263; 2 American Museum, 543.

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or the suggestions of fear, stimulated by discontent, or carried away by phantoms of the imagination.[1]

§ 943. But another extraordinary objection, which shows, how easily men may persuade themselves of the truth of almost any proposition, which temporary interests or excitements induce them to believe, was urged from the North; and it was, that the impost would be a partial tax; and that the southern states will pay but little in comparison with the northern. It was refuted by unanswerable reasoning;[2] and would hardly deserve mention, if the opposite doctrine had not been recently revived and propagated with abundant zeal at the South, that duties on importations fall with the most calamitous inequality on the southern states. Nay, it has been seriously urged, that a single southern state is burthened with the payment of more than half of the whole duties levied on foreign goods throughout the Union.

§ 944. Again; it was objected, that there was no certainty, that any duties would be laid on importations; for the southern states might object to all imposts of this nature, as they have no manufactures of their own, and consume more foreign goods, than the northern states; and, therefore, direct taxes would be the common resort to supply revenue.[3] To which no other answer need be given, than, that the rule of apportionment, as well as the inequalities of such taxes, would, undoubtedly, produce a strong disinclination in the nation, and especially in the southern states, to resort to them, unless under extraordinary circumstances.[4]

1 The Federalist, No. 36; 3 American Museum, 338, 341; 1 Elliot's Deb. 81, 293, 294, 300 to 302; Id. 337, 338; 2 Elliot's Deb. 98; Id. 198 to 204.

2 See Mr. Ellsworth's Speech, 3 American Museum, 338, 340.

3 1 Elliot's Debates, 90, 91.

4 1 Tuck. Black. Comm. App. 234 to 238; The Federalist, No. 12.

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An objection, of a directly opposite character, was also taken; viz. that the power of laying direct taxes was not proper to be granted to the national government, because it was unnecessary, impracticable, unsafe, and accumulative of expense.[1] This objection also was shown to be unfounded; and, indeed, under certain exigencies, which have been already alluded to, the national government might for want of it be utterly prostrated.[2]

§ 945. Other objections were urged, which it seems unnecessary to enumerate, as they were either temporary in their nature, or were mere auxiliaries to those already mentioned. The experience of the national government has hitherto shown the entire safety, practicability, and even necessity of its possessing the general power of taxation. The states have exercised a concurrent power without obstruction or inconvenience, and enjoy revenues adequate to all their wants; more adequate, indeed, than they could possibly possess, if the Union were abolished, or the national government were not vested with a general power of taxation, which enables it to provide for all objects of common defence and general welfare. The triumph of the friends of the constitution, in securing this great fundamental source of all real effective national sovereignty, was most signal; and it is the noblest monument of their wisdom, patriotism, and independence. Popular feelings, and popular prejudices, and local interests, and the pride of state authority, and the jeal-

21, 36; 1 Elliot's Debates, 61, 62; 2 Elliot's Debates, 105; 3 Elliot's Debates, 77 to 91; 8 Journ. of Continent. Congress, 16th Dec. 1782, p. 203.

[1] 2 Elliot's Debates, 197 to 204; Id. 208, 232, 235; 3 Elliot's Debates, 77, 91.

[2] Ibid.

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ousy of state sovereignty, were all against them. Yet they were not dismayed; and by steadfast appeals to reason, to the calm sense of the people, and to the lessons of history, they subdued opposition, and won confidence. Without the possession of this power, the constitution would have long since, like the confederation, have dwindled down to an empty pageant. It would have become an unreal mockery, deluding our hopes, and exciting our fears. It would have flitted before us for a moment with a pale and ineffectual light, and then have departed for ever to the land of shadows. There is so much candour and force in the remarks of the learned American commentator on Blackstone, on this subject, that they deserve to be cited in this place.[1] "A candid review of this part of the federal constitution cannot fail to excite our just applause of the principles, upon which it is founded. All the arguments against it appear to have been drawn from the inexpediency of establishing such a form of government, rather than from any defect in this part of the system, admitting, that a general government was necessary to the happiness and prosperity of the states individually. This great primary question being once decided in the affirmative, it might be difficult to prove, that any part of the powers granted to congress in this clause ought to have been altogether withheld: yet being granted, rather as an ultimate provision in any possible case of emergency, than as a means of ordinary revenue, it is to be wished, that the exercise of powers, either oppressive in their operation, or inconsistent with the genius of the people, or irreconcilable to their prejudices, might be reserved for cogent occasions, which might justify the temporary recourse to a

[1] 1 Tuck. Black. Comm. App. 246.

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lesser evil, as the means of avoiding one more permanent, and of greater magnitude."

§ 946. The language of the constitution is, "Congress "shall have power to lay and collect taxes, duties, im- "posts, and excises," &c. "But all *duties*, *imposts*, and "*excises* shall be uniform throughout the United States." A distinction is here taken between taxes, and duties, imposts, and excises; and, indeed, there are other parts of the constitution respecting the taxing power, (as will presently be more fully seen,) such as the regulations respecting direct taxes, the prohibition of taxes or duties on exports by the United States, and the prohibition of imposts or duties by the states on imports or exports, which require an attention to this distinction.

§ 94.7 In a general sense, all contributions imposed by the government upon individuals for the service of the state, are called taxes, by whatever name they may be known, whether by the name of tribute, tythe, talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name.[1] In this sense, they are usually divided into two great classes, those, which are direct, and those, which are indirect. Under the former denomination are included taxes on land, or real property, and under the latter, taxes on articles of consumption.[2] The constitution, by giving the power to lay and collect taxes in general terms, doubtless meant to include all sorts of taxes, whether direct or indirect.[3] But, it may be asked, if such was the intention, why were the sub-

[1] See 2 Stuart's Polit. Econ. 485; 1 Tuck. Black. Comm. App. 232; 1 Black. Comm. 308; 3 Dall. R. 171; Smith's Wealth of Nations, B. 3, ch. 3, B. 5, ch. 2, P. 1, P. 2, art. 4.

[2] The Federalist, No. 21, 36; 1 Tuck. Black. Comm. 233, 238, 239; Smith's Wealth of Nations, B. 5, ch. 2, Pt. 2, art. 1 and 2, and App.

[3] *Loughborough* v. *Blake*, 5 Wheat. R. 317, 318, 319.

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sequent words, *duties*, *imposts* and *excises*, added in the clause? Two reasons may be suggested; the first, that it was done to avoid all possibility of doubt in the construction of the clause, since, in common parlance, the word *taxes* is sometimes applied in contradistinction to duties, imposts, and excises, and, in the delegation of so vital a power, it was desirable to avoid all possible misconception of this sort; and, accordingly, we find, in the very first draft of the constitution, these explanatory words are added.[1] Another reason was, that the constitution prescribed different rules of laying taxes in different cases, and, therefore, it was indispensable to make a discrimination between the classes, to which each rule was meant to apply.[2]

§ 948. The second section of the first article, which has been already commented on for another purpose, declares, that "*direct* taxes shall be apportioned among "the several states, which may be included within this "Union, according to their respective numbers." The fourth clause of the ninth section of the same article (which would regularly be commented on in a future page) declares, that "no capitation, or other direct tax, "shall be laid, unless in proportion to the census or "enumeration herein before directed to be taken." And the clause now under consideration, that "all du- "duties, imposts, and excises shall be uniform through- "out the United States." Here, then, two rules are prescribed, the rule of apportionment (as it is called) for *direct* taxes, and the rule of uniformity for *duties*, *imposts*, and *excises*. If there are any other kinds of taxes, not embraced in one or the other of these two classes, (and it is certainly difficult to give full effect to

1 Journal of Convention, 220.

2 *Hylton v. United States*, 3 Dall. 171, 174.

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the words of the constitution without supposing them to exist,) it would seem, that congress is left at full liberty to levy the same by either rule, or by a mixture of both rules, or perhaps by any other rule, not inconsistent with the general purposes of the constitution.[1] It is evident, that "duties, imposts, and excises" are indirect taxes in the sense of the constitution. But the difficulty still remains, to ascertain[1] what taxes are comprehended under this description; and what under the description of *direct* taxes. It has been remarked by Adam Smith, that the private revenue of individuals arises ultimately from three different sources, rent, profit, and wages; and, that every public tax must be finally paid from some one, or all of these different sorts of revenue.[2] He treats all taxes upon land, or the produce of land, or upon houses, or parts, or appendages thereof, (such as hearth taxes and window taxes,) under the head of taxes upon rent; all taxes upon stock, and money at interest, upon other personal property yielding an income, and upon particular employments, or branches of trade and business, under the head of taxes on profits; and taxes upon salaries under the head of wages. He treats capitation taxes and taxes on consumable articles, as mixed taxes, falling upon all or any of the different species of revenue.[3] A full consideration of these different classifiations of taxes belongs more properly to a treatise upon political economy, than upon constitutional law.

§ 949. The word "duties" has not, perhaps, in all cases a very exact signification, or rather it is used sometimes in a larger, and sometimes in a narrower

[1] *Hylton* v. *United States*, 3 Dall. R. 171.
[2] Smith's Wealth of Nations, B. 5. ch. 2, P. 2.
[3] Smith's Wealth of Nations, B. 5, ch. 2, P. 2, art. 1, 2, 3, 4.

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sense. In its large sense, it is very nearly an equivalent to taxes, embracing all impositions or charges levied on persons or things.[1] In its more restrained sense, it is often used as equivalent to "customs," which appellation is usually applied to those taxes, which are payable upon goods and merchandise imported, or exported, and was probably given on account of the usual and constant demand of them for the use of kings, states, and governments.[2] In this sense, it is nearly synonymous with "imposts," which is sometimes used in the large sense of taxes, or duties, or impositions, and sometimes in the more restrained sense of a duty on imported goods and merchandise.[3] Perhaps it is not unreasonable to presume, that this narrower sense might be in the minds of the framers of the constitution, when this clause was adopted, since, in another clause, it is subsequently provided, that "No tax or duty shall be laid "on articles *exported* from any state;" and, that "No "state shall, without the consent of congress, lay "any *imposts* or *duties* on *imports* or *exports*, except "what may be absolutely necessary for executing its "inspection laws."[4] There is another provision, that "No state shall, without the consent of congress, "lay any *duty of tonnage*," &c.; from which, perhaps, it may be gathered, that a tonnage duty, (by which is to be understood, not the ancient custom in England, so called, on wines imported,[5] but a duty on the ton-

[1] See The Federalist, No. 36.

[2] Smith's Wealth of Nations, B. 4, ch. 1, P. 3, B. 5, ch. 2, art. 4; Hale on Customs, Harg. Tracts, p. 115, &c.; 1 Black. Comm. 313, 314, 315, 316; Com. Dig. *Prerogative*, D. 43 to D. 49.

[3] The Federalist, No. 30; 3 Elliot's Debates, 289.

[4] Mr. Madison is of opinion, that the terms, *imposts*, and *duties*, in these clauses, are used as synonymous. There is much force in his suggestions. Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828.

[5] 1 Black. Comm. 315; Hale on Customs, Harg. Law Tracts, p. 3, ch. 7, ch. 14, ch. 15.

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nage of ships and vessels,) was not deemed an *impost*, strictly, but a *duty*. However, it must be admitted, that little certainty can be arrived at from such slight changes of phraseology, where the words are susceptible of various interpretations, and of more or less expansion. The most, that can be done, is, to offer a probable conjecture from the apparent use of words in a connexion, where it is desirable not to deem any one superfluous, or synonymous with the others. A learned commentator has supposed, that the words, "duties and imposts," in the constitution, were probably intended to comprehend every species of tax or contribution, not included under the ordinary terms, "*taxes* and excises."[1] Another learned judge has said,[2] "what is the natural and common, or technical and appropriate, meaning of the words, *duty* and *excise*, it is not easy to ascertain. They present no clear or precise idea to the mind. Different persons will annex different significations to the terms." On the same occasion, another learned judge said, "The term, *duty*, is the most comprehensive, next to the generical term, *tax*; and practically in Great Britain, (whence we take our general ideas of taxes, duties, imposts, excises, customs, &c.) embraces taxes on stamps, tolls for passage, &c. and is not confined to taxes on importations only."[3]

§ 960. "Excises" are generally deemed to be of an opposite nature to "imposts," in the restrictive sense of the latter term, and are defined to be an inland imposition, paid sometimes upon the consumption of the com-

[1] 1 Tuck. Black. Comm. App. 243.
[2] Mr. Justice Patterson in *Hylton* v. *U. States*, 3 Dall. R. 171, 177.
[3] Mr. Justice Chase, Ibid. 174. See The Federalist, No. 36.

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modity, or frequently upon the retail sale, which is the last stage before the consumption.[1]

§ 951. But the more important inquiry is, what are direct taxes in the sense of the constitution, since they are required to be laid by the rule of apportionment, and all indirect taxes, whether they fall under the head of "duties, imposts, or excises," or under any other description, may be laid by the rule of uniformity. It is clear, that capitation taxes,[2] or, as they are more commonly called, poll taxes, that is, taxes upon the polls, heads, or persons, of the contributors, are direct taxes, for the constitution has expressly enumerated them, as such. "No capitation, or *other direct* tax, shall be laid," &c. is the language of that instrument.

§ 952. Taxes on lands, houses, and other permanent real estate, or on parts or appurtenances thereof, have always been deemed of the same character, that is, direct taxes.[3] It has been seriously doubted, if, in the sense of the constitution, any taxes are direct taxes, except those on polls or on lands. Mr. Justice Chase, in *Hylton* v. *United States*, (3 Dall. R. 171,) said, "I am inclined to think, that the direct taxes, contemplated by the constitution, are *only* two, viz. a capitation or poll tax simply, without regard to property, profession, or other circumstance, and a tax on land. I doubt, whether a tax by a general assessment of personal property within the United States is included within the term,

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[1] 1 Black. Comm. 318; 1 Tuck. Black. Comm. App. 341; Smith's Wealth of Nations, B. 5, ch. 2, art. 4; 2 Elliot's Debates, 209; 3 Elliot's Debates, 289, 290.

[2] See 2 Smith's Wealth of Nations, B. 5, ch. 2, art. 4; The Federalist, No. 36; 2 Elliot's Debates, 209.

[3] 1 Tuck. Black. Comm. App. 232, 233; *Hylton* v. *United States*, 3 Dall. R. 171; The Federalist, No. 21; *Loughborough* v. *Blake*, 5 Wheat. R. 317 to 325.

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direct tax." Mr. Justice Patterson, in the same case, said, "It is not necessary to determine, whether a tax on the produce of land be a direct or an indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered, as a part of the land itself. When the produce is converted into a manufacture, it assumes a new shape, &c. Whether 'direct taxes,' in the sense of the constitution, comprehend any other tax, than a capitation tax, or a tax on land, is a questionable point, &c. I never entertained a doubt, that the principal, I will not say the only, objects, that the framers of the constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land." And he proceeded to state, that the rule of apportionment, both as regards representatives, and as regards direct taxes, was adopted to guard the Southern states against undue impositions and oppressions in the taxing of slaves. Mr. Justice Iredell, in the same case, said, "Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or poll tax may be considered of this description. The latter is to be considered so, particularly under the present constitution, on account of the slaves in the Southern states, who give a ratio in the representation in the proportion of three to five. Either of these is capable of an apportionment. In regard to other articles, there may possibly be considerable doubt." The reasoning of the Federalist seems to lead to the same result.[1]

§ 953. In the year 1794, congress passed an act,[2] laying duties upon carriages for the conveyance of per-

[1] The Federalist, No. 31, 36.

[2] Act of 1794, ch. 45.

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sons, which were kept by or for any person, for his own use, or to be let out to hire, or for the conveying of passengers, to wit, for every coach the yearly sum of ten dollars, &c. &c.; and made the levy uniform throughout the United States. The constitutionality of the act was contested, in the case before stated,[1] upon the ground, that it was a direct tax, and so ought to be *apportioned* among the states according to their numbers. After solemn argument, the Supreme Court decided, that it was not a direct tax within the meaning of the constitution. The grounds of this decision, as stated in the various opinions of the judges, were; first, the doubt, whether any taxes were direct in the sense of the constitution, but capitation and land taxes, as has been already suggested; secondly, that in cases of doubt, the rule of apportionment ought not to be favoured, because it was matter of compromise, and in itself radically indefensible and wrong; thirdly, the monstrous inequality and injustice of the carriage tax, if laid by the rule of apportionment, which would show, that no tax of this sort could have been contemplated by the convention, as within the rule of apportionment; fourthly, that the terms of the constitution were satisfied by confining the clause, respecting direct taxes, to capitation and land taxes; fifthly, that, accurately speaking, all taxes on expenses or consumption are *indirect* taxes, and a tax on carriages is of this kind; and, sixthly, (what is probably of most cogency and force, and of itself decisive,) that no tax could be a direct one in the sense of the constitution, which was not capable of apportionment according to the rule laid down in the constitution. Thus, suppose ten dollars were contemplated as a tax on each coach or post-chaise in the United

[1] 3 Dallas's Reports, 171.

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States, and the number of such carriages in the United States were one hundred and five, and the number of representatives in congress the same. This would produce ten hundred and fifty dollars. The share of Virginia would be $\frac{19}{100}$ parts, or $190; the share of Connecticut would be $\frac{7}{100}$ parts, or $70. Suppose, then, in Virginia, there are fifty carriages, the sum of $190 must be collected from the owners of these carriages, and apportioned among them, which would make each owner pay $3·80. And suppose, in Connecticut, there are but two carriages, the share of that state ($70) must be paid by the owners of those two carriages, viz. $35 each. Yet congress, in such a case, intend to lay a tax of but ten dollars on each coach. And if, in any state, there should be no coach or post-chaise owned, then, there could be no apportionment at all. The absurdity, therefore, of such a mode of taxation demonstrates, that such a tax cannot be a direct tax in the sense of the constitution. It is no answer to this reasoning, that congress, having determined to raise such a sum of money, as such a tax on carriages would produce, might apportion the sum due by the rule of apportionment, and then order it to be collected on different articles, selected in each state. That would be, not to lay and collect a tax on carriages, but on the articles, which were made contributory to the payment. Thus, the tax might be called a tax on carriages, and levied on horses. And the same objection would lie to an apportionment of the sum, and then a general assessment of it by congress upon all articles.[1]

[1] 3 Dallas's Reports, 171; Rawle on Const. ch. 9; 4 Elliot's Deb. 242; 1 Kent's Comm. Lect. 12, p. 239, 240; 1 Tuck. Black. Comm. App. 294.

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§ 954. Having endeavoured to point out the leading distinctions between direct and indirect taxes, and that duties, imposts, and excises, in the sense of the constitution, belong to the latter class, the order of the subject would naturally lead us to the inquiry, why direct taxes are required to be governed by the rule of apportionment; and why "duties, imposts, and excises" are required to be uniform throughout the United States. The answer to the former will be given, when we come to the farther examination of certain prohibitory and restrictive clauses of the constitution on the subject of taxation. The answer to the latter may be given in a few words. It was to cut off all undue preferences of one state over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different states, might exist. The agriculture, commerce, or manufactures of one state might be built up on the ruins of those of another; and a combination of a few states in congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favoured neighbours. The constitution throughout all its provisions is an instrument of checks, and restraints, as well as of powers. It does not rely on confidence in the general government to preserve the interests of all the states. It is founded in a wholesome and strenuous jealousy, which, foreseeing the possibility of mischief, guards with solicitude against any exercise of power, which may endanger the states, as far as it is practicable. If this provision, as to uniformity of duties, had been omitted, although the power might never have been abused to the injury of the

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feebler states of the Union, (a presumption, which history does not justify us in deeming quite safe or certain;) yet it would, of itself, have been sufficient to demolish, in a practical sense, the value of most of the other restrictive clauses in the constitution. New York and Pennsylvania might, by an easy combination with the Southern states, have destroyed the whole navigation of New England. A combination of a different character, between the New England and the Western states, might have borne down the agriculture of the South; and a combination of a yet different character might have struck at the vital interests of manufactures. So that the general propriety of this clause is established by its intrinsic political wisdom, as well as by its tendency to quiet alarms, and suppress discontents.[1]

§ 955. Two practical questions of great importance have arisen upon the construction of this clause, either standing alone, or in connexion with other clauses, and incidental powers, given by the constitution. One is, whether the government has a right to lay taxes for any other purpose, than to raise revenue, however much that purpose may be for the common defence, or general welfare. The other is, whether the money, when raised, can be appropriated to any other purposes, than such, as are pointed out in the other enumerated powers of congress. The former involves the question, whether congress can lay taxes to protect and encourage domestic manufactures; the latter, whether congress can appropriate money to internal improvements. Each of these questions has given rise to much animated controversy; each has been affirmed and denied, with great pertinacity, zeal, and eloquent reasoning;

[1] See 4 Elliot's Deb. 235, 236.

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each has become prominent in the struggles of party; and defeat in each has not hitherto silenced opposition, or given absolute security to victory. The contest is often renewed; and the attack and defence maintained with equal ardour. In discussing this subject, we are treading upon the ashes of yet unextinguished fires, — *incedimus per ignes suppositos cineri doloso;* — and while the nature of these Commentaries requires, that the doctrine should be freely examined, as maintained on either side, the result will be left to the learned reader, without a desire to influence his judgment, or dogmatically to announce that belonging to the commentator.

§ 956. First, then, as to the question, whether congress can lay taxes, except for the purposes of revenue. This subject has been already touched, in considering what is the true reading, and interpretation of the clause, conferring the power to lay taxes. If the reading and interpretation, there insisted on, be correct, it furnishes additional means to resolve the question, now under consideration.

§ 957. The argument against the constitutional authority is understood to be maintained on the following grounds, which, though applied to the protection of manufactures, are equally applicable to all other cases, where revenue is not the object. The general government is one of specific powers, and it can rightfully exercise only the powers expressly granted, and those, which may be "necessary and proper" to carry them into effect; all others being reserved expressly to the states, or to the people. It results necessarily, that those, who claim to exercise a power under the constitution, are bound to show, that it is expressly granted, or that it is "necessary and proper," as a means to execute some of the granted powers. No such proof has been offered in regard to the protection of manufactures.

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§ 958. It is true, that the eighth section of the first article of the constitution authorizes congress to lay and collect an impost duty; but it is granted, as a tax power, for the sole purpose of revenue; a power, in its nature, essentially different from that of imposing protective, or prohibitory duties. The two are incompatible; for the prohibitory system must end in destroying the revenue from imports. It has been said, that the system is a violation of the spirit, and not of the letter of the constitution. The distinction is not material. The constitution may be as grossly violated by acting against its meaning, as against its letter. The constitution grants to congress the power of imposing a duty on imports for revenue, which power is abused by being converted into an instrument for rearing up the industry of one section of the country on the ruins of another. The violation, then, consists in using a power, granted for one object, to advance another, and that by a sacrifice of the original object. It is in a word a *violation of perversion*, the most dangerous of all, because the most insidious and difficult to resist. Such is the reasoning emanating from high legislative authority.[1] On another interesting occasion, the argument has been put in the following shape. It is admitted, that congress has power to lay and collect such duties, as they may deem necessary for the purposes of revenue, and *within these limits* so to arrange those duties, *as incidentally*, and to that extent to give protection to the manufacturer. But the right is denied to convert, what is here denominated

[1] See the exposition and protest, reported by a committee of the house of representatives, of South Carolina, on 19th of December, 1829, and adopted; the draft of which has been attributed to Mr. Vice President Calhoun. I have followed, as nearly as practicable, the very words of the report.

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the incidental, into the principal power, and transcending the limits of revenue, to impose an additional duty substantially and exclusively for the purpose of affording that protection. Congress may countervail the regulations of a foreign power, which may be hostile to our commerce; but their authority is denied permanently to prohibit all importation, for the purpose of securing the home market exclusively to the domestic manufacturer; thereby destroying the commerce they were entrusted to regulate, and fostering an interest, with which they have no constitutional power to interfere. To do so, therefore, is a palpable abuse of the taxing power, which was conferred for the purpose of revenue; and if it is referred to the authority to regulate commerce, it is as obvious a perversion of that power, since it may be extended to an utter annihilation of the objects, which it was intended to protect.[1]

§ 959. In furtherance of this reasoning, it has been admitted, that under the power to regulate commerce, congress is not limited to the imposition of duties upon imports for the sole purpose of revenue. It may impose retaliatory duties on foreign powers; but these retaliatory duties must be imposed for the regulation of commerce, not for the encouragement of manufactures. The power to regulate manufactures, not having been confided to congress, they have no more right to act upon it, than they have to interfere with the systems of education, the poor laws, or the road laws, of the states. Congress is empowered to lay taxes for rev-

[1] This is extracted from the address of the Free Trade Convention, at Philadelphia, in Oct. 1831, p. 33, 34, attributed to the pen of Mr. Attorney General Berrien. Mr. Senator Hayne, in his Speech, 9 January, 1832, says, that he does not know, where the constitutional objections to the tariff system are better summed up, than in this address, (p. 31, 32.)

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enue, it is true; but there is no power to encourage, protect, or meddle with manufactures.[1]

§ 960. It is unnecessary to consider the argument at present, so far as it bears upon the constitutional authority of congress to protect or encourage manufactures; because that subject will more properly come under review, in all its bearings, under another head, viz. the power to regulate commerce, to which it is nearly allied, and from which it is more usually derived. Stripping the argument, therefore, of this adventitious circumstance, it resolves itself into this statement. The power to lay taxes is a power exclusively given to raise revenue, and it can constitutionally be applied to no other purposes. The application for other purposes is an abuse of the power; and, in fact, however it may be in *form* disguised, it is a premeditated usurpation of authority. Whenever money or revenue is wanted for constitutional purposes, the power to lay taxes may be applied to obtain it. When money or revenue is not so wanted, it is not a proper means for any constitutional end.

§ 961. The argument in favour of the constitutional authority is grounded upon the terms and the intent of the constitution. It seeks for the true meaning and objects of the power according to the obvious sense of the language, and the nature of the government proposed to be established by that instrument. It relies upon no strained construction of words; but demands a fair and reasonable interpretation of the clause, without any restrictions not naturally implied in it, or in the context. It will not do to assume, that the clause was intended solely for the purposes of raising revenue; and

[1] Col. Drayton's Oration, at Charleston, 4th of July, 1831, p. 13, 14.

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then argue, that being so, the power cannot be constitutionally applied to any other purposes. The very point in controversy is, whether it is restricted to purposes of revenue. That must be proved; and cannot be assumed, as the basis of reasoning.

§ 962. The language of the constitution is, "Congress "shall have power to lay and collect taxes, duties, im- "posts, and excises." If the clause had stopped here, and remained in this absolute form, (as it was in fact, when reported in the first draft in the convention,) there could not have been the slightest doubt on the subject. The absolute power to lay taxes includes the power in every form, in which it may be used, and for every purpose, to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by congress to purposes, for which nations have been accustomed to apply to it. Now, nothing is more clear, from the history of commercial nations, than the fact, that the taxing power is often, very often, applied for other purposes, than revenue. It is often applied, as a regulation of commerce. It is often applied, as a virtual prohibition upon the importation of particular articles, for the encouragement and protection of domestic products, and industry; for the support of agriculture, commerce, and manufactures;[1] for retaliation upon foreign monopolies and injurious restrictions;[2] for mere purposes of state policy, and domestic economy; sometimes to banish a noxious article of consumption; sometimes, as a bounty upon an infant manufacture, or agricultural

[1] Hamilton's Report on Manufactures, in 1791.

[2] See Mr. Jefferson's Report on Commercial Restrictions, in 1793; 5 Marshall's Life of Washington, ch. 7, p. 482 to 487; 1 Wait's State Papers, 422, 434.

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product; sometimes, as a temporary restraint of trade; sometimes, as a suppression of particular employments; sometimes, as a prerogative power to destroy competition, and secure a monopoly to the government![1]

§ 963. If, then, the power to lay taxes, being general, may embrace, and in the practice of nations does embrace, all these objects, either separately, or in combination, upon what foundation does the argument rest, which assumes one object only, to the exclusion of all the rest? which insists, in effect, that because revenue may be one object, therefore it is the sole object of the power? which assumes its own construction to be correct, because it suits its own theory, and denies the same right to others, entertaining a different theory? If the power is general in its terms, is it not an abuse of all fair reasoning to insist, that it is particular? to desert the import of the language, and to substitute other and different language? Is this allowable in regard to any instrument? Is it allowable in an especial manner, as to constitutions of government, growing out of the rights, duties, and exigencies of nations, and looking to an infinite variety of circumstances, which may require very different applications of a given power?

§ 964. In the next place, then, is the power to lay taxes, given by the constitution, a general power; or is it a limited power? If a limited power, to what objects is it limited by the terms of the constitution?

§ 965. Upon this subject, (as has been already stated,) three different opinions appear to have been held by statesmen of no common sagacity and ability. The first is, that the power is unlimited; and that the subsequent clause, "to pay the debts, and provide for the "common defence and general welfare," is a substan-

[1] See Smith's Wealth of Nations, B. 5, ch. 2, art. 4.

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tive, independent power. In the view of those, who maintain this opinion, the power, being general, cannot with any consistency be restrained to purposes of revenue.

§ 966. The next is, that the power is restrained by the subsequent clause, so that it is a power to lay taxes in order to pay debts, and to provide for the common defence and general welfare. Is raising revenue the only proper mode to provide for the common defence and general welfare? May not the general welfare, in the judgment of congress, be, in given circumstances, as well provided for, nay better provided for, by prohibitory duties, or by encouragements to domestic industry of all sorts? If a tax of one sort, as on tonnage, or foreign vessels, will aid commerce, and a tax on foreign raw materials will aid agriculture, and a tax on imported fabrics will aid domestic manufactures, and so promote the general welfare; may they not be all constitutionally united by congress in a law for this purpose? If congress can unite them all, may they not sustain them severally in separate laws? Is a tax to aid manufactures, or agriculture, or commerce, necessarily, or even naturally, against the general welfare, or the common defence? Who is to decide upon such a point? Congress, to whom the authority is given to exercise the power? Or any other body, state or national, which may choose to assume it?

§ 967. Besides; if a particular act of congress, not for revenue, should be deemed an excess of the powers; does it follow, that all other acts are so? If the common defence or general welfare can be promoted by laying taxes in any other manner, than for revenue, who is at liberty to say, that congress cannot constitutionally exercise the power for such a purpose? No

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one has a right to say, that the common defence and general welfare can never be promoted by laying taxes, except for revenue. No one has ever yet been bold enough to assert such a proposition. Different men have entertained opposite opinions on subjects of this nature. It is a matter of theory and speculation, of political economy, and national policy, and not a matter of power. It may be wise or unwise to lay taxes, except for revenue; but the wisdom or inexpediency of a measure is no test of its constitutionality. Those, therefore, who hold the opinion above stated, must unavoidably maintain, that the power to lay taxes is not confined to revenue; but extends to all cases, where it is proper to be used for the common defence and general welfare.[1] One of the most effectual means of defence against the injurious regulations and policy of foreign nations, and which is most commonly resorted to, is to apply the power of taxation to the products and manufactures of foreign nations by way of retaliation; and, short of war, this is found to be practically that, which is felt most extensively, and produces the most immediate redress. How, then, can it be imagined for a moment, that this was not contemplated by the framers of the constitution, as a means to provide for the common defence and general welfare?

§ 968. The third opinion is, (as has been already stated,) that the power is restricted to such specific objects, as are contained in the other enumerated powers. Now, if revenue be not the *sole* and *exclusive* means of carrying into effect all these enumerated powers, the advocates of this doctrine must maintain with those of the second opinion, that the power is not

[1] See Hamilton's Report on Manufactures, in 1791; 1 Hamilton's Works, (edit. 1810,) 230; 2 Elliot's Debates, 344.

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limited to purposes of revenue. No man will pretend to say, that all those enumerated powers have no other objects, or means to effectuate them, than revenue. Revenue may be one mode; but it is not the sole mode. Take the power "to regulate commerce." Is it not clear from the whole history of nations, that laying taxes is one of the most usual modes of regulating commerce? Is it not, in many cases, the best means of preventing foreign monopolies, and mischievous commercial restrictions? In such cases, then, the power to lay taxes is confessedly not for revenue. If so, is not the argument irresistible, that it is not limited to purposes of revenue? Take another power, the power to coin money and regulate its value, and that of foreign coin; might not a tax be laid on certain foreign coin for the purpose of carrying this into effect by suppressing the circulation of such coin, or regulating its value? Take the power to promote the progress of science and useful arts; might not a tax be laid on foreigners, and foreign inventions, in aid of this power, so as to suppress foreign competition, or encourage domestic science and arts? Take another power, vital in the estimation of many statesmen to the security of a republic, — the power to provide for organizing, arming, and disciplining the militia; may not a tax be laid on foreign arms, to encourage the domestic manufacture of arms, so as to enhance our security, and give uniformity to our organization and discipline? Take the power to declare war, and its auxiliary powers; may not congress, for the very object of providing for the effectual exercise of these powers, and securing a permanent domestic manufacture and supply of powder, equipments, and other warlike apparatus, impose a prohibitory duty upon foreign articles of the same

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nature? If congress may, in any, or all of these cases, lay taxes; then as revenue constitutes, upon the very basis of the reasoning, no object of the taxes, is it not clear, that the enumerated powers require the power to lay taxes to be more extensively construed, than for purposes of revenue? It would be no answer to say, that the power of taxation, though in its nature only a power to raise revenue, may be resorted to, as an implied power to carry into effect these enumerated powers in any effectual manner. That would be to contend, that an *express* power to lay taxes is not co-extensive with an *implied* power to lay taxes; that when the express power is given, it means a power to raise revenue only; but when it is implied, it no longer has any regard to this object. How, then, is a case to be dealt with, of a mixed nature, where revenue is mixed up with other objects in the framing of the law?

§ 969. If, then, the power to lay taxes were admitted to be restricted to cases within the enumerated powers; still the advocates of that doctrine are compelled to admit, that the power must be construed, as not confined to revenue, but as extending to all other objects within the scope of those powers. Where the power is expressly given, we are not at liberty to say, that it is to be implied. Being given, it may certainly be resorted to, as a means to effectuate all the powers, to which it is appropriate; not, because it is to be implied in the grant of those powers; but because it is expressly granted, as a substantive power, and may be used, of course, as an auxiliary to them.[1]

§ 970. So that, whichever construction of the power to lay taxes is adopted, the same conclusion is sustain-

[1] See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828.

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ed, that the power to lay taxes is not by the constitution confined to purposes of revenue. In point of fact, it has never been limited to such purposes by congress; and all the great functionaries of the government have constantly maintained the doctrine, that it was not constitutionally so limited.[1]

§ 971. Such is a general summary of the reasoning on each side, so far as it refers to the power of laying taxes. It will be hereafter resumed in examining the nature and extent of the power to regulate commerce.

§ 972. The other question is, whether congress has any power to appropriate money, raised by taxation or otherwise, for any other purposes, than those pointed out in the enumerated powers, which follow the clause respecting taxation. It is said, "raised by taxation or otherwise;" for there may be, and in fact are, other sources of revenue, by which money may, and does come into the treasury of the United States otherwise, than by taxation; as, for instance, by fines, penalties, and forfeitures; by sales of the public lands, and interests and dividends on bank stocks; by captures and prize in times of war; and by other incidental profits and emoluments growing out of governmental transactions and prerogatives. But, for all the common purposes of argument, the question may be treated, as one growing out of levies by taxation.

§ 973. The reasoning, upon which the opinion, adverse to the authority of congress to make appropria-

[1] The present Commentaries were written before the appearance of Mr. John Q. Adams's Letter to Mr. Speaker Stevenson, in 1832. That Letter (as has been already intimated) contains a very able and elaborate vindication of the power to lay taxes, as extending to all purposes of the common defence and general welfare. It is the fullest response to the Letter of Mr. Madison to Mr. Speaker Stevenson, 27th Nov. 1830, which has ever yet been given.

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tions not within the scope of the enumerated powers, is maintained, has been already, in a great measure, stated in the preceding examination of the grammatical construction of the clause, giving the power to lay taxes.[1] The controversy is virtually at an end, if it is once admitted, that the words, "to provide for the common defence and general welfare," are a part and qualification of the power to lay taxes; for then, congress has certainly a right to appropriate money to any purposes, or in any manner, conducive to those ends. The whole stress of the argument is, therefore, to establish, that the words, "to provide for the common defence and general welfare," do not form an independent power, nor any qualification of the power to lay taxes. And the argument is, that they are "mere general terms, explained and limited by the subjoined specifications." It is attempted to be fortified (as has been already seen) by a recurrence to the history of the confederation; to the successive reports and alterations of the tax clause in the convention; to the inconveniencies of such a large construction; and to the supposed impossibility, that a power to make such appropriations for the common defence and general welfare, should not have been, at the adoption of the constitution, a subject of great alarm, and jealousy; and as such, resisted in and out of the state conventions.[2]

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[1] See Virginia Resolutions, 7th Jan. 1800; Mr. Madison's Letter to Mr. Speaker Stevenson, 27th Nov. 1830. See also 4 Elliot's Debates, 280, 281; 2 Elliot's Debates, 344.

[2] The following summary, taken from President Madison's Veto Message on the Bank Bonus Bill for Internal Improvements, 3d March, 1817,* contains a very clear statement of the reasoning. "To refer the power in question," (that is, of constructing roads, canals, and other internal improvements,) "to the clause, to provide for the common defence

* 4 Elliot's Debates, 280, 281.

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§ 974. The argument in favour of the power is derived, in the first place, from the language of the clause, conferring the power, (which it is admitted in its literal terms covers it;[1]) secondly, from the nature of the power, which renders it in the highest degree expedient, if not indispensable for the due operations of the national government; thirdly, from the early, constant and decided maintenance of it by the government and its functionaries, as well as by many of our ablest statesmen from the very commencement of the constitution. So, that it has the language and intent

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and general welfare, would," says he, "be contrary to the established rules of interpretation, as rendering the special and careful enumeration of powers, which follow the clause, nugatory and improper. Such a view of the constitution would have the effect of giving to congress a general power of legislation, instead of the defined and limited one, hitherto understood to belong to them; the terms, 'the common defence and general welfare,' embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the constitution and laws of the several states, in all cases not specifically exempted, to be superseded by the laws of congress; it being expressly declared, that the constitution of the United States, and the laws made in pursuance thereof, shall be the supreme law of the land, and the judges of every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. Such a view of the constitution, finally, would have the effect of excluding *the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the general and state governments*; inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision. A restriction of the power 'to provide for the common defence and general welfare,' to cases, which are to be provided for by the expenditure of money, would still leave within the legislative power of congress all the great and most important measures of government, money being the ordinary and necessary means of carrying them into execution." It will be perceived at once, that this is the same reasoning insisted on by Mr. Madison in the Virginia Report and Resolutions, of 7th Jan. 1800; and in his Letter to Mr. Speaker Stevenson, of 27th Nov. 1830; and by the same gentleman in the Debate on the Cod-fishery Bill, in 1792. 4 Elliot's Debates, 236.

[1] Mr. Madison's Letter to Mr. Speaker Stevenson, 27th Nov. 1830.

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of the text, and the practice of the government to sustain it against an artificial doctrine, set up on the other side.

§ 975. The argument derived from the words and intent has been so fully considered already, that it cannot need repetition. It is summed up with great force in the report of the secretary of the treasury [1] on manufactures, in 1791. "The national legislature," says he, "has express authority to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare, with no other qualifications, than that all duties, imposts, and excises, shall be uniform throughout the United States; that no capitation or other direct tax shall be laid, unless in proportion to numbers ascertained by a census, or enumeration taken on the principle prescribed in the constitution; and that no tax or duty shall be laid on articles exported from any state. These three qualifications excepted, the power to raise money is plenary and indefinite. And the objects, to which it may be appropriated, are no less comprehensive, than the payment of the public debts, and the providing for the common defence and general welfare. The terms 'general welfare' were doubtless intended to signify more, than was expressed or imported in those, which preceded; otherwise numerous exigencies, incident to the affairs of the nation, would have been left without a provision. The phrase is as comprehensive, as any, that could have been used; because it was not fit, that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits, than the general wel-

[1] Mr. Hamilton.

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fare; and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification, nor of definition. It is, therefore, of necessity left to the discretion of the national legislature to pronounce upon the objects, which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems no room for a doubt, that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, *so far as regards an application of money.* The only qualification of the generality of the phrase in question, which seems to be admissible, is this; that the object, to which an appropriation of money is to be made, must be *general*, and not *local*; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot. No objection ought to arise to this construction from a supposition, that it would imply a power to do, whatever else should appear to congress conducive to the general welfare. A power *to appropriate money* with this latitude, which is granted in express terms, would not carry a power to do any other thing, not authorized in the constitution either expressly, or by fair implication." [1]

§ 976. But the most thorough and elaborate view, which perhaps has ever been taken of the subject, will be found in the exposition of President Monroe, which

[1] There is no doubt, that President Washington fully concurred in this opinion, as his repeated recommendations to congress of objects of this sort, especially of the encouragement of manufactures, of learning, of a university, of new inventions, of agriculture, of commerce and navigation, of a military academy, abundantly prove. See 5 Marshall's Life of Washington, ch. 4, p. 231, 232; 1 Wait's State Papers, 15; 2 Wait's State Papers, 109, 110, 111.

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accompanied his message respecting the bill for the repairs of the Cumberland Road, (4th of May, 1822.) The following passage contains, what is most direct to the present purpose; and, though long, it will amply reward a diligent perusal. After quoting the clause of the constitution respecting the power to lay taxes, and to provide for the common defence and general welfare, he proceeds to say,

§ 977. "That the second part of this grant gives a right to appropriate the public money, and nothing more, is evident from the following considerations: (1.) If the right of appropriation is not given by this clause, it is not given at all, there being no other grant in the constitution, which gives it directly, or which has any bearing on the subject, even by implication, except the two following: first, the prohibition, which is contained in the eleventh of the enumerated powers, not to appropriate money for the support of armies for a longer term than two years; and, secondly, the declaration in the sixth member or clause of the ninth section of the first article, that no money shall be drawn from the treasury, but in consequence of appropriations made by law. (2.) This part of the grant has none of the characteristics of a distinct and original power. It is manifestly incidental to the great objects of the first branch of the grant, which authorizes congress to lay and collect taxes, duties, imposts, and excises; a power of vast extent, not granted by the confederation, the grant of which formed one of the principal inducements to the adoption of this constitution. If both parts of the grant are taken together, as they must be, (for the one follows immediately after the other in the same sentence,) it seems to be impossible to give to the latter any other construction, than that contended for. Con-

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gress shall have power to lay and collect taxes, duties, imposts, and excises. For what purpose? To pay the debts, and provide for the common defence and general welfare of the United States; an arrangement and phraseology, which clearly show, that the latter part of the clause was intended to enumerate the purposes, to which the money thus raised might be appropriated. (3.) If this is not the real object and fair construction of the second part of this grant, it follows, either that it has no import or operation whatever, or one of much greater extent, than the first part. This presumption is evidently groundless in both instances; in the first, because no part of the constitution can be considered as useless; no sentence or clause in it without a meaning. In the second, because such a construction, as would make the second part of the clause an original grant, embracing the same objects with the first, but with much greater power than it, would be in the highest degree absurd. The order generally observed in grants, an order founded in common sense, since it promotes a clear understanding of their import, is to grant the power intended to be conveyed in the most full and explicit manner; and then to explain or qualify it, if explanation or qualification should be necessary. This order has, it is believed, been invariably observed in all the grants contained in the constitution. In the next place, because, if the clause in question is not construed merely as an authority to appropriate the public money, it must be obvious, that it conveys a power of indefinite and unlimited extent; that there would have been no use for the special powers to raise and support armies, and a navy; to regulate commerce; to call forth the militia; or even to lay and collect taxes, duties, imposts, and excises. An unqualified power to pay the debts

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and provide for the common defence and general welfare, as the second part of this clause would be, if considered, as a distinct and separate grant, would extend to every object, in which the public could be interested. A power to provide for the common defence would give to congress the command of the whole force, and of all the resources of the Union; but a right to provide for the general welfare would go much further. It would, in effect, break down all the barriers between the states and the general government, and consolidate the whole under the latter.

§ 978. "The powers specifically granted to congress, are what are called the enumerated powers, and are numbered in the order, in which they stand; among which, that contained in the first clause holds the first place in point of importance. If the power created by the latter part of the clause is considered an original grant, unconnected with, and independent of, the first, as in that case it must be; then the first part is entirely done away, as are all the other grants in the constitution, being completely absorbed in the transcendent power granted in the latter part. But, if the clause be construed in the sense contended for, then every part has an important meaning and effect; not a line, or a word, in it is superfluous. A power to lay and collect taxes, duties, imposts, and excises, subjects to the call of congress every branch of the public revenue, internal and external; and the addition to pay the debts and provide for the common defence and general welfare, gives the right of applying the money raised, that is, of appropriating it to the purposes specified, according to a proper construction of the terms. Hence it follows, that it is the first part of the clause only, which gives a power, which affects in any manner the power remain-

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ing to the states; as the power to raise money from the people, whether it be by taxes, duties, imposts, or excises, though concurrent in the states, as to taxes and excises, must necessarily do. But the use or application of the money, after it is raised, is a power altogether of a different character. It imposes no burthen on the people, nor can it act on them in a sense to take power from the states; or in any sense, in which power can be controverted, or become a question between the two governments. The application of money raised under a lawful power, is a right or grant, which may be abused. It may be applied partially among the states, or to improper purposes in our foreign and domestic concerns; but still it is a power not felt in the sense of other powers; since the only complaint, which any state can make of such partiality and abuse is, that some other state or states have obtained greater benefit from the application, than, by a just rule of apportionment, they were entitled to. The right of appropriation is, therefore, from its nature, secondary and incidental to the right of raising money; and it was proper to place it in the same grant, and same clause with that right. By finding them then in that order, we see a new proof of the sense, in which the grant was made, corresponding with the view herein taken of it.

§ 979. The last part of this grant, which provides, that all duties, imposts, and excises shall be uniform throughout the United States, furnishes another strong proof, that it was not intended, that the second part should constitute a distinct grant, in the sense above stated, or convey any other right, than that of appropriation. This provision operates exclusively on the power granted in the first part of the clause. It recites three branches of that power — duties, imposts, and ex-

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cises — those only, on which it could operate; the rule, by which the fourth, that is, taxes, should be laid, being already provided for in another part of the constitution. The object of this provision is, to secure a just equality among the states in the exercise of that power by congress. By placing it after both the grants, that is, after that to raise, and that to appropriate the public money, and making it apply to the first only, it shows, that it was not intended, that the power granted in the second should be paramount to, and destroy that granted in the first. It shows, also, that no such formidable power, as that suggested, had been granted in the second, or any power, against the abuse of which it was thought necessary specially to provide. Surely, if it was deemed proper to guard a specific power, of limited extent and well known import, against injustice and abuse, it would have been much more so, to have guarded against the abuse of a power of such vast extent, and so indefinite, as would have been granted, by the second part of the clause, if considered as a distinct and original grant.

§ 980. "With this construction all the other enumerated grants, and indeed all the grants of power contained in the constitution, have their full operation and effect. They all stand well together, fulfilling the great purposes intended by them. Under it we behold a great scheme consistent in all its parts, a government instituted for national purposes, vested with adequate powers for those purposes, commencing with the most important of all, that of revenue, and proceeding, in regular order, to the others, with which it was deemed proper to endow it; all too drawn with the utmost circumspection and care. How much more consistent is this construction with the great objects of the institu-

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tion, and with the high character of the enlightened and patriotic citizens, who framed it, as well as of those, who ratified it, than one, which subverts every sound principle and rule of construction, and throws every thing into confusion.

§ 981. "I have dwelt thus long on this part of the subject, from an earnest desire to fix, in a clear and satisfactory manner, the import of the second part of this grant, well knowing, from the generality of the terms used, their tendency to lead into error. I indulge a strong hope, that the view, herein presented, will not be without effect, but will tend to satisfy the unprejudiced and impartial, that nothing more was granted by that part, than a power to *appropriate* the public money raised under the other part. To what extent that power may be carried, will be the next object of inquiry.

§ 982. "It is contended, on the one side, that, as the national government is a government of limited powers, it has no right to expend money, except in the performance of acts, authorized by the other specific grants, according to a strict construction of their powers; that this grant, in neither of its branches, gives to congress discretionary power of any kind; but is a mere instrument in its hands, to carry into effect the powers contained in the other grants. To this construction I was inclined in the more early stage of our government; but, on further reflection and observation, my mind has undergone a change, for reasons, which I will frankly unfold.

§ 983. "The grant consists, as heretofore observed, of a two-fold power; the first, to raise, and the second, to appropriate the public money; and the terms used in both instances are general and unqualified. Each

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branch was obviously drawn with a view to the other, and the import of each tends to illustrate that of the other. The grant to raise money gives a power over every subject, from which revenue may be drawn; and is made in the same manner with the grants to declare war; to raise and support armies and a navy; to regulate commerce; to establish post-offices and post roads; and with all the other specific grants to the general government. In the discharge of the powers contained in any of these grants, there is no other check, than that, which is to be found in the great principles of our system — the responsibility of the representative to his constituents. If war, for example, is necessary, and congress declare it for good cause, their constituents will support them in it. A like support will be given them for the faithful discharge of their duties under any and every other power, vested in the United States. It affords to the friends of our free governments the most heart-felt consolation to know, and from the best evidence, — our own experience, — that, in great emergencies, the boldest measures, such as form the strongest appeals to the virtue and patriotism of the people, are sure to obtain their most decided approbation. But should the representative act corruptly, and betray his trust, or otherwise prove, that he was unworthy of the confidence of his constituents, he would be equally sure to lose it, and to be removed, and otherwise censured, according to his deserts. The power to raise money by taxes, duties, imposts, and excises, is alike unqualified; nor do I see any check on the exercise of it, other than that, which applies to the other powers above recited, — the responsibility of the representative to his constituents. Congress know the extent of the public engagements, and the sums necessary to meet them;

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they know, how much may be derived from each branch of revenue without pressing it too far; and, paying due regard to the interests of the people, they likewise know, which branch ought to be resorted to in the first instance. From the commencement of the government, two branches of this power (duties and imposts) have been in constant operation, the revenue from which has supported the government in its various branches, and met its other ordinary engagements. In great emergencies, the other two (taxes and excises) have likewise been resorted to; and neither was the right nor the policy ever called in question.

§ 984. "If we look to the second branch of this power, that, which authorizes the appropriation of the money thus raised, we find, that it is not less general and unqualified, than the power to raise it. More comprehensive terms, than to 'pay the debts and provide for the common defence and general welfare,' could not have been used. So intimately connected with, and dependent on each other, are these two branches of power, that had either been limited, the limitation would have had a like effect on the other. Had the power to raise money been conditional, or restricted to special purposes, the appropriation must have corresponded with it; for none but the money raised could be appropriated, nor could it be appropriated to other purposes, than those, which were permitted. On the other hand, if the right of appropriation had been restricted to certain purposes, it would be useless and improper to raise more, than would be adequate to those purposes. It may fairly be inferred, that these restraints or checks have been carefully and intentionally avoided. The power in each branch is alike broad and unqualified; and each is drawn with peculiar fitness to the other;

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the latter requiring terms of great extent and force to accommodate the former, which have been adopted; and both placed in the same clause and sentence. Can it be presumed, that all these circumstances were so nicely adjusted by mere accident? Is it not more just to conclude, that they were the result of due deliberation and design? Had it been intended, that congress should be restricted in the appropriation of the public money to such expenditures, as were authorized by a rigid construction of the other specific grants, how easy would it have been to have provided for it by a declaration to that effect. The omission of such declaration is, therefore, an additional proof, that it was not intended, that the grant should be so construed.

§ 985. "It was evidently impossible to have subjected this grant, in either branch, to such restriction, without exposing the government to very serious embarrassment. How carry it into effect? If the grant had been made in any degree dependent upon the states, the government would have experienced the fate of the confederation. Like it, it would have withered, and soon perished. Had the Supreme Court been authorized, or should any other tribunal, distinct from the government, be authorized to interpose its veto, and to say, that more money had been raised under either branch of this power, (that is, by taxes, duties, imposts, or excises,) than was necessary; that such a tax or duty was useless; that the appropriation to this or that purpose was unconstitutional; the movement might have been suspended, and the whole system disorganized. It was impossible to have created a power within the government, or any other power, distinct from congress and the executive, which should control the movement of the government in this respect,

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and not destroy it. Had it been declared by a clause in the constitution, that the expenditures under this grant should be restricted to the construction, which might be given of the other grants, such restraint, though the most innocent, could not have failed to have had an injurious effect on the vital principles of the government, and often on its most important measures. Those, who might wish to defeat a measure proposed, might construe the power relied on in support of it, in a narrow and contracted manner, and in that way fix a precedent inconsistent with the true import of the grant. At other times, those, who favoured a measure, might give to the power relied on a forced or strained construction; and, succeeding in the object, fix a precedent in the opposite extreme. Thus it is manifest, that, if the right of appropriation be confined to that limit, measures may oftentimes be carried, or defeated by considerations and motives, altogether independent of, and unconnected with, their merits, and the several powers of congress receive constructions equally inconsistent with their true import. No such declaration, however, has been made; and from the fair import of the grant, and, indeed, its positive terms, the inference, that such was intended, seems to be precluded.

§ 986. "Many considerations of great weight operate in favour of this construction, while I do not perceive any serious objection to it. If it be established, it follows, that the words, 'to provide for the common defence and general welfare,' have a definite, safe, and useful meaning. The idea of their forming an original grant with unlimited power, superceding every other grant, is abandoned. They will be considered, simply, as conveying a right of appropriation; a right indispensable to that of raising a revenue, and necessary to ex-

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penditures under every grant. By it, as already observed, no new power will be taken from the states, the money to be appropriated being raised under a power already granted to congress. By it, too, the motive for giving a forced or strained construction to any of the other specific grants will, in most instances, be diminished, and, in many, utterly destroyed. The importance of this consideration cannot be too highly estimated; since, in addition to the examples already given, it ought particularly to be recollected, that, to whatever extent any specific power may be carried, the right of jurisdiction goes with it, pursuing it through all its incidents. The very important agency, which this grant has in carrying into effect every other grant, is a strong argument in favour of the construction contended for. All the other grants are limited by the nature of the offices, which they have severally to perform; each conveying a power to do a certain thing, and that only; whereas this is co-extensive with the great scheme of the government itself. It is the lever, which raises and puts the whole machinery in motion, and continues the movement. Should either of the other grants fail, in consequence of any condition or limitation attached to it, or misconstruction of its powers, much injury might follow; but still it would be the failure of one branch of power, of one item in the system only. All the others might move on. But should the right to raise and appropriate the public money be improperly restricted, the whole system might be sensibly affected, if not disorganized. Each of the other grants is limited by the nature of the grant itself. This, by the nature of the government only. Hence, it became necessary, that, like the power to declare war, this power should

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be commensurate with the great scheme of the government, and with all its purposes.

§ 987. "If, then, the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants, according to a strict construction of their powers respectively, is there no limitation to it? Have congress a right to raise and appropriate the public money to any, and to every purpose, according to their will and pleasure? They certainly have not. The government of the United States is a limited government, instituted for great national purposes, and for those only. Other interests are committed to the states, whose duty it is to provide for them. Each government should look to the great and essential purposes, for which it was instituted, and confine itself to those purposes. A state government will rarely, if ever, apply money to national purposes, without making it a charge to the nation. The people of the state would not permit it. Nor will congress be apt to apply money in aid of the state administrations, for purposes strictly local, in which the nation at large has no interest, although the state should desire it. The people of the other states would condemn it. They would declare, that congress had no right to tax them for such a purpose, and dismiss, at the next election, such of their representatives, as had voted for the measure, especially if it should be severely felt. I do not think, that in offices of this kind there is much danger of the two governments mistaking their interests, or their duties. I rather suspect, that they would soon have a clear and distinct understanding of them, and move on in great harmony."

§ 988. In regard to the practice of the government, it has been entirely in conformity to the principles here

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laid down. Appropriations have never been limited by congress to cases falling within the specific powers enumerated in the constitution, whether those powers be construed in their broad, or their narrow sense. And in an especial manner appropriations have been made to aid internal improvements of various sorts, in our roads, our navigation, our streams, and other objects of a national character and importance.[1] In some cases, not silently, but upon discussion, congress has gone the length of making appropriations to aid destitute foreigners, and cities labouring under severe calamities; as in the relief of the St. Domingo refugees, in 1794, and the citizens of Venezuela, who suffered from an earthquake in 1812.[2] An illustration equally forcible, of a

[1] It would be impracticable to enumerate all these various objects of appropriation in detail. Many of them will be found enumerated in President Monroe's Exposition, of 4 of May, 1822, p. 41 to 45. The annual appropriation acts speak a very strong language on this subject Every president of the United States, except President Madison, seems to have acted upon the same doctrine. President Jefferson can hardly be deemed an exception. In his early opinion, already quoted, (4 Jefferson's Corresp. 524,) he manifestly maintained it. In his message to congress, ('2 Dec. 1806.*) he seems to have denied it. In signing the bill for the Cumberland Road, on 29th March, 1806,† he certainly gave it a partial sanction, as well as upon other occasions. See Mr. Monroe's Exposition, on 4th May, 1822, p. 41. But see 4 Jefferson's Corresp. 457, where Mr. Jefferson adopts an opposite reasoning. President Jackson has adopted it with manifest reluctance; but he considers it as firmly established by the practice of the government. See his veto message on the Maysville Road bill, 27 May, 1830, 4 Elliot's Deb. 333 to 335. The opinions maintained in congress, for and against the same doctrine, will be found in 4 Elliot's Deb. 236, 240, 265, 278, 280, 284, 291, 292, 332, 334. Report on Internal Improvements, by Mr. Hemphill, in the house of representatives, 10 Feb. 1831. See 1 Kent. Comm. Lect. 12, p. 250, 251; Sergeant's Const. Law, ch. 28, p. 311 to 314; Rawle on the Const. ch. 9, p. 104; 2 United States Law Jour. April, 1826, p. 251, 264 to 282.

[2] See act of 12 Feb. 1794, ch. 2; Act of 8 May, 1812, ch. 79; 4 Elliot's Debates, 240.

* Wait's State Papers, 457, 458.

† Act of 1806, ch. 19.

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domestic character, is in the bounty given in the cod-fisheries, which was strenuously resisted on constitutional grounds in 1792; but which still maintains its place in the statute book of the United States. [1]

§ 989. No more need be said upon this subject in this place. It will be necessarily resumed again in the discussion of other clauses of the constitution, and especially of the powers to regulate commerce, to establish post-offices and post-roads, and to make internal improvements.

§ 990. In order to prevent the necessity of recurring again to the subject of taxation, it seems desirable to bring together, in this connexion, all the remaining provisions of the constitution on this subject, though they are differently arranged in that instrument. The first one is, "no capitation or other direct tax shall be laid, "unless in proportion to the census, or enumeration, "herein before directed to be taken." This includes poll taxes, and land taxes, as has been already remarked.

§ 991. The object of this clause doubtless is, to secure the Southern states against any undue proportion of taxation; and, as nearly as practicable, to overcome the necessary inequalities of direct tax. The South has a very large slave population; and consequently a poll tax, which should be laid by the rule of uniformity, would operate with peculiar severity on them. It would tax their property beyond its supposed

[1] See act of congress, of 16 Feb. 1792, ch. 6; 4 Elliot's Debates, 234 to 238; Act of 1813, ch. 34. See also Hamilton's Report on Manufactures, 1791, article, *Bounties*. — The Speech of the Hon. Mr. Grimké, in the senate of South Carolina, in Dec. 1828, and of the Hon. Mr. Huger, in the house of representatives of the same state, in Dec. 1830, contain very elaborate and able expositions of the whole subject, and will reward a diligent perusal.

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relative value, and productiveness to white labour. Hence, a rule is adopted, which, in effect, in relation to poll taxes, exempts two fifths of all slaves from taxation; and thus is supposed to equalize the burthen with the white population.[1]

§ 992. In respect to direct taxes on land, the difficulties of making a due apportionment, so as to equalize the burthens and expenses of the Union according to the relative wealth and ability of the states, was felt as a most serious evil under the confederation. By that instrument, (it will be recollected,) the apportionment was to be among the states according to the value of all land within each state, granted or surveyed for any person, and the buildings and improvements thereon, to be estimated in such mode, as congress should prescribe. The whole proceedings to accomplish such an estimate were so operose and inconvenient, that congress, in April, 1783,[2] recommended, as a substitute for the article, an apportionment, founded on the basis of population, adding to the whole number of white and other free citizens and inhabitants, including those bound to service for a term of years, three fifths of all other persons, &c. in each state; which is precisely the rule adopted in the constitution.

§ 993. Those, who are accustomed to contemplate the circumstances, which produce and constitute national wealth, must be satisfied, that there is no common standard, by which the degrees of it can be ascertained. Neither the value of lands, nor the numbers of the people, which have been successively proposed, as the rule of

[1] The Federalist, No. 21, 36, 54; 3 Dall. R. 171, 178; 1 Tucker's Black. Comm. App. 236, 287; 2 Elliot's Deb. 208 to 210; 3 Elliot's Debates, 290; 3 Amer. Museum, 424; 2 Elliot's Deb. 338.

[2] 8 Journal of Continental Congress, 184, 188, 198.

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state contributions, has any pretension to being deemed a just representative of that wealth. If we compare the wealth of the Netherlands with that of Russia or Germany, or even of France, and at the same time compare the total value of the lands, and the aggregate population of the contracted territory of the former, with the total value of the lands, and the aggregate population of the immense regions of either of the latter kingdoms, it will be at once discovered, that there is no comparison between the proportions of these two subjects, and that of the relative wealth of those nations. If a like parallel be run between the American states, it will furnish a similar result.[1] Let Virginia be contrasted with Massachusetts, Pennsylvania with Connecticut, Maryland with Virginia, Rhode-Island with Ohio, and the disproportion will be at once perceived. The wealth of neither will be found to be, in proportion to numbers, or the value of lands.

§ 994. The truth is, that the wealth of nations depends upon an infinite variety of causes. Situation, soil, climate; the nature of the productions; the nature of the government; the genius of the citizens; the degree of information they possess; the state of commerce, of arts, and industry; the manners and habits of the people; these, and many other circumstances, too complex, minute, and adventitious to admit of a particular enumeration, occasion differences, hardly conceivable, in the relative opulence and riches of different countries. The consequence is, that there can be no common measure of national wealth; and, of course, no general rule, by which the ability of a state to pay taxes can be determined.[2] The estimate, however fairly or

[1] The Federalist, No. 21.

[2] The Federalist, No. 21.

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deliberately made, is open to many errors and inequalities, which become the fruitful source of discontents, controversies, and heart-burnings. These are sufficient, in themselves, to shake the foundations of any national government, when no common artificial rule is adopted to settle permanently the apportionment; and every thing is left open for debate, as often as a direct tax is to be imposed. Even in those states, where direct taxes are constantly resorted to, every new valuation or apportionment is found, practically, to be attended with great inconvenience, and excitements. To avoid these difficulties, the land tax in England is annually laid according to a valuation made in the reign of William the Third, (1692,) and apportioned among the counties, according to that valuation.[1] The gross inequality of this proceeding cannot be disguised; for many of the counties, then comparatively poor, are now enormously increased in wealth. What is Yorkshire or Lancashire now, with its dense manufacturing population, compared with what it then was? Even when the population of each state is ascertained, the mode, by which the assessment shall be laid on the lands in the state, is a subject of no small embarrassment. It would be gross injustice to tax each house or acre to the same amount, however different may be its value, or however different its quality, situation, or productiveness. And in estimating the absolute value, so much is necessarily matter of opinion, that different judgments may, and will arrive at different results. And in adjusting the comparative values in different counties or towns, new elements of discord are unavoidably introduced.[2] In short, it may be

[1] 1 Black. Comm. 312, 313.

[2] See the remarks of Mr. Justice Patterson, in *Hylton* v. *United States*, 3 Dall. 171, 178, 179.

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affirmed without fear of contradiction, that some artificial rule of apportionment of a fixed nature is indispensable to the public repose; and considering the peculiar situation of the American states, and especially of the slave and agricultural states, it is difficult to find any rule of greater equality or justice, than that, which the constitution has adopted. And it may be added, (what was indeed foreseen,) that direct taxes on land will not, from causes sufficiently apparent, be resorted to, except upon extraordinary occasions, to supply a pressing want.[1] The history of the government has abundantly established the correctness of the remark; for in a period of forty years three direct taxes only have been laid; and those only with reference to the state and operations of war.

§ 995. The constitution having, in another clause, declared, that "Representatives and *direct taxes* shall "be apportioned *among the several states* within this "Union according to their respective numbers," and congress having, in 1815,[2] laid a direct tax on the District of Columbia, (according to the rule of apportionment,) a question was made, whether congress had constitutionally a right to lay such a tax, the district not being one of the states; and it was unanimously decided by the Supreme Court, that congress had such a right.[3] It was further held, that congress, in laying a direct tax upon the states, was not constitutionally bound to extend such tax to the district, or the territories of the United States; but, that it was a matter for

[1] 1 Tuck. Black. Comm. App. 234, 235, and note; Id. 236, 237; 3 Dall. R. 178, 179; Federalist, No. 21, 36; 2 Elliot's Deb. 208 to 210.

[2] Act of 27 Feb. 1815, ch. 213.

[3] *Loughborough* v. *Blake*, 5 Wheaton's R. 317; Sergeant on Const. Law, ch. 28, p. 290; 1 Kent. Comm. Lect. 12, p. 241.

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their discretion. When, however, a direct tax is to be laid on the district or the territories, it can be laid only by the rule of apportionment. The reasoning, by which this doctrine is maintained, will be most satisfactorily seen by giving it in the very words used by the court on that occasion.

§ 996. "The eighth section of the first article gives to congress 'power to lay and collect taxes, duties, 'imposts, and excises,' for the purposes thereinafter mentioned. This grant is general, without limitation as to place. It, consequently, extends to all places, over which the government extends. If this could be doubted, the doubt is removed by the subsequent words, which modify the grant. These words are, 'but all 'duties, imposts, and excises shall be uniform through-'out the United States.' It will not be contended, that the modification of the power extends to places, to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises, may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one, than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter

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extends throughout the United States, it follows, that the power to impose direct taxes also extends throughout the United States.

§ 997. "The extent of the grant being ascertained, how far is it abridged by any part of the constitution? The twentieth section of the first article declares, that 'representatives and direct taxes shall be apportioned 'among the several states, which may be included within 'this Union, according to their respective numbers.'

§ 998. "The object of this regulation is, we think, to furnish a standard, by which taxes are to be apportioned, not to exempt from their operation any part of our country. Had the intention been to exempt from taxation those, who are not represented in congress, that intention would have been expressed in direct terms. The power having been expressly granted, the exception would have been expressly made. But a limitation can scarcely be said to be insinuated. The words used do not mean, that direct taxes shall be imposed on states only, which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to states, shall be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every 30,000 souls, one state had been found to contain 59,000, and another 60,000, the first would have been entitled to only one representative, and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty. This clause was obviously not intended to create any exemption from taxation, or to make taxation dependent on representation, but to furnish a standard for the apportionment of each on the states.

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§ 999. "The fourth paragraph of the ninth section of the same article will next be considered. It is in these words: 'No capitation, or other direct tax, shall be 'laid, unless in proportion to the census, or enumera-'tion herein before directed to be taken.'

§ 1000. "The census referred to is in that clause of the constitution, which has just been considered, which makes numbers the standard, by which both representatives and direct taxes shall be apportioned among the states. The actual enumeration is to be made 'within three years after the first meeting of the con-'gress of the United States, and within every subse-'quent term of ten years, in such manner as they shall 'by law direct.'

§ 1001. "As the direct and declared object of this census is, to furnish a standard, by which 'representatives, and direct taxes, may be apportioned among the several states, which may be included within this Union,' it will be admitted, that the omission to extend it to the district, or the territories, would not render it defective. The census referred to is admitted to be a census exhibiting the numbers of the respective States. It cannot, however, be admitted, that the argument, which limits the application of the power of direct taxation to the population contained in this census, is a just one. The language of the clause does not imply this restriction. It is not, that 'no capitation, or other direct tax shall be laid, unless on those comprehended within the census herein before directed to be taken,' but 'unless in proportion to' that census. Now this proportion may be applied to the district or the territories. If an enumeration be taken of the population in the district and the territories, on the same principles, on which the enumeration of the respective states is made, then

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the information is acquired, by which a direct tax may be imposed on the district and territories, 'in proportion to the census or enumeration' which the constitution directs to be taken.

§ 1002. "The standard, then, by which direct taxes must be laid, is applicable to this district, and will enable congress to apportion on it its just and equal share of the burthen, with the same accuracy as on the respective states. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to.

§ 1003. "But the argument is presented in another form, in which its refutation is more difficult. It is urged against this construction, that it would produce the necessity of extending direct taxation to the district and territories, which would not only be inconvenient, but contrary to the understanding and practice of the whole government. If the power of imposing direct taxes be co-extensive with the United States, then it is contended, that the restrictive clause, if applicable to the district and territories, requires, that the tax should be extended to them; since to omit them would be to violate the rule of proportion.

§ 1004. "We think, a satisfactory answer to this argument may be drawn from a fair comparative view of the different clauses of the constitution, which have been recited.

§ 1005. "That the general grant of power to lay and collect taxes, is made in terms, which comprehend the district and the territories, as well as the states, is, we think, incontrovertible. The subsequent clauses are intended to regulate the exercise of this power; not to withdraw from it any portion of the community. The words,

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in which those clauses are expressed, import this intention. In thus regulating its exercise, a rule is given in the second section of the first article for its application to the respective states. That rule declares, how direct taxes upon the states shall be imposed. They shall be apportioned upon the several states according to their numbers. If, then, a direct tax be laid at all, it must be laid on every state, conformably to the rule provided in the constitution. Congress has clearly no power to exempt any state from its due share of the burthen. But this regulation is expressly confined to the states, and creates no necessity for extending the tax to the district or the territories. The words of the ninth section do not in terms require, that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the second section require, that it shall be extended to all the states. They, therefore, may, without violence, be understood to give a rule, when the territories shall be taxed, without imposing the necessity of taxing them. It could scarcely escape the members of the convention, that the expense of executing the law in a territory might exceed the amount of the tax. But be this as it may, the doubt created by the words of the ninth section relates to the obligation to apportion a direct tax on the territories, as well as the states, rather than to the power to do so.

§ 1006. "If, then, the language of the constitution be construed to comprehend the territories and District of Columbia, as well as the states, that language confers on congress the power of taxing the district and territories, as well as the states. If the general language of the constitution should be confined to the states, still the sixteenth paragraph of the eighth section gives to

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congress the power of exercising 'exclusive legislation in all cases whatsoever within this district.'

§ 1007. "On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion; but it is contended, that they must be limited by that great principle, which was asserted in our revolution, that representation is inseparable from taxation. The difference between requiring a continent, with an immense population, to submit to be taxed by a government, having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings; and permitting the representatives of the American people, under the restrictions of our constitution, to tax a part of the society, which is either in a state of infancy advancing to manhood, looking forward to complete equality, as soon as that state of manhood shall be attained, as is the case with the territories; or which has voluntarily relinquished the right of representation, and has adopted the whole body of congress for its legitimate government, as is the case with the district; is too obvious not to present itself to the minds of all. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, it may be doubted, whether in fact, its interests would be rendered thereby the more secure; and certainly the constitution does not consider its want of a representative in congress as exempting it from equal taxation.

§ 1008. "If it were true, that, according to the spirit of our constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts, and excises, within this district? If the principles of liberty, and of

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our constitution, forbid the raising of revenue from those, who are not represented, do not these principles forbid the raising it by duties, imposts, and excises, as well as by a direct tax? If the principles of our revolution give a rule applicable to this case, we cannot have forgotten, that neither the stamp act, nor the duty on tea, were direct taxes. Yet it is admitted, that the constitution not only allows, but enjoins the government to extend the ordinary revenue system to this district.

§ 1009. "If it be said, that the principle of uniformity, established in the constitution, secures the district from oppression in the imposition of indirect taxes, it is not less true, that the principle of apportionment, also established in the constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes."

§ 1010. The next clause in the constitution is: "No "tax or duty shall be laid on articles exported from "any state. No preference shall be given by any reg- "ulation of commerce, or revenue, to the ports of one "state over those of another; nor shall vessels bound "to, or from one state be obliged to enter, clear, or pay "duties in another."

§ 1011. The obvious object of these provisions is, to prevent any possibility of applying the power to lay taxes, or regulate commerce, injuriously to the interests of any one state, so as to favour or aid another. If congress were allowed to lay a duty on exports from any one state it might unreasonably injure, or even destroy, the staple productions, or common articles of that state.[1] The inequality of such a tax would be extreme. In some of the states, the whole of their

[1] Rawle on the Constitution, ch. 10, p. 115, 116.

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means result from agricultural exports. In others, a great portion is derived from other sources; from external fisheries; from freights; and from the profits of commerce in its largest extent. The burthen of such a tax would, of course, be very unequally distributed. The power is, therefore, wholly taken away to intermeddle with the subject of exports. On the other hand, preferences might be given to the ports of one state by regulations, either of commerce or revenue, which might confer on them local facilities or privileges in regard to commerce, or revenue. And such preferences might be equally fatal, if individually given under the milder form of requiring an entry, clearance, or payment of duties in the the ports of any state, other than the ports of the state, to or from which the vessel was bound. The last clause, therefore, does not prohibit congress from requiring an entry or clearance, or payment of duties at the custom-house on importations in any port of a state, to or from which the vessel is bound; but cuts off the right to require such acts to be done in other states, to which the vessel is not bound.[1] In other words, it cuts off the power to require, that circuity of voyage, which, under the British colonial system, was employed to interrupt the American commerce before the revolution. No American vessel could then trade with Europe, unless through a circuitous voyage to and from a British port.[2]

§ 1012. The first part of the clause was reported in the first draft of the constitution. But it did not pass

[1] Journ. of Convention, 293, 294; Sergeant on Const. Law, ch. 28, p. 346; *United States* v. *Brig William*, 2 Hall's Law Journal, 255, 259, 260; Rawle on the Const. ch. 10. p. 116; 1 Jefferson's Corresp. 104 to 106, 112.

[2] Reeves on Shipping, 28, 36, 47, 49, 52 to 105; Id. 491, 492, 493; Burke's Speech on American Taxation, in 1774; 1 Pitk. Hist. ch. 3, p. 91 to 106.

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without opposition; and several attempts were made to amend it; as by inserting after the word "duty" the words, "for the purpose of revenue," and by inserting at the end of it, "unless by consent of two thirds of the legislature;" both of which propositions were negatived.[1] It then passed by a vote of seven states against four.[2] Subsequently, the remaining parts of the clause were proposed by a report of a committee, and they appear to have been adopted without objection.[3] Upon the whole, the wisdom and sound policy of this restriction cannot admit of reasonable doubt; not so much that the powers of the general government were likely to be abused, as that the constitutional prohibition would allay jealousies, and confirm confidence.[4] The prohibition extends not only to exports, but to the exporter. Congress can no more rightfully tax the one, than the other.[5]

§ 1013. The next clause contains a prohibition on the states for the like objects and purposes. "No state "shall, *without the consent of congress*, lay any imposts, "or duties on imports or exports, except what may be "absolutely necessary for executing its inspection laws; "and the nett produce of all duties and imposts laid by "any state on imports and exports shall be for the use "of the treasury of the United States; and all such "laws shall be subject to the revision and control of "congress. No state shall, without the consent of "congress, lay any tonnage duty." In the first draft of the constitution, the clause stood, "no state, without "the consent," &c. "shall lay imposts or duties on im-

[1] Journ. of Convention, 222, 275. [2] Id. 275, 276.
[3] Journ. of Convention, 301, 318; Id. 377, 378.
[4] 1 Tuck. Black. Comm. App. 252, 253; Id. 294.
[5] *Brown* v. *Maryland*, 12 Wheat. R. 449.

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ports." The clause was then amended by adding, "or exports," not however without opposition, six states voting in the affirmative, and five in the negative;"[1] and again by adding, "nor with such consent, but for the use of the treasury of the United States," by a vote of nine states against two.[2] In the revised draft, the clause was reported as thus amended. The clause was then altered to its present shape by a vote of ten states against one; and the clause, which respects the duty on tonnage, was then added by a vote of six states against four, one being divided.[3] So, that it seems, that a struggle for state powers was constantly maintained with zeal and pertinacity throughout the whole discussion. If there is wisdom and sound policy in restraining the United States from exercising the power of taxation unequally in the states, there is, at least, equal wisdom and policy in restraining the states themselves from the exercise of the same power injuriously to the interests of each other. A petty warfare of regulation is thus prevented, which would rouse resentments, and create dissensions, to the ruin of the harmony and amity of the states. The power to enforce their respective laws is still retained, subject to the revision and control of congress; so, that sufficient provision is made for the convenient arrangement of their domestic and internal trade, whenever it is not injurious to the general interests.[4]

§ 1014. Inspection laws are not, strictly speaking, regulations of commerce, though they may have a

[1] Journ. of Convention, 227, 303. [2] Id. 303, 304.

[3] Journ. of Convention, 359, 380, 381. See 2 American Museum, 534; Id. 540.

[4] The Federalist, No. 44; 1 Tuck. Black. Comm. App. 252, 313. See also 2 Elliot's Debates, 354 to 356; Journ. of Convention, 294, 295.

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remote and considerable influence on commerce. The object of inspection laws is to improve the quality of articles produced by the labour of a country; to fit them for exportation, or for domestic use. These laws act upon the subject, before it becomes an article of commerce, foreign or domestic, and prepare it for the purpose. They form a portion of that immense mass of legislation, which embraces every thing in the territory of a state not surrendered to the general government. Inspection laws, quarantine laws, and health laws, as well as laws for regulating the internal commerce of a state, and others, which respect roads, fences, &c. are component parts of state legislation, resulting from the residuary powers of state sovereignty. No direct power over these is given to congress, and consequently they remain subject to state legislation, though they may be controlled by congress, when they interfere with their acknowledged powers.[1] Under the confederation, there was a provision, that "no state shall lay any imposts or duties, which may interfere with any stipulations of treaties entered into by the United States," &c. &c. This prohibition was notoriously (as has been already stated) disregarded by the states; and in the exercise by the states of their general authority to lay imposts and duties, it is equally notorious, that the most mischievous restraints, preferences, and inequalities existed; so, that very serious irritations and feuds were constantly generated, which threatened the peace of the Union, and indeed must have inevitably led to a dissolution of it.[2] The power to lay duties and imposts on

[1] *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 203 to 206, 210, 235, 236, 311; *Brown* v. *Maryland*, 12 Wheat. R. 419, 438, 439, 440.

[2] The Federalist, No. 7, 22.

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imports and exports, and to lay a tonnage duty, are doubtless properly considered a part of the taxing power; but they may also be applied, as a regulation of commerce.[1]

§ 1015. Until a recent period, no difficulty occurred in regard to the prohibitions of this clause. Congress, with a just liberality, gave full effect to the inspection laws of the states, and required them to be observed by the revenue officers of the United States.[2] In the year 1821, the state of Maryland passed an act requiring, that all importers of foreign articles or commodities, &c. by bale or package, or of wine, rum, &c. &c., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, should, before they were authorized to sell, take out a license, for which they were to pay *fifty* dollars, under certain penalties. Upon this act a question arose, whether it was, or not a violation of the constitution of the United States, and especially of the prohibitory clause now under consideration. Upon solemn argument, the Supreme Court decided, that it was.[3] The judgment of the Supreme Court, delivered on that occasion, contains a very full exposition of the whole subject; and although it is long, it seems difficult to abridge it without marring the reasoning, or in some measure leaving imperfect a most important constitutional inquiry. It is, therefore, inserted at large.

§ 1016. "The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer of foreign articles to take out a

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[1] *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 199, 200, 201; *Brown* v. *Maryland*, 12 Wheat. R. 446, 447.

[2] Act of 2d April, 1790, ch. 5; Act of 2d March, 1799, ch. 128, § 93.

[3] *Brown* v. *Maryland*, 12 Wheat. R. 419; The Federalist, No. 278.

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license from the state, before he shall be permitted to sell a bale or package so imported. It has been truly said, that the presumption is in favour of every legislative act, and that the whole burthen of proof lies on those, who deny its constitutionality. The plaintiffs in error take the burthen upon themselves, and insist, that the act under consideration is repugnant to two provisions in the constitution of the United States. (1.) To that, which declares, that 'no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.' (2.) To that, which declares, that congress shall have power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'

§ 1017. "1. The first inquiry is, into the extent of the prohibition upon states, 'to lay any imposts or duties on imports or exports.' The counsel for the state of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope. In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their connexion with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power. What, then, is the meaning of the words, 'imposts or duties on imports or exports?' An impost or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership

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over them, because evasions of the law can be prevented more certainly by executing it, while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports?' The lexicons inform us, they are 'things imported.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves, which are brought into the country. 'A duty on imports,' then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied, while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence, which limit the prohibition, show the extent, in which it was understood. The limitation is, 'except what may be absolutely necessary for executing its inspection laws.' Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far, as they act upon importations, they are generally executed upon articles, which are landed. The tax or duty of inspection, then, is a tax, which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made, because the tax would otherwise have been within the prohibition. If

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it be a rule of interpretation, to which all assent, that the exception of a particular thing from general words proves, that in the opinion of the lawgiver, the thing excepted would be within the general clause, had the exception not been made, we know no reason, why this general rule should not be as applicable to the constitution, as to other instruments. If it be applicable, then this exception in favour of duties for the support of inspection laws, goes far in proving, that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

§ 1018. "If we quit this narrow view of the subject, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation. From the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner, in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives, which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary, as it was, and jealous, as the states were, of any encroachment on it, was so far abridged, as to forbid them to touch imports or exports, with the single exception, which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of congress. Whether the prohibition to 'lay imposts, or duties on imports or ex-

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ports,' proceeded from an apprehension, that the power might be so exercised, as to disturb that equality among the states, which was generally advantageous, or that harmony between them, which it was desirable to preserve; or to maintain unimpaired our commercial connexions with foreign nations; or to confer this source of revenue on the government of the Union; or, whatever other motive might have induced the prohibition; it is plain, that the object would be as completely defeated by a power to tax the article in the hands of the importer, the instant it was landed, as by a power to tax it, while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported, if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious, that the same power, which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree, to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those, in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent, which will defeat the revenue by impost, so far, as it is drawn from importations into the particular state.

§ 1019. We are told, that such a wild and irrational abuse of power is not to be apprehended, and is not to be taken into view, when discussing its existence. All power may be abused; and if the fear of its abuse is

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to constitute an argument against its existence, it might be urged against the existence of that, which is universally acknowledged, and which is indispensable to the general safety. The states will never be so mad, as to destroy their own commerce, or even to lessen it. We do not dissent from these general propositions. We do not suppose any state would act so unwisely. But we do not place the question on that ground. These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason be said, that no state would be so blind to its own interests, as to lay duties on importation, which would either prohibit, or diminish its trade. Yet the framers of our constitution have thought this a power, which no state ought to exercise. Conceding, to the full extent, which is required, that every state would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded, that each would respect the interests of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less a tax, because their interest would afford ample security against its ever being so heavy, as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those states, whose situation was less favourable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the states. When we are inquiring, whether a particular act is within this prohibition, the question is not, whether the state may so legislate, as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already

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been shown, that a tax on the article in the hands of the importer is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it, while entering the port.

§ 1020. "The counsel for the state of Maryland insist with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent, which has never yet been suspected; and will deprive them of resources, which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time, when the prohibition ceases, and the power of the state to tax commences. It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers, which remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But while we admit, that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object, which the constitution is intended to secure; that there must be a point of time, when the prohibition ceases, and the power of the state to tax commences; we cannot admit, that this point of time is the instant, that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

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§ 1021. "The constitutional prohibition on the states to lay a duty on imports, a prohibition, which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable, when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly, as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked, as the cases arise. Till they do arise, it might be premature to state any rule, as being universal in its application. It is sufficient for the present, to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character, as an import, and has become subject to the taxing power of the state. But, while remaining the property of the importer, in his warehouse, in the original form or package, in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

§ 1022. "The counsel for the plaintiffs in error contend, that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration, for which the duty is paid,

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every principle of fair dealing requires, that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only, which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows, that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

§ 1023. "The counsel for the defendant in error have endeavoured to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences, which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right, when, where, and as he pleases; and the state cannot regulate it. He may sell by retail, at auction, or as an itinerant pedlar. He may introduce articles, as gun-powder, which endanger a city, into the midst of its population; he may introduce articles, which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

§ 1024. "These objections to the principle, if well founded, would certainly be entitled to serious consideration. But, we think, they will be found, on examination, not to belong necessarily to the principle, and, conse-

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quently, not to prove, that it may not be resorted to with safety, as a criterion, by which to measure the extent of the prohibition. This indictment is against the importer for selling a package of dry goods in the form, in which it was imported, without a license. This state of things is changed, if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and travelling with them, as an itinerant pedlar. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege, which he has purchased from the United States, until he shall have also purchased it from the state. In the last case, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them, as it finds them. The same observations apply to plate, or other furniture used by the importer. So, if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other, for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way. The power to direct the removal of gun-powder is a branch of the police power, which unquestionably remains, and ought to remain with the states. If the possessor stores it himself out of town, the removal cannot be a duty on

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imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure, that this may not he classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state.

§ 1025. "The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation, which is acknowledged to reside in the states, to that dangerous extent, which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no farther, than to prevent the states from doing that, which it was the great object of the constitution to prevent.

§ 1026. "But if it should be proved, that a duty on the article itself would be repugnant to the constitution, it is still argued, that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally; but this tax must be paid by those, who employ the individual, or is a tax on his business.

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The lawyer, the physician, or the mechanic, must either charge more on the article, in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner, as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution.

§ 1027. "In support of the argument, that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words, export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act, which is prohibited. The United States have the same right to tax occupations, which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax, as congress might think proper to impose; would the government be permitted to shield itself from the just censure, to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty

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on all merchandise found in vessels, which were leaving the United States for foreign countries; would it be received, as an excuse for this outrage, were the government to say, that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased, when they were carried out of the country?

§ 1028. "We think, then, that the act, under which the plaintiffs in error were indicted, is repugnant to that article of the constitution, which declares, that 'no state shall lay any impost or duties on imports or exports.'"[1]

§ 1029. As the power of taxation exists in the states concurrently with the United States, subject only to the restrictions imposed by the constitution, several questions have from time to time arisen in regard to the nature and extent of the state power of taxation.

§ 1030. In the year 1818, the state of Maryland passed an act, laying a tax on all banks, and branches thereof, not chartered by the legislature of that state; and a question was made, whether the state had a right under that act, to lay a tax on the Branch Bank of the United States in that state. This gave rise to a most animated discussion in the Supreme Court of the United States; where it was finally decided, that the tax was, as to the Bank of the United States, unconstitutional.[2] The reasoning of the Supreme Court, on this subject, was as follows.

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1 The opinion also proceeded to declare, that the act was a violation of the exclusive power of congress to regulate commerce. But the examination of this part of the question properly belongs to another head.

2 *M'Culloch* v. *State of Maryland*, 4 Wheat. R. 316; 1 Kent's Comm. Lect. 19, p. 398; Id. 401.

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§ 1031. "Whether the state of Maryland may, without violating the constitution, tax that branch? That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths, which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded; if it may restrain a state from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other, as if express terms of repeal were used.

§ 1032. "On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case; but the claim has been sustained on a principle, which so entirely pervades the constitution; is so intermixed with the materials, which compose it; so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them.

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From this, which may be almost termed an axiom, other propositions are deduced, as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. that a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with the powers to create and to preserve. 3d. That where this repugnancy exists, that authority, which is supreme, must control, not yield to that over which it is supreme. These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

§ 1033. "The power of congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable. That the power of taxing it by the states may be exercised so, as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits, than those expressly prescribed in the constitution; and like sovereign power of every other description, is trusted to the discretion of those, who use it. But the very terms of this argument admit, that the sovereignty of the state in the article of taxation itself, is subordinate to, and may be controlled by, the constitution of the United States. How far it has been controlled by that instrument, must be a question of construction. In making this construction, no principle, not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of

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supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view, while construing the constitution.

§ 1034. "The argument, on the part of the state of Maryland, is, not that the states may directly resist a law of congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence, that they will not abuse it. Before we proceed to examine this argument, and to subject it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the states. It is admitted, that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects, to which it is applicable, to the utmost extent, to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over

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their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security; nor is the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state; not given by the constituents of the legislature, which claim the right to tax them; but by the people of all the states. They are given by all, for the benefit of all; and upon theory, should be subjected to that government only, which belongs to all.

§ 1035. "It may be objected to this definition, that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that, to which it is an incident. All subjects, over which the sovereign power of a state extends, are objects of taxation; but those, over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a state extends to every thing, which exists by its own authority, or is introduced by its permission; but does it extend to those means, which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States to a government, whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty, which will extend over them.

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§ 1036. "If we measure the power of taxation residing in a state, by the extent of sovereignty, which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case, to which the power may be applied. We have a principle, which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources; and which places beyond its reach all those powers, which are conferred by the people of the United States on the government of the Union, and all those means, which are given for the purpose of carrying those powers into execution. We have a principle, which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down, what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy, what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power, which the people of a single state cannot give.

§ 1037. "We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed; and the question, whether it has been surrendered, cannot arise.

§ 1038. "But waiving this theory for the present, let

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us resume the inquiry, whether this power can be exercised by the respective states, consistently with a fair construction of the constitution? That the power to tax involves the power to destroy; that the power to destroy may defeat, and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that, which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word *confidence*. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence, which is essential to all government. But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state would be willing to trust those of another with a power to control the operations of a government, to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures, which concern all, in the confidence, that it will not be abused. This, then, is not a case of confidence, and we must consider it, as it really is.

§ 1039. "If we apply the principle, for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting

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all the measures of the government, and of prostrating it, at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states. If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any, and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess, which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. Gentlemen say, they do not claim the right to extend state taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those, who make it, have furnished no reason for it; and the principle, for which they contend, denies it. They contend, that the power of taxation has no other limit, than is found in the 10th section of the 1st article of the constitution; that, with respect to every thing else, the power of the states is supreme, and admits of no control. If this be true, the distinction between property and other subjects, to which the power of taxation is applicable, is merely arbitrary, and can never be sustained. This is not all. If the controlling power of the states be established; if their supremacy, as to taxation, be acknowledged; what is to restrain their exercising this control, in any shape they may please to give it? Their sovereignty is not confined to taxation. This is not the only mode, in which it might be displayed. The question is, in truth,

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a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded, the declaration, that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."

§ 1040. "It has also been insisted, that, as the power of taxation in the general and state governments, is acknowledged to be concurrent, every argument, which would sustain the right of the general government to tax banks, chartered by the states, will equally sustain the right of the states to tax banks, chartered by the general government. But, the two cases are not on the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But, when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people, over whom they claim no control. It acts upon the measures of a government, created by others, as well as themselves, for the benefit of others in common with themselves. The difference is, that, which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole; between the laws of a government declared to be supreme, and those of a government, which, when in opposition to those laws, is not supreme. But if the full application of this argument could be admitted, it might bring into question the

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right of congress to tax the state banks, and could not prove the right of the states to tax the bank of the United States.

§ 1041. "The court has bestowed on this subject its most deliberate consideration. The result is a conviction, that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy, which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the bank of the United States, is unconstitutional and void."[1]

§ 1042. In another case the question was raised, whether a state had a constitutional authority to tax stock issued for loans to the United States; and it was held by the Supreme Court, that a state had not.[2] The reasoning of the court was as follows. "Is the stock, issued for loans made to the government of the United States, liable to be taxed by states and corporations? Congress has power, 'to borrow money on the credit of the United States.' The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract, subsisting between the government and the individual. It bears directly upon that contract, while subsisting,

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[1] The doctrine was again re-examined by the Supreme Court in a later case, and deliberately re-affirmed; *Osborn* v. *Bank of the United States*, 9 Wheat. R. 738, 859 to 868; 1 Kent's Comm. Lect. 12, p. 235 to 239.

[2] *Weston* v. *The City Council of Charleston*, 2 Peters's R. 449.

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and in full force. The power operates upon the contract, the instant it is framed, and must imply a right to affect that contract. If the states and corporations throughout the Union, possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt, which will not be exposed to its influence?

§ 1043. "But it is unnecessary to pursue this principle, through its diversified application to all the contracts, and to the various operations of government. No one can be selected, which is of more vital interest to the community, than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburthened exercise of which more deeply affects every member of our republic. In war, when the honour, the safety, the independence of the nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important, which can occur in the progress of nations, have empowered their government to make these anticipations, 'to borrow money on the credit of the United States.' Can any thing be more dangerous, or more injurious, than the admission of a principle, which authorizes every state, and every corporation in the Union, which possesses the right of taxation, to burthen the exercise of this power at their discretion?

§ 1044. "If the right to impose the tax exists, it is a right, which in its nature acknowledges no limits. It

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may be carried to any extent within the jurisdiction of the state or corporation, which imposes it, which the will of each state and corporation may prescribe. A power, which is given by the whole American people for their common good; which is to be exercised at the most critical periods for the most important purposes; on the free exercise of which the interests certainly, perhaps the liberty, of the whole may depend; may be burthened, impeded, if not arrested, by any of the organized parts of the confederacy.

§ 1044. "In a society, formed like ours, with one supreme government for national purposes, and numerous state governments for other purposes; in many respects independent, and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a state, and one of the most extensive in its operation. The attempt to maintain a rule, which shall limit its exercise, is undoubtedly among the most delicate and difficult duties, which can devolve on those, whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this Court. In the performance of it we have considered it, as a necessary consequence, from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a state cannot, rightfully, be so exercised, as to impede and obstruct the free course of those measures, which the government of the United States, may rightfully adopt.

§ 1045. "This subject was brought before the Court

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in the case of *M'Culloch* v. *The State of Maryland*,[1] when it was thoroughly argued, and deliberately considered. The question decided in that case bears a near resemblance to that, which is involved in this. It was discussed at the bar in all its relations, and examined by the Court with its utmost attention. We will not repeat the reasoning, which conducted us to the conclusion thus formed; but that conclusion was, that 'all subjects, over which the sovereign power of a state extends, are objects of taxation; but those, over which it does not extend, are, upon the soundest principles, exempt from taxation.' 'The sovereignty of a state extends to every thing, which exists by its own authority, or is introduced by its permission;' but not 'to those means, which are employed by congress to carry into execution powers conferred on that body by the people of the United States.' 'The attempt to use' the power of taxation 'on the means employed by the government of the Union, in pursuance of the constitution, is itself an abuse; because it is the usurpation of a power, which the people of a single state cannot give.' 'The states have no power by taxation, or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws, enacted by congress to carry into execution the powers vested in the generel government.' We retain the opinions, which were then expressed. A contract made by the government in the exercise of its power, to borrow money on the credit of the United States, is undoubtedly independent of the will of any state, in which the individual, who lends, may reside; and is undoubtedly an operation essential

[1] 4 Wheaton, 316.

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to the important objects, for which the government was created. It ought, therefore, on the principles settled in the case of *M'Culloch* v. *The State of Maryland* to be exempt from state taxation, and consequently from being taxed by corporations, deriving their power from states.

§ 1046. "It is admitted, that the power of the government to borrow money cannot be directly opposed; and that any law, directly obstructing its operations, would be void. But a distinction is taken between direct opposition, and those measures, which may consequentially affect it; that is, a law prohibiting loans to the United States, would be void; but a tax on them to any amount is allowable. It is, we think, impossible not to perceive the intimate connexion, which exists between these two modes of acting on the subject. It is not the want of original power in an independent sovereign state, to prohibit loans to a foreign government, which restrains the legislature from direct opposition to those made by the United States. The restraint is imposed by our constitution. The American people have conferred the power of borrowing money on their government; and by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power; and the declaration of supremacy is a declaration, that no such restraining or controlling power shall be exercised. The right to tax the contract to any extent, when made, must operate upon the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on

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the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent, which will arrest them entirely.

§ 1047. "It is admitted by the counsel for the defendants, that the power to tax stock must affect the terms, on which loans will be made. But this objection, it is said, has no more weight, when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States. The distinction is, we think, apparent. When lands are sold, no connexion remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country, with no implied exemption from common burthens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation, in any form it may then assume, is not questioned. The connexion between the borrower and the lender is dissolved. It is no burthen on loans; it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands, which the government has sold. The Federalist has been quoted in the argument, and an eloquent and well merited eulogy has been bestowed on the great statesman, who is supposed to be the author of the number, from which the quotation was made. This high authority was also relied upon in the case of *M'Culloch* v. *The State of Maryland*, and was considered by the Court. Without

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repeating, what was then said, we refer to it, as exhibiting our view of the sentiments expressed on this subject by the authors of that work.

§ 1048. "It has been supposed, that a tax on stock comes within the exceptions stated in the case of *M'Culloch* v. *The State of Maryland.* We do not think so. The bank of the United States is an instrument, essential to the fiscal operations of the government; and the power, which might be exercised to its destruction, was denied. But property, acquired by that corporation in a state, was supposed to be placed in the same condition with property acquired by an individual. The tax on government stock is thought by this Court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the constitution."

§ 1049. It is observable, that these decisions turn upon the point, that no state can have authority to tax an instrument of the United States, or thereby to diminish the means of the United States, used in the exercise of powers confided to it. But there is no prohibition upon any state to tax any bank or other corporation created by its own authority, unless it has restrained itself, by the charter of incorporation, from the power of taxation.[1] This subject, however, will more properly fall under notice in some future discussions. It may be added, that congress may, without doubt, tax state banks; for it is clearly within the taxing power confided to the general government. When congress tax the chartered institutions of the states, they tax their

[1] *Providence Bank* v. *Billings*, 4 Peters's R. 514.

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own constituents; and such taxes must be uniform.[1] But when a state taxes an institution created by congress, it taxes an instrument of a superior and independent sovereignty, not represented in the state legislature.

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[1] *M'Culloch* v. *Maryland*, 4 Wheat. R. 316, 435.

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CHAPTER XV.

POWER TO BORROW MONEY AND REGULATE COMMERCE.

§ 1050. HAVING finished this examination of the power of taxation, and of the accompanying restrictions and prohibitions, the other powers of congress will be now examined in the order, in which they stand in the eighth section.

§ 1051. The next, is the power of congress "to bor- "row money on the credit of the United States." This power seems indispensable to the sovereignty and existence of a national government. Even under the confederation this power was expressly delegated.[1] The remark is unquestionably just, that it is a power inseparably connected with that of raising a revenue, and with the duty of protection, which that power imposes upon the general government. Though in times of profound peace it may not be ordinarily necessary to anticipate the revenues of a state; yet the experience of all nations must convince us, that the burthen and expenses of one year, in time of war, may more than equal the ordinary revenue of ten years. Hence, a debt is almost unavoidable, when a nation is plunged into a state of war. The least burthensome mode of contracting a debt is by a loan. Indeed, this recourse becomes the more necessary, because the ordinary duties upon importations are subject to great diminution and fluctuations in times of war; and a resort to direct taxes for the whole supply would, under such circum-

[1] Article 9.

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stances, become oppressive and ruinous to the agricultural interests of the country.[1] Even in times of peace exigencies may occur, which render a loan the most facile, economical, and ready means of supply, either to meet expenses, or to avert calamities, or to save the country from an undue depression of its staple productions. The government of the United States has, on several occasions in times of profound peace, obtained large loans, among which a striking illustration of the economy and convenience of such arrangements will be found in the creation of stock on the purchase of Louisiana. The power to borrow money by the United States cannot (as has been already seen) in any way be controlled, or interfered with by the states. The granting of the power is incompatible with any restraining or controlling power; and the declaration of supremacy in the constitution is a declaration, that no such restraining or controlling power shall be exercised.[2]

§ 1052. The next power of congress is, "to regulate "commerce with foreign nations, and among the several "states, and with the Indian tribes."

§ 1053. The want of this power (as has been already seen) was one of the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the constitution.[3] It is a power vital to the prosperity of the Union; and without it the government would scarcely deserve the name of a national government; and would soon sink into discredit and imbecility.[4] It would stand, as a mere

1 1 Tuck. Black. Comm. App. 245, 246; The Federalist, No. 41.

2 *Weston* v. *City Council of Charleston*, 2 Peters's R. 449, 468.

3 *Gibbons* v. *Ogden*, 9 Wheat. R. 1, 225, Johnson J.'s Opinion; *Brown* v. *Maryland*, 12 Wheat. R. 445, 446.

4 The Federalist, No. 4, 7, 11, 22, 37.

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shadow of sovereignty, to mock our hopes, and involve us in a common ruin.

§ 1054. The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by a want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent, as to render that power in a great degree useless. Those, who felt the injury arising from this state of things, and those, who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It is not, therefore, matter of surprise, that the grant should be as extensive, as the mischief, and should comprehend all foreign commerce, and all commerce among the states.[1]

§ 1055. But this subject has been already so much discussed, and the reasons for conferring the power so fully developed, that it seems unnecessary to dwell farther upon its importance and necessity.[2] In the convention there does not appear to have been any considerable (if, indeed, there was any) opposition to the grant of the power. It was reported in the first draft of the constitution exactly, as it now stands, ex-

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[1] *Brown* v. *State of Maryland*, 12 Wheat. R. 419, 445, 446; 1 Tucker's Black. Comm. App. 248 to 252; 1 Amer. Museum, 8, 272, 273, 281, 282, 288; 2 Amer. Museum, 263 to 276; Id. 371, 372; The Federalist, No. 7, 11, 22; Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; 5 Marshall's Life of Washington, ch. 2, p. 74 to 80; 2 Pitkin's Hist. 189, 192.

[2] The Federalist, No. 7, 11, 12, 22, 41, 42.

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cept that the words, "and with the Indian tribes," were afterwards added; and it passed without a division.[1]

§ 1056. In considering this clause of the constitution several important inquiries are presented. In the first place, what is the natural import of the terms; in the next place, how far the power is exclusive of that of the states; in the third place, to what purposes and for what objects the power may be constitutionally applied; and in the fourth place, what are the true nature and extent of the power to regulate commerce with the Indian tribes.

§ 1057. In the first place, then, what is the constitutional meaning of the words, "to regulate commerce;" for the constitution being (as has been aptly said) one of enumeration, and not of definition, it becomes necessary, in order to ascertain the extent of the power, to ascertain the meaning of the words.[2] The power is to regulate; that is, to prescribe the rule, by which commerce is to be governed.[3] The subject to be regulated is commerce. Is that limited to traffic, to buying and selling, or the interchange of commodities? Or does it comprehend navigation and intercourse? If the former construction is adopted, then a general term applicable to many objects is restricted to one of its significations. If the latter, then a general term is retained in its general sense. To adopt the former, without some guiding grounds furnished by the context, or the nature of the power, would be improper. The words being general, the sense must be general also, and embrace all subjects comprehended under them, unless there be some obvious mischief, or repugnance to other

1 Journal of Convention, 220, 257, 260, 356, 378.

2 *Gibbons* v. *Ogden*, 9 Wheat. R. 189.

3 9 Wheat. R. 196.

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clauses to limit them. In the present case there is nothing to justify such a limitation. Commerce undoubtedly is traffic; but it is something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches; and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation; which shall be silent on the admission of the vessels of one nation into the ports of another; and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or barter.[1]

§ 1058. If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing, what shall constitute American vessels, or requiring, that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government; it has been exercised with the consent of all America; and it has been always understood to be a commercial regulation. The power over navigation, and over commercial intercourse, was one of the primary objects, for which the people of America adopted their government; and it is impossible, that the convention should not so have understood the word "commerce," as embracing it.[2] Indeed, to construe the power, so as to impair its efficacy, would defeat the very object, for which it was introduced into the constitution;[3] for there cannot be a doubt, that to exclude

[1] *Gibbons* v. *Ogden*, 9 Wheat. 189, 190; Id. 229, 230.

[2] 9 Wheat. R. 190, 191; Id. 215, 216, 217; Id. 229, 230; 1 Tucker's Black. Comm. App. 249 to 252.

[3] 12 Wheat. R. 446.

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navigation and intercourse from its scope would be to entail upon us all the prominent defects of the confederation, and subject the Union to the ill-adjusted systems of rival states, and the oppressive preferences of foreign nations in favour of their own navigation.[1]

§ 1059. The very exceptions found in the constitution demonstrate this; for it would be absurd, as well as useless, to except from a granted power that, which was not granted, or that, which the words did not comprehend. There are plain exceptions in the constitution from the power over navigation, and plain inhibitions to the exercise of that power in a particular way. Why should these be made, if the power itself was not understood to be granted? The clause already cited, that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another, is of this nature. This clause cannot be understood, as applicable to those laws only, which are passed for purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference, which can be given to one port over another, relates to navigation. But the remaining part of the sentence directly points to navigation. "Nor shall vessels, bound to or from one state, be obliged to enter, clear, or pay duties in another."[2] In short, our whole system for the encouragement of navigation in the coasting trade and fisheries, is exclusively founded upon this supposition. Yet no one has ever been bold enough to question the constitutionality of the laws, creating this system.[3]

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1 1 Tucker's Black. Comm. App. 247, 248, 249.

2 9 Wheat. R. 191.

3 9 Wheat. R. 191, 215, 216; *North River Steamboat Company* v. *Livingston*, 3 Cowen's R. 713.

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§ 1060. Foreign and domestic intercourse has been universally understood to be within the reach of the power. How, otherwise, could our systems of prohibition and non-intercourse be defended? From what other source has been derived the power of laying embargoes in a time of peace, and without any reference to war, or its operations? Yet this power has been universally admitted to be constitutional, even in times of the highest political excitement. And although the laying of an embargo in the form of a perpetual law was contested, as unconstitutional, at one period of our political history, it was so, not because an embargo was not a *regulation* of commerce, but because a perpetual embargo was an annihilation, and not a regulation of commerce.[1] It may, therefore, be safely affirmed, that the terms of the constitution have at all times been understood to include a power over navigation, as well as trade, over intercourse, as well as traffic;[2] and, that, in the practice of other countries, and especially in our own, there has been no diversity of judgment or opinion. During our whole colonial history, this was acted upon by the British parliament, as an uncontested doctrine. That government regulated not merely our traffic with foreign nations, but our navigation, and intercourse, as unquestioned functions of the power to regulate commerce.[3]

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[1] 9 Wheat. 193; 1 Kent's Comm. Lect. 19, p. 404, 405; The Brigantine William, 2 Hall's Law Journal, 265; Sergeant on Const. ch. 28, p. 290, &c.

[2] 9 Wheat. 193, 215, 216, 217; Id. 226; 12 Wheat. R. 446, 447; *North River Steamboat Company* v. *Livingston*, 3 Cowen's R. 713.

[3] *Gibbons* v. *Ogden*, 9 Wheaton's R. 1, 201; Ib. 224; Ib. 225 to 228. See Mr. Verplank's letter to Col. Drayton in 1831; Resolves of Congress, 14th Oct. 1774, (1 Journal of Congress, 27); 2 Marshall's Life of Washington, (in five volumes,) p. 77, 81; Dr. Franklin's Examination,

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§ 1061. This power the constitution extends to commerce with foreign nations, and among the several states, and with the Indian tribes. In regard to foreign nations, it is universally admitted, that the words comprehend every species of commercial intercourse. No sort of trade or intercourse can be carried on between this country and another, to which it does not extend. Commerce, as used in the constitution, is a unit, every part of which is indicated by the term. If this be its admitted meaning in its application to foreign nations, it must carry the same meaning throughout the sentence.[1] The next words are "among the several states." The word "among" means intermingled with. A thing, which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It does not, indeed, comprehend any commerce, which is purely internal, between man and man in a single state, or between different parts of the same state, and not extending to, or affecting other states. Commerce among the states means, commerce, which concerns more states than one. It is not an apt phrase to indicate the mere interior traffic of a single state. The completely internal commerce of a state may be properly considered, as reserved to the state itself.[2]

§ 1062. The importance of the power of regulating commerce among the states, for the purposes of the

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before the house of commons, in 1766; Dickerson's Farmer's Letters, No. 2, 1767; 1 Jefferson's Corresp. 7; Burke's Speech on American Taxation, 1774.

1 *Gibbons* v. *Ogden*, 9 Wheaton's R. 194.

2 *Gibbon's* v. *Ogden*, 9 Wheaton's R. 194, 195, 196; *Brown* v. *Maryland*, 12 Wheaton, 446, 447.

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Union, is scarcely less, than that of regulating it with foreign states.[1] A very material object of this power is the relief of the states, which import and export through other states, from the levy of improper contributions on them by the latter. If each state were at liberty to regulate the trade between state and state, it is easy to foresee, that ways would be found out to load the articles of import and export, during their passage through the jurisdiction, with duties, which should fall on the makers of the latter, and the consumers of the former.[2] The experience of the American states during the confederation abundantly establishes, that such arrangements could be, and would be made under the stimulating influence of local interests, and the desire of undue gain.[3] Instead of acting as a nation in regard to foreign powers, the states individually commenced a system of restraint upon each other, whereby the interests of foreign powers were promoted at their expense. When one state imposed high duties on the goods or vessels of a foreign power to countervail the regulations of such powers, the next adjoining states imposed lighter duties to invite those articles into their ports, that they might be transferred thence into the other states, securing the duties to themselves. This contracted policy in some of the states was soon counteracted by others. Restraints were immediately laid on such commerce by the suffering states; and thus a state of affairs disorderly and unnatural grew up, the necessary tendency of which was to destroy the Union itself.[4] The history

[1] See the Federalist, No. 6, 7, 11, 12, 22, 41, 42; *N. R. Steamboat Company* v. *Livingston*, 3 Cowen's R. 713.

[2] 12 Wheaton's R. 448, 449; 9 Wheaton, 199 to 204.

[3] The Federalist, No. 42; 1 Tuck. Black. Comm. App. 247 to 252.

[4] See President Monroe's Exposition and Message, 4 May, 1822, p. 31, 32.

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of other nations, also, furnishes the same admonition. In Switzerland, where the union is very slight, it has been found necessary to provide, that each canton shall be obliged to allow a passage to merchandise through its jurisdiction into other cantons without an augmentation of tolls. In Germany, it is a law of the empire, that the princes shall not lay tolls on customs or bridges, rivers, or passages, without the consent of the emperor and diet. But these regulations are but imperfectly obeyed; and great public mischiefs have consequently followed.[1] Indeed, without this power to regulate commerce among the states, the power of regulating foreign commerce would be incomplete and ineffectual.[2] The very laws of the Union in regard to the latter, whether for revenue, for restriction, for retaliation, or for encouragement of domestic products or pursuits, might be evaded at pleasure, or rendered impotent.[3] In short, in a practical view, it is impossible to separate the regulation of foreign commerce and domestic commerce among the states from each other. The same public policy applies to each; and not a reason can be assigned for confiding the power over the one, which does not conduce to establish the propriety of conceding the power over the other.[4]

§ 1063. The next inquiry is, whether this power to regulate commerce is exclusive of the same power in the states, or is concurrent with it.[5] It has been

1 The Federalist, No. 42, 22.

2 The Federalist, No. 42.

3 The Federalist, No. 11, 12.

4 See the opinion of Mr. Justice Johnson, 9 Wheaton's R. 224 to 228.

5 In the convention, it was moved to amend the article, so as to give to congress "the sole and exclusive" power; but the proposition was rejected by the vote of six states against five. *

* Journal of Convention, 290, 270.

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settled upon the most solemn deliberation, that the power is exclusive in the government of the United States.[1] The reasoning, upon which this doctrine is founded, is to the following effect. The power to regulate commerce is general and unlimited in its terms. The full power to regulate a particular subject implies the whole power, and leaves no *residuum*. A grant of the whole is incompatible with the existence of a right in another to any part of it. A grant of a power to regulate necessarily excludes the action of all others, who would perform the same operation on the same thing. Regulation is designed to indicate the entire result, applying to those parts, which remain as they were, as well as to those, which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing, what the regulating power designs to have unbounded, as that, on which it has operated.[2]

§ 1064. The power to regulate commerce is not at all like that to lay taxes. The latter may well be concurrent, while the former is exclusive, resulting from the different nature of the two powers. The power of congress in laying taxes is not necessarily, or naturally inconsistent with that of the states. Each may lay a tax on the same property, without interfering with the action of the other; for taxation is but taking small portions from the mass of property, which is susceptible of almost infinite division. In imposing taxes for state purposes, a state is not doing, what congress is empowered to do. Congress is not empowered to tax for those purposes,

[1] *Gibbons* v. *Ogden*, 9 Wheaton's R. 1; *Brown* v. *Maryland*, 12 Wheaton's R. 419, 445. 446; 1 Tucker's Black. Comm. App. 180, 309; *N. R. Steam Boat Company* v. *Livingston*, 3 Cowen's R. 713.

[2] 9 Wheaton's R. 196, 198, 209; Ib. 227, 228.

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which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power, which is granted to congress; and is doing the very thing, which congress is authorized to do. There is no analogy, then, between the power of taxation, and the power of regulating commerce.[1]

§ 1065. Nor can any power be inferred in the states to regulate commerce from other clauses in the constitution, or the acknowledged rights exercised by the states. The constitution has prohibited the states from laying any impost or duty on imports or exports; but this does not admit, that the state might otherwise have exercised the power, as a regulation of commerce. The laying of such imposts and duties may be, and indeed often is used, as a mere regulation of commerce, by governments possessing that power.[2] But the laying of such imposts and duties is as certainly, and more usually, a right exercised as a part of the power to lay taxes; and with this latter power the states are clearly entrusted. So, that the prohibition is an exception from the acknowledged power of the state to lay taxes, and not from the questionable power to regulate commerce. Indeed, the constitution treats these as distinct and independent powers. The same remarks apply to a duty on tonnage.[3]

§ 1066. Nor do the acknowledged powers of the states over certain subjects, having a connexion with

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[1] Wheaton's R. 199, 200.

[2] 9 Wheaton's R. 201, 202; 1 Jefferson's Corresp. 7; The Federalist, No. 56; 12 Wheaton's R. 446, 447.

[3] 9 Wheaton's R. 201, 202.

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commerce, in any degree impugn this reasoning. These powers are entirely distinct in their nature from that to regulate commerce; and though the same means may be resorted to, for the purpose of carrying each of these powers into effect, this by no just reasoning furnishes any ground to assert, that they are identical.[1] Among these, are inspection laws, health laws, laws regulating turnpikes, roads, and ferries, all of which, when exercised by a state, are legitimate, arising from the general powers belonging to it, unless so far as they conflict with the powers delegated to congress.[2] They are not so much regulations of commerce, as of police; and may truly be said to belong, if at all to commerce, to that which is purely internal. The pilotage laws of the states may fall under the same description. But they have been adopted by congress, and without question are controllable by it.[3]

§1067. The reasoning, by which the power given to congress to regulate commerce is maintained to be exclusive, has not been of late seriously controverted; and it seems to have the cheerful acquiescence of the learned tribunals of a particular state, one of whose acts brought it first under judicial examination.[4]

§ 1068. The power to congress, then, being exclusive, no state is at liberty to pass any laws imposing a

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1 See *Corfield* v. *Cargill*, 4 Wash. Cir. R. 371, 379, &c.

2 9 Wheaton's R. 203 to 207, 209.

3 9 Wheaton's R. 207, 208, 209.

4 1 Kent's Comm. Lect. 19, p. 404, 410, 411. See also Rawle on the Constitution, ch. 9, p. 81 to 84; Sergeant on Const. ch. 28, p. 291, 292. —There is a very able and candid review of the whole subject by Mr. Chancellor Kent in his excellent commentaries. (1 Kent's Comm. Lect. 19, p. 404.) I gladly avail myself of this, as well as of all other occasions, to recommend his learned labours to those, who seek to study the law, or the constitution, with a liberal and enlightened spirit.

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tax upon importers, importing goods from foreign countries, or from other states. It is wholly immaterial, whether the tax be laid on the goods imported, or on the person of the importer. In each case, it is a restriction of the right of commerce, not conceded to the states. As the power of congress to regulate commerce reaches the interior of a state,[1] it might be capable of authorizing the sale of the articles, which it introduces. Commerce is intercourse; and one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize traffic, when given in the most comprehensive terms, with the intent, that its efficacy should be complete, should cease at the point, when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation; and it is an essential ingredient of that intercourse, of which importation constitutes a part. As congress has the right to authorize importation, it must have a right to authorize the importer to sell. What would be the language of a foreign government, which should be informed, that its merchants after importation were forbidden to sell the merchandize imported? What answer could the United States give to the complaints and just reproaches, to which such extraordinary conduct would expose them? No apology could be received, or offered. Such a state of things would annihilate commerce. It is no answer, that the tax may be moderate; for, if the power exists in the states, it may be carried to any extent they may choose. If it does

[1] 9 Wheaton's R. 197 to 204.

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not exist, every exercise of it is, *pro tanto*, a violation of the power of congress to regulate commerce.[1]

§ 1069. How far any state possesses the power to authorize an obstruction of any navigable stream or creek, in which the tide ebbs and flows, within its territorial limits, as by authorizing the erection of a dam across it, has been a subject of much recent discussion. If congress, in regulating commerce, should pass any act, the object of which should be to control state legislation over such navigable streams or creeks, there would be little difficulty in saying, that a state law in conflict with such an act would be void. But if congress has passed no general or special act on the subject, the invalidity of such a state act must be placed entirely upon its repugnancy to the power to regulate commerce in its dormant state. Under such circumstances, it would be difficult to affirm, that the sovereignty of a state, acting on subjects within the reach of other powers, beside that of regulating commerce, and which belonged to its general territorial jurisdiction, would be intercepted by the exclusive power of commerce, unexercised by congress, over the same subject-matter. The value of the property on the banks of such streams and creeks may be materially enhanced by excluding the waters from them and the adjacent low and marshy grounds, and the health of the inhabitants be improved. Measures calculated to produce these objects, provided they do not come into collision with the power of the general government, are undoubtedly within those, which are reserved to the states.[2]

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[1] *Brown* v. *State of Maryland*, 12 Wheaton's R. 419, 445 to 447; 9 Wheaton's R. 197. &c. — Mr. Justice Thompson dissented from this doctrine, as will be seen in his opinion in 12 Wheaton's R. 449, &c.

[2] *Wilson* v. *Blackbird Creek Company*, 2 Peters's R. 245.

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§ 1070. In the next place, to what extent, and for what objects and purposes the power to regulate commerce may be constitutionally applied.

§ 1071. And first, among the states. It is not doubted, that it extends to the regulation of navigation, and to the coasting trade and fisheries, within, as well as without any state, wherever it is connected with the commerce or intercourse with any other state, or with foreign nations.[1] It extends to the regulation and government of seamen on board of American ships; and to conferring privileges upon ships built and owned in the United States in domestic, as well as foreign trade.[2] It extends to quarantine laws, and pilotage laws, and wrecks of the sea.[3] It extends, as well to the navigation of vessels engaged in carrying passengers, and whether steam vessels or of any other description, as to the navigation of vessels engaged in traffic and general coasting business.[4] It extends to the laying of embargoes, as well on domestic, as on foreign voyages.[5] It extends to the construction of light-houses, the placing of buoys and beacons, the removal of obstructions to navigation in creeks, rivers, sounds, and bays, and the establishment of securities to navigation against the inroads of the ocean. It extends also to the designation of particular port or ports of entry and delivery for the purposes of foreign commerce.[6] These powers have been actually exerted by the national government

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1 *Gibbons* v. *Ogden*, 9 Wheat. R. 189 to 198; Id. 211 to 215; 1 Tuck. Black. Comm. App. 247 to 249; Id. 250.

2 1 Tuck. Black. Comm. App. 252.

3 9 Wheat. R. 203, 204, 205, 206, 207, 208; 1 Tuck. Black. Comm. App. 251, 252.

4 9 Wheat. R. 214, 215 to 221.

5 9 Wheat. R. 191, 192; 1 Kent's Comm. Lect. 19, p. 404, 405.

6 1 Tuck. Black. Comm. App. 249, 251; 9 Wheat. R. 208, 209

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under a system of laws, many of which commenced with the early establishment of the constitution; and they have continued unquestioned unto our day, if not to the utmost range of their reach, at least to that of their ordinary application.[1]

§ 1072. Many of the like powers have been applied in the regulation of foreign commerce. The commercial system of the United States has also been employed sometimes for the purpose of revenue; sometimes for the purpose of prohibition; sometimes for the purpose of retaliation and commercial reciprocity; sometimes to lay embargoes;[2] sometimes to encourage domestic navigation, and the shipping and mercantile interest by bounties, by discriminating duties, and by special preferences and privileges;[3] and sometimes to regulate intercourse with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty. In all these cases, the right and duty have been conceded to the national government by the unequivocal voice of the people.

§ 1073. A question has been recently made, whether congress have a constitutional authority to apply the power to regulate commerce for the purpose of encouraging and protecting domestic manufactures. It is not denied, that congress may, incidentally, in its arrange-

[1] Mr. Hamilton, in his celebrated argument on the national bank, (23d Feb. 1791,) enumerates the following as within the power to regulate commerce, viz. the regulation of policies of insurance, of salvage upon goods found at sea, and the disposition of such goods; the regulation of pilots; and the regulation of bills of exchange drawn by one merchant upon a merchant of another state; and, of course, the regulation of foreign bills of exchange.*

[2] Sergeant on Const. Law ch. 28, (ch. 30, 2d edit.)

[3] See 1 Elliot's Debates, 144.

* 1 Hamilton's Work's, 134.

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ments for revenue, or to countervail foreign restrictions, encourage the growth of domestic manufactures. But it is earnestly and strenuously insisted, that, under the colour of regulating commerce, congress have no right permanently to prohibit any importations, or to tax any unreasonably for the purpose of securing the home market to the domestic manufacturer, as they thereby destroy the commerce entrusted to them to regulate, and foster an interest, with which they have no constitutional power to interfere.[1] This opinion constitutes the leading doctrine of several states in the Union at the present moment; and is maintained, as vital to the existence of the Union. On the other hand, it is as earnestly and strenuously maintained, that congress does possess the constitutional power to encourage and protect manufactures by appropriate regulations of commerce; and that the opposite opinion is destructive of all the purposes of the Union, and would annihilate its value.

§ 1074. Under such circumstances, it becomes indispensable to review the grounds, upon which the doctrine of each party is maintained, and to sift them to the bottom; since it cannot be disguised, that the controversy still agitates all America, and marks the divisions of party by the strongest lines, both geographical and political, which have ever been seen since the establishment of the national government.

§ 1075. The reasoning, by which the doctrine is maintained, that the power to regulate commerce cannot be constitutionally applied, as a means, directly to encourage domestic manufactures, has been in part already adverted to in considering the extent of the power to lay taxes. It is proper, however, to present

1 See Address of the Philadelphia Free Trade Convention, in September and October 1831.

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it entire in its present connexion. It is to the following effect. — The constitution is one of limited and enumerated powers; and none of them can be rightfully exercised beyond the scope of the objects, specified in those powers. It is not disputed, that, when the power is given, all the appropriate means to carry it into effect are included. Neither is it disputed, that the laying of duties is, or may be an appropriate means of regulating commerce. But the question is a very different one, whether, under pretence of an exercise of the power to regulate commerce, congress may in fact impose duties for objects wholly distinct from commerce. The question comes to this, whether a power, exclusively for the regulation of commerce, is a power for the regulation of manufactures? The statement of such a question would seem to involve its own answer. Can a power, granted for one purpose, be transferred to another? If it can, where is the limitation in the constitution? Are not commerce and manufactures as distinct, as commerce and agriculture? If they are, how can a power to regulate one arise from a power to regulate the other? It is true, that commerce and manufactures are, or may be, intimately connected with each other. A regulation of one may injuriously or beneficially affect the other. But that is not the point in controversy. It is, whether congress has a right to regulate that, which is not committed to it, under a power, which is committed to it, simply because there is, or may be an intimate connexion between the powers. If this were admitted, the enumeration of the powers of congress would be wholly unnecessary and nugatory. Agriculture, colonies, capital, machinery, the wages of labour, the profits of stock, the rents of land, the punctual performance of contracts, and the diffusion of knowledge

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would all be within the scope of the power; for all of them bear an intimate relation to commerce. The result would be, that the powers of congress would embrace the widest extent of legislative functions, to the utter demolition of all constitutional boundaries between the state and national governments. When duties are laid, not for purposes of revenue, but of retaliation and restriction, to countervail foreign restrictions, they are strictly within the scope of the power, as a regulation of commerce. But when laid to encourage manufactures, they have nothing to do with it. The power to regulate manufactures is no more confided to congress, than the power to interfere with the systems of education, the poor laws, or the road laws of the states. It is notorious, that, in the convention, an attempt was made to introduce into the constitution a power to encourage manufactures; but it was withheld.[1] In stead of granting the power to congress, permission was given to the states to impose duties, with the consent of that body, to encourage their own manufactures; and thus, in the true spirit of justice, imposing the burthen on those, who were to be benefited. It is true, that congress may, incidentally, when laying duties for revenue, consult the other interests of the country. They may so arrange the details, as indirectly to aid manufactures. And this is the whole extent, to which congress has ever gone until the tariffs, which have given rise to the present controversy. The former precedents of congress are not, even if admitted to be authoritative, applicable to the question now presented.[2]

[1] A proposition was referred to the committee of Details and Revision "to establish public institutions, rewards, and immunities, for the promotion of agriculture, commerce, trade, and manufactures." The committee never reported on it. Journ. of Convention, p. 261.

[2] The above arguments and reasoning have been gathered, as far as

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§ 1076. The reasoning of those, who maintain the doctrine, that congress has authority to apply the power to regulate commerce to the purpose of protecting and encouraging domestic manufactures, is to the following effect. The power to regulate commerce, being in its terms unlimited, includes all means appropriate to the end, and all means, which have been usually exerted under the power. No one can doubt or deny, that a power to regulate trade involves a power to tax it. It is a familiar mode, recognised in the practice of all nations, and was known and admitted by the United States, while they were colonies, and has ever since been acted upon without opposition or question. The American colonies wholly denied the authority of the British parliament to tax them, except as a regulation of commerce; but they admitted this exercise of power, as legitimate and unquestionable. The distinction was with difficulty maintained in practice between laws for the regulation of commerce by way of taxation, and laws, which were made for mere monopoly, or restriction, when they incidentally produced revenue.[1] And it is certain, that the main and admitted object of parliamentary regulations of trade with the colonies was the encouragement of manufactures in Great-Britain.

could be, from documents admitted to be of high authority by those, who maintain the restrictive doctrine. See the Exposition and Protest of the South Carolina legislature, in Dec. 1828, attributed to Mr. Vice President Calhoun; the Address of the Free Trade Convention at Philadelphia, in Oct. 1831, attributed to Mr. Attorney General Berrion; the Oration of the Hon. Mr. Drayton, on the 4th of July, 1831; and the Speech of Mr. Senator Hayne, 9th of Jan. 1832. See also 4 Jefferson's Corresp. 421.

[1] See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; Mr. Verplanck's Letter to Col. Drayton, in 1831; Address of the New-York Convention in favour of Domestic Industry, November, 1831, p. 12, 13, 14 9 Wheat. R. 202; 1 Pitk. Hist. ch. 3, p. 93 to 106.

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Other nations have, in like manner, for like purposes, exercised the like power. So, that there is no novelty in the use of the power, and no stretch in the range of the power.

§ 1077. Indeed, the advocates of the opposite doctrine admit, that the power may be applied, so as incidentally to give protection to manufactures, when revenue is the principal design; and that it may also be applied to countervail the injurious regulations of foreign powers, when there is no design of revenue. These concessions admit, then, that the regulations of commerce are not wholly for purposes of revenue, or wholly confined to the purposes of commerce, considered *per se*. If this be true, then other objects may enter into commercial regulations; and if so, what restraint is there, as to the nature or extent of the objects, to which they may reach, which does not resolve itself into a question of expediency and policy? It may be admitted, that a power, given for one purpose, cannot be perverted to purposes wholly opposite, or beside its legitimate scope. But what perversion is there in applying a power to the very purposes, to which it has been usually applied? Under such circumstances, does not the grant of the power without restriction concede, that it may be legitimately applied to such purposes? If a different intent had existed, would not that intent be manifested by some corresponding limitation?

§ 1078. Now it is well known, that in commercial and manufacturing nations, the power to regulate commerce has embraced practically the encouragement of manufactures. It is believed, that not a single exception can be named. So, in an especial manner, the power has always been understood in Great-Britain, from which we derive our parentage, our laws, our language, and

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our notions upon commercial subjects. Such was confessedly the notion of the different states in the Union under the confederation, and before the formation of the present constitution. One known object of the policy of the manufacturing states then was, the protection and encouragement of their manufactures by regulations of commerce.[1] And the exercise of this power was a source of constant difficulty and discontent; not because improper of itself; but because it bore injuriously upon the commercial arrangements of other states. The want of uniformity in the regulations of commerce was a source of perpetual strife and dissatisfaction, of inequalities, and rivalries, and retaliations among the states. When the constitution was framed, no one ever imagined, that the power of protection of manufactures was to be taken away from all the states, and yet not delegated to the Union. The very suggestion would of itself have been fatal to the adoption of the constitution. The manufacturing states would never have acceded to it upon any such terms; and they never could, without the power, have safely acceded to it; for it would have sealed their ruin. The same reasoning would apply to the agricultural states; for the regulation of commerce, with a view to encourage domestic agriculture, is just as important, and just as vital to the interests of the nation, and just as much an application of the power, as the protection or encouragement of manufactures. It would have been strange indeed, if the people of the United States had been solicitous solely to advance and encourage commerce, with a total disregard of the interests of agriculture and manufactures, which had, at the time of the adoption of the con-

[1] 1 American Museum, 16.

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stitution, an unequivocal preponderance throughout the Union. It is manifest from contemporaneous documents, that one object of the constitution was, to encourage manufactures and agriculture by this very use of the power.[1]

§ 1079. The terms, then, of the constitution are sufficiently large to embrace the power; the practice of other nations, and especially of Great-Britain and of the American states, has been to use it in this manner; and this exercise of it was one of the very grounds, upon which the establishment of the constitution was urged and vindicated. The argument, then, in its favour would seem to be absolutely irresistible under this aspect. But there are other very weighty considerations, which enforce it.

§ 1080. In the first place, if congress does not possess the power to encourage domestic manufactures by regulations of commerce, the power is annihilated for the whole nation. The states are deprived of it. They have made a voluntary surrender of it; and yet it exists not in the national government. It is then a mere nonentity. Such a policy, voluntarily adopted by a free people, in subversion of some of their dearest rights and interests, would be most extraordinary in itself, without any assignable motive or reason for so great a sacrifice, and utterly without example in the history of the world. No man can doubt, that domestic agriculture and manufactures may be most essentially promoted and protected by regulations of commerce. No

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1 1 Elliot's Debates, 74, 75, 76, 77, 115; 3 Elliot's Debates, 31, 32, 33; 2 Amer. Museum, 371, 372, 373; 3 Amer. Museum, 62, 554, 556, 557; The Federalist, No. 12, 41; 1 Tuck. Black. Comm. App. 237, 238; 1 American Museum, 16, 282, 289, 429, 432; Id. 434, 436; Hamilton's Report on Manufactures, in 1791; 4 Elliot's Debates, App. 351 to 354.

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man can doubt, that it is the most usual, and generally the most efficient means of producing those results. No man can question, that in these great objects the different states of America have as deep a stake, and as vital interests, as any other nation. Why, then, should the power be surrendered and annihilated? It would produce the most serious mischiefs at home; and would secure the most complete triumph over us by foreign nations. It would introduce and perpetuate national debility, if not national ruin. A foreign nation might, as a conqueror, impose upon us this restraint, as a badge of dependence, and a sacrifice of sovereignty, to subserve its own interests; but that we should impose it upon ourselves, is inconceivable. The achievement of our independence was almost worthless, if such a system was to be pursued. It would be in effect a perpetuation of that very system of monopoly, of encouragement of foreign manufactures, and depression of domestic industry, which was so much complained of during our colonial dependence; and which kept all America in a state of poverty, and slavish devotion to British interests. Under such circumstances, the constitution would be established, not for the purposes avowed in the preamble, but for the exclusive benefit and advancement of foreign nations, to aid their manufactures, and sustain their agriculture. Suppose cotton, rice, tobacco, wheat, corn, sugar, and other raw materials could be, or should hereafter be, abundantly produced in foreign countries, under the fostering hands of their governments, by bounties and commercial regulations, so as to become cheaper with such aids than our own; are all our markets to be opened to such products without any restraint, simply because we may not want revenue, to the ruin of our products and industry? Is

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America ready to give every thing to Europe, without any equivalent; and take in return whatever Europe may choose to give, upon its own terms? The most servile provincial dependence could not do more evils. Of what consequence would it be, that the national government could not tax our exports, if foreign governments might tax them to an unlimited extent, so as to favour their own, and thus to supply us with the same articles by the overwhelming depression of our own by foreign taxation? When it is recollected, with what extreme discontent and reluctant obedience the British colonial restrictions were enforced in the manufacturing and navigating states, while they were colonies, it is incredible, that they should be willing to adopt a government, which should, or might entail upon them equal evils in perpetuity. Commerce itself would ultimately be as great a sufferer by such a system, as the other domestic interests. It would languish, if it did not perish. Let any man ask himself, if New-England, or the Middle states would ever have consented to ratify a constitution, which would afford no protection to their manufactures or home industry. If the constitution was ratified under the belief, sedulously propagated on all sides, that such protection was afforded, would it not now be a fraud upon the whole people to give a different construction to its powers?

§ 1081. It is idle to say, that with the consent of congress, the states may lay duties on imports or exports, to favour their own domestic manufactures. In the first place, if congress could constitutionally give such consent for such a purpose, which has been doubted;[1] they would have a right to refuse such consent,

[1] See Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; 4 Elliot's Debates, App. 345.

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and would certainly refuse it, if the result would be what the advocates of free trade contend for. In the next place, it would be utterly impracticable with such consent to protect their manufactures by any such local regulations. To be of any value they must be general, and uniform through the nation. This is not a matter of theory. Our whole experience under the confederation established beyond all controversy the utter local futility, and even the general mischiefs of independent state legislation upon such a subject. It furnished one of the strongest grounds for the establishment of the constitution.[1]

§ 1082. In the next place, if revenue be the sole legitimate object of an impost, and the encouragement of domestic manufactures be not within the scope of the power of regulating trade, it would follow, (as has been already hinted,) that no monopolizing or unequal regulations of foreign nations could be counteracted. Under such circumstances, neither the staple articles of subsistence, nor the essential implements for the public safety, could be adequately ensured or protected at home by our regulations of commerce. The duty might be wholly unnecessary for revenue; and incidentally, it might even check revenue. But, if congress may, in arrangements for revenue, incidentally and designedly protect domestic manufactures, what ground is there to suggest, that they may not incorporate this design through the whole system of duties, and select and arrange them accordingly? There is no constitutional measure, by which to graduate, how much shall be assessed for revenue, and how much for encouragement of home industry. And no system ever yet

[1] Mr. Madison's Letter to Mr. Cabell, 18th Sept. 1828; 4 Elliot's Debates, App. 345.

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adopted has attempted, and in all probability none hereafter adopted will attempt, wholly to sever the one object from the other. The constitutional objection in this view is purely speculative, regarding only future possibilities.

§ 1083. But if it be conceded, (as it is,) that the power to regulate commerce includes the power of laying duties to countervail the regulations and restrictions of foreign nations, then, what limits are to be assigned to this use of the power?[1] If their commercial regulations, either designedly or incidentally, do promote their own agriculture and manufactures, and injuriously affect ours, why may not congress apply a remedy coextensive with the evil? If congress have, as cannot be denied, the choice of the means, they may countervail the regulations, not only by the exercise of the *lex talionis* in the same way, but in any other way conducive to the same end. If Great Britain by commercial regulations restricts the introduction of our staple products and manufactures into her own territories, and levies prohibitory duties, why may not congress apply the same rule to her staple products and manufactures, and secure the same market to ourselves? The truth is, that as soon as the right to retaliate foreign restrictions or foreign policy by commercial regulations is admitted, the question, in what manner, and to what extent, it shall be applied, is a matter of legislative discretion, and not of constitutional authority. Whenever commercial restrictions and regulations shall cease all over the world, so far as they favour the nation adopting them, it will be time enough to consider, what America ought to do in her own regulations of commerce, which are designed to protect her own

[1] See the Federalist, No. 11, 12.

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industry and counteract such favoritism. It will then become a question, not of power, but of policy. Such a state of things has never yet existed. In fact the concession, that the power to regulate commerce may embrace other objects, than revenue, or even than commerce itself, is irreconcilable with the foundation of the argument on the other side.

§ 1084. Besides; the power is to regulate commerce. And in what manner regulate it? Why does the power involve the right to lay duties? Simply, because it is a common means of executing the power. If so, why does not the same right exist as to all other means equally common and appropriate? Why does the power involve a right, not only to lay duties, but to lay duties for *revenue*, and not merely for the regulation and restriction of commerce, considered *per se?* No other answer can be given, but that revenue is an incident to such an exercise of the power. It flows from, and does not create the power. It may constitute the motive for the exercise of the power, just as any other cause may; as for instance, the prohibition of foreign trade, or the retaliation of foreign monopoly; but it does not constitute the power.

§ 1085. Now, the motive of the grant of the power is not even alluded to in the constitution. It is not even stated, that congress shall have power to promote and encourage domestic navigation and trade. A power to regulate commerce is not necessarily a power to advance its interests. It may in given cases suspend its operations and restrict its advancement and scope. Yet no man ever yet doubted the right of congress to lay duties to promote and encourage domestic navigation, whether in the form of tonnage duties, or other preferences and privileges, either in the foreign trade, or

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coasting trade, or fisheries.[1] It is as certain, as any thing human can be, that the sole object of congress, in securing the vast privileges to American built ships, by such preferences, and privileges, and tonnage duties, was, to encourage the domestic manufacture of ships, and all the dependent branches of business.[2] It speaks out in the language of all their laws, and has been as constantly avowed, and acted on, as any single legislative policy ever has been. No one ever dreamed, that revenue constituted the slightest ingredient in these laws. They were purely for the encouragement of home manufactures, and home artisans, and home pursuits. Upon what grounds can congress constitutionally apply the power to regulate commerce to one great class of domestic manufactures, which does not involve the right to encourage all? If it be said, that navigation is a part of commerce, that is true. But a power to regulate navigation no more includes a power to encourage the manufacture of ships by tonnage duties, than any other manufacture. Why not extend it to the encouragement of the growth and manufacture of cotton and hemp for sails and rigging; of timber, boards, and masts; of tar, pitch, and turpentine; of iron and wool; of sheetings and shirtings; of artisans and mechanics, however remotely connected with it? There are many products of agriculture and manufactures, which are connected with the prosperity of commerce as intimately, as domestic ship building. If the one may be encouraged, as a primary motive in regulations of commerce, why may not the others? The truth is, that the encouragement of domestic ship building is within

1 See Mr. Jefferson's Report on the Fisheries, 1st Feb. 1791, 10 Amer. Mus. App. 1, &c., 8, &c.

2 See Mr. Williamson's Speech in Congress, 8 Amer. Mus. 140.

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the scope of the power to regulate commerce, simply, because it is a known and ordinary means of exercising the power. It is one of many, and may be used like all others according to legislative discretion. The motive to the exercise of a power can never form a constitutional objection to the exercise of the power.

§ 1086. Here, then, is a case of laying duties, an ordinary means used in executing the power to regulate commerce; how can it be deemed unconstitutional? If it be said, that the motive is not to collect revenue, what has that to do with the power? When an act is constitutional, as an exercise of a power, can it be unconstitutional from the motives, with which it is passed? If it can, then the constitutionality of an act must depend, not upon the power, but upon the motives of the legislature. It will follow, as a consequence, that the same act passed by one legislature will be constitutional, and by another unconstitutional. Nay, it might be unconstitutional, as well from its omissions as its enactments, since if its omissions were to favour manufactures, the motive would contaminate the whole law. Such a doctrine would be novel and absurd. It would confuse and destroy all the tests of constitutional rights and authorities. Congress could never pass any law without an inquisition into the motives of every member; and even then, they might be re-examinable. Besides; what possible means can there be of making such investigations? The motives of many of the members may be, nay must be utterly unknown, and incapable of ascertainment by any judicial or other inquiry: they may be mixed up in various manners and degress; they may be opposite to, or wholly independent of each other. The constitution would thus depend upon processes utterly vague, and incomprehensible; and the

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written intent of the legislature upon its words and acts, the *lex scripta*, would be contradicted or obliterated by conjecture, and parol declarations, and fleeting reveries, and heated imaginations. No government on earth could rest for a moment on such a foundation. It would be a constitution of sand heaped up and dissolved by the flux and reflux of every tide of opinion. Every act of the legislature must therefore be judged of from its object and intent, as they are embodied in its provisions; and if the latter are within the scope of admitted powers, the act must be constitutional, whether the motive for it were wise, or just, or otherwise. The manner of applying a power may be an abuse of it; but this does not prove, that it is unconstitutional.

§ 1087. Passing by these considerations, let the practice of the government and the doctrines maintained by those, who have administered it, be deliberately examined; and they will be found to be in entire consistency with this reasoning. The very first congress, that ever sat under the constitution, composed in a considerable degree of those, who had framed, or assisted in the discussion of its provisions in the state conventions, deliberately adopted this view of the power. And what is most remarkable, upon a subject of deep interest and excitement, which at the time occasioned long and vehement debates, not a single syllable of doubt was breathed from any quarter against the constitutionality of protecting agriculture and manufactures by laying duties, although the intention to protect and encourage them was constantly avowed.[1] Nay, it was

[1] See 1 Lloyd's Deb. 17, 19, 22, 23, 24, 26, 27, 28, 31, 34, 39, 43, 46, 47, 50, 51, 52, 55, 64 to 69, 71, 72, 74 to 83, 94, 95, 97, 109, 116, 145, 160, 161, 211, 212, 243, 244, 254; Id. 144, 183, 194, 206, 207. See also 5 Marshall's Wash. ch. 3, p. 189, 190.

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contended to be a paramount duty, upon the faithful fulfilment of which the constitution had been adopted, and the omission of which would be a political fraud, without a whisper of dissent from any side.[1] It was demanded by the people from various parts of the Union; and was resisted by none.[2] Yet, state jealousy was never more alive than at this period, and state interests never more actively mingled in the debates of congress. The two great parties, which afterwards so much divided the country upon the question of a liberal and strict construction of the constitution, were then distinctly formed, and proclaimed their opinions with firmness and freedom. If, therefore, there had been a point of doubt, on which to hang an argument, it cannot be questioned, but that it would have been brought into the array of opposition. Such a silence, under such circumstances, is most persuasive and convincing.

§ 1088. The very preamble of this act[3] (the second passed by congress) is, "Whereas it is necessary for the "support of the government, for the discharge of the "debts of the United States, and *the encouragement* "*and protection of manufactures*, that duties be laid "on goods, wares, and merchandises imported, Be it "enacted," &c.[4] Yet, not a solitary voice was raised against it. The right, and the duty, to pass such laws was, indeed, taken so much for granted, that in some of the most elaborate expositions of the government upon

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[1] See 1 Lloyd's Deb. 24, 160, 161, 243, 244; 4 Elliot's Deb. App. 351, 352.

[2] See Grimké's Speech, in Dec. 1828, p 58, 59, 63.

[3] Act of 4th July, 1789.

[4] It is not a little remarkable, that the culture of cotton was just then beginning in South Carolina; and her statesmen then thought a protecting duty to aid agriculture was in all respects proper, and constitutional. 1 Lloyd's Deb. 79; Id. 210, 211, 212, 244.

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the subject of manufactures, it was scarcely alluded to.[1] The Federalist itself, dealing with every shadow of objection against the constitution, never once alludes to such a one; but incidentally commends this power, as leading to beneficial results on all domestic interests.[2] Every successive congress since that time has constantly acted upon the system through all the changes of party and local interests. Every successive executive has sanctioned laws on the subject; and most of them have actively recommended the encouragement of manufactures to congress.[3] Until a very recent period, no person in the public councils seriously relied upon any constitutional difficulty. And even now, when the subject has been agitated, and discussed with great ability and zeal throughout the Union, not more than five states have expressed an opinion against the constitutional right, while it has received an unequivocal sanction in the others with an almost unexampled degree of unanimity. And this too, when in most other respects these states have been in strong opposition to each other upon the general system of politics pursued by the government.

§ 1089. If ever, therefore, contemporaneous exposition, and the uniform and progressive operations of the government itself, in all its departments, can be of any weight to settle the construction of the constitution, there never has been, and there never can be more decided evidence in favour of the power, than is furnished by the history of our national laws for the encouragement of domestic agriculture and manufactures. To resign an exposition so sanctioned, would be to de-

1 Hamilton's Report on Manufacturers in 1791.

2 The Federalist, No. 10, 35, 41.

3 See 4 Elliot's Debates, App. 353, 354.

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liver over the country to interminable doubts; and to make the constitution not a written system of government, but a false and delusive text, upon which every successive age of speculatists and statesmen might build any system, suited to their own views and opinions. But if it be added to this, that the constitution gives the power in the most unlimited terms, and neither assigns motives, nor objects for its exercise; but leaves these wholly to the discretion of the legislature, acting for the common good, and the general interests; the argument in its favour becomes as absolutely irresistible, as any demonstration of a moral or political nature ever can be. Without such a power, the government would be absolutely worthless, and made merely subservient to the policy of foreign nations, incapable of self-protection or self-support;[1] with it, the country will have a right to assert its equality, and dignity, and sovereignty among the other nations of the earth.[2]

§ 1089. In regard to the rejection of the proposition in the convention "to establish *institutions*, *rewards*, and *immunities* for the promotion of agriculture, commerce, trades, and manufactures,"[3] it is manifest, that it has no bearing on the question. It was a power much

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[1] 4 Jefferson's Correspondence, 280, 281; 1 Pitkin's Hist. ch. 3, p. 93 to 106.

[2] The foregoing summary has been principally abstracted from the Letter of Mr. Madison to Mr. Cabell, 18th Sept. 1828; 4 Elliot's Deb. 345; Mr. Grimké's Speech in Dec. 1828, in the South Carolina senate; Mr. Huger's Speech in the South Carolina legislature, in Dec. 1830; Address of the New York Convention of the Friends of Domestic Industry, in Oct. 1831; Mr. Verplanck's Letter to Col. Drayton, in 1831; Mr. Clay's Speech in the senate, in Feb. 1832; Mr. Edward Everett's Address to the American Institute, in Oct. 1831; Mr. Hamilton's Report on Manufactures, in 1791; Mr. Jefferson's Report on the Fisheries, in 1791. See, also, 4 Jefferson's Correspondence, 280, 281.

[3] Journal of Convention, p. 261.

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more broad in its extent and objects, than the power to encourage manufactures by the exercise of another granted power. It might be contended with quite as much plausibility, that the rejection was an implied rejection of the right to encourage commerce, for that was equally within the scope of the proposition. In truth, it involved a direct power to establish *institutions, rewards,* and *immunities* for all the great interests of society, and was, on that account, deemed too broad and sweeping. It would establish a general, and not a limited power of government.

§ 1090. Such is a summary (necessarily imperfect) of the reasoning on each side of this contested doctrine. The reader will draw his own conclusions; and these Commentaries have no further aim, than to put him in possession of the materials for a proper exercise of his judgment.

§ 1091. When the subject of the regulation of commerce was before the convention, the first draft of the constitution contained an article, that "no navigation "act shall be passed, without the assent of two thirds "of the members present in each house."[1] This article was afterwards recommended in a report of a committee to be stricken out. In the second revised draft it was left out; and a motion, to insert such a restriction to have effect until the year 1808, was negatived by the vote of seven states against three.[2] Another proposition, that no act, regulating the commerce of the United States with foreign powers, should be passed without the assent of two thirds of the mem-

[1] Journal of Convention, p. 222.

[2] Journal of Convention, 222, 285, 286, 293, 358, 387. See, also, 3 American Museum, 62, 419, 420; 2 American Museum, 553; 2 Pitkin's Hist. 261.

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bers of each house, was rejected by the vote of seven states against four.[1] The rejection was, probably, occasioned by two leading reasons. First, the general impropriety of allowing the minority in a government to control, and in effect to govern all the legislative powers of the majority. Secondly, the especial inconvenience of such a power in regard to regulations of commerce, where the proper remedy for grievances of the worst sort might be withheld from the navigating and commercial states by a very small minority of the other states.[2] A similar proposition was made, after the adoption of the constitution, by some of the states; but it was never acted upon.[3]

§ 1092. The power of congress also extends to regulate commerce with the Indian tribes. This power was not contained in the first draft of the constitution. It was afterwards referred to the committee on the constitution (among other propositions) to consider the propriety of giving to congress the power "to regulate affairs with the Indians, as well within, as without the limits of the United States." And, in the revised draft, the committee reported the clause, "and with the Indian Tribes," as it now stands.[4]

§ 1093. Under the confederation, the continental congress were invested with the sole and exclusive right and power "of regulating the trade and managing all affairs with the Indians, not *members* of any of the states, provided, that the legislative right of any state within its own limits be not infringed or violated."[5]

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[1] Journal of Convention, 306.

[2] See The Federalist, No. 22; 1 Tucker's Black. Comm. App. 253, 375.

[3] 1 Tucker's Black. Comm. App. 253, 375.

[4] Journal of Convention, 220, 260, 356.

[5] Art. 9.

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§ 1094. Antecedently to the American Revolution the authority to regulate trade and intercourse with the Indian tribes, whether they were within, or without the boundaries of the colonies, was understood to belong to the prerogative of the British crown.[1] And after the American Revolution, the like power would naturally fall to the federal government, with a view to the general peace and interests of all the states.[2] Two restrictions, however, upon the power were, by the above article, incorporated into the confederation, which occasioned endless embarrassments and doubts. The power of congress was restrained to Indians, not members of any of the states; and was not to be exercised, so as to violate or infringe the legislative right of any state within its own limits. What description of Indians were to be deemed members of a state was never settled under the confederation; and was a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a state, yet residing within its legislative jurisdiction, was to be regulated by an external authority, without so far intruding on the internal rights of legislation, was absolutely incomprehensible. In this case, as in some other cases, the articles of confederation inconsiderately endeavoured to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the states; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.[3] The constitution has wisely disembarrassed the

[1] *Worcester* v. *State of Georgia*, 6 Peters's R. 515; *Johnson* v. *McIntosh*, 8 Wheat. R. 543; Journal of Congress, 3 August, 1787, 12th vol. p. 81 to 86.

[2] Ibid.

[3] The Federalist, No. 42; 1 Tuck. Black. Comm. App. 253; 12 Jour. of Congress, 3 August, 1787, p. 81 to 84.

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power of these two limitations; and has thus given to congress, as the only safe and proper depositary, the exclusive power, which belonged to the crown in the ante-revolutionary times; a power indispensable to the peace of the states, and to the just preservation of the rights and territory of the Indians.[1] In the former illustrations of this subject, it was stated, that the Indians, from the first settlement of the country, were always treated, as distinct, though in some sort, as dependent nations. Their territorial rights and sovereignty were respected. They were deemed incapable of carrying on trade or intercourse with any foreign nations, or of ceding their territories to them. But their right of self-government was admitted; and they were allowed a national existence, under the protection of the parent country, which exempted them from the ordinary operations of the legislative power of the colonies. During the revolution and afterwards they were secured in the like enjoyment of their rights and property, as separate communities.[2] The government of the United States, since the constitution, have always recognised the same attributes of dependent sovereignty, as belonging to them, and claimed the same right of exclusive regulation of trade and intercourse with them, and the same authority to protect and guarantee their territorial possessions, immunities, and jurisdiction.[3]

1 *Worcester* v. *The State of Georgia*, 6 Peters's R. 515; 12 Journ. of Congress, 3 August, 1787, p. 81 to 84.

2 *Johnson* v. *M'Intosh*, 8 Wheat. R. 543; *Fletcher* v. *Peck*, 6 Cranch, 146, 147, per Johnson J.; *The Cherokee Nation* v. *Georgia*, 5 Peters's R. 1; *Worcester* v. *The State of Georgia*, 6 Peters's R. 515; *Jackson* v. *Goodell*, 20 Johnson's R. 193; 3 Kent's Comm. Lect. 50, p. 303 to 318.

3 *Worcester* v. *State of Georgia*, 6 Peters's R. 515; Journ. of Congress, 3 August, 1787, vol. 12, p. 81 to 84.—Mr. Blunt, in his valuable Historical Sketch of the Formation of the Confederacy, &c. has given a very full

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§ 1095. The power, then, given to congress to regulate commerce with the Indian tribes, extends equally to tribes living within or without the boundaries of particular states, and within or without the territorial limits of the United States. It is (says a learned commentator) wholly immaterial, whether such tribes continue seated within the boundaries of a state, inhabit part of a territory, or roam at large over lands, to which the United States have no claim. The trade with them is, in all its forms, subject exclusively to the regulation of congress. And in this particular, also, we trace the wisdom of the constitution. The Indians, not distracted by the discordant regulations of different states, are taught to trust one great body, whose justice they respect, and whose power they fear.[1]

§ 1096. It has lately been made a question, whether an Indian tribe, situated within the territorial boundaries of a state, but exercising the powers of government, and national sovereignty, under the guarantee of the general government, is a foreign state in the sense of the constitution, and as such entitled to sue in the courts of the United States. Upon solemn argument, it has been held, that such a tribe is to be deemed politically a state; that is, a distinct political society, capable of self-government; but it is not to be deemed a *foreign state*, in the sense of the constitution. It is rather a domestic dependent nation. Such a tribe

view of the ante-revolutionary, as well as post-revolutionary authority exercised in regard to the Indian tribes. See Blunt's Historical Sketch, &c. (New-York, 1825.) Mr. Jefferson's opinion was, that the United States had no more than a right of pre-emption of the Indian lands, not amounting to any dominion, or jurisdiction, or permanent authority whatever; and that the Indians possessed a full, undivided, and independent sovereignty. 4 Jefferson's Corresp. 478.

[1] Rawle on the Constitution, ch. 9, p. 84. See also 1 Tuck. Black. Comm. App. 254; 1 Kent's Comm. Lect. 50, p. 308 to 318.

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may properly be deemed in a state of pupillage; and its relation to the United States resembles that of a ward to a guardian.[1] *

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[1] *The Cherokee Nation* v. *Georgia*, 5 Peters's R. 1, 16, 17; *Jackson* v. *Goodell*, 20 John. R. 193; 3 Kent's Comm. Lect. 50. p. 308 to 318. — In the first volume of Bioren & Duane's edition of the laws of the United States, there will be found a history of our Indian Treaties and Laws regulating Intercourse and Trade with the Indians. 1 United States Laws, 597 to 620.

* While this sheet was passing through the press, President Jackson's Proclamation of the 10th of December, 1832, concerning the recent Ordinance of South-Carolina on the subject of the tariff, appeared. That document contains a most elaborate view of several questions, which have been discussed in this and the preceding volume, especially respecting the supremacy of the laws of the Union; the right of the judiciary to decide upon the constitutionality of those laws; and the total repugnancy to the constitution of the modern doctrine of nullification asserted in that ordinance. As a state paper it is entitled to very high praise for the clearness, force, and eloquence, with which it has defended the rights and powers of the national government. I gladly copy into these pages some of its important passages, as among the ablest commentaries ever offered upon the constitution.

"Whereas, a convention assembled in the state of South-Carolina have passed an ordinance, by which they declare, 'That the several acts and parts of acts of the congress of the United States, purporting to be laws for the imposing of duties and imposts on the importation of foreign commodities, and now having actual operation and effect within the United States, and more especially,' two acts for the same purpose passed on the 29th of May, 1828, and on the 14th of July, 1832, 'are unauthorized by the constitution of the United States, and violate the true meaning and intent thereof, and are null and void, and no law,' nor binding on the citizens of that state or its officers: and by the said ordinance, it is further declared to be unlawful for any of the constituted authorities of the state, or of the United States, to enforce the payment of the duties imposed by the said acts within the same state, and that it is the duty of the legislature to pass such laws, as may be necessary to give full effect to the said ordinance:

"And whereas, by the said ordinance, it is further ordained, that in no case of law or equity, decided in the courts of said state, wherein shall be drawn in question the validity of the said ordinance, or of the acts of the legislature, that may be passed to give it effect, or of the said laws of the United States, no appeal shall be allowed to the Supreme Court of the United States, nor shall any copy of the record be

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permitted or allowed for that purpose, and that any person attempting to take such appeal shall be punished as for a contempt of court:

"And, finally, the said ordinance declares, that the people of South-Carolina will maintain the said ordinance at every hazard; and that they will consider the passage of any act by congress, abolishing or closing the ports of the said state, or otherwise obstructing the free ingress or egress of vessels to and from the said ports, or any other act of the federal government to coerce the state, shut up her ports, destroy or harass her commerce, or to enforce the said acts otherwise, than through the civil tribunals of the country, as inconsistent with the longer continuance of South-Carolina in the Union; and that the people of the said state will thenceforth hold themselves absolved from all further obligation to maintain or preserve their political connexion with the people of the other states, and will forthwith proceed to organize a separate government, and do all other acts and things, which sovereign and independent states may of right do:

"And whereas, the said ordinance prescribes to the people of South-Carolina a course of conduct, in direct violation of their duty, as citizens of the United States, contrary to the laws of their country, subversive of its constitution, and having for its object the destruction of the Union, — that Union, which, coeval with our political existence, led our fathers, without any other ties to unite them, than those of patriotism and a common cause, through a sanguinary struggle to a glorious independence, — that sacred Union, hitherto inviolate, which, perfected by our happy constitution, has brought us, by the favour of Heaven, to a state of prosperity at home, and high consideration abroad, rarely, if ever, equalled in the history of nations. To preserve this bond of our politcal existence from destruction, to maintain inviolate this state of national honour and prosperity, and to justify the confidence my fellow-citizens have reposed in me, I, ANDREW JACKSON, *President of the United States*, have thought proper to issue this my PROCLAMATION, stating my views of the constitution and laws, applicable to the measures adopted by the convention of South-Carolina, and to the reasons they have put forth to sustain them, declaring the course, which duty will require me to pursue, and, appealing to the understanding and patriotism of the people, warn them of the consequences, that must inevitably result from an observance of the dictates of the convention.

"Strict duty would require of me nothing more, than the exercise of those powers, with which I am now, or may hereafter be, invested, for preserving the peace of the Union, and for the execution of the laws. But the imposing aspect, which opposition has assumed in this case, by clothing itself with state authority, and the deep interest, which the people of the United States must all feel in preventing a resort to stronger measures, while there is a hope, that any thing will be yielded to reasoning and remonstrance, perhaps demand, and will certainly justify, a full exposition to South-Carolina and the nation of the views I entertain

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of this important question, as well as a distinct enunciation of the course, which my sense of duty will require me to pursue.

"The ordinance is founded, not on the indefeasible right of resisting acts, which are plainly unconstitutional and too oppressive to be endured; but on the strange position, that any one state may not only declare an act of congress void, but prohibit its execution, — that they may do this consistently with the constitution, — that the true construction of that instrument permits a state to retain its place in the Union, and yet be bound by no other of its laws, than those it may choose to consider as constitutional. It is true, they add, that to justify this abrogation of a law, it must be palpably contrary to the constitution; but it is evident, that to give the right of resisting laws of that description, coupled with the uncontrolled right to decide, what laws deserve that character, is to give the power of resisting all laws. For, as by the theory there is no appeal, the reasons alleged by the state, good or bad, must prevail. If it should be said, that public opinion is a sufficient check against the abuse of this power, it may be asked, why it is not deemed a sufficient guard against the passage of an unconstitutional act by congress. There is, however, a restraint in this last case, which makes the assumed power of a state more indefensible, and which does not exist in the other. There are two appeals from an unconstitutional act passed by congress, — one to the judiciary, the other to the people, and the states. There is no appeal from the state decision in theory, and the practical illustration shows, that the courts are closed against an application to review it, both judges and jurors being sworn to decide in its favour. But reasoning on this subject is superfluous, when our social compact in express terms declares, that the laws of the United States, the constitution, and treaties made under it, are the supreme law of the land; and for greater caution adds, 'that the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.' And it may be asserted without fear of refutation, that no federative government could exist without a similar provision. Look for a moment to the consequence. If South-Carolina considers the revenue laws unconstitutional, and has a right to prevent their execution in the port of Charleston, there would be a clear constitutional objection to their collection in every other port, and no revenue could be collected any where; for all imposts must be equal. It is no answer to repeat, that an unconstitutional law is no law, so long as the question of its legality is to be decided by the state itself; for every law, operating injuriously upon any local interest, will be perhaps thought, and certainly represented, as unconstitutional, and, as has been shown, there is no appeal.

"If this doctrine had been established at an earlier day, the Union would have been dissolved in its infancy. The excise law in Pennsylvania; the embargo and non-intercourse law in the Eastern states; the carriage tax in Virginia, were all deemed unconstitutional, and were

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more unequal in their operation, than any of the laws now complained of; but fortunately none of those states discovered, that they had the right now claimed by South-Carolina. The war, into which we were forced, to support the dignity of the nation and the rights of our citizens, might have ended in defeat and disgrace, instead of victory and honour, if the states, who supposed it a ruinous and unconstitutional measure, had thought they possessed the right of nullifying the act, by which it was declared, and denying supplies for its prosecution. Hardly and unequally, as those measures bore upon several members of the Union, to the legislatures of none did this efficient and peaceable remedy, as it is called, suggest itself. The discovery of this important feature in our constitution was reserved to the present day. To the statesmen of South-Carolina belongs the invention; and upon the citizens of that state will unfortunately fall the evils of reducing it to practice.

"If the doctrine of a state veto upon the laws of the Union carries with it internal evidence of its impracticable absurdity, our constitutional history will also afford abundant proof, that it would have been repudiated with indignation, had it been proposed to form a feature in our government.

"In our colonial state, although dependent on another power, we very early considered ourselves, as connected by common interest with each other. Leagues were formed for common defence, and before the Declaration of Independence we were known in our aggregate character, as THE UNITED COLONIES OF AMERICA. That decisive and important step was taken jointly. We declared ourselves a nation by a joint, not by several acts; and when the terms of our confederation were reduced to form, it was in that of a solemn league of several states, by which they agreed, that they would collectively form one nation, for the purpose of conducting some certain domestic concerns, and all foreign relations. In the instrument forming that union is found an article, which declares, that 'every state shall abide by the determinations of congress on all questions, which by that confederation should be submitted to them.'

"Under the confederation, then, no state could legally annul a decision of the congress, or refuse to submit to its execution; but no provision was made to enforce these decisions. Congress made requisitions, but they were not complied with. The government could not operate on individuals. They had no judiciary; no means of collecting revenue.

"But the defects of the confederation need not be detailed. Under its operation we could scarcely be called a nation. We had neither prosperity at home, nor consideration abroad. This state of things could not be endured; and our present happy constitution was formed, but formed in vain, if this fatal doctrine prevails. It was formed for important objects, that are announced in the preamble, made in the name and by the authority of the people of the United States, whose delegates framed, and whose conventions approved it. The most important among these objects, that, which is placed first in rank, on which all the others rest,

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is, '*to form a more perfect Union.*' Now, is it possible, that even if there were no express provision giving supremacy to the constitution and laws of the United States over those of the states, it can be conceived, that an instrument, made for the purpose of '*forming a more perfect Union,*' than that of the confederation, could be so constructed by the assembled wisdom of our country, as to substitute for that confederation a form of government dependent for its existence on the local interest, the party spirit of a state, or of a prevailing faction in a state? Every man of plain, unsophisticated understanding, who hears the question, will give such an answer, as will preserve the Union. Metaphysical subtlety, in pursuit of an impracticable theory, could alone have devised one, that is calculated to destroy it.

"I consider, then, the power to annul a law of the United States, assumed by one state, *incompatible with the existence of the Union; contradicted expressly by the letter of the constitution; unauthorized by its spirit; inconsistent with every principle, on which it was founded; and destructive of the great object, for which it was formed.*

"After this general view of the leading principle, we must examine the particular application of it, which is made in the Ordinance.

"The preamble rests its justification on these grounds: — It assumes, as a fact, that the obnoxious laws, although they purport to be laws for raising revenue, were, in reality, intended for the protection of manufactures, which purpose it asserts to be unconstitutional; that the operation of these laws is unequal; that the amount raised by them is greater, than is required by the wants of the government; and finally, that the proceeds are to be applied to objects unauthorized by the constitution. These are the only causes alleged to justify an open opposition to the laws of the country, and a threat of seceding from the Union, if any attempt should be made to enforce them. The first virtually acknowledges, that the law in question was passed under a power expressly given by the constitution, to lay and collect imposts; but its constitutionality is drawn in question from the *motives* of those, who passed it. However apparent this purpose may be in the present case, nothing can be more dangerous, than to admit the position, that an unconstitutional purpose, entertained by the members, who assent to a law enacted under a constitutional power, shall make that law void; for how is that purpose to be ascertained? Who is to make the scrutiny? How often may bad purposes be falsely imputed? in how many cases are they concealed by false professions? in how many is no declaration of motive made? Admit this doctrine, and you give to the states an uncontrolled right to decide; and every law may be annulled under this pretext. If, therefore, the absurd and dangerous doctrine should be admitted, that a state may annul an unconstitutional law, or one that it deems such, it will not apply to the present case.

"The next objection is, that the laws in question operate unequally. This objection may be made, with truth, to every law that has been or

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can be passed. The wisdom of man never yet contrived a system of taxation, that would operate with perfect equality. If the unequal operation of a law makes it unconstitutional, and if all laws of that description may be abrogated by any state for that cause, then, indeed, is th federal constitution unworthy of the slightest effort for its preservation. We have hitherto relied on it, as the perpetual bond of our union. We have received it, as the work of the assembled wisdom of the nation. We have trusted to it, as the sheet-anchor of our safety in the stormy times of conflict with a foreign or domestic foe. We have looked to it with sacred awe, as the palladium of our liberties, and with all the solemnities of religion have pledged to each other our lives and fortunes here, and our hopes of happiness hereafter, in its defence and support. Were we mistaken, my countrymen, in attaching this importance to the constitution of our country? Was our devotion paid to the wretched, inefficient, clumsy contrivance, which this new doctrine would make it? Did we pledge ourselves to the support of an airy nothing, a bubble, that must be blown away by the first breath of disaffection? Was this self-destroying, visionary theory, the work of the profound statesmen, the exalted patriots, to whom the task of constitutional reform was entrusted?

"Did the name of Washington sanction, did the states deliberately ratify such an anomaly in the history of fundamental legislation? No. We were not mistaken. The letter of this great instrument is free from this radical fault: its language directly contradicts the imputation: its spirit, its evident intent, contradicts it. No, we did not err! Our constitution does not contain the absurdity of giving power to make laws, and another power to resist them. The sages, whose memory will always be reverenced, have given us a practical, and, as they hoped, a permanent constitutional compact. The father of his country did not affix his revered name to so palpable an absurdity. Nor did the states, when they severally ratified it, do so under the impression, that a veto on the laws of the United States was reserved to them, or that they could exercise it by implication. Search the debates in all their conventions, examine the speeches of the most zealous opposers of federal authority; look at the amendments, that were proposed; they are all silent; not a syllable uttered, not a vote given, not a motion made to correct the explicit supremacy given to the laws of the Union over those of the states, or to show that implication, as is now contended, could defeat it. No; we have not erred! The constitution is still the object of our reverence, the bond of our Union, our defence in danger, and the source of our prosperity in peace. It shall descend, as we have received it, uncorrupted by sophistical construction, to our posterity; and the sacrifices of local interest, of state prejudices, of personal animosities, that were made to bring it into existence, will again be patriotically offered for its support.

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"The two remaining objections made by the Ordinance to these laws are, that the sums intended to be raised by them are greater, than are required, and that the proceeds will be unconstitutionally employed.

"The constitution has given expressly to congress the right of raising revenue, and of determining the sum the public exigencies will require. The states have no control over the exercise of this right, other than that, which results from the power of changing the representatives, who abuse it, and thus procure redress. Congress may undoubtedly abuse this discretionary power, but the same may be said of others, with which they are vested. Yet the discretion must exist somewhere. The constitution has given it to the representatives of all the people, checked by the representatives of the states, and by the executive power. The South-Carolina construction gives it to the legislature or the convention of a single state, where neither the people of the different states, nor the states in their separate capacity, nor the chief magistrate elected by the people, have any representation. Which is the most discreet disposition of the power? I do not ask you, fellow citizens, which is the constitutional disposition; that instrument speaks a language not to be misunderstood. But if you were assembled in general convention, which would you think the safest depository of this discretionary power in the last resort? Would you add a clause, giving it to each of the states, or would you sanction the wise provisions already made by your constitution? If this should be the result of your deliberations, when providing for the future, are you, can you be ready to risk all, that we hold dear, to establish, for a temporary and a local purpose, that, which you must acknowledge to be destructive and even absurd, as a general provision? Carry out the consequences of this right vested in the different states, and you must perceive, that the crisis your conduct presents at this day would recur, whenever any law of the United States displeased any of the states, and that we should soon cease to be a nation.

"The Ordinance, with the same knowledge of the future, that characterizes a former objection, tells you, that the proceeds of the tax will be unconstitutionally applied. If this could be ascertained with certainty, the objection would, with more propriety, be reserved for the law so applying the proceeds; but surely cannot be urged against the laws levying the duty.

"These are the allegations contained in the Ordinance. Examine them seriously, my fellow citizens,—judge for yourselves. I appeal to you to determine, whether they are so clear, so convincing, as to leave no doubt of their correctness; and even if you should come to this conclusion, how far they justify the reckless, destructive course, which you are directed to pursue. Review these objections, and the conclusions drawn from them, once more. What are they? Every law, then, for raising revenue, according to the South-Carolina Ordinance, may be rightfully annulled, unless it be so framed, as no law ever will or can

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be framed. Congress have a right to pass laws for raising revenue, and each state has a right to oppose their execution, — two rights directly opposed to each other; — and yet is this absurdity supposed to be contained in an instrument, drawn for the express purpose of avoiding collisions between the states and the general government, by an assembly of the most enlightened statesmen and purest patriots ever embodied for a similar purpose.

"In vain have these sages declared, that congress shall have power to lay and collect taxes, duties, imposts, and excises; in vain have they provided, that they shall have power to pass laws, which shall be neces sary and proper to carry those powers into execution; that those laws and that constitution shall be the 'supreme law of the land, and that the judges in every state shall be bound thereby, any thing in the constitution and laws of any state to the contrary notwithstanding.' In vain have the people of the several states solemnly sanctioned these provisions, made them their paramount law, and individually sworn to support them whenever they were called on to execute any office. Vain provisions! ineffectual restrictions! vile profanations of oaths! miserable mockery of legislation! if the bare majority of the voters in any one state may, on a real or supposed knowledge of the intent, with which a law has been passed, declare themselves free from its operation, — say here it gives too little, there too much, and operates unequally, — here it suffers articles to be free, that ought to be taxed,— there it taxes those, that ought to be free — in this case the proceeds are intended to be applied to purposes, which we do not approve, — in that the amount raised is more than is wanted. Congress, it is true, are invested by the constitution with the right of deciding these questions according to their sound discretion; congress is composed of the representatives of all the states, and of all the people of all the states; but we, part of the people of one state, to whom the constitution has given no power on the subject, from whom it has expressly taken it away, — we, who have solemnly agreed, that this constitution shall be our law, — we, most of whom have sworn to support it, — we now abrogate this law, and swear, and force others to swear, that it shall not be obeyed; — and we do this, not because congress have no right to pass such laws; this we do not allege; but because they have passed them with improper views. They are unconstitutional, from the motives of those, who passed them, which we can never with certainty know, from their unequal operation, although it is impossible, from the nature of things, that they should be equal, and from the disposition, which we presume may be made of their proceeds, although that disposition has not been declared. This is the plain meaning of the ordinance in relation to laws, which it abrogates for alleged unconstitutionality. But it does not stop there. It repeals, in express terms, an important part of the constitution itself, and of laws passed to give it effect, which have never been alleged to be unconstitutional. The constitution declares, that the judicial powers of

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the United States extend to cases arising under the laws of the United States, and that such laws, the constitution and treaties, shall be paramount to the state constitutions and laws. The judiciary act prescribes the mode, by which the case may be brought before a court of the United States by appeal, when a state tribunal shall decide against this provision of the constitution. The ordinance declares, that there shall be no appeal — makes the state law paramount to the constitution and laws of the United States — forces judges and jurors to swear, that they will disregard their provisions; and even makes it penal in a suitor to attempt relief by appeal. It further declares, that it shall not be lawful for the authorities of the United States, or of that state, to enforce the payment of duties imposed by the revenue laws within its limits.

"Here is a law of the United States, not even pretended to be unconstitutional, repealed by the authority of a small majority of the voters of a single state. Here is a provision of the constitution, which is solemnly abrogated by the same authority.

"On such expositions and reasonings, the ordinance grounds not only an assertion of the right to annul the laws, of which it complains, but to enforce it by a threat of seceding from the Union, if any attempt is made to execute them.

"This right to secede is deduced from the nature of the constitution, which they say is a compact between sovereign states, who have preserved their whole sovereignty, and therefore are subject to no superior; that because they made the compact, they can break it, when, in their opinion, it has been departed from by the other states. Fallacious as this course of reasoning is, it enlists state pride, and finds advocates in the honest prejudices of those, who have not studied the nature of our government sufficiently to see the radical error, on which it rests.

"The people of the United States formed the constitution, acting through the state legislatures in making the compact, to meet and discuss its provisions, and acting in separate conventions, when they ratified those provisions; but the terms used in its construction, show it to be a government, in which the people of all the states collectively are represented. We are ONE PEOPLE in the choice of president and vice-president. Here the states have no other agency, than to direct the mode, in which the votes shall be given. The candidates having the majority of all the votes are chosen. The electors of a majority of states may have given their votes for one candidate, and yet another may be chosen. The people, then, and not the states, are represented in the executive branch.

"In the house of representatives there is this difference, that the people of one state do not, as in the case of president and vice-president, all vote for the same officers. The people of all the states do not vote for all the members, each state electing its own representatives. But this creates no material distinction. When chosen, they are all representatives of the United States, not representatives of the particular

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state from whence they come. They are paid by the United States, not by the state; nor are they accountable to it for any act done in the performance of their legislative functions; and however they may in practice, as it is their duty to do, consult and prefer the interests of their particular constituents, when they come in conflict with any other partial or local interest, yet it is their first and highest duty, as representatives of the United States, to promote the general good.

"The constitution of the United States, then, forms a *government*, not a league; and whether it be formed by compact between the states, or in any other manner, its character is the same. It is a government, in which all the people are represented, which operates directly on the people individually, not upon the states; they retained all the power they did not grant. But each state having expressly parted with so many powers, as to constitute jointly with the other states a single nation, cannot from that period possess any right to secede, because such secession does not break a league, but destroys the unity of a nation; and any injury to that unity is not only a breach, which would result from the contravention of a compact; but it is an offence against the whole Union. To say, that any state may at pleasure secede from the Union, is to say, that the United States are not a nation; because it would be a solecism to contend, that any part of a nation might dissolve its connexion with the other parts, to their injury or ruin, without committing any offence. Secession, like any other revolutionary act, may be morally justified by the extremity of oppression; but to call it a constitutional right, is confounding the meaning of terms; and can only be done through gross error, or to deceive those, who are willing to assert a right, but would pause before they made a revolution, or incur the penalties consequent on a failure.

"Because the Union was formed by compact, it is said the parties to that compact may, when they feel themselves aggrieved, depart from it; but it is precisely because it is a compact, that they cannot. A compact is an agreement, or binding obligation. It may, by its terms, have a sanction or penalty for its breach, or it may not. If it contains no sanction, it may be broken with no other consequence, than moral guilt: if it have a sanction, then the breach incurs the designated or implied penalty. A league between independent nations, generally, has no sanction, other than a moral one; or, if it should contain a penalty, as there is no common superior, it cannot be enforced. A government, on the contrary, always has a sanction, express or implied; and in our case, it is both necessarily implied, and expressly given. An attempt by force of arms to destroy a government, is an offence, by whatever means the constitutional compact may have been formed; and such government has the right, by the law of self-defence, to pass acts for punishing the offender, unless that right is modified, restrained, or resumed by the constitutional act. In our system, although it is modified in the case of treason, yet authority is expressly given to pass all laws necessary to

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carry its powers into effect, and under this grant provision has been made for punishing acts, which obstruct the due administration of the laws.

"It would seem superfluous to add any thing to show the nature of that Union, which connects us; but as erroneous opinions on this subject are the foundation of doctrines the most destructive to our peace, I must give some further developement to my views on this subject. No one, fellow citizens, has a higher reverence for the reserved rights of the states, than the magistrate, who now addresses you. No one would make greater personal sacrifices, or official exertions to defend them from violation; but equal care must be taken to prevent, on their part, an improper interference with, or resumption of the rights they have vested in the nation. The line has not been so distinctly drawn, as to avoid doubts in some cases of the exercise of power. Men of the best intentions, and soundest views may differ in their construction of some parts of the constitution; but there are others, on which dispassionate reflection can leave no doubt. Of this nature appears to be the assumed right of secession. It rests, as we have seen, on the alleged undivided sovereignty of the states, and on their having formed, in this sovereign capacity, a compact, which is called the constitution, from which, because they made it, they have the right to secede. Both of these positions are erroneous, and some of the arguments to prove them so have been anticipated.

"The states severally have not retained their entire sovereignty. It has been shown, that, in becoming parts of a nation, not members of a league, they surrendered many of their essential parts of sovereignty. The right to make treaties, declare war, levy taxes, exercise exclusive judicial and legislative powers, were all of them functions of sovereign power. The states, then, for all these important purposes, were no longer sovereign. The allegiance of their citizens was transferred, in the first instance, to the government of the United States; they became American citizens, and owed obedience to the constitution of the United States, and to laws made in conformity with the powers it vested in congress. This last position has not been, and cannot be denied. How, then, can that state be said to be sovereign and independent, whose citizens owe obedience to laws not made by it, and whose magistrates are sworn to disregard those laws, when they come in conflict with those passed by another? What shows conclusively, that the states cannot be said to have reserved an undivided sovereignty, is, that they expressly ceded the right to punish treason; not treason against their separate power, but treason against the United States. Treason is an offence against *sovereignty*, and sovereignty must reside with the power to punish it. But the reserved rights of the states are not less sacred, because they have, for their common interest, made the general government the depositary of these powers.

"The unity of our political character, (as has been shown for another

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purpose) commenced with its very existence. Under the royal government we had no separate character; our opposition to its oppressions began as UNITED COLONIES. We were the UNITED STATES under the confederation, and the name was perpetuated, and the Union rendered more perfect by the Federal constitution. In none of these stages did we consider ourselves in any other light, than as forming one nation. Treaties and alliances were made in the name of all. Troops were raised for the joint defence. How, then, with all these proofs, that under all changes of our position we had, for designated purposes and with defined powers, created National governments; how is it, that the most perfect of those several modes of Union should now be considered as a mere league, that may be dissolved at pleasure? It is from an abuse of terms. 'Compact' is used, as synonymous with 'league,' although the true term is not employed, because it would at once show the fallacy of the reasoning. It would not do to say, that our constitution was only a league; but it is laboured to prove it a compact, (which in one sense it is,) and then to argue, that, as a league is a compact, every compact between nations must of course be a league, and that from such an engagement every sovereign power has a right to recede. But it has been shown, that in this sense the states are not sovereign, and that even if they were, and the national constitution had been formed by compact, there would be no right in any one state to exonerate itself from its obligations.

"So obvious are the reasons, which forbid this secession, that it is necessary only to allude to them. The Union was formed for the benefit of all. It was produced by mutual sacrifices of interests and opinions. Can those sacrifices be recalled? Can the states, who magnanimously surrendered their title to the territories of the West, recall the grant? Will the inhabitants of the inland states agree to pay the duties, that may be imposed without their assent, by those on the Atlantic or the Gulf, for their own benefit? Shall there be a free port in one state, and onerous duties in another? No one believes, that any right exists, in a single state, to involve the others in these and countless other evils, contrary to the engagements solemnly made. Every one must see, that the other states, in self-defence, must oppose at all hazards.

"These are the alternatives, that are presented by the convention: A repeal of all the acts for raising revenue, leaving the government without the means of support; or an acquiescence in the dissolution of our Union by the secession of one of its members. When the first was proposed, it was known, that it could not be listened to for a moment. It was known, if force was applied to oppose the execution of the laws, that it must be repelled by force; that congress could not, without involving itself in disgrace, and the country in ruin, accede to the proposition; and yet, if this is not done on a given day, or if any attempt is made to execute the laws, the state is, by the ordinance, declared to be out of the Union. The majority of a convention assembled for the purpose

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have dictated these terms, or rather this rejection of all terms, in the name of the people of South Carolina. It is true, that the governor of the state speaks of the submission of their grievances to a convention of all the states, which, he says, they 'sincerely and anxiously seek and desire.' Yet this obvious and constitutional mode of obtaining the sense of the other states, on the construction of the federal compact, and amending it, if necessary, has never been attempted by those, who have urged the state on to this destructive measure. The state might have proposed to call for a general convention to the other states; and congress, if a sufficient number of them concurred, must have called it. But the first magistrate of South Carolina, when he expressed a hope, that, 'on a review by congress and the functionaries of the general government of the merits of the controversy,' such a convention will be accorded to them, must have known, that neither congress, nor any functionary of the general government, has authority to call such a convention, unless it be demanded by two thirds of the states. This suggestion, then, is another instance of the reckless inattention to the provisions of the constitution, with which this crisis has been madly hurried on; or of the attempt to persuade the people, that a constitutional remedy had been sought and refused. If the legislature of South Carolina 'anxiously desire' a general convention to consider their complaints, why have they not made application for it, in the way the constitution points out? The assertion, that they 'earnestly seek' it, is completely negatived by the omission."

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