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ART. I.—STORY'S COMMENTARIES—VOL. I.

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 of the United States. By JOSEPH STORY, LL. D. Dane Professor of Law in Harvard University In 3 volumes. 8vo. Boston. Hilliard, Gray, & Co.

A well constructed frame of government is the most stupendous work of human genius and wisdom. It should combine the fruits of all past experience; those who set about its construction must explore the great magazine of history for materials, nor can they work these into even the rudiments of a system of civil polity without a thorough knowledge of the character and condition of the people to be governed — and with all the possible qualifications and advantages for the undertaking, they can, after all, at the best, but sketch an outline, the filling up and finishing of which must be the work of many years, perhaps centuries. To adapt a constitution to the exigencies of a nation, a prescience of the future is no less essential than a knowledge of the past. Indeed the task is too mighty for any other than gigantic minds acting in the most propitious circumstances. It will be apparent that we are not speaking of those ephemeral organizations, of which so many have been so hastily made and so soon broken up, during the past fifty years; and of which at one time the

Abbe Sieyes, at another, Mr. Bentham set up a laboratory to supply any number to order, for any occasion or any people; but of a political system well adapted to a people; capable of happily blending with their customs and habits; accommodating itself to their interests; operating with facility in successive internal and external changes; and resisting, with a still accumulating vigor, the thousand tendencies to decay and dissolution inherent in all human productions. The difficulty is to propel the machinery with the adequate moving principles, and at the same time so to distribute, limit and adjust the powers that they shall act in harmony, and so adapt them that the national energies shall corroborate, and be reciprocally corroborated by, those of the government.

The formation of this complicated piece of political machinery, upon one comprehensive plan has been attempted in respect to but a very small part of the constitutions now in actual administration. And every permanent government has its constitution, though it may not be formally drawn out on parchment and solemnly ratified. All governments, from the most absolute despotism to the merest democracy, are administered upon certain principles. The fundamental law of a nation may be the present will of one or many, according to the most literal interpretation; but we are not thence necessarily to conclude that this will can be the mere capricious or random volition of the governing one or the governing multitude. On the contrary there are, in almost every government, certain directing and controlling principles, according to which this will must act. Now, whether the organization be simple, as in the instances just given, or complicated, as in more mixed and compounded governments, as are those of Great Britain and the United States, still we shall find a greater or less number of principles by which the action of the political machinery is determined. The great object of constructing a constitution is the fixing upon these principles, and making them permanent.

In the case of a government, as in that of a machine, the more simple it is, the more easy it is to assign its principles. But here the parallel ceases, for a simple machine may be an adequate and perfect one, but a simple government is a rude, imperfect and inadequate one. Yet it may be the only one adapted to certain nations, where, if they should undertake to

create one more complicated, the machinery would, by being unskilfully or unfaithfully managed, be soon entangled and rent in pieces by its own operation. Where this is the case it does not prove the badness of the machinery in itself, but it shows that it is not suited to the customs, characters, social conditions and relations of that particular community. At certain stages of the social progress, nations seem to be capable of nothing more in the form of government than merely the rules that may be agreed upon among soldiers united under a chief. Since the times of patriarchal government, this has been the most frequent rudimental form of a political system. Savage tribes and semi-civilized nations, like the South Americans, seem to be incapable of passing beyond this kind of government. The people of some parts of the United States, even show a great tendency to relapse into a social state in which only such a kind of government, or substitute for a government, could be maintained. A majority of a nation, or even the whole nation, may feel the deepest interest in establishing a better system, and still not possess the skill and social virtue requisite to its adoption and management.

A country so situated may be the scene of a series of revolutions, or, in other words, the administration may be handed over from one faction to another, and so indeed it usually happens; but even in cases of this description there will probably be found some certain and pretty uniform principles that determine the administration. The rulers for the time may, for instance, always respect certain religious or political prejudices. But these principles will be very few. Those that determine the administration of permanent despotisms will be more numerous; but still very few in comparison with those of a mixed government in which the powers are distributed and reciprocally counterpoised among many coordinate, and in some respects independent functionaries. England, without any formal written constitution, merely from its political organization and from usage, has a constitution as well, probably better, defined than ours, since it has been operating upon substantially its present principles for a century and a half; and accordingly a specific application of its principles has been made to more numerous cases. But whether we take the English government, or any other of any considerable complexity of structure, and having

any thing more than a mere rudimental character, we shall find, after the most attentive study of it, that we shall be able to lay down and define only its most general and fundamental principles. So in constructing a government, though, it will be obvious to the framers that it must be made congenial to the character of the people for whom it is intended, and admit of application to the almost infinite variety of cases that may arise under it, yet the most that can be done in framing it, is to make a general sketch, a mere outline.

To draw such an outline, and in such a manner that it might be filled up year after year, and still preserve its proportions and distinctive character, was the great work undertaken by the framers of our constitution, and under circumstances by no means the most encouraging. Thirteen different political communities, with diversity of constitutions, laws, and interests, mutually repelled from each other by jealousies, were to be moulded into one nation, by their own consent, with the reciprocal sacrifice of their conflicting opinions, and what they might conceive to be their conflicting interests. What aggravated the difficulty of the undertaking, they felt, and very naturally too, a grudging distrust in assigning powers to a supreme authority in the place of one they had just shaken off, after a fearful struggle. The evils of disunion and the experience of the inefficacy of the old confederation, it is true, supplied the strongest arguments and motives in favor of forming a government of sufficient strength to hold the States together. But the obstacles were great enough to appal the most sanguine and courageous minds. The prospect seemed, at most, to justify the hope of repairing and perhaps slightly improving the dilapidated confederation; of making a general treaty instead of a general government. And there are not wanting those who now maintain that this was all that was in fact accomplished; that the constitution is only another amphyctionic league depending wholly on the continued concurrence of each of its members; who maintain that no government was in fact formed; and that the United States are not *a* nation, but twenty-five different nations associated in a political copartnership during the pleasure of each. But this was not what the framers of the constitution contemplated; nor was it so accepted by the people, in adopting it. All the proceedings in framing it, the language of the instru-

ment itself, the contemporaneous expositions, and the whole administration under it for forty-five years, concur in holding it forth as a fundamental *law*, and the result of its adoption as *a government*. If it was merely a treaty, a league, a contract, revocable at the will of any of the parties to it, or at most the confederation reorganized, its formation and adoption were matters of small glory; the enthusiasm with which its establishment was hailed was a weak infatuation; and the eulogies that have been pronounced upon it are silly bombast. The magnificent fabric, to rear which all the energies and all the magnanimity of the nation were evoked, dwindles into a pasteboard palace that may be crushed by the slightest shock; and after a delusion of forty-five years we are for the first time restored to our senses, to perceive, in its real diminutiveness, the petty result of such grand efforts of great men, and, what we mistook for, a great nation, and to be mortified at the exultation of the whole people of these States for all this period in a childish illusion. Upon this construction the wonder is not at the great achievement in framing and adopting the constitution, but at the total delusion under which it was framed, and adopted, and has been so long administered, and at its continuing in existence and effective operation for a period so long as it took to establish it. But if the constitution is what it purports to be on the face of it, according to its uniform language and spirit from beginning to end, a fundamental law — or, according to the Virginia style, if that be more acceptable, if it be a compact, league, treaty, stipulation, covenant or bargain, but irrevocable and inextinguishable except by the power which formed it originally, the concurring will of the people of the several States — if the result of its adoption was the compounding and consolidating the States into one nation, to the extent of the powers conferred upon the general government, then its construction and adoption were truly a glorious work and a great epoch in political history.

The interpretation and practical application of this instrument are necessarily of an importance corresponding to that of the instrument itself, since, as we have already remarked, a constitution can, at the most, embrace only the general outlines and most leading principles of the system. Without a comprehensive view of these principles in the administration of the government, and consistent and harmonious deductions from them,

and a scrupulous adherence to their true spirit, disorder and confusion must be the consequence, and so the government either be changed, or made to dwindle away to its dissolution. The construction and application of the principles of the constitution, are the proper subject for the mightiest intellectual power, guided by the greatest prudence, and assisted by the amplest knowledge, and its maintenance and perpetuation are as much jeopardized by a narrow, short-sighted, confused, inadequate interpretation, as from any direct attempt to overthrow it. Such interpretations tend to divest the government of its powers, until it becomes too weak to sustain itself: they tend to inconsistency and contradiction, and consequently to substitute, in the place of permanent principles, the present discretion or opinion of its administrators for the time being, or, in other words, to give it practically an arbitrary character. Those who defend a comprehensive, consistent interpretation, are advocates of the freedom of the citizen, since they insist upon an adherence to certain rules by which the administration, in its various departments, shall be governed. And such rules can be established only by the broadest and most comprehensive views, and a deep insight into all the consequences of the doctrines to be espoused. We do not mean to say that the interpretation which gives the most extensive powers to the government is necessarily, in all cases, the true one, but that it is essential to the maintenance of the government as one of fixed rules, that they should be such as to give the powers operation as those of a *government;* and that those who are constantly urging a different interpretation are actuated by a spirit hostile to our political institutions.

It has so happened that those, into whose hands the practical exposition of the constitution has mostly fallen, have been among the most enlightened and worthy of our citizens, to whom we owe almost as much as to its original framers. Before the government went into operation all the provisions of the constitution were critically analyzed and lucidly expounded by General Hamilton, Mr. Madison, and Mr. Jay, in the numbers of Federalist. The provisions of this great charter have also frequently been subjected to investigation and analysis in the Supreme Court of the United States. The mere usage of forty-five years is also an authority for the construction of the

instrument. Add to these sources of light upon our political system, the essays and speeches of eminent statesmen contemporaneous with the adoption of the constitution and at subsequent periods; and the opinions of the judicial officers in the several States. The results of these various authorities and expositions have occasionally been collected in general treatises, as in Tucker's Blackstone, Rawle on the Constitution, and Kent's Commentaries. But these are all very compendious in plan; a full elaborate work was wanted, that should present the whole body of constitutional law rigidly digested and lucidly arranged. Such a work Mr. Justice Story has given to the public, and very opportunely, since we have most strangely, now at this late day, been unexpectedly thrown back to the very threshold — to the agitation of the question whether we have, in fact, any constitution of government, or are entirely destitute of a supreme law; and which is, in effect, equivalent, whether we have any tribunal to interpret and apply, and an authority to enforce that law. These are the questions recently agitated. Some of the powers exercised by the government ever since its establishment, are strenuously denied to have been ever granted. In regard to those granted, rules of interpretation have been proposed, which would embarrass or defeat their operation. A fierce contest is raging over the whole field of constitutional law, which will end, we will not doubt, in the firm establishment of those constructions which have hitherto been adopted in the practical administration, and in demonstrating still more clearly the admirable structure of our government. A work presenting the whole subject, to which every man can readily resort for all the learning that may help him to form his opinion, will, it is obvious, have a powerful influence upon these discussions, by enlightening the public mind and by fortifying public opinion against plausible sophisms and groundless exceptions.

A dry forbidding work, laborious to peruse, however learned it might be, would not meet the exigency; since only the most resolute and indefatigable would plod through it. The one before us is not liable, in the least degree, to this objection. The style is animated, free and flowing, in the usual manner of the author. The arrangement is methodical and clear. It is a fortunate part of the author's plan to commence with the consti-

tutional history of the period antecedent to the Revolution. By an outline of the political history of each of the colonies, and that of the Revolution, and the confederation, the reader is not only prepared to enter upon the history and exposition of the constitution with greater intelligence, and greater facility of apprehension, but his curiosity is excited and his interest in the subject kindled, for he has a lively sense of the difficulty and peril of the occasion at the dissolution of the confederation, and the magnitude of the work then to be accomplished, and he proceeds with earnest solicitude to the subsequent analysis and exposition. Having fresh in his mind all the difficulties to be overcome, he is desirous of learning, by a critical review of the whole subject, in what way they are surmounted; and at each step, as he advances, he is struck with new admiration of the profound, practical wisdom displayed in the structure of the government. Indeed any one capable of understanding the constitution, who does not admire and glory in it, is not worthy to live under it.

The work commences, as we have said, with a constitutional history of each of the thirteen colonies. A general view is then given of their resemblances and diversities, and of their political condition at the epoch of the Revolution. There were three kinds of colonial government, the provincial, proprietary, and chartered. The provincial colonies were governed according to the royal commissions and instructions to the governors and other magistrates, to which class belonged New Hampshire, New York, New Jersey, Virginia, the Carolinas, and Georgia. In the proprietary governments the colony was granted to individuals in the nature of feudatory principalities, with all the inferior royalties and subordinate powers of legislation which formerly belonged to counties palatine; of which class were Maryland, Pennsylvania, and Delaware. The chartered colonies were political establishments possessing the general powers of government, and rights of sovereignty, being dependent upon and subject to the realm of England, but still possessing within their own territorial limits the general powers of legislation and taxation; such were Massachusetts, Rhode Island, and Connecticut.

The political condition of all of them was similar in some respects. The inhabitants of all 'enjoyed the rights and privi-

leges of British born subjects and the benefit of the common laws of England.[1] This, as we have seen, was a limitation upon the legislative power contained in an express clause of all the charters; and could not be transcended without a clear breach of their fundamental conditions. A very liberal exposition of this clause seems, however, always to have prevailed, and to have been acquiesced in, if not adopted by the crown. Practically speaking, it seems to have been left to the judicial tribunals in the colonies to ascertain what part of the common law was applicable to the situation of the colonies;[2] and of course, from a difference of interpretation, the common law, as actually administered, was not in any two of the colonies exactly the same. The general foundation of the local jurisprudence was confessedly composed of the same materials; but in the actual superstructure they were variously combined, and modified, so as to present neither a general symmetry of design, nor an unity of execution.

'In regard to the legislative power, there was a still greater latitude allowed; for notwithstanding the cautious reference in the charters to the laws of England, the assemblies actually exercised the authority to abrogate every part of the common law, except that, which united the colonies to the parent state by the general ties of allegiance and dependency; and every part of the statute law, except those acts of Parliament, which expressly prescribed rules for the colonies, and necessarily bound them, as integral parts of the empire, in a general system, formed for all, and for the interest of all.[3] To guard this superintending authority with more effect, it was enacted by Parliament in 7 & 8 William 3, ch. 22, "that all laws, by-laws, usages, and customs, which should be in practice in any of the plantations, repugnant to any law made, or to be made in this king-

[1] Com. Dig. Navigation, G. 1; Id. Ley. C.; 2 Wilson's Law Lect. 48, 49, 50, 51, 52.

[2] 1 Chalm. Annals, 677, 678, 687; 1 Tucker's Black. Comm. 384. 1 Vez. 444, 449; 2 Wilson's Law Lect. 49 to 54; Mass. State Papers, (Ed. 1818,) 375, 390, 391.

[3] 1 Chalmer's Annals, 139, 140, 684, 687, 671, 675; 1 Tucker's Black. Comm. 384, App.; 2 Wilson's Law Lect. 49, 50; 1 Doug. Summ. 213; 1 Pitk. Hist. 108; Mass. State Papers, 345, 346, 347, 351 to 364, 375, 390; Dummer's Defence, 1 American Tracts, 65, &c.

dom relative to the said plantations, shall be utterly void and of none effect." [1]

'It was under the consciousness of the full possession of the rights, liberties, and immunities of British subjects, that the colonists in almost all the early legislation of their respective assemblies insisted upon a declaratory act, acknowledging and confirming them.[2] And for the most part they thus succeeded in obtaining a real and effective magna charta of their liberties. The trial by jury, in all cases, civil and criminal, was as firmly, and as universally established in the colonies, as in the mother country.

'In all the colonies local legislatures were established, one branch of which consisted of representatives of the people freely chosen, to represent and defend their interests, and possessing a negative upon all laws.[3] We have seen, that in the original structure of the charters of the early colonies, no provision was made for such a legislative body. But accustomed as the colonists had been to possess the rights and privileges of Englishmen, and valuing as they did, above all others, the right of representation in Parliament, as the only real security for their political and civil liberties, it was easy to foresee, that they would not long endure the exercise of any arbitrary power; and that they would insist upon some share in framing the laws, by which they were to be governed. We find accordingly, that at an early period [1619] a house of burgesses was forced upon the then proprietors of Virginia.[4] In Massachusetts, Connecticut, New Hampshire, and Rhode Island, the same course was pursued.[5] And Mr. Hutchinson has correctly observed, that all the colonies before the reign of Charles the Second, (Maryland alone excepted, whose charter contained an express provision on the subject,) settled a model of government for themselves, in which the people had a voice, and representation in framing the laws, and in assenting to burthens to be imposed upon themselves. After the restoration, there was no instance

[1] Stokes's Colon. 27.

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

[3] 1 Doug. Summ. 213 to 215.

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

[5] 1 Tucker's Black. Comm. App. 386.

of a colony without a representation of the people, nor any attempt to deprive the colonies of this privilege, except during the brief and arbitrary reign of King James the Second.[1]

'In the proprietary and charter governments, the right of the people to be governed by laws established by a local legislature, in which they were represented, was recognised as a fundamental principle of the compact. But in the provincial governments it was often a matter of debate, whether the people had a *right* to be represented in the legislature, or whether it was a privilege enjoyed by the favor and during the

[1] 1 Hutch. Hist. Mass. 93, note; 1 Doug. Summ. 213. — Mr. Hutchinson's remarks are entitled to something more than this brief notice, and a quotation is therefore made of the leading passage. "It is observable, that all the colonies before the reign of King Charles the Second, Maryland excepted, settled a model of government for themselves. Virginia had been many years distracted under the government of presidents and governors, with councils, in whose nomination or removal the people had no voice, until in the year 1620 a house of burgesses broke out in the colony; the king nor the grand council at home not having given any powers or directions for it. The governor and assistants of the Massachusetts at first intended to rule the people; and, as we have observed, obtained their consent for it, but this lasted two or three years only; and although there is no color for it in the charter, yet a house of deputies appeared suddenly, in 1634, to the surprise of the magistrates, and the disappointment of their schemes for power. Connecticut soon after followed the plan of the Massachusetts. New Haven, although the people had the highest reverence for their leaders, and for near thirty years in judicial proceedings submitted to the magistracy, (it must, however, be remembered, that it was annually elected,) without a jury; yet in matters of legislation the people, from the beginning, would have their share by their representatives. — New Hampshire combined together under the same form with Massachusetts. — Lord Say tempted the principal men of the Massachusetts, to make them and their heirs nobles and absolute governors of a new colony; but, under this plan, they could find no people to follow them. Barbadoes and the leeward islands, began in 1625, struggled under governors, and councils, and contending proprietors, for about twenty years. Numbers suffered death by the arbitrary sentences of courts martial, or other acts of violence, as one side, or the other happened to prevail. At length, in 1645, the first assembly was called, and no reason given but this, viz. That, by the grant to the Earl of Carlisle, the inhabitants were to enjoy all the liberties, privileges, and franchises of English subjects; and therefore, as it is also expressly mentioned in the grant, could not legally be bound, or charged by any act without their own consent. This grant, in 1627, was made by Charles the First, a prince not the most tender of the subjects' liberties. After the restoration, there is no instance of a colony settled without a representative of the people, nor any attempt to deprive the colonies of this privilege, except in the arbitrary reign of King James the Second."

pleasure of the crown. The former was the doctrine of the colonists; the latter was maintained by the crown and its legal advisers. Struggles took place from time to time on this subject in some of the provincial assemblies; and declarations of rights were there drawn up, and rejected by the crown, as an invasion of its prerogative.[1] The crown also claimed, as within its exclusive competence, the right to decide, what number of representatives should be chosen, and from what places they should come.[2] The provincial assemblies insisted upon an adverse claim. The crown also insisted on the right to continue the legislative assembly for an indefinite period, at its pleasure, without a new election; and to dissolve it in like manner. The latter power was admitted; but the former was most stoutly resisted, as in effect a destruction of the popular right of representation, frequent elections being deemed vital to their political safety; — "a right," (as the declaration of independence emphatically pronounces,) "inestimable to them, and formidable to tyrants only."[3] In the colony of New York the crown succeeded at last [1743][4] in establishing septennial assemblies, in imitation of the septennial parliaments of the parent country, which was a measure so offensive to the people, that it constituted one of their grievances propounded at the commencement of the American Revolution.[5]

'For all the purposes of domestic and internal regulation, the colonial legislatures deemed themselves possessed of entire and exclusive authority. One of the earliest forms, in which the spirit of the people exhibited itself on this subject, was the constant denial of all power of taxation, except under laws passed by themselves. The propriety of their resistance of the claim of the *Crown* to tax them seems not to have been denied by the most strenuous of their opponents.[6] It was the object of the latter to subject them only to the undefined and arbitrary power of taxation by *Parliament*. The colonists with a firm-

[1] 1 Pitk. Hist. 85, 86, 87; 1 Chalm. Opin. 189; 2 Doug. Summ. 251, &c

[2] 1 Pitk. Hist. 88; 1 Chalm. Opin. 268, 272; 2 Doug. Summ. 37, 38, 39, 40, 41, 73; Chitty, Prerog. ch. 3.

[3] 1 Pitk. Hist. 86, 87.

[4] 1 Pitk. Hist. 87, 88.

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

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

ness and public spirit, which strike us with surprise and admiration, claimed for themselves, and their posterity, a total exemption from all taxation not imposed by their own representatives. A declaration to this effect will be found in some of the earliest of colonial legislation; in that of Plymouth, of Massachusetts, of Virginia, of Maryland, of Rhode Island, of New York, and indeed of most of the other colonies.[1] The general opinion held by them was, that parliament had no authority to tax them, because they were not represented in parliament.[2]

'On the other hand, the statute of 6 Geo. 3, ch. 12, contained an express declaration by parliament, that "the colonies and plantations in America have been, are, and of right ought to be subordinate unto and dependent upon the imperial crown and parliament of Great Britain," and that the king, with the advice and consent of parliament, "had, hath, and of right ought to have full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America in all cases whatsoever."[3]

'It does not appear, that this declaratory act of 6 Geo. 3, met with any general opposition among those statesmen in England, who were most friendly to America. Lord Chatham, in a speech on the 17th of December, 1765, said, "I assert the authority of this country over the colonies to be sovereign and supreme in every circumstance of government and legislation. But, (he added,) taxation is no part of the governing or legislative power — taxes are the voluntary grant of the people alone." Mr. Burke, who may justly be deemed the leader of the colonial advocates, maintained the supremacy of parliament to the full extent of the declaratory act, and as justly including the power of taxation.[4] But he deemed the power of taxation in parliament as an instrument of empire, and not as a means of supply; and therefore, that it should be resorted to only in ex-

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

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

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

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

treme cases for the former purpose. With a view to conciliation, another act was passed at a late period, (in 18 Geo. 3, ch. 12,) which declared, that parliament would not impose any duty or tax on the colonies, except for the regulation of commerce; and that the net produce of such duty, or tax, should be applied to the use of the colony, in which it was levied. But it failed of its object. The spirit of resistance had then become stubborn and uncontrollable. The colonists were awake to a full sense of all their rights; and habit had made them firm, and common sufferings had made them acute, as well as indignant in the vindication of their privileges. And thus the struggle was maintained on each side with unabated zeal, until the American Revolution. The Declaration of Independence embodied in a permanent form a denial of such parliamentary authority, treating it as a gross and unconstitutional usurpation.

'The colonial legislatures, with the restrictions necessarily arising from their dependency on Great Britain, were sovereign within the limits of their respective territories. But there was this difference among them, that in Maryland, Connecticut, and Rhode Island, the laws were not required to be sent to the king for his approval; whereas, in all the other colonies, the king possessed a power of abrogating them, and they were not final in their authority until they had passed under his review.[1] In respect to the mode of enacting laws, there were some differences in the organization of the colonial governments.[2] In Connecticut and Rhode Island the governor had no negative upon the laws; in Pennsylvania the council had no negative, but was merely advisory to the executive; in Massachusetts, the council was chosen by the legislature, and not by the crown; but the governor had a negative on the choice.' pp. 147 — 159.

In all the colonies the lands within their limits were, by the terms of their original grants, and charters, to be holden of the crown in free and common socage; and not in capite or by knight's service. They were all holden either as of the manor of East Greenwich in Kent, or of the castle of Windsor in Berkshire, or of the manor of Hampton Court in Middlesex. 'All the slavish and military part of the ancient feudal tenures,'

[1] Chalmers's Annals, 203, 295; 1 Doug. Summ. 207, 208.
[2] 1 Doug. Summ. 215.

says the commentator, 'were thus effectually prevented from taking root in the American soil. Our tenures thus acquired a universal simplicity; and it is believed that none but freehold tenures in socage ever were in use among us. No traces can be found of copyhold, or gavelkind, or burgage tenures. In short, for most purposes, our lands may be deemed to be perfectly allodial, or held of no superior at all, though many of the distinctions of the feudal law have necessarily insinuated themselves into the modes of acquiring, transferring, and transmitting estates.' p. 159. Connected with this state of things and naturally flowing from it, is the simplicity of our system of conveyances.

All the colonies considered themselves, not as parcel of the realm of England, but as dependencies of and owing allegiance to, the British crown, and in virtue of this superintendency the crown claimed the right of entertaining appeals from the courts of last resort in the colonies, to be heard and finally adjudged on by the king in council.

Although the colonies were independent of each other they were not wholly alien to each other. 'On the contrary, they were fellow subjects, and for many purposes one people. Every colonist had a right to inhabit, if he pleased, in any other colony; and as a British subject, he was capable of inheriting lands by descent in every other colony. The commercial intercourse of the colonies, too, was regulated by the general laws of the British empire; and could not be restrained, or obstructed by colonial legislation. The remarks of Mr. Chief Justice Jay on this subject are equally just and striking. "All the people of this country were then subjects of the king of Great Britain, and owed allegiance to him; and all the civil authority then existing, or exercised here, flowed from the head of the British empire. They were, in a strict sense, *fellow* subjects, and in a variety of respects *one people*. When the Revolution commenced, the patriots did not assert, that only the same affinity and social connexion subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain, and Spain, while Roman provinces, to wit, only that affinity and social connexion, which result from the mere circumstance of being governed by the same prince." Different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.'

The diversities among the colonies are then enumerated; among which the first is that of descents and distribution of intestate estates. 'All the southern colonies, including Virginia, adhered to the course of descents, at the common law, down to the Revolution. As a natural consequence, real property was in these colonies held in large masses by the families of the ancient proprietors.' The rule was the same in New York and New Jersey; and so also in Rhode Island almost to the era of the revolution. In the others, estates were distributed equally among all the children, and next of kin, the eldest son being entitled to a double portion.

'A very curious question was at one time (in 1727) agitated before the king in council, upon an appeal from Connecticut, how far the statute of descents and distributions, dividing the estate among all the children, was conformable to the charter of that colony, which required the laws to be "not contrary to the laws of the realm of England." It was upon that occasion decided, that the law of descents, giving the female, as well as the male heirs, a part of the real estate, was repugnant to the charter, and therefore void. This determination created great alarm, not only in Connecticut, but elsewhere; since it might cut deep into the legislation of the other colonies, and disturb the foundation of many titles. The decree of the council, annulling the law, was upon the urgent application of some of the colonial agents revoked, and the law reinstated with its obligatory force.' p. 167.

In some of the colonies lands were liable only to an extent of an elegit in favor of creditors, but in general they were subject to be sold or set off on execution for the satisfaction of debts; and were also assets in the hands of executors and administrators. This was the natural consequence of the condition of a people possessing little moveable property.

Such were the striking circumstances of resemblance and diversity among the colonies; after the enumeration, of which the author takes a general view of the legislative authority in the colonies and the authority of parliament to bind them. This theme sounds of the revolution, to the political events of which, as far as they relate to constitutional law, the reader is then introduced. In this part of the work some topics are discussed that have a direct bearing upon the nature and fundamental

principles of our union. Without an attentive study of the political events of this period, our frame of government cannot be understood. It will appear from the history of these times, that the several States never considered themselves as wholly independent nations, alien one to another.

'None of the colonies before the Revolution were, in the most large and general sense, independent, or sovereign communities. They were all originally settled under, and subjected to the British crown.[1] Their powers and authorities were derived from, and limited by their respective charters. All, or nearly all, of these charters controlled their legislation by prohibiting them from making laws repugnant, or contrary to those of England. The crown, in many of them, possessed a negative upon their legislation, as well as the exclusive appointment of their superior officers; and a right of revision, by way of appeal, of the judgments of their courts.[2] In their most solemn declarations of rights, they admitted themselves bound, as British subjects, to allegiance to the British crown; and as such, they claimed to be entitled to all the rights, liberties, and immunities of free born British subjects. They denied all power of taxation, except by their own colonial legislatures; but at the same time they admitted themselves bound by acts of the British parliament for the regulation of external commerce, so as to secure the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members.[3] So far, as respects foreign states, the colonies were not, in the sense of the laws of nations, sovereign states; but mere dependencies of Great Britain. They could make no treaty, declare no war, send no ambassadors, regulate no intercourse or commerce, nor in any other shape act, as sovereigns, in the negociations usual between independent states. In respect to each other, they stood in the common relation of British subjects; the legislation of neither could be controlled by any other; but there was a common subjection to the British

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

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

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

crown.[1] If in any sense they might claim the attributes of sovereignty, it was only in that subordinate sense, to which we have alluded, as exercising within a limited extent certain usual powers of sovereignty. They did not even affect to claim a local allegiance.[2]

'In the next place the colonies did not severally act for themselves, and proclaim their own independence. It is true, that some of the states had previously formed incipient governments for themselves; but it was done in compliance with the recommendations of congress.[3] Virginia, on the 29th of June, 1776, by a convention of delegates, declared "the government of this country, as formerly exercised under the crown of Great Britain, totally dissolved;" and proceeded to form a new constitution of government. New Hampshire also formed a government, in December, 1775, which was manifestly intended to be temporary, "during (as they said) the unhappy and unnatural contest with Great Britain."[4] New Jersey, too, established a frame of government, on the 2d of July, 1776; but it was expressly declared, that it should be void upon a reconciliation with Great Britain.[5] And South Carolina, in March, 1776, adopted a constitution of government; but this was, in like manner, "established until an accommodation between Great Britain and America could be obtained."[6] But the declaration of the independence of all the colonies was the united act of all. It was "a declaration by the representatives of the United States of America in congress assembled;" "by the delegates appointed by the good people of the colonies," as in a prior declaration of rights they were called.[7] It was not an act done by the state governments then organized; nor by persons chosen by them. It was emphatically the act of the whole *people* of the united colonies, by the instrumentality of their representatives,

[1] Chalmer's Annals, 686, 687; 2 Dall. 479. Per Jay C J.

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

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

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

[5] Stokes's Hist. Colon. 51, 75.

[6] Stokes's Hist. Colon. 105; 1 Pitk. Hist. 355.

[7] Journal, 1776, p. 241; Journal, 1774, p. 27, 45.

chosen for that, among other purposes.[1] It was an act not competent to the state governments, or any of them, as organized under their charters, to adopt. Those charters neither contemplated the case, nor provided for it. It was an act of original, inherent sovereignty by the people themselves, resulting from their right to change the form of government, and to institute a new government, whenever necessary for their safety and happiness. So the declaration of independence treats it. No state had presumed of itself to form a new government, or to provide for the exigencies of the times, without consulting congress on the subject; and when they acted, it was in pursuance of the recommendation of congress. It was, therefore, the achievement of the whole for the benefit of the whole. The people of the united colonies made the united colonies free and independent states, and absolved them from all allegiance to the British crown. The declaration of independence has accordingly always been treated, as an act of paramount and sovereign authority, complete and perfect *per se*, and *ipso facto* working an entire dissolution of all political connexion with and allegiance to Great Britain. And this, not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice.[2]

'In the debates in the South Carolina legislature, in January, 1788, respecting the propriety of calling a convention of the people to ratify or reject the constitution, a distinguished statesman[3] used the following language: "This admirable manifesto (i. e. the declaration of independence) sufficiently refutes the doctrine of the individual sovereignty and independence of the several states. In that declaration the several states are not even enumerated; but after reciting in nervous language, and with convincing arguments our right to independence, and the tyranny, which compelled us to assert it, the declaration is made in the following words: 'We, therefore, the representatives of the United States, &c. do, in the name, &c. of the good people of these colonies, solemnly publish, &c. that these united colonies are, and of right ought to be, free and independent states.'

[1] 2 Dall. 470, 471. Per Jay C. J.; 9 Dane's Abridg. App. § 12, 13, p. 23, 24.

[2] 2 Dallas R. 470.

[3] Mr. Charles Cotesworth Pinckney.

The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots, who framed this declaration. The several states are not even mentioned by name in any part, as if it was intended to impress the maxim on America, that our freedom and independence arose from our union, and that without it we could never be free or independent. Let us then consider all attempts to weaken this union by maintaining, that each state is separately and individually independent, as a species of political heresy, which can never benefit us, but may bring on us the most serious distresses."[1]

'In the next place we have seen, that the power to do this act was not derived from the state governments; nor was it done generally with their cooperation. The question then naturally presents itself, if it is to be considered as a national act, in what manner did the colonies become a nation, and in what manner did congress become possessed of this national power? The true answer must be, that as soon as congress assumed powers and passed measures, which were in their nature national, to that extent the people, from whose acquiescence and consent they took effect, must be considered as

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

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

'The same body, in 1776, took bolder steps, and exerted powers, which could in no other manner be justified or accounted for, than upon the supposition, that a national union for national purposes already existed, and that the congress was invested with sovereign power over all the colonies for the purpose of preserving the common rights and liberties of all. They accordingly authorized general hostilities against the persons and property of British subjects; they opened an extensive commerce with foreign countries, regulating the whole subject of im-

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

ports and exports; they authorized the formation of new governments in the colonies; and finally they exercised the sovereign prerogative of dissolving the allegiance of all colonies to the British crown. The validity of these acts was never doubted, or denied by the people. On the contrary, they became the foundation, upon which the superstructure of the liberties and independence of the United States has been erected. Whatever, then, may be the theories of ingenious men on the subject, it is historically true, that before the declaration of independence these colonies were not, in any absolute sense, sovereign states; that that event did not find them or make them such; but that at the moment of their separation they were under the dominion of a superior controlling national government, whose powers were vested in and exercised by the general congress with the consent of the people of all the states.[1]

'From the moment of the declaration of independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation *de facto*, having a general government over it created, and acting by the general consent of the people of all the colonies. The powers of that government were not, and indeed could not be well defined. But still its exclusive sovereignty, in many cases, was firmly established; and its controlling power over the states was in most, if not in all national measures, universally admitted.[2] The arti-

[1] This whole subject is very amply discussed by Mr. Dane in his Appendix to the 9th volume of his Abridgment of the Laws; and many of his views coincide to those stated in the text. The whole of that Appendix is worthy of the perusal of every constitutional lawyer, even though he might differ from some of the conclusions of the learned author. He will there find much reasoning from documentary evidence of a public nature, which has not hitherto been presented in a condensed or accurate shape.

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

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

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

cles of confederation, of which we shall have occasion to speak more hereafter, were not prepared or adopted by congress until November, 1777;[1] they were not signed or ratified by any of the states until July, 1778; and they were not ratified, so as to become obligatory upon all the states, until March, 1781. In the intermediate time, congress continued to exercise the powers of a general government, whose acts were binding on all the states. And though they constantly admitted the states to be "sovereign and independent communities;"[2] yet it must be obvious, that the terms were used in the subordinate and limited sense already alluded to; for it was impossible to use them in any other sense, since a majority of the states could by their public acts in congress control and bind the minority. Among the exclusive powers exercised by congress, were the power to declare war and make peace; to authorize captures; to institute appellate prize courts; to direct and control all national, military, and naval operations; to form alliances, and make treaties; to contract debts, and issue bills of credit upon national account. In respect to foreign governments, we were politically known as the United States only; and it was in our national capacity, as such, that we sent and received ambassadors, entered into treaties and alliances, and were admitted into the general community of nations, who might exercise the right of belligerents, and claim an equality of sovereign powers and prerogatives.[3]

'In confirmation of these views, it may not be without use to refer to the opinions of some of our most eminent judges, delivered on occasions, which required an exact examination of the subject. In *Chisholm's Executors* v. *The State of Georgia*, (3 Dall. 419, 470,[4]) Mr. Chief Justice Jay, who was equally distinguished as a revolutionary statesman and a general jurist, expressed himself to the following effect: "The revolution, or rather the declaration of independence, found the *people* already united for general purposes, and at the same time providing for their more domestic concerns by state conventions, and other

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

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

[3] 1 Amer. Museum, 15; 1 Kent. Comm. 197, 198, 199.

[4] S. C. 1 Peter's Cond. R. 635.

temporary arrangements. From the crown of Great Britain the sovereignty of their country passed to the *people* of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states, within whose limits they were situated, but to the *whole people.* On whatever principle this opinion rested, it did not give way to the other; and *thirteen sovereignties* were considered as emerging from the principles of the revolution, combined by local convenience and considerations. The people, nevertheless, continued to consider themselves, in a national point of view, as *one people;* and they continued without interruption to manage their national concerns accordingly." In *Penhallow* v. *Doane,* (3 Dall. R. 54,[1]) Mr. Justice Patterson, (who was also a revolutionary statesman) said, speaking of the period before the ratification of the confederation: "The powers of congress were revolutionary in their nature, arising out of events adequate to every national emergency, and coextensive with the object to be attained. Congress was the general, supreme, and controlling council of the nation, the centre of the union, the centre of force, and the sun of the political system. Congress raised armies, fitted out a navy, and prescribed rules for their government, &c. &c. These high acts of sovereignty were submitted to, acquiesced in, and approved of by the *people* of America, &c. &c. The danger being imminent and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert, or break the violence of the gathering storm. They accordingly grew into union, and formed one great political body, of which congress was the directing principle and soul, &c. &c. The truth is, that the states, individually, were not known, nor recognised as sovereign by foreign nations, nor are they now. The states collectively under congress, as their connecting point or head, were acknowledged by foreign powers, as sovereign, particularly in that acceptation of the term, which is applicable to all great national concerns, and in the exercise of which other sovereigns would be more immediately interested." In *Ware* v. *Hylton,* (3 Dall. 199,[2]) Mr. Justice Chase (himself also a revolutionary

[1] S. C. 1 Peters's Cond. Rep. 21.
[2] S. C. 1 Peters's Cond. R. 99.

statesman) said: "It has been inquired, what powers congress possessed from the first meeting in September, 1774, until the ratification of the confederation on the 1st of March, 1781. It appears to me, that the powers of congress during that whole period were derived from the *people* they represented, expressly given through the medium of their state conventions or state legislatures; or, that after they were exercised, they were impliedly ratified by the acquiescence and obedience of the *people*, &c. The powers of congress originated from necessity, and arose out of it, and were only limited by events; or, in other words, they were revolutionary in their nature. Their extent depended on the exigencies and necessities of public affairs. I entertain this general idea, that the several states retained all internal sovereignty; and that congress properly possessed the rights of external sovereignty. In deciding on the powers of congress, and of the several states before the confederation, I see but one safe rule, namely, that all the powers actually exercised by congress before that period were rightfully exercised, on the presumption not to be controverted, that they were so authorized by the people they represented, by an express or implied grant; and that all the powers exercised by the state conventions or state legislatures were also rightfully exercised, on the same presumption of authority from the people."[1]

'In respect to the powers of the continental congress exercised before the adoption of the articles of confederation, few questions were judicially discussed during the revolutionary contest; for men had not leisure in the heat of war nicely to scrutinize or weigh such subjects; *inter arma silent leges*. The people, relying on the wisdom and patriotism of congress, silently acquiesced in whatever authority they assumed. But soon after the organization of the present government, the question was most elaborately discussed before the Supreme Court of the United States, in a case calling for an exposition of the appellate jurisdiction of congress in prize causes before the ratification of the confederation.[2] The result of that examina-

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

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

tion was, as the opinions already cited indicate, that congress, before the confederation, possessed, by the consent of the people of the United States, sovereign and supreme powers for national purposes; and among others, the supreme powers of peace and war, and, as an incident, the right of entertaining appeals in the last resort in prize causes, even in opposition to state legislation. And that the actual powers exercised by congress, in respect to national objects, furnished the best exposition of its constitutional authority, since they emanated from the representatives of the people, and were acquiesced in by the people.' p. 196—208.

These views and historical facts ought to be pondered upon, and no man who gives his mind to them can afterwards listen, for a moment, to the narrow doctrines and querulous exceptions, and the degrading and belittleing sentiments, in respect to the union of these States, which have been announced and so often and so pertinaciously reiterated, since the doctrine of nullification has been under discussion.

In introducing the history and analysis of the confederation, the author makes some remarks which we extract as a corrective of the flippant levity with which some politicians — we will not say statesmen — express themselves on the great subjects of forming nations and establishing and overthrowing governments.

'It will be an instructive and useful lesson to us to trace historically the steps, which led to the formation and final adoption of the articles of confederation and perpetual union between the United States. It will be instructive, by disclosing the real difficulties attendant upon such a plan, even in times, when the necessity of it was forced upon the minds of men not only by common dangers, but by common protection, by common feelings of affection, and by common efforts of defence. It will be useful, by moderating the ardor of inexperienced minds, which are apt to imagine, that the theory of government is too plain, and the principles on which it should be formed, too obvious, to leave much doubt for the exercise of the wisdom of statesmen, or the ingenuity of speculatists. Nothing is indeed more difficult to foresee, than the practical operation of given powers, unless it be the practical operation of restrictions, intended to control those powers. It is a mortifying truth, that if the possession of power sometimes leads to mischievous abuses, the absence of it also sometimes produces a political debility, quite

as ruinous in its consequences to the great objects of civil government.' p. 210.

The history of the formation of the confederation is given in a few words.

'On the 11th of June, 1776, the same day on which the committee for preparing the declaration of independence was appointed, congress resolved, that "a committee be appointed to prepare and digest the form of a confederation to be entered into between these colonies;" and on the next day a committee was accordingly appointed, consisting of a member from each colony.[1] Nearly a year before this period, (viz. on the 21st of July, 1775,) Dr. Franklin had submitted to congress a sketch of articles of confederation, which does not, however, appear to have been acted on. These articles contemplated a union, until a reconciliation with Great Britain, and on failure thereof, the confederation to be perpetual.

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

'The subject seems not again to have been touched until the 8th of April, 1777, and the articles were debated at several times between that time and the 15th of November of the same year. On this last day the articles were reported with sundry amendments, and finally adopted by congress. A committee was then appointed to draft, and they accordingly drafted, a circular letter, requesting the states respectively to authorize their delegates in congress to subscribe the same in behalf of the state. The committee remark in that letter, "that to form a permanent union, accommodated to the opinions and wishes

[1] Journals of 1776, p. 207.

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

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

of the delegates of so many states, differing in habits, produce, commerce, and internal police, was found to be a work, which nothing but time and reflection, conspiring with a disposition to conciliate, could mature and accomplish. Hardly is it to be expected, that any plan, in the variety of provisions essential to our union, should exactly correspond with the maxims and political views of every particular state. Let it be remarked, that after the most careful inquiry and the fullest information, this is proposed, as the best, which could be adapted to the circumstances of all, and as that alone, which affords any tolerable prospect of general ratification. Permit us, then, (add the committee,) earnestly to recommend these articles to the immediate and dispassionate attention of the legislatures of the respective states. Let them be candidly reviewed under a sense of the difficulty of combining, in one general system, the various sentiments and interests of a continent, divided into so many sovereign and independent communities, under a conviction of the absolute necessity of uniting all our councils, and all our strength, to maintain and defend our common liberties. Let them be examined with a liberality becoming brethren and fellow citizens, surrounded by the same imminent dangers, contending for the same illustrious prize, and deeply interested in being forever bound, and connected together, by ties the most intimate and indissoluble. And finally, let them be adjusted with the temper and magnanimity of wise and patriotic legislators, who, while they are concerned for the prosperity of their own more immediate circle, are capable of rising superior to local attachments, when they may be incompatible with the safety, happiness, and glory of the general confederacy."

'Such was the strong and eloquent appeal made to the states. It carried, however, very slowly conviction to the minds of the local legislatures. Many objections were stated; and many amendments were proposed. All of them, however, were rejected by congress, not probably because they were all deemed inexpedient or improper in themselves; but from the danger of sending the instrument back again to all the states, for reconsideration. Accordingly, on the 26th of June, 1778, a copy, engrossed for ratification, was prepared, and the ratification begun on the 9th day of July following. It was ratified by all the states, except Delaware and Maryland, in 1778; by Dela-

ware in 1779, and by Maryland on the first of March, 1781, from which last date its final ratification took effect, and was joyfully announced by congress.[1]' pp. 211—213.

One of the great causes of the delay of the ratification of the articles of confederation in the several states was the controversies about state boundaries and the public lands.

'On the one hand, the great states contended, that each of them had an exclusive title to all the lands of the crown within its boundaries; and these boundaries, by the claims under some of the charters, extended to the South sea, or to an indefinite extent into the uncultivated western wilderness. On the other hand, the other states as strenuously contended, that the territory, unsettled at the commencement of the war, and claimed by the British crown, which was ceded to it by the treaty of Paris of 1763, if wrested from the common enemy by the blood and treasure of the thirteen states, ought to be deemed a common property, subject to the disposition of congress for the general good.[2] Rhode Island, Delaware, New Jersey, and Maryland insisted upon some provision for establishing the western boundaries of the states; and for the recognition of the unsettled western territory, as the property of the Union.

'The subject was one of a perpetually recurring interest and irritation; and threatened a dissolution of the confederacy. New York, at length, in February, 1780, passed an act, authorizing a surrender of a part of the western territory claimed by her. Congress embraced the opportunity, thus afforded, to address the states on the subject of ceding the territory, reminding them, "how indispensably necessary it is to establish the federal union on a fixed and permanent basis, and on principles, acceptable to all its respective members; how essential to public credit and confidence, to the support of our army, to the vigor of our councils, and the success of our measures; to our tranquillity at home, our reputation abroad; to our very existence, as a free, sovereign, and independent people." They recommended, with earnestness, a cession of the western territory; and at the same time, they as earnestly recommended to Maryland to subscribe the articles of confederation.[3] A cession

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

[2] 2 Dall. R. 470, per Jay C. J.; 2 Pitk. Hist. ch. 11, p. 19 to 36.

[3] Secret Journals, 6 Sept. 1780, p. 442; 1 Kent's Comm. 197, 198; 2 Pitk. Hist. ch. 111, p. 19 to 36.

was accordingly made by the delegates of New York on the first of March, 1781, the very day, on which Maryland acceded to the confederation. Virginia had previously acted upon the recommendation of congress; and by subsequent cessions from her, and from the states of Massachusetts, Connecticut, South Carolina, and Georgia, at still later periods, this great source of national dissension was at last dried up.[1]'

We pass over the author's analysis of the confederation and his history of its decline and fall, though it abounds with facts and remarks of the greatest importance in enabling the reader to understand and fully appreciate our present constitution. It is worthy of observation that some of those provisions in which our present constitution differs from the confederation, have been made the objects of attack by the enemies of the constitution. The most important feature by which it is distinguished from the articles of confederation, is that it was constituted by the *people* of the states, and not by the corporate organized states in their political capacities. There is no denying this distinction, and yet some of the assailants of the government maintain, at this day, that it was constituted by, and is dependent upon, and directly amenable to, the organized embodied states as distinguished from the people themselves of all the states indiscriminately, and as being the citizens, not of the several states, but of the one nation, the United States. Those who maintain this doctrine yearn after the old confederacy.

Another distinguishing feature is the judiciary, without which the government would cease to be such, for how can that be called a government which is without the power of applying and enforcing its laws; and how can laws be applied and enforced except by a tribunal constituted for the purpose? Those who attack the judiciary, therefore, are hostile in principle to the government, and consequently to the Union. They are at the same time regardless of the rights of individuals, for every individual in the United States has a *right* — and it is the broadest, and deepest, and dearest right that he enjoys — to the interpretation and effectual application of the law to his own case; a

[1] The history of these cessions will be found in the Introduction to the Land Laws of the United States, printed by order of congress in 1810, 1817, and 1828; and in the first volume of the Laws of the United States, printed by Bioren and Duane in 1815, p. 452, &c.

right which he cannot enjoy but through the medium of the judicial tribunals. Destroy or cripple the judiciary and you at once deprive every citizen of the United States of the right which constitutes the essence of political freedom, namely, that of being governed by the laws.

The power of effectually regulating commerce is another distinguishing characteristic of the present government, which has been assailed and denied with great vehemence by those who are hostile to the government as such. The same remarks apply to the power to make internal improvements, and the guaranty of the validity of contracts. These powers are all essential to the effectual beneficent operation of the government, and so are odious to all who lean towards the restoration of the old confederacy, and to anarchy. It was in the school of calamitous experience under the confederacy that the majority of the nation gained the dear-bought wisdom which induced them to give to the general government these and the other powers which distinguished it from the preceding one, and which the people will never think of withdrawing until they have forgotten the history of the confederation.

In the sketch of the adoption of the constitution the author makes an extract from the address by the convention to the people, by which it was accompanied when proposed to them; a document of so grave import and so appropriate in admonition to the present times, that we are tempted to copy it.

'"It is obviously impracticable (says the address) in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals, entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend, as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights, which must be surrendered, and those, which may be reserved; and on the present occasion this difficulty was increased by a difference among the several states, as to their situation, extent, habits, and particular interests. In all our deliberations on this subject, we kept steadily in our view that, which appears to us the greatest interest of every true American, *the consolidation of our Union*, in which is involved our prosperity, felicity, safety, perhaps our

national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the convention to be less rigid on points of inferior magnitude, than might have been otherwise expected. And thus *the constitution*, which we now present, is *the result of a spirit of amity, and of that mutual deference and concession*, which the peculiarity of our political situation rendered indispensable."[1]

Rhode Island declined sending delegates to the convention for framing the constitution. Eleven of the states having adopted it, sent representatives to the first congress, a quorum of which was not assembled at New York, the appointed place of meeting, until April, 1789, on the 30th of which month President Washington took the oath of office. The constitution was ratified by North Carolina in November following, and lastly by Rhode Island in May, 1790; and thus was consummated a work too great, too magnificent to have been achieved without obstacles and gigantic efforts. It is interesting to retrace, in these commentaries, the sectional prejudices, the wild apprehensions, the futile suspicions, and absurd objections, which actuated so many in every state to withstand its adoption. Some of the states fondly clung to the privilege of making paper money and enacting *stop* laws. The small states were jealous of the larger ones, as if these latter were more to be feared as fellow citizens, than as aliens, and so, whenever they might choose, aggressors and enemies. One great point of division of the parties related to the extent of powers granted to the government.

'Perhaps, from the very nature and organization of our government, being partly federal and partly national in its character, whatever modifications in other respects parties may undergo, there will forever continue to be a strong line of division between those, who adhere to the state governments, and those, who adhere to the national government, in respect to principles and policy. It was long ago remarked, that in a contest for power, "the body of the people will always be on the side of the state governments. This will not only result from their love of liberty and regard to their own safety, but from other strong principles of human nature. The state governments operate

[1] 12 Journ. of Cong. 109, 110; Journ. of Convention, 367, 368; 5 Marsh. Life of Wash. 129.

upon those familiar personal concerns, to which the sensibility of individuals is awake. The distribution of private justice, in a great measure belonging to them, they must always appear to the sense of the people as the immediate guardians of their rights. They will of course have the strongest hold on their attachment, respect, and obedience."[1] To which it may be added, that the state governments must naturally open an easier field for the operation of domestic ambition, of local interests, of personal popularity, and of flattering influence to those, who have no eager desire for a wide spread fame, or no acquirements to justify it.

'On the other hand, if the votaries of the national government are fewer in number, they are likely to enlist in its favor men of ardent ambition, comprehensive views, and powerful genius. A love of the Union; a sense of its importance, nay, of its necessity, to secure permanence and safety to our political liberty; a consciousness, that the powers of the national constitution are eminently calculated to preserve peace at home, and dignity abroad, and to give value to property, and system and harmony to the great interests of agriculture, commerce, and manufactures; a consciousness, too, that the restraints, which it imposes upon the states, are the only efficient means to preserve public and private justice, and to ensure tranquillity amidst the conflicting interests and rivalries of the states: — these will, doubtless, combine many sober and reflecting minds in its support. If to this number we add those, whom the larger rewards of fame, or emolument, or influence, connected with a wider sphere of action, may allure to the national councils, there is much reason to presume, that the Union will not be without resolute friends.

'This view of the subject, on either side, (for it is the desire of the commentator to abstain, as much as possible, from mere private political speculation,) is not without its consolations. If there were but one consolidated national government, to which the people might look up for protection and support, they might in time relax in that vigilance and jealousy, which seem so necessary to the wholesome growth of republican institutions. If, on the other hand, the state governments could engross all the

[1] Gen. Hamilton's Speech in 1786; 1 Amer. Museum, 445, 447. See also The Federalist, No. 17, 31, 45, 46.

affections of the people, to the exclusion of the national government, by their familiar and domestic regulations, there would be danger, that the Union, constantly weakened by the distance and discouragements of its functionaries, might at last become, as it was under the confederation, a mere show, if not a mockery of sovereignty. So, that this very division of empire may, in the end, by the blessing of providence, be the means of perpetuating our rights and liberties, by keeping alive in every state at once a sincere love of its own government, and a love of the Union, and by cherishing in different minds a jealousy of each, which shall check, as well as enlighten, public opinion.'

Probably many of those who are jealous of an excess of power in the government, are not actuated merely by a preference of the state government; but by a jealousy of government as such. They do not generally attempt to show any advantage from the exercise of the disputed powers by the states, but the argument more usually goes to demonstrate the evils and danger of all power in any kind of government. It is very frequently an indirect implicit eulogy upon the savage state, and too often suggested by a desire to be above the laws, which might be hoped for under a feeble government. The very object of forming a government is to give it powers for the protection of the citizens. Having once secured the weight of the popular voice and influence in making laws, the main question then is, whether the government is so constituted as that the officers shall be bound by them. All the power that gives force to the law, and makes it supreme, is a security to the freedom of the citizen. Weak governments are those that degenerate into a mere domination of faction, or into a military tyranny through their very weakness, for if the government is not strong enough to protect individuals, they resort to voluntary combinations or factions, independent of law, for protection. This is perceived by many of those who oppose the granting of powers to government in general, merely because they wish for the chance of raising themselves above the law, and they know they have a better prospect of doing so under a feeble government than under one that has powers sufficient to make the law respected. We cannot but believe that this is the secret of some of the opposition to the constitution at the time of its adoption, and of still more since that time.

'The objections from different quarters were not only of different degrees and magnitude, but often of totally opposite natures. With some persons the mass of the powers was a formidable objection; with others, the distribution of those powers. With some the equality of vote in the senate was exceptionable; with others the inequality of representation in the house. With some the power of regulating the times and places of elections was fatal; with others the power of regulating commerce by a bare majority. With some the power of *direct* taxation was an intolerable grievance; with others the power of *indirect* taxation by duties on imports. With some the restraint of the state legislatures from laying duties upon exports and passing *ex post facto* laws was incorrect; with others the lodging of the executive power in a single magistrate.[1] With some the term of office of the senators and representatives was too long; with others the term of office of the president was obnoxious to a like censure, as well as his re-eligibility.[2] With some the intermixture of the legislative, executive, and judicial functions in the senate was a mischievous departure from all ideas of regular government; with others the non-participation of the house of representatives in the same functions was the alarming evil. With some the powers of the president were alarming and dangerous to liberty; with others the participation of the senate in some of those powers. With some the powers of the judiciary were far too extensive; with others the power to make treaties even with the consent of two thirds of the senate. With some the power to keep up a standing army was a sure introduction to despotism; with others the power over the militia.[3] With some the paramount authority of the constitution, treaties, and laws of the United States was a dangerous feature; with others the small number composing the senate and the house of representatives was an alarming and corrupting evil.[4]' pp. 271, 272.

The author goes into an investigation of the question whether

[1] 2 Amer. Museum, 534, 536, 540; Id. 427, 435; Id. 547, 555.

[2] 3 Amer. Museum, 62; 2 Pitk. Hist. 283, 284; The Federalist, No. 71, 72.

[3] See 2 Amer. Museum, 422, &c.; Id. 435; Id. 534; Id. 540, &c. 543, &c.; Id. 553; 3 Amer. Museum, 62; Id. 157; Id. 419, 420, &c.

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

the government of the United States is a compact, and we wish we had space to extract all he has said on this subject. He explains, that is, as far as any explanation can be given, and mostly, in the language of Judge Tucker, what is meant in Virginia by the doctrine of 1798.

'The obvious deductions, which may be, and indeed have been, drawn from considering the constitution as a compact between the states, are, that it operates as a mere treaty, or convention between them, and has an obligatory force upon each state no longer, than suits its pleasure, or its consent continues; that each state has a right to judge for itself in relation to the nature, extent, and obligations of the instrument, without being at all bound by the interpretation of the federal government, or by that of any other state; and that each retains the power to withdraw from the confederacy and to dissolve the connexion, when such shall be its choice; and may suspend the operations of the federal goverment, and nullify its acts within its own territorial limits, whenever, in its own opinion, the exigency of the case may require.[1] These conclusions may not always be avowed; but they flow naturally from the doctrines, which we have under consideration.[2] They go to the extent of reducing

[1] Virginia, in the resolutions of her legislature on the tariff, in Feb. 1829 declared, "that there is no common arbiter to construe the constitution; *being a federative compact between* sovereign states, each state has a right to construe the compact for itself." 9 Dane's Abridg. ch. 187, art. 20, § 14, p. 589. See also North American Review, Oct. 1830, p. 488 to 528. The resolutions of Kentucky of 1798 contain a like declaration, that "to this compact [the constitution] each state acceded as a state, and is an integral party; that the government created by this compact was not made the exclusive, or final judge of the powers delegated to itself, &c.; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, *as well of infractions, as of the mode and measure of redress.*" North American Review, Oct. 1830, p. 501. The Kentucky resolutions of 1799 go further, and assert, "that the several states, who formed that instrument, [the constitution] being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification by those sovereignties of all unauthorized acts done under color of that instrument is the rightful remedy." North American Review, Id. 503; 4 Elliot's Debates, 315, 322. In Mr. Madison's Report in the Virginia legislature, in January, 1800, it is also affirmed, that the states are parties to the constitution; but by *states* he here means (as the context explains) the people of the states. That report insists, that the states are in the last resort the ultimate judges of the infractions of the constitution. p. 6, 7, 8, 9.

[2] I do not mean to assert, that all those, who held these doctrines, have

the government to a mere confederacy during pleasure; and of thus presenting the extraordinary spectacle of a nation existing only at the will of each of its constituent parts.

'If this be the true interpretation of the instrument, it has wholly failed to express the intentions of its framers, and brings back, or at least may bring back, upon us all the evils of the old confederation, from which we were supposed to have had a safe deliverance. For the power to operate upon individuals, instead of operating merely on states, is of little consequence, though yielded by the constitution, if that power is to depend for its exercise upon the continual consent of all its members upon every emergency. We have already seen, that the framers of the instrument contemplated no such dependence. Even under the confederation it was deemed a gross heresy to maintain, that a party to a compact has a right to revoke that compact; and the possibility of a question of this nature was deemed to prove the necessity of laying the foundations of our national government deeper, than in the mere sanction of delegated authority.[1] "A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity, than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others, and authorizes them, if they please, to pronounce the compact violated and void."[2] Consequences like these, which place

adopted the conclusions drawn from them. There are eminent exceptions; and among them the learned commentator on Blackstone's Commentaries, seems properly numbered. See 1 Tucker's Black. App. 170, 171, § 8. See the Debates in the senate on Mr. Foot's Resolution in 1830, and Mr. Dane's Appendix, and his Abridgment and Digest, 9th Vol. ch. 187, art. 20, § 13 to 22, p. 588 et seq.; North American Review for Oct. 1830, on the Debates on the Public Lands, p. 481 to 486, 488 to 528; 4 Elliot's Debates, 315 to 330; Madison's Virginia Report, Jan. 1800, p. 6, 7, 8, 9; 4 Jefferson's Correspondence, 415; Vice President Calhoun's Letter to Gov. Hamilton, Aug. 28, 1832.

[1] The Federalist, No. 22; Id. No. 43; See also Mr. Patterson's Opinion in the Convention, 4 Elliot's Debates, 74, 75; and Yates's Minutes.

[2] The Federalist, No. 43. — Mr. Madison, in the Virginia Report of January 1800, asserts, (p. 6, 7,) that "the states being parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that

the dissolution of the government in the hands of a single state, and enable it at will to defeat, or suspend the operation of the laws of the union, are too serious, not to require us to scrutinize with the utmost care and caution the principles from which they flow, and by which they are attempted to be justified.

'The word "compact," like many other important words in our language, is susceptible of different shades of meaning, and may be used in different senses. It is sometimes used merely to express a deliberate and voluntary assent to any act or thing. Thus, it has been said by Dr. South, that "in the beginnings of speech, there was an implicit *compact* founded upon common consent, that such words, voices, or gestures, should be signs, whereby they would express their thoughts;"[1] where, it is obvious, that nothing more is meant, than a mutual and settled appointment in the use of language. It is also used to express any agreement or contract between parties, by which they are bound, and incur legal obligations.[2] Thus we say, that one person has entered into a compact with another, meaning, that the contracting parties have entered into some agreement, which is valid in point of law, and includes mutual rights and obligations between them. And it is also used, in an emphatic sense, to denote those agreements and stipulations, which are entered into between nations, such as public treaties, conventions, confederacies, and other solemn acts of national authority.[3] When we speak of a compact in a legal sense, we naturally include in

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

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

[2] Pothier distinguishes between a contract and an agreement. An agreement, he says, is the consent of two or more persons to form some engagement, or to rescind, or modify an engagement already made. Duorum vel plurium in idem placitum consensus. Pand. Lib. 1, § 1. de Pactis. An agreement, by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other, to give some particular thing, or to do or abstain from a particular act, is a contract; by which he means such an agreement, as gives a party the right legally to demand its performance. Pothier, Oblig. Part. 1, ch. 1, § 1, art. 1, § 1. See 1 Black. Comm. 44, 45.

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

it the notion of distinct contracting parties, having mutual rights, and remedies to enforce the obligations arising therefrom. We suppose, that each party has an equal and independent capacity to enter into the contract, and has an equal right to judge of its terms, to enforce its obligations, and to insist upon redress for any violation of them.[1] This, in a general sense, is true under our systems of municipal law, though practically, that law stops short of maintaining it in all the variety of forms, to which modern refinement has pushed the doctrine of implied contracts.

'A compact may, then, be said in its most general sense to import an agreement according to Lord Coke's definition, *aggregatio mentium*, an aggregation or consent of minds; in its stricter sense to import a contract between parties, which creates obligations, and rights capable of being enforced, and contemplated, as such, by the parties, in their distinct and independent characters. This is equally true of them, whether the contract be between individuals, or between nations. The remedies are, or may be, different; but the right to enforce, as accessory to the obligation, is equally retained in each case. It forms the very substratum of the engagement.

'The doctrine maintained by many eminent writers upon public law in modern times is, that civil society has its foundation in a voluntary consent or submission;[2] and, therefore it is often said to depend upon a social compact of the people composing the nation. And this, indeed, does not, in substance, differ from the definition of it by Cicero, *Multitudo, juris consensu et utilitatis communione sociata;* that is, (as Burlamaqui gives it,) a multitude of people united together by a common interest, and by common laws, to which they submit with one accord.[3]

[1] 2 Black. Comm. 442.

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

[3] 2 Burlamaqui, Part 1, ch. 4, § 9; Heinecc. Elem. Juris. Natur. L. 2, ch. 6, § 107.

Mr. Locke is one of the most eminent authors, who have treated on this subject. He founds all civil government upon consent. "When," says he, "any number of men have so consented to make a community or government, they are thereby presently incorporated, and make one body

'Mr. Justice Blackstone has very justly observed, that the theory of an original contract upon the first formation of society

politic, *wherein the majority have a right to act, and conclude the rest.*" * And he considers this consent to be bound by the will of the majority, as the indispensable result of becoming a community; "else," says he, "this original compact, whereby he, with others, incorporates into one society, would signify nothing, and be no compact at all." † Doctor Paley has urged some very forcible objections against this doctrine, both as matter of theory and of fact, with which, however, it is unnecessary here to intermeddle. The discussion of them would more properly belong to lectures upon natural and political law. ‡ Mr. Burke has, in one of his most splendid performances, made some profound reflections on this subject, the conclusion of which seems to be, that if society is to be deemed a contract, it is one of eternal obligation, and not liable to be dissolved at the will of those, who have entered into it. The passage is as follows: "Society is indeed a contract. Subordinate contracts for objects of more occasional interest may be deposited at pleasure. But the state ought not to be considered as nothing better than a partnership agreement in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to gross animal existence, of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those, who are living, but between those, who are living, those, who are dead, and those, who are to be born. Each contract of each particular state is but a clause in the great primeval contract of eternal society, linking the lower with the higher natures, connecting the visible and invisible world, according to a fixed compact, sanctioned by the inviolable oath, which holds all physical and all moral natures, each in their appointed place. This law is not subject to the will of those, who by an obligation above them, and infinitely superior, are bound to submit their will to that law. The municipal corporations of that universal kingdom are not morally at liberty at their pleasure, and on their speculations of a contingent improvement, wholly to separate and tear asunder the bands of their subordinate community, and to dissolve it into an unsocial, uncivil, unconnected chaos of elementary principles. It is the first and supreme necessity only, a necessity, that is not chosen, but chooses, a necessity paramount to deliberation, that admits no discussion, and demands no evidence, which alone can justify a resort to anarchy. This necessity is no exception to the rule; because this necessity itself is a part too of that moral and physical disposition of things, to which man must be obedient by consent or force. But, if that, which is only submission to necessity, should be made the object of choice, the law is broken, nature is disobeyed, and the rebellious are outlawed, cast forth, and exiled from this world of reason, and order, and peace, and virtue, and fruitful penitence, into the antagonist world of madness, discord, vice, confusion, and unavailing sorrow." Reflections on the Revolution in France.

* Locke on Government, B. 2, ch. 8, § 95.
† Locke on Government, B. 2, § 96, 97, 98, 99; Id. § 119, 120.
‡ Paley on Moral and Political Philosophy, B. 6, ch. 3.

is a visionary notion. "But though society had not its formal beginning from any convention of individuals actuated by their wants and fears; yet it is the sense of their weakness and imperfection, that keeps mankind together; that demonstrates the necessity of this union; and that, therefore, is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society, which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet, in nature and reason, must always be understood, and implied in the very act of associating together; namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member; and that in return for this protection each member should submit to the laws of the community." [1] It is in this sense, that the preamble of the constitution of Massachusetts asserts, that "the body politic is formed by a voluntary association of individuals; that it is a social compact, by which the whole people covenants with each citizen and each citizen with the whole people, that all shall be governed by certain laws for the common good;" and that in the same preamble, the people acknowledge with grateful hearts, that Providence had afforded them an opportunity "of entering into an original, explicit, and solemn compact with each other, and of forming a new constitution of civil government for *themselves* and *their* posterity." It is in this sense too, that Mr. Chief Justice Jay is to be understood, when he asserts,[2] that "every state constitution is a compact made by and between the citizens of a state to govern themselves in a certain manner; and the constitution of the United States is, likewise, a compact made by the people of the United States, to govern themselves as to general objects in a certain manner." He had immediately before stated, with reference to the preamble of the constitution, "Here

[1] 1 Black. Comm. 47; see also 1 Hume's Essays, Essay 12.—Mr. Hume considers, that the notion of government, being universally founded in original contract, is visionary, unless in the sense of its being founded upon the consent of those, who first associate together, and subject themselves to authority. He has discussed the subject at large in an elaborate Essay. Essay 12, p. 491.

[2] *Chisholm* v. *State of Georgia*, 3 Dall. R. 419; 2 Cond. Rep. 635, 668; see also 1 Wilson's Law Lect. 305.

we see the people acting, as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution, by which it was *their will*, that the state governments should be bound, and to which the state constitutions should be made to conform."[1]

'But although in a general sense, and theoretically speaking, the formation of civil societies and states may thus be said to be founded in a social compact or contract, that is, in the solemn, express or implied consent of the individuals composing them; yet the doctrine itself requires many limitations and qualifications, when applied to the actual condition of nations, even of those, which are most free in their organization.[2] Every state, however organized, embraces many persons in it, who have never assented to its form of government; and many, who are deemed incapable of such assent, and yet who are held bound by its fundamental institutions and laws. Infants, minors, married women, persons insane, and many others, are deemed subjects of a country, and bound by its laws; although they have never assented thereto, and may by those very laws be disabled from such an act. Even our most solemn instruments of government, framed and adopted as the constitutions of our state governments, are not only not founded upon the assent of all the people within the territorial jurisdiction; but that assent is expressly excluded by the very manner, in which the ratification is required to be made. That ratification is restricted to those who are qualified voters; and who are, or shall be qualified voters, is decided by the majority in the convention or other body, which submits the constitution to the people. All of the American constitutions have been formed in this manner. The

[1] In the ordinance of congress of 1787, for the government of the territory of the United States northwest of river Ohio, in which the settlement of the territory, and the establishment of several states therein was contemplated, it was declared, that certain articles therein enumerated "shall be considered as *articles of compact* between the original states and the people and states in the said territory, and forever remain unalterable, unless by common consent." Here is an express enumeration of parties, some of whom were not then in existence, and the articles of compact attached as such only, when they were brought into life. And then to avoid all doubt, as to their obligatory force, they were to be unalterable, except by *common consent*. One party could not change or absolve itself from the obligation to obey them.

[2] See Burke's Appeal from the New to the Old Whigs.

assent of minors, of women, and of unqualified voters has never been asked or allowed; yet these embrace a majority of the whole population in every organized society, and are governed by its existing institutions. Nay more; a majority only of the qualified voters is deemed sufficient to change the fundamental institutions of the state, upon the general principle, that the majority has at all times a right to govern the minority, and to bind the latter to obedience to the will of the former. And if more than a plurality is, in any case, required, to amend or change the actual constitution of the society, it is a matter of political choice with the majority for the time being, and not of right on the part of the minority.

'It is a matter of fact, therefore, in the history of our own forms of government, that they have been formed without the consent, express or implied, of the whole people; and that, although firmly established, they owe their existence and authority to the simple will of the majority of the qualified voters. There is not probably a single state in the Union, whose constitution has not been adopted against the opinions and wishes of a large minority, even of the qualified voters; and it is notorious, that some of them have been adopted by a small majority of votes. How, then, can we assert with truth, that even in our free constitutions the government is founded in fact on the assent of the whole people, when many of them have not been permitted to express any opinion, and many have expressed a decided dissent? In what manner are we to prove, that every citizen of the state has contracted with all the other citizens, that such constitution shall be a binding compact between them, with mutual obligations to observe and keep it, against such positive dissent? If it be said, that by entering into the society an assent is necessarily implied to submit to the majority, how is it proved, that a majority of all the people of all ages and sexes were ever asked to assent, or did assent to such a proposition? And as to persons subsequently born, and subjected by birth to such society, where is the record of such assent in point of law or fact?[1]

'In respect to the American Revolution itself, it is notorious, that it was brought about against the wishes and resistance of a

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

formidable minority of the people; and that the declaration of independence never had the universal assent of all the inhabitants of the country. So, that this great and glorious change in the organization of our government owes its whole authority to the efforts of a triumphant majority. And the dissent on the part of the minority was deemed in many cases a crime, carrying along with it the penalty of confiscation, forfeiture, and personal, and even capital punishment; and in its mildest form was deemed an unwarrantable outrage upon the public rights, and a total disregard of the duties of patriotism.

'The truth is, that the majority of every organized society has always claimed, and exercised the right to govern the whole of that society, in the manner pointed out by the fundamental laws, which from time to time have existed in such society.[1] Every revolution, at least when not produced by positive force, has been founded upon the authority of such majority. And the right results from the very necessities of our nature; for universal consent can never be practically required or obtained. The minority are bound, whether they have assented or not; for the plain reason, that opposite wills in the same society, on the same subjects, cannot prevail at the same time; and, as society is instituted for the general safety and happiness, in a conflict of opinion the majority must have a right to accomplish that object by the means, which they deem adequate for the end. The majority may, indeed, decide, how far they will respect the rights or claims of the minority; and how far they will, from policy or principle, insist upon or absolve them from obedience. But this is a matter, on which it decides for itself, according to its own notions of justice or convenience. In a general sense the will of the majority of the people is absolute and sovereign, limited only by its means and power to make its will effectual.[2] The declaration of independence (which, it is historically known, was not the act of the whole American people) puts the doctrine

[1] 1 Tucker's Black. Comm. App. 168; Id. 172, 173; Burke's Appeal from the New to the Old Whigs.

[2] Mr. Dane, in his Appendix to the ninth volume of his Abridgment, has examined this subject very much at large. See, especially, pages 37 to 43. Mr. Locke, the most strenuous asserter of liberty and of the original compact of society, contends resolutely for this power of the majority to bind the minority, as a necessary condition in the original formation of society, Locke on Government, B. 2, ch. 8, from § 95 to § 100.

on its true grounds. Men are endowed, it declares, with certain unalienable rights, and among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the *consent* of the governed. Whenever any form of government becomes destructive of these ends, it is the right of the people (plainly intending, the majority of the people) to alter, or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such forms, as to them shall seem most likely to effect their safety and happiness.

'But whatever may be the true doctrine, as to the nature of the original compact of society, or of the subsequent institution and organization of governments consequent thereon, it is a very unjustifiable course of reasoning to connect with the theory all the ordinary doctrines applicable to municipal contracts between individuals, or to public conventions between nations. We have already seen, that the theory itself is subject to many qualifications; but whether true or not, it is impossible, with a just regard to the objects and interests of society, or the nature of compacts of government, to subject them to the same constructions and conditions, as belong to positive obligations, created between independent parties, contemplating a distinct and personal responsibility. One of the first elementary principles of all contracts is, to interpret them according to the intentions and objects of the parties. They are not to be so construed, as to subvert the obvious objects, for which they were made; or to lead to results wholly beside the apparent intentions of those who framed them.[1]

[1] It was the consideration of the consequences deducible from the theory of an original subsisting compact between the people, upon the first formation of civil societies and governments, that induced Doctor Paley to reject it. He supposed, that, if admitted, its fundamental principles were still disputable and uncertain; that if founded on compact, the form of government, however absurd or inconvenient, was still obligatory; and that every violation of the compact involved a right of rebellion and a dissolution of the government.* Mr. Wilson (afterwards Mr. Justice Wilson) urged the same objection very forcibly in the Pennsylvania Convention for adopting the constitution. 3 Elliot's Debates, 286, 287, 288. Mr. Hume considers

* Paley's Moral Philosophy, B. 6, ch. 3. But see Burke's Reflections on the French Revolution, ante, p. 293, 294.

'Admitting, therefore, for the sake of argument, that the institution of a government is to be deemed, in the restricted sense already suggested, an original compact or contract between each citizen and the whole community, is it to be construed, as a continuing contract after its adoption, so as to involve the notion of there being still distinct and independent parties to the instrument, capable, and entitled, as matter of right, to judge and act upon its construction, according to their own views of its import and obligations? to resist the enforcement of the powers delegated to the government at the good pleasure of each? to dissolve all connexion with it, whenever there is a supposed breach of it on the other side?[1] These are momentous questions, and go to the very foundation of every government founded on the voluntary choice of the people; and they should be seriously investigated, before we admit the conclusions, which may be drawn from one aspect of them.[2]

'Take, for instance, the constitution of Massachusetts, which in its preamble contains the declaration already quoted, that government "is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole government;" are we to construe that compact, after the adoption of the constitution, as still a contract, in which each citizen is still a distinct party, entitled to his remedy for any breach of its obligations, and authorized to separate himself from the whole society, and to throw off all allegiance, whenever he supposes, that any of the fundamental principles of that compact are in-

the true reason for obedience to government to be, not a contract or promise to obey; but the fact, that society could not otherwise subsist. *

[1] 9 Dane's Abridg. ch. 187, art. 20, § 13, p. 589.

[2] Mr. Woodeson (Elements of Jurisp. p. 22,) says, "However the historical fact may be of a social compact, government ought to be, and is generally considered as founded on consent, tacit or express, or a real, or *quasi* compact. This theory is a material basis of political rights; and as a theoretical point, is not difficult to be maintained, &c. &c. Not that such consent is subsequently revokable at the will, even of all the subjects of the state, for that would be making a part of the community equal in power to the whole originally, and superior to the rulers thereof after their establishment." However questionable this latter position may be, (and it is open to many objections,†) it is certain, that a right of the minority to withdraw from the government, and to overthrow its powers, has no foundation in any just reasoning.

* 1 Hume's Essays, Essay 12.

† See 1 Wilson's Lectures, 417, 418, 419, 420.

fringed, or misconstrued? Did the people intend, that it should be thus in the power of any individual to dissolve the whole government at his pleasure, or to absolve himself from all obligations and duties thereto, at his choice, or upon his own interpretation of the instrument? If such a power exists, where is the permanence or security of the government? In what manner are the rights and property of the citizens to be maintained or enforced? Where are the duties of allegiance or obedience? May one withdraw his consent to-day, and re-assert it to-morrow? May one claim the protection and assistance of the laws and institutions to-day, and to-morrow repudiate them? May one declare war against all the others for a supposed infringement of the constitution? If he may, then each one has the same right in relation to all others; and anarchy and confusion, and not order and good government and obedience, are the ingredients, which are mainly at work in all free institutions, founded upon the will, and choice, and compact of the people. The existence of the government, and its peace, and its vital interests will, under such circumstances, be at the mercy and even at the caprice of a single individual. It would not only be vain, but unjust to punish him for disturbing society, when it is but by a just exercise of the original rights reserved to him by the compact. The maxim, that in every government the will of the majority shall, and ought to govern the rest, would be thus subverted; and society would, in effect, be reduced to its original elements. The association would be temporary and fugitive, like those voluntary meetings among barbarous and savage communities, where each acts for himself, and submits only, while it is his pleasure.' pp. 287 — 303.

The author pursues this train of inquiry still further, in what appears to us to be a demonstration that the constitution is what it is declared in the instrument itself to be, a *law*, — a supreme and fundamental *law*.

We have not left ourselves room to follow the author through the investigation of the provisions contained in the constitution as to the tribunal that is its final interpreter, which of course must be the Supreme Court of the United States, since it is the very object of the establishment of that court that it should interpret and apply the *law*, — of which the constitution is a part, — as far as it can be made a subject of investigation between party

and party within the jurisdiction of that court. This is not a matter of mere election and comity or discretionary arrangement among the departments of the government. It is, as we have already intimated, the first and greatest constitutional right of every citizen of the United States, to have all laws as far as they may be applicable to his own case, interpreted, and applied, after a hearing in open court, by the judicial tribunals.

The remainder of this volume is occupied with the rules of interpretation of the constitution, and an analysis of, and a minute and full commentary upon the preamble.

After what we have said and extracted, it is hardly necessary to add, that this work is a masterly exposition of the constitution, so well arranged and so clearly expressed, that a reader in the least conversant with subjects of the sort may, with the greatest facility, penetrate into the depths and recesses of our form of government. It cannot but put at rest some of the constitutional questions that have heretofore occupied the public attention, and if diversity of opinion should still prevail as to others, which will no doubt be the case, the work will necessarily have the effect of giving the discussion a more large and liberal character, for it is quite impossible for any one to read it, though he may dissent ever so widely from the author's views, and then enter into a discussion of constitutional questions with narrow views, querulous exceptions, and frivolous arguments. A patriotic national tone of feeling runs through the work; besides initiating the reader into all the constitutional learning which the most indefatigable industry could collect in the widest range of inquiry with the amplest means for pursuing the investigation, it inspires a love and veneration of our political institutions, and awakens in the reader an exalted and generous national pride.

We have followed the author through the first volume, and intend hereafter to notice the two others.