A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

by
William Rawle, LL.D.

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by William Rawle
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PREFACE

If the following work shall prove useful, as an elementary treatise to the *American student,* the author will be gratified.

If *foreigners* be enabled, by the perusal of it, to obtain a general idea of the merits of the Constitution, his satisfaction will be increased.

To the American *public in general,* its value may chiefly consist in the exhibition of those judicial decisions, which have settled the construction of some points that have been the subjects of controversy.

In this edition, the principles laid down in the first remain unaltered. The author has seen no reason for any change of them. A small variation in the arrangement, and the correction of some typographical errors, will principally distinguish it from the first.

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INTRODUCTION

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Of Political Constitutions in General, of the Nature of the Colonial Governments, and of the British Colonies in North America

By a constitution we mean the principles on which a government is formed and conducted.

On the voluntary association of men in sufficient numbers to form a political community, the first step to be taken for their own security and happiness, is to agree on the terms on which they are to be united and to act. They form a constitution, or plan of government suited to their character, their exigencies, and their future prospects. They agree that it shall be the supreme rule of obligation among them.

This is the pure and genuine source of a constitution in the republican form. In other governments the origin of constitutions is not always the same.

A successful conqueror establishes such a form of government as he thinks proper. If he deigns to give it the name of a constitution, the people are instructed to consider it as a donation from him; but the danger to his power, generally induces him to withhold an appellation, of which, in his own apprehension, an improper use might be made.

In governments purely despotic, we never hear of a constitution. The people are sometimes, however, roused to vindicate their rights, and when their discontents and their power become so great as to prove the necessity of relaxation on the part of the

government, or when a favourable juncture happens, of which they prudently avail themselves, a constitution may be exacted, and the government compelled to recognise principles and concede rights in favour of the people.

The duration of this relief is wholly dependent upon political events. In some countries the people are able to retain what is thus conceded; in others, the concession is swept away by some abrupt revolution in favour of absolute power, and the country relapses into its former condition. To rectify abuses, without altering the general frame of government, is a task, which though found more difficult, yet is of less dignity and utility, than the formation of a complete constitution.

To alter and amend, to introduce new parts into the ancient texture, and particularly new principles of a different and contrary nature, often produces an irregular and discordant composition, which its own confusion renders difficult of execution. The formation of a constitution founded on a single principle is the more practicable from its greater simplicity.

Whether this principle is pure monarchy, aristocracy, or democracy, if it be steadily kept in view, the parts may be all conformable and homogeneous.

In a pure monarchy all the power is vested in a single head. He may be authorized to make and expound, and execute the laws. If this be the result of general consent, such countries possess a constitution. The same may be said of an aristocracy if the people agree to deposit all power in the hands of a select number; and of a democracy, in which they retain, in such manner as they hold most conducive to their own safety, all sovereignty within their own control. The difficulty in either case is to regulate the divisions of the authority granted, so that no portion of it, vested in one branch or one body of men, shall bear an undue relation to the others. Each must be sufficient to support itself, yet all must be made to harmonize and co-operate.

A constitution may combine two of the foregoing principles, like those of ancient Rome, some of the Grecian Republics, and in modern times, Geneva and some of the small communities of Italy: or, like the present government of England, it may com-

bine the three principles.

The high authority which has been often quoted[1] in favour of the last mentioned form, may be allowed its full weight, without impugning the obvious position, that the whole power which is conceded to an hereditary monarch, may be vested by a democratic republic in an elective magistrate, and all the benefits derived from it, enjoyed without the dangers attending hereditary succession.

If an hereditary monarch abuses his power, the people seldom obtain relief without insurrection; and thus, between the ambition of princes on the one side, and the sense of injury on the other, the peace of the country is constantly endangered. If the monarch be elected for life, a young aspiring prince may continue the grievances of the State for a long time, and unless there be an express provision for deposing him, the choice of another in his place would involve the whole body in tumult and disorder.

The power of choosing another supreme magistrate at the end of a reasonable time obviates these objections. The substantial difference between a mixed monarchy and a republic formed on a proper distribution of powers is therefore confined to the term of service of the supreme magistrate.

The powers of every government are only of three kinds; the legislative, executive, and judicial. This natural division, founded upon moral order, must be preserved by a careful separation or distinction of the powers vested in different branches. If the three powers are injudiciously blended; if for instance, the legislative and executive, or the executive and judicial powers, are united in the same body, great dangers may ensue, and the effect would be the same, whether such powers are devolved on a single magistrate or on several. In the wise distribution of these powers, in the application of suitable aids and checks to each, we may attain the *uptimè constituta respublica,* which is the object of general desire and admiration.

It has been reserved for modem times and for this side of the Atlantic, fully to appreciate and soundly to apply the principle

1. Cicero de Republica.

of representation in government. The advantages, which occasionally arise to an individual, of being able to commit his cares and concerns to another, who in the exercise of such authority is considered as the principal himself, are elevated and ennobled by being transferred to the concerns of an entire community. Without the representative principle, one of two consequences must follow; either the whole body must be assembled and act together, or a few, who may have possessed themselves sufficient force, will undertake to dictate and give laws to the whole. But a wise people sees and dreads its own danger in large assemblies. Experience tells them that they cannot trust themselves when thus collected together; that sudden bursts of feeling are likely to predominate over their own judgment; that facts and causes are often misrepresented or misunderstood, and the deliberate judgment, which alone ought to be solely exercised, is overpowered by unaccountable excitement and precipitate impulse. It was forcibly said in reference to the popular assemblies of Athens, that if every Athenian were a Socrates, still every Athenian assembly would be a mob.

A people sagacious enough to discover this imperfection in itself, avoids the danger by selecting a suitable number to act for it, upon full consideration and with due caution; and while it authorizes them to express what are to be considered its own sentiments, it gives to that expression the same effect as if it proceeded immediately from itself. The virtue of this salutary principle is impaired if it be divided. If it extend only to a part of the government; if there are other component parts which have an equal or superior power, independent of the representative principle, the benefit is partial.

In England, of three co-ordinate parts, one only is supposed by the constitution to represent the authority of the people, and at what time this representation was introduced among them is not clearly settled by their own jurists and antiquarians. That it existed before the Norman Conquest in some form, now not exactly ascertained, is indeed agreed; but on the subversion of the Saxon institutions, effected by William, the practice was, at least, suspended until the reign of Henry III. The provincial constitu-

tions of America were, with two exceptions, modelled with some conformity to the English theory; but the colonists of Rhode Island and Providence Plantations were empowered to choose all their officers, legislative, executive, and judicial; and about the same time a similar charter was granted to Connecticut. "And thus," complains Chalmers, a writer devoted to regal principles, "a mere democracy or rule of the people was established. Every power deliberative and active was invested in the freemen or their delegates, and the supreme executive magistrate of the empire, by an inattention which does little honour to the statesmen of those days, was wholly excluded." He expresses his own doubts whether the king had a right to grant such charters.[2]

But, although in all the other provinces, the charters were originally granted or subsequently modified so as to exclude the principle of representation from the executive department, these two provinces, at the time of our revolution, retained it undiminished. The suggestion of the full unqualified extension of the principle of representation may therefore be justly attributed to the example of Rhode Island and Connecticut, which, when converted into States, found it unnecessary to alter the nature of their governments, and continued the same forms, in all respects, except the nominal recognition of the king's authority, until 1818, when Connecticut made some minor changes and adopted a formal constitution. Rhode Island, however, is still satisfied with the charter of Charles II. from which it has been found sufficient to expunge the reservation of allegiance, the required conformity of its legislative acts to those of Great Britain, and the royal right to a certain portion of gold and silver ores, which happily for that State, have never been found within it.

As representation is sometimes partial in respect to the proportion of the powers of government to be exercised, so it is sometimes confined to a portion only of those governed. In this respect it is perhaps still more objectionable. The power of electing the great officers of the State belonged in Venice to a few

2. George Chalmers, *Politica1 Annals of the Present United Colonies From Their Settlement to the Peace of 1763* (London, 1780).

families; the people at large had no voice, and it was therefore indifferent to the Venetians whether they became the subjects of France, or were ceded by her to Austria, or whether they continued to be governed by those in whose appointments they had not the least share. With us, representation is in its nature universal, but in practice there are some exceptions which will be noticed in a subsequent place. They are few, and do not impair the principle.

It is not necessary that a constitution should be in writing; but the superior advantages of one reduced to writing over those which rest on traditionary information, or which are to be collected from the acts and proceedings of the government itself, are great and manifest. A dependence on the latter is indeed destructive of one main object of a constitution, which is to check and restrain governors. If the people can only refer to the acts and proceedings of the government to ascertain their own rights, it is obvious, that as every such act may introduce a new principle, there can be no stability in the government. The order of things is inverted; what ought to be the inferior, is placed above that which should be the superior, and the legislature is enabled to alter the constitution at its pleasure.

This is admitted by English jurists to be the case in respect to their own constitution, which in all its vital parts may be changed by an act of parliament; that is, the king, lords, and commons may, if they think proper, abrogate and repeal any existing laws, and pass any new laws in direct opposition to that which the people contemplate and revere as their ancient constitution. No such laws can be resisted or disobeyed by the subject, nor declared void by their courts of justice as unconstitutional. A written constitution which may be enforced by the judges and appealed to by the people, is therefore most conducive to their happiness and safety.

Vattel[3] justly observes, that the perfection of a State, and its aptitude to fulfil the ends proposed by society, depend on its constitution – the first duty to itself is, to form the best constitution possible, and one most suited to its circumstances; and thus

3. Emer de Vattel, *Law of Nations* (1758), Book I. Ch. 3.

it lays the foundation of its safety, permanence and happiness. But the best constitution which can be framed with the most anxious deliberation that can be bestowed upon it, may, in practice, be found imperfect and inadequate to the true interests of society. Alterations and amendments then become desirable – the people retains – the people cannot perhaps divest itself of the power to make such alterations. A moral power equal to and of the same nature with that which made, alone can destroy. The laws of one legislature may be repealed by another legislature, and the power to repeal them cannot be withheld by the power that enacted them. So the people may, on the same principle, at any time alter or abolish the constitution they have formed. This has been frequently and peaceably done by several of these States since 1776.[4] If a particular mode of effecting such alterations has been agreed on, it is most convenient to adhere to it, but it is not exclusively binding. We shall hereafter see the careful provision in this respect contained in the Constitution of the United States, and the cautious and useful manner in which it has hitherto been exercised. Indeed it is a power which, although it cannot be denied, ought never to be used without an urgent necessity. A good constitution is better understood and more highly valued the longer it continues. Frequent changes tend to unsettle public opinion, and in proportion to the facility with which they are made, is the temptation to make them. The transactions in France since the year 1791 support these remarks.

The history of man does not present a more illustrious monument of human invention, sound political principles, and judicious combinations, than the Constitution of the United States. In many other countries, the origin of government has been vaguely attributed to force, or artifice or accident, and the obscurities of history have been laboriously developed to trace the result of these supposed causes. But America has distinctly presented to view the deliberate formation of an independent government, not under compulsion, or by artifice, or chance, but

4. New Hampshire, New York, Pennsylvania, Delaware, South Carolina, Georgia, and Connecticut, have altered their constitutions since that period.

as a mean of resisting external force, and with a full and accurate knowledge of her own rights, providing for, and securing her own safety. It is not, however, intended to assert that this instrument is perfect, although it is deemed to approach as near to perfection as any that has ever been formed. If defects are perceived they may readily be accounted for.

Great and peculiar difficulties attended its formation. It was not the simple act of a homogeneous body of men, either large or small. It was to be the act of many independent States, though in a greater degree the act of the people set in motion by those States; it was to be the act of the people of each State, and not of the people at large. The interests, the habits, and the prejudices of the people of the different States were in many instances variant and dissimilar. Some of them were accustomed chiefly to agriculture, others to commerce; domestic slavery was reprobated by some, by others it was held lawful in itself, and almost necessary to their existence. Each State was naturally tenacious of its own sovereignty and independence, which had been expressly reserved in their antecedent association, and of which it was still meant to retain all that it did not become unavoidably necessary to surrender. Different local positions and different interests were therefore the sources of many impediments to the completion of this great work, which at last resulted in the combination of mutual and manly concessions: the representatives of each State, deeply impressed with the necessity of giving strength and efficiency to their union, yielded those points which by them were deemed of inferior magnitude. That every State should be fully satisfied was scarcely to be expected; but every State was bound to consider, that not its own peculiar interests only, but those of the whole were to be regarded, and that what might be supposed to be particular sacrifices, were compensated by the general advantage in which they were to participate.

The Constitution thus became the result of a liberal and noble sacrifice of partial and inferior interests, to the general good; and the people, formed into one mass, as citizens of the Union, yet still remaining distinct, as citizens of the different States, created a new government, without destroying those which

existed before, reserving in the latter, what they did not surrender to the former, and in the very act of retaining part, conferring power and dignity on the whole.

It will contribute to a proper understanding of the nature of this government, to consider the political situation of the country and its colonial dependence on Great Britain, before the great event of its final separation.

An explanation of the legal nature of colonies in general will not only serve as an introduction in this view, but will be useful to the student, as the United States, possessing vast tracts of uncultivated land, are in the constant habit of forming colonies therein, under the appellation of territorial governments.

A colony is a portion of the population of a country, either expressly sent or permitted to go to a distant place for the purpose of forming a dependant, political body. Dependance necessarily enters into the description of a colony, for a body of men may emigrate, either with the view of uniting themselves to a foreign community, or of setting up a government of their own, in neither of which cases would the parent country be bound to protect them, or be entitled to interfere with their internal government or control their trade.

The Greeks, the Carthaginians, and the Romans, established numerous colonies, sometimes of a military nature, to secure distant conquests, but more generally of a civil kind and for commercial purposes, or to furnish an outlet for a superabundant population. In the former instance, the removal was compelled, in the two latter voluntary, but in all, the patent country retained and exercised certain rights over her colonists, founded on the express or implied engagement to protect them. The colony always continued so much a part of the parent country that, if she entered into war, the colony was rendered a party to it, and an attack upon the latter, without any hostile declaration against the parent, was held to be an attack upon the parent.

This relation produced certain consequences which were considered beneficial to both. The internal administration of the colony was either immediately directed by the parent State or subjected to her revision, and its trade was either confined to their

mutual intercourse, or sparingly allowed to be shared with other countries.

We are not clearly informed in what manner a revenue for the benefit of the parent State was extracted from them. In some mode it was probably attained, since it is reasonable that those who receive protection out of the public purse, should proportionally contribute to the public expense. One important political feature in these institutions is, that the members of the parent State are entitled to participate in the civil rights of the colony. An Athenian was received as a citizen at Crotona, and a Corinthian at Corcyra; and *vice versa,* the colonist continues a subject or a citizen of the parent State. A Frenchman or an Englishman, born in either of their Colonies, is a natural born subject of the country from which his ancestors migrated.[5]

The Romans alone made some distinctions on this subject, which did not long continue, and are now merely interesting as a matter of history.

But a stranger who joined a colony, gained only those rights which would have appertained to him in the parent country, and hence if an alien cannot hold lands in the United States, he cannot, without an express legislative dispensation, hold land in any of our territories where the feudal tenures prevail.

There are instances in ancient history of colonies increasing in population and strength so as to send out new colonies to adjacent territories, who still however, partook of the original relation to the parent country, and there also are examples of Greek colonies, when they had become populous and strong, throwing off their subjugation to the States from which they sprung.

With us it is a standing and a sound rule, to erect our colonies into States, and receive them into the Union as soon as they acquire a sufficient population; a subject to which we shall

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5. The only exception that occurs with us is, as to the right of the inhabitant of a territory to maintain an action against a citizen of one of the States, in the United States' courts, but this is owing to the particular structure of the Judiciary system of the United States.

again have occasion to advert.

The discoveries made in America by Europeans, being considered as conferring an exclusive right of occupancy on the sovereign under whose authority they had sailed, various parts of this continent were appropriated by the British crown to the establishment of colonies; sometimes by extensive grants to favoured individuals, sometimes by encouraging settlers at large, reserving the general domain to the crown.

Hence two sorts of provincial governments ensued. 1. Those denominated Royal Governments, in which the executive officers were appointed by the crown, but the legislative power was vested in the people, subject however to the control of the king in council. This form prevailed in those provinces where the general domain continued in the crown until it was, from time to time, granted to the settlers. 2. Proprietary Governments, where a large territory was at once granted by the crown to one or more individuals.

Of the latter, Maryland granted to Lord Baltimore, and Pennsylvania to William Penn, are instances; it likewise embraces the provinces of New England as the territory was collectively termed, which was afterwards subdivided into New Hampshire, Massachusetts, Rhode Island and Providence Plantations, and Connecticut. New Jersey, North and South Carolina were also granted to private companies. Charters were granted by the different monarchs, more or less liberal in their terms, but all founded on the general relation of subjection to the crown, sometimes expressly declared, but omitted in others from a conviction that it was unnecessary.

In some of them the power of legislation was uncontrolled by the parent State. In others, the laws that were passed were to be transmitted to England, and if disallowed by the king in council, they lost their force; but until his disapprobation was announced, they were binding on the colony, if enacted according to their respective charters. In most of the colonies, appeals were allowed to the same authority, from the decisions of the highest provincial tribunals. There is no reason to believe that these appeals were in general otherwise decided than the justice of the

case required; but the power of rejecting the acts of the legislature, was sometimes capriciously exercised. It may perhaps have been deemed expedient by the English ministry to keep alive the sense of colonial dependance whenever the charter afforded the opportunity.

In general the courts of Vice Admiralty were retained under the direction of the crown, who appointed the judges of them and exercised exclusive jurisdiction as well in relation to the proper subjects of maritime jurisdiction, as the collection of so much of the revenue as arose from trade, the exclusive power of regulating which was uniformly understood to be reserved. Little direct commercial intercourse was allowed between the colonies and any other than the British dominions: their mutual or internal commerce and their manufactures were seldom interfered with, yet one or two regulations, calculated to promote the interests of English manufactures, were justly complained of, although they were peaceably submitted to.

But, for a long time, Great Britain abstained from imposing internal taxation. On some great public exigencies, when their own safety was endangered, the colonists spontaneously rendered assistance to the extent of their ability, and with these filial efforts, and with the revenue derived from imposts on trade, the parent country appeared to be satisfied. But at length the increase and prosperity of the colonies suggested to the ministry the idea of a new contributory fund, to be subject to their own power and not to be dependent on voluntary grants. The principle that the right of taxation depends on representation, one of the greatest beauties in the ancient constitution of England, though now reduced almost to a shadow, was disregarded, or the British subject was supposed to have suspended his claim for it by residence in a distant colony. The chartered rights, which in the reign of the Stuarts had been frequently trampled on, were again set at nought, and a scheme of internal taxation was adopted, which it was supposed might be easily enforced, and would gradually introduce a systematic extraction of internal revenue. Stamp duties were imposed on most of the instruments in common use, and were to be paid to officers appointed by the crown. But the

people of America were too sagacious not to perceive the danger of submitting to the first inroads upon their rights, and too firm not to resist them. By a simultaneous impulse, from one end of our continent to the other, a concerted abstinence from the use of stamps and the resignation of many of the officers employed, the measure was rendered impracticable.

The common danger suggested the idea of an union for common defence. A precedent for a Congress of the provinces was not wanting. In the year 1753, deputies from several of them had assembled at Albany for a different purpose. The apprehensions of a war between France and Great Britain, in which, as we have already observed, the colonies of each would be necessarily involved, led to this assembly, the object of which was to increase the means of defence by forming an union of the provinces. The plan was disapproved by the British ministry, because it was apprehended that it might produce a concert of measures opposing the supremacy of the mother country.[6] In 1765, the object of a Congress was still defence, but against an enemy of a different description; against the invasion of a ministry supported by acts of Parliament which they could procure at pleasure. Remonstrance and entreaty were, however, the only weapons wielded, and these, combined with the practical opposition every where experienced, produced a change in the ministry and an abandonment of the measure. But although the law was repealed, the ministry thought it expedient to assert, by a declaratory act, the right to bind their colonies, by acts of Parliament, in all cases whatever; a declaration disregarded by the colonists, who now began to feel their own power, till it was endeavoured to be enforced by the imposition of a duty on tea, glass, and a few other articles, expressly for the purpose of raising a revenue to defray part of the colonial expenses. The spirit which had been raised was not however easily allayed. The same indications of resistance were now renewed, but the military force in this country was increased by detachments from the regular army in Great

6. John Marshall, *The Life of George Washington* (Philadelphia, 1804), Vol. I. p. 300; Vol. II. p. 90.

Britain – and the ministry avowed a determination to persevere. Another Congress was convened, and a second course of complaint and supplication unavailingly pursued. The language was still that of faithful, though injured subjects: their grievances were imputed not to the monarch, but to his ministers and in the ardent expressions of hope that they should not be deprived of the rights enjoyed by their fellow subjects, they admitted their own subjection. Even after the fatal blow was struck at Lexington in 1775, and the whole country was in arms, the most dutiful language of subjects towards a sovereign was retained. But this incongruity ceased, when the people, perceiving no relaxation of the efforts to subdue them, boldly resolved to throw off a yoke too heavy to be borne, and no longer contenting themselves with claiming the rights of British subjects, asserted those of independent man.

By this great measure the Congress of provinces became at once the Congress of so many sovereign States – entitled to places in the catalogue of nations; and a meeting of humble, complaining colonists terminated in the formation of an empire.

It soon was found expedient to devise some explicit form of association, by which the powers granted to the Congress or retained by the new States should be distinctly ascertained. Articles of Confederation were therefore prepared, (and with the exception of one State, which, however, afterwards came into them,) speedily adopted, by which the United States were formed into a Federal body, with an express reservation to each State of its freedom, sovereignty and independence, and of every power, right, and jurisdiction, not expressly delegated to the United States in Congress assembled. The Federal powers were declared to be those of making war and peace, coining money and issuing bills of credit, establishing courts of admiralty, building and equipping a navy, ascertaining the number of men to be raised for the army, making requisitions on each State for its quota, regulating the trade and managing all affairs with the Indians, establishing post-offices, and some other matters of less importance; but for many of these, even for agreeing on the number of ships to be built, and the appointment of a commander in chief of the army or navy, the consent of at least nine States, in Congress assem-

bled, was requisite. From this outline it is obvious that the Congress still continued in a great degree dependent on the individual States, which alone possessed the means of raising supplies. The power to coin money, when it did not possess the bullion, to emit bills of credit when it had no funds to redeem them, was purely nominal. Even the expenses of its own members were to be defrayed by the respective States which sent them, and which retained the dangerous power to recall them at pleasure. Yet such was the fervour of freemen engaged in a common cause, that, while the war continued, the mere recommendations of Congress carried with them the force of mandates, and it was not until after the peace of 1783, that the necessity of giving to the head of the Union the means of supporting its own government was universally felt and acknowledged. After some ineffectual substitutes had been proposed, a convention of delegates from the different States was assembled at Philadelphia in 1787. The members were appointed by the legislatures of the respective States. The result of their deliberations was again to become a matter of recommendation which required the assent of the people to give it effect. It was communicated by the convention to Congress, and by Congress to the several legislatures, in order to be submitted to a convention of delegates chosen in each State by the people. This course, which had been recommended by the general convention itself, eventuated in its final adoption by all the States. But the assent of nine was sufficient for its commencement, and on the 2d of July, 1788, Congress was informed, that nine States had adopted it. On the 13th of September, they fixed the time for the appointment and meeting of electors, and "commencing proceedings under the new Constitution."

CHAPTER ONE
The Constitution of the United States

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The government, formed under the appellation of *The United States of America*, is declared in the solemn instrument which is denominated the Constitution, to be "ordained and established by the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

In this distinct exposition of principles, most of which are common to all freemen, and some peculiar to the situation of our country, we perceive the motives, and are guided in the construction of the instrument. We find the intention to create a new political society; to form a new government which the necessities and dangers of our country loudly required. The imperfect and inefficient Confederation of 1779, is intended to be abandoned. The States are no longer to be known to each other merely as States. The people of the States unite with each other, without destroying their previous organization. They vest in a new government all the powers necessary for the attainment of the great objects to which the States, separately or confederated, had been found incompetent. They reserve to the State governments, or to themselves, only what is not necessary for the attainment of those objects. In all other respects the sovereignty of the States is unaltered. The obligations of duty and allegiance to them are not impaired; but in all those instances which are within the sphere of

the general government, the higher obligations of allegiance and duty to it, supersede what was due to the State governments, because from the nature of the case they cannot be co-equal. Two governments of concurrent right and power cannot exist in one society. Superiority must, therefore, be conferred on the general government, or its formation, instead of promoting domestic tranquility, would produce perpetual discord and disorder.

The principles of this Constitution to be thoroughly understood should be frequently contemplated. The composition of such a government presents a novel and sublime spectacle in political history. It is a society, formed not only out of the people of other societies, but in certain parts, formed by those societies themselves. The State is as much a member of the Union and forms as much a part of the greater society as the people themselves, yet the State does not enter into the Union upon federate principles; it does not send representatives in the nature of Federal delegates, or ambassadors; it cannot, at its own pleasure, increase or diminish their number. When the appointment is made, the person appointed becomes an officer of the United States, not of the State which sends him, and he is not politically responsible to his immediate constituent. In one case only is a vote taken by States, and the immediate representatives of the people, in that case, represent the State.

It will be seen that in some cases a State has the right to claim the aid of the judicial power of the Union, and in all, it is bound to support the legislative and executive acts of the general government when consistent with the Constitution. As therefore it is neither a stranger, nor, properly speaking, a confederate, it seems to follow that it must be considered as part of the greater nation, a term, which in the course of this work we shall chiefly use in reference to the United States, because although every political body, governed only by its own laws or internal regulations, may be denominated a nation, yet the States, not possessing that absolute independence, cannot with full propriety be so designated. But a name is of little importance if the substance be retained; and if Virginia or Pennsylvania are not known abroad as nations, it does not affect their power at home as States. In this

relation every State must be viewed as entirely sovereign in all points not transferred by the people who compose it to the government of the Union: and every exposition that may be given to the Constitution, inconsistent with this principle, must be unsound. The supremacy of the Union in all those points that are thus transferred, and the sovereignty of the State in all those which are not transferred, must therefore be considered as two co-ordinate qualities, enabling us to decide on the true mode of giving a construction to the Constitution. As different views have prevailed, different theories of construction have been formed. Some have contended that it should be construed strictly; others have asserted, that the most liberal construction should be allowed. By construction we can only mean the ascertaining the true meaning of an instrument, or other form of words, and by this rule alone ought we to be governed in respect to this Constitution. A strict construction, adhering to the letter, without pursuing the sense of the composition, could only proceed from a needless jealousy, or rancorous enmity. On the other hand, a liberal construction may be carried to an injurious extreme; concessions of power may be conceived, or assumed, which never were intended, and which therefore are not necessary for its legitimate effect. The true rule therefore seems to be no other than that which is applied in all cases of impartial and correct exposition; which is to deduce the meaning from its known intention and its entire text, and to give effect, if possible, to every part of it, consistently with the unity, and the harmony of the whole.

In many respects we have the benefit of the learned elucidations of judicial tribunals, and wherever the Supreme Court of the United States has pronounced its solemn decision upon constitutional points, the author has gladly availed himself of this irrefragable authority; but where a guide so certain cannot be found, recourse can only be had to an anxious and serious endeavour to display and expound, with truth and justice, the main features of a Constitution which must always be more admired, as it is more considered, and better understood. If these examinations produce the same effect upon the reader that they have upon the author, the attachment to it, of our native citizens,

and its attractions to foreigners will be increased; and those who are now here, and those who may hereafter be here, will concur to venerate and support a government, eminent above all others in promoting the freedom and the happiness of man.

CHAPTER TWO
Of the Legislative Power

The course proposed to be pursued is first, to consider the legislative power as it resides in the Senate and House of Representatives; to what extent the President participates in general legislation, and his power in conjunction with the Senate relative to making treaties, with the operation and effect of treaties; we shall then proceed to those powers of general legislation which are implied by the Constitution, or expressly enumerated, and conclude this head with a view of the restraints under which both the United States and the States severally, are Constitutionally placed.

The legislative power is vested in the Congress of the United States, consisting of the Senate and house of representatives. The first paragraph evinces that it is a limited government. The term "all legislative powers herein granted," remind both the Congress and the people, of the existence of some limitation. The introduction displays the general objects. The Constitution itself enumerates some of the powers of Congress, and excludes others which might perhaps fall within the general expressions of the introductory part. These prohibitions are in some degree auxiliary to a due construction of the Constitution. When a general power over certain objects is granted, accompanied with certain exceptions, it may be considered as leaving that general power undiminished in all those respects which are not thus excepted.

The value and effect of this proposition may be adverted to hereafter.

The legislative body possesses with us a great advantage over that of those countries where it may be adjourned or dissolved at the pleasure of the executive authority. It is self-moving and self-dependent. Although it may be convened by the executive, it cannot be adjourned or dissolved by it. The time of its assembling is fixed by the Constitution, until which, unless a law has been passed appointing an earlier day, or the President on extraordinary occasions has thought proper to convene it, the *action* of the legislature cannot commence; but if in their opinion the public good shall require it, they may continue uninterruptedly in session, until the termination of the period for which the members of the House of Representatives are elected, and they may fix as early a time for the meeting of the next Congress as they think proper. A similar principle prevails in all the State Constitutions, and it is only where it exists, that a legislature is truly independent. It is as inconsistent with sound principles for the executive to suspend, at its pleasure, the action of the legislature, as for the latter to undertake to deprive the executive of its constitutional functions.

But without a constitutional limit on its duration, it must be conceded, that a power in the legislature to protract its own continuance, would be dangerous. Blackstone attributes the misfortunes of Charles I. to his having unadvisedly passed an act to continue the Parliament, then in being, till such time as it should please to dissolve itself, and this is one of the many proofs that the much praised Constitution of that country wants the character of certainty. No act of Congress could prolong the continuance of the legislature beyond the term fixed by the Constitution.

CHAPTER THREE
Of the Senate

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The Senate, on account of its more permanent duration and various functions, will receive our first attention. If the infusion of any aristocratic quality can be found in our Constitution, it must be in the Senate; but it is so justly tempered and regulated by other divisions of power, that it excites no uneasiness. The mounds and safeguards with which it is surrounded must be violently broken down, before any political injury can arise from the Senate.

The Senators are appointed from time to time, by the legislatures of the different States; but if a vacancy happens during the recess of the State legislature, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

The vesting this power in the State legislatures is the only material remnant of the federative character of the late Congress; but the delegates then appointed possessed the whole power; those now appointed, hold but a part of the powers of the general government. It is recommended by the double advantage of favouring a select appointment, and of giving to the State governments, such an agency in the formation of the general government as preserves the authority of the former, and contributes to render them living members of the great body.[1]

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1. *Federalist*, No. 62. The author avails himself of the first occasion to quote this excellent work, to unite in the general homage that has been paid to it.

Whether the appointment shall be made by a joint or a concurrent vote of the two branches, when the legislature of a State consists of two branches, as it now universally does, the Constitution does not direct. The difference is, that in a joint vote, the members of both houses assemble together and vote numerically. A concurrent vote is taken by each house voting separately, and the vote of one receiving the assent of the other branch.

The person appointed must be at least thirty years of age, have been a citizen of the United States nine years, and at the time of his election, he must be an inhabitant of the State by which he shall be chosen. The senatorial trust requiring great extent of information and stability of character, a mature age is requisite. Participating immediately in some of the transactions with foreign nations, it ought to be exercised by those who are thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The term of nine years is a reasonable medium between a total exclusion of naturalized citizens, whose merits and talents may claim a share of public confidence, and an indiscriminate and hasty admission of them, which might possibly create a channel for foreign influence in the national council.[2]

Each State, whether more or less populous, appoints two Senators – a number which would have been inconvenient, if the votes in the Senate were taken, as in the former Congress, by States, when, if the delegates from a State were equally divided, the vote of the State was lost; and which of course rendered an uneven number preferable: but in the Senate, a numerical vote is taken in all cases, and the division of opinion among those who represent particular States, has no influence in the general result. If the Senate should be equally divided, the casting vote is given by the Vice President, whose office it is to preside in the Senate. The equality of States in this respect is not perhaps defensible on

2. The letters signed *Publius* were the production of three enlightened Statesmen, Jay, Madison, and Hamilton. They were collected and published under the title of the *Federalist*, and contain the soundest principles of government, expressed in the most eloquent language.

the principle of representing the people, which ought always to be according to numbers; but it was the result of mutual concession and compromise, in which the populous States, enjoying the advantages of proportional numbers in the House of Representatives, by which they, are enabled to control the interests of the smaller States, yielded as a compensation, the principle of equality in this branch of the legislature, which enjoys in most respects equal, in some respects, greater powers.

No other political league or community is known to have possessed this wise adjustment of its capacities and qualities. In Europe, different states or cities have always stood as individual members of the league, and the majority which decided, was the majority of the league, not of the representatives who attended. This composition of both is peculiar to our country, and has been found in practice neither productive of schism nor deficient in energy. A perfect independence of sentiment has been uniformly manifested by the members, and great superiority to local interests and impressions, particularly sought for in the Senate, has always been found there.

It may not be improper to observe in this place, that some of the State legislatures appear to have viewed the relative duties of the Senators whom they have appointed in a more restricted light than it is *apprehended* the Constitution implies. It seems to have been supposed that the Senators were bound to obey the directions of the State legislatures, and the language of some resolutions has been that the Senators be "instructed," and the members of the House of Representatives from the particular States "requested," to make or support certain propositions. But surely the opinion is erroneous. A Senator is no more bound to obey the instructions of the State legislature, in opposition to his own judgment, than a Representative of the people in the other house is bound by the occasional instructions of his constituents. They are both elected for the purpose of freely and honestly exercising their own judgments according to the best of their capacities.

The moment they take their seats, they commence the task of legislating for the Union, including the State from which they are delegated, whose peculiar interests and desires it may of-

ten be necessary to postpone to the general benefit. On the contrary, the State contemplates and urges its own interests; its inhabitants, or the electoral sections of its inhabitants, in like manner consider and pursue theirs, and it is perfectly proper that they should be represented to and directly pressed upon the persons so delegated. But the powers and the duties of those delegates are essentially altered if such requests are converted into binding instructions. In respect to Senators, the impropriety of the measure seems peculiarly striking. If one State possesses a right to direct the votes of its Senators, every other State must have the same right, and if every State were to exercise such right, no portion of the legislative power would really reside in the Senate, but would be held by the States; thus relapsing into the principles of the old Confederation, or falling into something worse.

The appointment of a Senator is for six consecutive years, but if a vacancy happens, an appointment is made by the executive of the State for the proportion of the term of service which remains. Under the direction of the Constitution, the Senators were at their first meeting divided into three classes: the seats of those of the first class to be vacated at the end of two years, of the second class at the end of four, and of the third at the end of six years; the reason of which was that the Senate should always continue a permanent body. The House of Representatives, at the expiration of two years is at an end: a new House, though it may consist of the same members, then succeeds; but the public service requires, for many purposes, that there should always be a Senate. In executing the directions of the Constitution, it was so arranged that two Senators from the same State should not go out at the same time.

The Senate at first sat with closed doors, but it was afterwards conceived to be more conformable to the genius of a free country that the deliberations of both the legislative bodies should be openly conducted, with the exception, however, of its consideration of treaties and appointments to offices on the Presdent's nomination.

On these points, their deliberations would be very improperly exposed to public notice; the national interest is better pro-

moted by waiting for the result.

A majority of the Senate constitutes a quorum; that is, a majority of the members of the Senate, not a majority of the States. The power of legislation might therefore be suspended by the wilful absence of a majority; but what effect this would have on the government, in other respects, will hereafter be considered.

In respect to the single function of legislation, a deep and serious discussion might be had on a point which has not yet occurred, and it is fervently hoped may never arise in this country. If the legislatures of a majority of the States were to omit or refuse to appoint Senators, the question would be, whether the majority of those who were actually in office, excluding from the computation the number to which the non-appointing States were entitled, would be sufficient, within the spirit of the Constitution, to uphold the legislative power. It is sufficient to state, without presuming to decide the question.