

Tucker's Blackstone

Volume 1 - Appendix

Note D

VIEW OF THE CONSTITUTION OF THE UNITED STATES

[Section 1 - Nature of U.S. Constitution; manner of its adoption]

HAVING in the preceding pages taken a slight view of the several forms of government, and afterwards examined with somewhat closer attention the constitution of the commonwealth of Virginia, as a sovereign, and independent state, it now becomes necessary for the American student to enquire into the connexion established between the several states in the union by the constitution of the United States. To assist him in this enquiry, I shall now proceed to consider: First, the nature of that instrument, with the manner in which it hath been adopted; and, Secondly, its structure, and organization; with the powers, jurisdiction, and rights of the government thereby established, either independent of; or connected with, those of the state governments; together with the mutual relation which subsists between the federal, and state governments, in virtue of that instrument.

I. I am to consider the nature of that instrument by which the federal government of the United States, has been established, with the manner of its adoption.

The constitution of the United States of America, then, is an original, written, federal, and social compact, freely, voluntarily, and solemnly entered into by the several states of North-America, and ratified by the people thereof, respectively; whereby the several states, and the people thereof; respectively, have bound themselves to each other, and to the federal government of the United States; and by which the federal government is bound to the several states, and to every citizen of the United States.

It is a compact; by which it is distinguished from a charter, or grant; which is either the act of a

superior to an inferior; or is founded upon some consideration moving from one of the parties, to the other, and operates as an exchange, or sale: but here the contracting parties, whether considered as states, in their politic capacity and character; or as individuals, are all equal; nor is there any thing granted from one to another: but each stipulates to part with, and to receive the same thing, precisely, without any distinction or difference in favor of any of the parties.

The considerations upon which this compact was founded, and the motives which led to it, as declared in the instrument itself; were, to form a more perfect union than theretofore existed between the confederated states; to establish justice, and ensure domestic tranquility, between them; to provide for their common defence, against foreign force, or such powerful domestic insurrections as might require aid to suppress them; to promote their general welfare; and to secure the blessings of liberty to the people of the United States, and their posterity 1.

2. It is a federal compact; several sovereign and independent states may unite themselves together by a perpetual confederacy, without each ceasing to be a perfect state. They will together form a federal republic: the deliberations in common will offer no violence to each member, though they may in certain respects put some constraint on the exercise of it, in virtue of voluntary engagements 2. The extent, modifications, and objects of the federal authority are mere matters of discretion; so long as the separate organization of the members remains, and from the nature of the compact must continue to exist, both for local and domestic, and for federal purposes; the union is in fact, as well as in theory, an association of states, or, a confederacy 3. The state governments not only retain every power, jurisdiction, and right not delegated to the United States, by the constitution, nor prohibited by it to the states 4, but they are constituent and necessary parts of the federal government; and without their agency in their politic character, there could be neither a senate, nor president of the United States; the choice of the latter depending mediately, and of the former, immediately, upon the legislatures of the several states in the union 5.

This idea of a confederate, or federal, republic, was probably borrowed from Montesquieu, who treats of it as an expedient for extending the sphere of popular government, and reconciling

internal freedom with external security 6, as hath been mentioned elsewhere 7. The experience of the practicability and benefit of such a system, was recent in the memory of every American, from the success of the revolutionary war, concluded but a few years before; during the continuance of which the states entered into a perpetual alliance and confederacy with each other.

Large concessions of the rights of sovereignty were thereby made to congress; but the system was defective in not providing adequate means, for a certain, and regular revenue; congress being altogether dependent upon the legislatures of the several states for supplies, although the latter, by the terms of compact, were bound to furnish, whatever the former should deem it necessary to require. At the close of the war, it was found that congress had contracted debts, without a revenue to discharge them; that they had entered into treaties, which they had not power to fulfil; that the several states possessed sources of an extensive commerce, for which they could not find any vent. These evils were ascribed to the defects of the existing confederation; and it was said that the principles of the proposed constitution were to be considered less as absolutely new, than as the expansion of the principles contained in the articles of confederation: that in the latter those principles were so feeble and confined, as to justify all the charges of inefficiency which had been urged against it; that in the new government, as in the old, the general powers are limited, and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdictions 8

This construction has since been fully confirmed by the twelfth article of amendments, which declares, "that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This article was added "to prevent misconstruction or abuse" of the powers granted by the constitution 9, rather than supposed necessary to explain and secure the rights of the states, or of the people. The powers delegated to the federal government being all positive, and enumerated, according to the ordinary rules of construction, whatever is not enumerated is retained; for, *expressum facit tacere tacitum* is a maxim in all cases of construction: it is likewise a maxim of political law, that sovereign states cannot be deprived of any of their rights by implication; nor in any manner

whatever but by their own voluntary consent, or by submission to a conqueror.

Some of the principal points mutually insisted on, and conceded, by the several states, as such, to each other, were, that representatives and direct taxes should be apportioned among the states, according to a decennial census; that each state should have an equal number of senators; and that the number of electors of the president of the United States, should in each state be equal to the whole number of senators and representatives to which such state may be entitled in the congress; that no capitation or other direct tax shall be laid, unless in proportion to the census; that full faith and credit shall be given in each state to the public acts, records, and proceedings of every other state; that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; that persons charged with treason, felony, or other crime, in one state, and fleeing from justice to another state, shall be delivered up, on demand of the executive authority of the state from which he fled; that no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned; that the United States shall guarantee to every state in the union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence; that amendments to the constitution, when proposed by congress, shall not be valid unless ratified by the legislatures of three fourths of the several states; and that congress shall, on the application of two thirds of the legislatures of the several states, call a convention for proposing amendments, which when ratified by the conventions in three fourths of the states shall be valid to all intents and purposes, as a part of the constitution; that the ratification of the conventions of nine states, should be sufficient for the establishment of the constitution, between the states so ratifying; and lastly, by the amendment before mentioned, it is declared, that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. Thus far every feature of the constitution appears to be strictly federal.

3. It is also, to a certain extent, a social compact; the end of civil society is the procuring for the

citizens whatever their necessities require, the conveniences and accommodations of life, and, in general, whatever constitutes happiness: with the peaceful possession of property, a method of obtaining justice with security; and in short, a mutual defence against all violence from without. In the act of association, in virtue of which a multitude of men form together a state or nation, each individual is supposed to have entered into engagements with all, to procure the common welfare: and all are supposed to have entered into engagements with each other, to facilitate the means of supplying the necessities of each individual, and to protect and defend him 10. And this is, what is ordinarily meant by the original contract of society. But a contract of this nature actually existed in a visible form, between the citizens of each state, respectively, in their several constitutions; it might therefore be deemed somewhat extraordinary, that in the establishment of a federal republic, it should have been thought necessary to extend its operation to the persons of individuals, as well as to the states, composing the confederacy. It was apprehended by many, that this innovation would be construed to change the nature of the union, from a confederacy, to a consolidation of the states; that as the tenor of the instrument imported it to be the act of the people, the construction might be made accordingly: an interpretation that would tend to the annihilation of the states, and their authority. That this was the more to be apprehended, since all questions between the states, and the United States, would undergo the final decision of the latter.

That the student may more clearly apprehend the nature of these objections, it may be proper to illustrate the distinction between federal compacts and obligations, and such as are social by one or two examples. A federal compact, alliance, or treaty, is an act of the state, or body politic, and not of an individual; on the contrary, the social contract is understood to mean the act of individuals, about to create, and establish, a state, or body politic, among themselves.... Again; if one nation binds itself by treaty to pay a certain tribute to another; or if all the members of the same confederacy oblige themselves to furnish their quotas of a common expence, when required; in either of the cases, the state, or body politic, only, and not the individual is answerable for this tribute, or quota; for although every citizen in the state is bound by the contract of the body politic, who may compel him to contribute his part, yet that part can neither be ascertained nor levied, by any other authority than that of the state, of which he is a citizen.

This is, therefore, a federal obligation; which cannot reach the individual, without the agency of the state who made it. But where by any compact, express, or implied, a number of persons are bound to contribute their proportions of the common expence; or to submit to all laws made by the common consent; and where, in default of compliance with these engagements the society is authorized to levy the contribution, or, to punish the person of the delinquent; this seems to be understood to be more in the nature of a social, than a federal obligation.... Upon these grounds, and others of a similar nature, a considerable alarm was excited in the minds of many, who considered the constitution as in some danger of establishing a national, or consolidated government, upon the ruins of the old federal republic.

To these objections the friends and supporters of the constitution replied, "that although the constitution would be founded on the assent and ratification of the people of America, yet that assent and ratification was to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent states, to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state, the authority of the people themselves. The, act, therefore establishing the constitution, will not," said they, "be a national but a federal act.

"That it will be a federal and not a national act, as these terms are understood by the objectors, the act of the people, as forming so many independent states, not as forming one aggregate nation, is obvious one from this single consideration, that it is the result neither from the decision of a majority of the people of the union, nor from a majority of the states. It must result from the unanimous assent of the several states that are parties to it, differing no otherwise from their ordinary assent, than in its being expressed, not by the legislative authority, but by that of the people themselves.

Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority; in the same manner as the majority in each state must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes; or by considering the will of the majority of the

states, as evidence of the will of the majority of the people of the United States. Neither of these rules have been adopted. Each state in ratifying the constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation then the new constitution will be a federal, and not a national, constitution.

"With regard to the sources from which the ordinary powers of government are to be derived. The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular state. So far the government is national, not federal. The senate, on the other hand, will derive its powers from the states, as political and co-equal societies; and these will be represented on the principle of equality in the senate, as under the confederation. So far the government is federal, not national. The executive power will be derived from a very compound source. The immediate election of the president is to be made by the states, in their political character. The votes allotted to them are in a compound ratio, which considers them partly as distinct and co-equal societies; partly as unequal members of the same societies. The eventual election again is to be made, by that branch of the legislature which consists of the national representatives: but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and co-equal bodies politic. From this aspect of the government it appears to be of a mixt character, presenting at least as many federal, as national features 11.

"The difference between a federal and national government, as it relates to the operation of the government, is, by the adversaries of the plan of the convention, supposed to consist in this, that in the former the powers operate on the political bodies composing the confederacy in their political capacities; in the latter, on the individual citizens composing the nation in their individual capacities.

On trying the constitution by this criterion, it falls under the national, not the federal character, though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which states may be parties, they must be viewed and proceeded against in their collective and political capacities only 12."

"In some instances the powers of the federal government, established by the confederation, act immediately on individuals: in cases of capture, of piracy, of the post-office, of coins, weights, and measures, of trade with the Indians, of claims under grants of land by different states, and, above all, in the cases of trials by courts martial in the army and navy, by which death may be inflicted without the intervention of a jury, or even of a civil magistrate; in all these cases the powers of the confederation operate immediately on the persons and interests of individual citizens. The confederation itself authorises a direct tax to a certain extent on the post-office; and the power of coinage has been so construed by congress, as to levy a tribute immediately from that source also 13. The operation of the new government on the people in their individual capacities, in its ordinary and most essential proceedings, will, on the whole, in the sense of its opponents, designate it, in this relation, a national government.

"But if the government be national with regard to the operation of its powers, it changes its aspect again when we contemplate it in relation to the extent of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature.

Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere. In this relation then the government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects, only, and leaves to the several states a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made according to the rules of the

constitution; and all the usual and most effectual precautions are taken to secure this impartiality.

"If we try the constitution by its last relation, to the authority by which amendments are to be made, we find it neither wholly national, nor wholly federal. Were it wholly national, the supreme and ultimate authority would reside in a majority of the people of the union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal on the other hand, the concurrence of each state in the union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly in computing the proportion by states, not by citizens, it departs from the national, and advances towards the federal character; in rendering the concurrence of less than the whole number of states sufficient, it loses again the federal, and partakes of the national character.

"The proposed constitution, therefore, even when tested by the rules laid down by its antagonists, is in strictness neither a national nor a federal constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national; in the operation of those powers, it is national, not federal; in the extent of them, it is federal, not national; and finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national 14."

4. It is an original compact; whatever political relation existed between the American colonies, antecedent to the revolution, as constituent parts of the British empire, or as dependencies upon it, that relation was completely dissolved and annihilated from that period. From the moment of the revolution they became severally independent and sovereign states, possessing all the rights, jurisdictions, and authority, that other sovereign states, however constituted, or by whatever title denominated, possess; and bound by no ties but of their own creation, except such as all other civilized nations are equally bound by, and which together constitute the customary

law of nations. A common council of the colonies, under the name of a general congress, had been established by the legislature, or rather conventional authority in the several colonies. The revolutionary war had been begun, and conducted under its auspices; but the first act of union which took place among the states after they became independent, was the confederation between them, which was not ratified until March 1781, near five years from the commencement of their independence. The powers thereby granted to congress, though very extensive in point of moral obligation upon the several states, were perfectly deficient in the means provided for the practical use of them, as has been already observed.

The agency and co-operation of the states, which was requisite to give effect to the measures of congress, not unfrequently occasioned their total defeat. It became an unanimous opinion that some amendment to the existing confederation was absolutely necessary, and after a variety of unsuccessful attempts for that purpose, a general convention was appointed by the legislatures of twelve states, who met, consulted together, prepared, and reported a plan, which contained such an enlargement of the principles of the confederation, as gave the new system the aspect of an entire transformation of the old 15. The mild tone of requisition was exchanged for the active operations of power, and the features of a federal council for those of a national sovereignty. These concessions it was seen were, in many instances, beyond the power of the state legislatures, (limited by their respective constitutions) to make, without the express assent of the people.

A convention was therefore summoned, in every state by the authority of their respective legislatures, to consider of the propriety of adopting the proposed plan; and their assent made it binding in each state; and the assent of nine states rendered it obligatory upon all the states adopting it. Here then are all the features of an original compact, not only between the body politic of each state, but also between the people of those states in their highest sovereign capacity.

Whether this original compact be considered as merely federal, or social, and national, it is that instrument by which power is created on the one hand, and obedience exacted on the other. As

federal it is to be construed strictly, in all cases where the antecedent rights of a state may be drawn in question 16; as a social compact it ought likewise to receive the same strict construction, wherever the right of personal liberty, of personal security, or of private property may become the subject of dispute; because every person whose liberty or property was thereby rendered subject to the new government, was antecedently a member of a civil society to whose regulations he had submitted himself, and under whose authority and protection he still remains, in all cases not expressly submitted to the new government 17. The few particular cases in which he submits himself to the new authority, therefore, ought not to be extended beyond the terms of the compact, as it might endanger his obedience to that state to whose laws he still continues to owe obedience; or may subject him to a double loss, or inconvenience for the same cause.

And here it ought to be remembered that no case of municipal law can arise under the constitution of the United States, except such as are expressly comprehended in that instrument. For the municipal law of one state or nation has no force or obligation in any other nation; and when several states, or nations unite themselves together by a federal compact, each retains its own municipal laws, without admitting or adopting those of any other member of the union, unless there be an article expressly to that effect. The municipal laws of the several American states differ essentially from each other; and as neither is entitled to a preference over the other, on the score of intrinsic superiority, or obligation; and as there is no article in the compact which bestows any such preference upon any, it follows, that the municipal laws of no one state can be resorted to as a general rule for the rest. And as the states, and their respective legislatures are absolutely independent of each other, so neither can any common rule be extracted from their several municipal codes. For, although concurrent laws, or rules may perhaps be met with in their codes, yet it is in the power of their legislatures, respectively to destroy that concurrence at any time, by enacting an entire new law on the subject; so that it may happen that that which is a concurrent law in all the states to-day may cease to be law in one, or more of them to-morrow.

Consequently neither the particular municipal law of any one, or more, of the states, nor the concurrent municipal laws of the whole of them, can be considered, as the common rule, or measurer of justice in the courts of the federal republic; neither hath the federal government any

power to establish such a common rule, generally; no such power being granted by the constitution. And the principle is certainly much stronger, that neither the common, nor statute law of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption 18: which, not, being permitted by the original compact, by which the government is created, any attempt to introduce it, in that or any other, mode, would be a manifest breach of the terms of that compact.

Another light in which this subject may be viewed is this. Since each state in becoming a member of a federal republic retains an uncontrolled jurisdiction over all cases of municipal law, every grant of jurisdiction to the confederacy, in any such case, is to be considered as special, inasmuch as it derogates from the antecedent rights and jurisdiction of the state making the concession, and therefore ought to be construed strictly, upon the grounds already mentioned. Now, the cases falling under the head of municipal law, to which the authority of the federal government extends, are few, definite, and enumerated, and are all carved out of the sovereign authority, and former exclusive, and uncontrollable jurisdiction of the states respectively: they ought therefore to receive the strictest construction. Otherwise the gradual and sometimes imperceptible usurpations of power, will end in the total disregard of all its intended limitations.

If it be asked, what would be the consequence in case the federal government should exercise powers not warranted by the constitution, the answer seems to be, that where the act of usurpation may immediately affect an individual, the remedy is to be sought by recourse to that judiciary, to which the cognizance of the case properly belongs. Where it may affect a state, the state legislature, whose rights will be invaded by every such act, will be ready to mark the innovation and sound the alarm to the people 19: and thereby either effect a change in the federal representation, or procure in the mode prescribed by the constitution, further "declaratory and restrictive clauses", by way of amendment thereto. An instance of which may be cited in the conduct of the Massachusetts legislature: who, as soon as that state was sued in the federal court, by an individual, immediately proposed, and procured an amendment to the constitution, declaring that the judicial power of the United States shall not be construed to extend to any suit

brought by an individual against a state.

1. Preamble to the C. U. S.

2. Vattel, B. 1. c. 1 §. 10.

3. Federalist, vol. 1. p. 51. 52.

4. Amendments to C. U. S. art. 12.

5. C. U. S. art. 1. 2.

6. Spirit of Laws, vol. 1. B. 9. c. 1.

7. See Note B. Title Federal Government.

8. 2 Federalist, p 32. 33.

9. Preamble to the amendments.

10. Vattel, B. 1. c. 2. § 15. 16.

11. Federalist, vol. II. p. 23, 24, 25.

12. Ibidem p. 25.

13. Federalist, vol. II. p. 31, 32.

14. Federalist, vol. II. p. 26, 27.

15. Federalist, vol. II. p. 33.

16. Vattel, B. 2. c. 17. §. 305, 308. amendments to the C. U. S art. 12.

17. Vattel, ibid. amendments, C. U. S. art. 11, 12.

18. Federalist, p. 50.

19. Federalist vol. 2. 74.

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Note D

[Section 2 - Nature of U.S. Constitution; manner of its adoption (cont.)]

5. It is a written contract; considered as a federal compact, or alliance between the states, there is nothing new or singular in this circumstance, as all national compacts since the invention of letters have probably been reduced to that form: but considered in the light of an original, social, compact, it may be worthy of remark, that a very great lawyer, who wrote but a few years before the American revolution, seems to doubt whether the original contract of society had in any one instance been formally expressed at the first institution of a state²⁰; The American revolution seems to have given birth to this new political phenomenon: in every state a written constitution was framed, and adopted by the people, both in their individual and sovereign capacity, and character. By this means, the just distinction between the sovereignty, and the government, was rendered familiar to every intelligent mind; the former was found to reside in the people, and to be unalienable from them; the latter in their servants and agents: by this means, also, government

was reduced to its elements; its object was defined, its principles ascertained; its powers limited, and fixed; its structure organized; and the functions of every part of the machine so clearly designated, as to prevent any interference, so long as the limits of each were observed. The same reasons operated in behalf of similar restrictions in the federal constitution, whether considered as the act of the body politic of the several states, or, of the people of the states, respectively, or, of the people of the United States, collectively. Accordingly we find the structure of the government, its several powers and jurisdictions, and the concessions of the several states, generally, pretty accurately defined, and limited. But to guard against encroachments on the powers of the several states, in their politic character, and of the people, both in their individual and sovereign capacity, an amendatory article was added, immediately after the government was organized, declaring; that the powers not delegated to the United States, by the constitution; nor prohibited by it to the states, are reserved to the states, respectively, or to the people 21. And, still further, to guard the people against constructive usurpations and encroachments on their rights, another article declares; that the enumeration of certain rights in the constitution, shall not be construed to deny, or disparage, others retained by the people 22. The sum of all which appears to be, that the powers delegated to the federal government, are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a state or of the people, either collectively, or individually, may be drawn in question.

The advantages of a written constitution, considered as the original contract of society must immediately strike every reflecting mind; power, when undefined, soon becomes unlimited; and the disquisition of social rights where there is no text to resort to, for their explanation, is a task, equally above ordinary capacities, and incompatible with the ordinary pursuits, of the body of the people. But, as it is necessary to the preservation of a free government, established upon the principles of a representative democracy, that every man should know his own rights, it is also indispensably necessary that he should be able, on all occasions, to refer to them. In those countries where the people have been deprived of the sovereignty, and have no share, even in the government, it may perhaps be happy for them, so long as they remain in a state of subjection, to be ignorant of their just rights. But where the sovereignty is, confessedly, vested in the people,

government becomes a subordinate power, and is the mere creature of the people's will: it ought therefore to be so constructed, that its operations may be the subject of constant observation, and scrutiny. There should be no hidden machinery, nor secret spring about it.

The boasted constitution of England, has nothing of this visible form about it; being purely constructive, and established upon precedents or compulsory concessions betwixt parties at variance. The several powers of government, as has been elsewhere observed, are limited, though in an uncertain way, with respect to each other; but the three together are without any check in the constitution, although neither can be properly called the representative of the people. And from hence, the union of these powers in the parliament hath given occasion to some writers of that nation to stile it omnipotent: by which figure it is probable they mean no more, than to inform us that the sovereignty of the nation resides in that body; having by gradual and immemorial usurpations been completely wrested from the people.

6. It is a compact freely, voluntarily, and solemnly entered into by the several sates, and ratified by the people thereof, respectively: freely, there being neither external, nor internal force, or violence to influence, or promote the measure; the U. States being at peace with all the world, and in perfect tranquility in each state: voluntarily, because the measure had its commencement in the spontaneous acts of the state-legislatures, prompted by a due sense of the necessity of some change in the existing confederation: and, solemnly, as having been discussed, not only by the general convention who proposed, and framed it; but afterwards in the legislatures of the several states, and finally, in the conventions of all the states, by whom it was adopted and ratified.

The progress of this second revolution in our political system was extremely rapid. Its origin may be deduced from three distinct sources: The discontents of the army, and other public creditors; the decay of commerce, which had been diverted from its former channels; and the backwardness, or total neglect of the state-legislatures in complying with the requisitions, or recommendations of congress.

The discontents of the army had at several periods, during the war, risen to an alarming height,

and threatened, if not a total revolt, at least a general disbandment. They were checked, or palliated by various temporary expedients and resolves of congress; but, not long before the cessation of hostilities, some late applications to congress, respecting the arrears of their pay and depreciation, not having produced the desired effect; an anonymous address to the army, couched in the most nervous language of complaint, made its appearance in camp 23; It contained a most spirited recapitulation of their services, grievances, and disappointments, and concluded with advising, "an appeal from the justice to the fears of government." The effects, naturally to have been apprehended from so animated a performance, addressed to men who felt their own injuries in every word, were averted by the prudence of the commander in chief 24; and congress, as far as in them lay, endeavoured to do ample justice to the army; which was soon after entirely disbanded: but, as congress had not the command of any revenue, requisitions to the states were the only mode, by which funds for the discharge of so honorable a debt, could be procured. The states, already exhausted by a long and burthensome war, were either in no condition to comply with the recommendations of congress, or were so tardy and parsimonious in furnishing the supplies required, that the clamours against the government became every day louder and louder. Every creditor of government, of which there were thousands, besides the army now dispersed among the citizens, became an advocate for the change of such an inefficient government, from which they saw it was in vain to hope for satisfaction of their various demands.

But it is not probable that the discontents or clamors of the creditors of government, alone, would have been sufficient to effectuate a fundamental change in the government, had not other causes conspired to render it's inefficiency the subject of observation and complaint, among another very numerous class of citizens.... these were the commercial part of the people, inhabiting almost exclusively all the sea-ports, and other towns on the continent, and dispersed at small intervals through the whole country. The New-England states, in a great measure, dependent upon commerce, had before the war enjoyed a free trade with the West-India Islands, subject to the crown of Great-Britain; they had likewise maintained a very beneficial intercourse with the French Islands, from whence they drew supplies of molasses for their distilleries. Then whale and cod-fisheries might be said to have been almost monopolized by them, on the

American coast; at least the advantages they enjoyed for carrying on these branches of trade, bade fair to exclude every other nation from a competition with them on their native coasts. New-York and Pennsylvania had likewise the benefit of an advantageous furr-trade, through the channels lately occupied by the British posts, on the frontiers of the United States, which by the treaty of peace were to have been evacuated with all convenient speed. The possession of these being still retained, and the utmost vigilance exerted by the British government to prevent any communication with the Indian country; that very lucrative branch of the trade of the United States had been wholly diverted into the channel of Canada.... The ports of the English West-India Islands, which, it was expected would have been open to our vessels, as before the revolution, were, immediately after the conclusion of the peace, strictly prohibited to the American traders: those of the French islands were under such restrictions as greatly impaired the former advantageous intercourse with them: The protection formerly enjoyed under the British flag from the depredations of the corsairs of the Barbarian states, being now withdrawn, the commerce with the Mediterranean and the ports bordering thereupon, whither a great part of the produce of the fisheries, as well as the surplus of grain, was exported, was entirely cut off, from the danger of annoyance from those piratical states ... Great-Britain had, formerly, not only afforded a market for the whale oil, but had given a liberal bounty on it, both of which she now ceased to do, and no other country could be found to supply either of these advantages. Thus the sources of commerce in those states, were either dried up, or obstructed on every side, and the discontents prevailing among the newly liberated states, were little short of those of the Israelites in the wilderness.... Commotions in the northern states, seemed to threaten a repetition of the horrors of a civil war; these were ascribed to the inadequacy of the general government to secure or promote the interest and prosperity of the federal union: but whether their origin was not also to be ascribed to the administration of the state governments, is at least highly questionable.

The little regard which was paid to the requisitions of congress for money from the states, to discharge the interest of the national debt, and in particular that part due to foreigners, or foreign states, and to defray the ordinary expences of the federal government, gave rise to a proposition 25, that congress should be authorized, for the period of twenty-five years, to impose a duty of five per cent on all goods imported into the United States. Most of the states had consented to

the measure 26, but the number required by the confederation could not be prevailed on to adopt it: New-York and Rhode-Island were particularly opposed to it. Thus a project which might perhaps have answered every beneficial purpose, proposed afterwards by the new constitution, was disconcerted, from the jealousy of granting a limited power for a limited time, by the same people, who, within three years after, surrendered a much larger portion of the rights of sovereignty without reserve.

In addition to this measure, congress in their act of April 18th, 1783, had proposed, that the eighth article of the confederation, which made the value of lands the ratio of contribution from the several states, should be revoked, and instead thereof the ratio should be fixed among the states, in proportion to the whole number of white inhabitants and three-fifths of all other persons, according to a triennial census. This proposition was agreed to in Virginia 27, but like the former, was not acceded to by a sufficient number of the states to form an article of the confederation....

Yet this ratio is precisely the same, which has been since fixed by the new constitution as the rate by which direct taxes shall be imposed on the several states.

The total derangement of commerce, as well as of the finances of the United States, had proceeded to such lengths before the conclusion of the year 1785, that early in the succeeding year commissioners were appointed by the state of Virginia, to meet such commissioners as might be appointed by other states, for the purpose of "considering how far an uniform system in the commercial regulations may be necessary to their common interests, and their permanent harmony; and to report to the several states such an act, relative to that object, as when unanimously ratified by them, would enable congress effectually to provide for the same." The commissioners assembled at Annapolis accordingly, in September 1786, but were met only by commissioners from four of the other twelve states.... They considered the number of states represented to be too few to proceed to business.... but before they separated, wrote a letter to their constituents, recommending the appointment of deputies to meet in Philadelphia the succeeding May, for the purpose of extending the revision of the federal system to all its

defects.... In pursuance whereof the legislature of Virginia passed an act, appointing seven commissioners to meet such deputies as may be appointed by other states, to assemble, as recommended, and join in "devising and discussing, all such alterations, and further provisions as may be necessary to render the federal constitution adequate to the exigencies of the union; and in reporting such an act for that purpose to the United States in congress, as when agreed to by them, and duly confirmed by the several states, would effectually provide for the same 28." Similar measures were adopted by all the states in the union, except Rhode Island: deputies assembled from all the other states; but instead of amendments to the confederation, they produced a plan for an entire change of the form of the federal government, and not without some innovation of its principles. The moment of its appearance all the enemies of the former government lifted up their voices in its favour.

Party zeal never ran higher without an actual breach of the peace. Had the opposers of the proposed constitution been as violent as its advocates, it is not impossible that matters would have proceeded to some pernicious lengths: but the former were convinced that some change was necessary, which moderated their opposition; whilst the latter were animated in the pursuit of their favourite plan, from an apprehension that no other change was practicable. In several of the states, the question was decided in favour of the constitution by a very small majority of the conventions assembled to consider of its adoption. In North Carolina it was once rejected, and in Rhode Island twice: nor was it adopted by either, until the new government was organized by the ratifying states. Considerable amendments were proposed by several states; by the states of Massachusetts, South Carolina, Virginia, and New York, particularly. It was finally adopted by all the States, after having been the subject of consideration and discussion for a period little short of two years 29.

I have said that the constitution was ratified by the conventions of the several states, assembled for the purpose of considering the propriety of adopting it. As the tenor of the instrument imports that it is the act of the people, and as every individual may, to a certain degree, be considered as a party to it, it will be necessary to add a few words on the subject of representation, and of the power which a majority have to bind the minority.

The right of suffrage is one of the most important rights of a free citizen; and in small states where the citizens can easily be collected together, this right ought never to be dispensed with on any great political question. But in large communities, such a measure, however desirable; is utterly impracticable, for reasons too obvious to be dwelt upon: hence the necessity that the people should appoint a smaller and more convenient number to represent the aggregate mass of the citizens. This is done not only for the purposes of ordinary legislation, but in large states, and on questions which require discussion and deliberation, is the most eligible mode of proceeding, even where the vote of every individual of the nation should be desired. Therefore, when the convention at Philadelphia had made their report, the ordinary legislatures, with great propriety, recommended the appointment of state-conventions, for the sole and especial purpose of considering the propriety of adopting the constitution, thus proposed by the convention of the states. The deputies in most of the counties were chosen according to the prevailing sentiments of the people in favour of the constitution, the opinions of the candidates being generally previously known.

It is much to be wished that this had been universally the case, since the will of the people would in that case have been unequivocally expressed.

The right of the majority to bind the minority, results from a due regard to the peace of society; and the little chance of unanimity in large societies or assemblies, which, if obtainable, would certainly be very desirable; but inasmuch as that is not to be expected, whilst the passions, interests, and powers of reason remain upon their present footing among mankind, in all matters relating to the society in general, some mode must be adopted to supply the want of unanimity. The most reasonable and convenient seems to be, that the will of the majority should supply this defect; for if the will of the majority is not permitted to prevail in questions where the whole society is interested, that of the minority necessarily must. The society therefore, in such a case, would be under the influence of a minority of its members, which, generally speaking, can on no principle be justified.

It is true there are cases, even under our own constitution, where the vote of a bare majority is

not permitted to take effect; but this is only in points which have, or may be presumed to have, received the sanction of a former majority, as where an alteration in the constitution is proposed. In order, therefore, to give the greater stability to such points, they are not permitted to be altered by a bare majority: in cases also which are to be decided by a few, but which may, nevertheless, affect a variety of interests, it was conceived to be safest to require the assent of more than a bare majority; as, in concluding treaties with foreign nations, where the interests of a few states may be vitally affected, while that of a majority may be wholly unconcerned. Or, lastly, where the constitution has reposed a corresponding trust in different bodies who may happen to disagree in opinion; as, where the president of the United States shall return a bill to congress with his reasons for refusing his assent to it; in all these cases more than a bare majority are required to concur in favour of any measure, before it can be carried into complete effect.

7th. It is a compact by which the several states and the people thereof, respectively, have bound themselves to each other, and to the federal government.

Having shewn that the constitution had its commencement with the body politic of the several states; and, that its final adoption and ratification was, by the several legislatures referred to, and completed by conventions, especially called and appointed for that purpose, in each state; the acceptance of the constitution, was not only an act of the body politic of each state, but of the people thereof respectively, in their sovereign character and capacity: the body politic was competent to bind itself so far as the constitution of the state permitted, but not having power to bind the people, in cases beyond their constitutional authority, the assent of the people was indispensably necessary to the validity of the compact, by which the rights of the people might be diminished, or submitted to a new jurisdiction, or in any manner affected. From hence, not only the body politic of the several states, but every citizen thereof, may be considered as parties to the compact, and to have bound themselves reciprocally to each other, for the due observance of it and, also, to have bound themselves to the federal government, whose authority has been thereby created, and established.

8. Lastly. It is a compact by which the federal government is bound to the several states, and to

every citizen of the United States.

Although the federal government can, in no possible view, be considered as a party to a compact made anterior to its existence, and by which it was, in fact, created; yet as the creature of that compact, it must be bound by it, to its creators, the several states in the union, and the citizens thereof. Having no existence but under the constitution, nor any rights, but such as that instrument confers; and those very rights being in fact duties; it can possess no legitimate power, but such, as is absolutely necessary for the performance of a duty, prescribed and enjoined by the constitution. Its duties, then, become the exact measure of its powers; and wherever it exerts a power for any other purpose, than the performance of a duty prescribed by the constitution, it transgresses its proper limits, and violates the public trust.

Its duties, being moreover imposed for the general benefit and security of the several states, in their politic character; and of the people, both in their sovereign, and individual capacity, if these objects be not obtained, the government will not answer the end of its creation: it is therefore bound to the several states, respectively, and to every citizen thereof, for the due execution of those duties. And the observance of this obligation is enforced, by the solemn sanction of an oath, from all who administer the government 31.

The constitution of the United States, then being that instrument by which the federal government hath been created; its powers defined, and limited; and the duties, and functions of its several departments prescribed; the government, thus established, may be pronounced to be a confederate republic, composed of several independent, and sovereign democratic states, united for their common defence, and security against foreign nations, and for the purposes of harmony, and mutual intercourse between each other; each state retaining an entire liberty of exercising, as it thinks proper, all those parts of its sovereignty, which are not mentioned in the constitution, or act of union, as parts that ought to be exercised in common. It is the supreme law of the land 32, and as such binding upon the federal government; the several states; and finally upon all the citizens of the United States.... It can not be controlled, or altered without the express consent of the body politic of three fourths of the states in the union, or, of the people, of an equal number

of the states. To prevent the necessity of an immediate appeal to the latter, a method is pointed out, by which amendments may be proposed and ratified by the concurrent act of two thirds of both houses of congress, and three fourths of the state legislatures: but if congress should neglect to propose amendments in this way, when they may be deemed necessary, the concurrent sense of two thirds of the state legislatures may enforce congress to call a convention, the amendments proposed by which, when ratified by the conventions of three fourths of the states, become valid, as a part of the constitution. In either mode, the assent of the body politic of the states, is necessary, either to complete, or to originate the measure 33.

Here let us pause a moment, and reflect on the peculiar happiness of the people of the United States, thus to possess the power of correcting whatever errors may have crept into the constitution, or may hereafter be discovered therein, without the danger of those tremendous scenes which have convulsed every nation of the earth; in their attempts to ameliorate their condition; a power which they have already more than once successfully exercised.

"Americans," says a writer whom I have before quoted, "ought to look upon themselves, at present, as almost the sole guardians and trustees of republican freedom: for other nations are not, as we are, at leisure to shew it in its true and most enticing form. Whilst we contemplate with a laudable delight, the rapid growth of our prosperity, let us ascribe it to its true cause; the wholesome operation of our new political philosophy.

Whatever blessings we enjoy, over and above what are to be found under the British government, whatever evils we avoid, to which the people of that government are exposed; for all these advantages are we indebted to the separation that has taken place, and the new order of things that has obtained among us. Let us be thankful to the parent of the universe, that he has given us, the first enjoyment of that freedom, which: is intended in due time for the whole race of man. Let us diligently study the nature of our situation, that we may better know how to preserve and improve its advantages. But above all, let us study the genuine principles of DEMOCRACY, and steadily practice them, that we may refute the calumnies of those who would bring them into disgrace.

"Let us publish to the world, and let our conduct verify our assertions, that by democracy we mean not a state of licentiousness, nor a subversion of order, nor a defiance of legal authority. Let us convince mankind, that we understand by it, a well ordered government, endued with energy to fulfil all its intentions, to act with effect upon all delinquents, and to bring to punishment all offenders against the laws: but, at the same time, not a government of usurpation; not a government of prescription; but a government of compact, upon the ground of equal right, and equal obligation; in which the rights of each individual spring out of the engagement he has entered into, to perform the duties required of him by the community, whereby the same rights in others, are to be maintained inviolate."

That mankind have a right to bind themselves by their own voluntary acts, can scarcely be questioned: but how far have they a right to enter into engagements to bind their posterity likewise? Are the acts of the dead binding upon their living posterity, to all generations; or has posterity the same natural rights which their ancestors have enjoyed before them? And if they have, what right have any generation of men to establish any particular form of government for succeeding generations? The answer is not difficult: "Government," said the congress of the American States, in behalf of their constituents, "derives its just authority from the consent of the governed." This fundamental principle then may serve as a guide to direct our judgment with respect to the question. To which we may add, in the words of the author of Common Sense, a law is not binding upon posterity, merely, because it was made by their ancestors; but, because posterity have not repealed it. It is the acquiescence of posterity under the law, which continues its obligation upon them, and not any right which their ancestors had to bind them.

Until, therefore, the people of the United States, whether the present, or any future generation, shall think it necessary to alter, or revoke the present constitution of the United States, it must be received, respected, and obeyed among us, as the great and unequivocal declaration of the will of the people, and the supreme law of the land.

21. Amendments to C. U. S. art 12

22. Ibidem. art. 11

23. See the Remembrancer vol. 18. p. 72. Carey's Museum vol. 1. 302.

24. Ibidem, p. 120. Had General Washington no other claim to the gratitude of his country, his conduct on that occasion, alone, would have entailed an unextinguishable debt of gratitude upon it, to all posterity.

25. See Resolves of Congress, April 18th, 1783.

26. Oct. 1783, c. 31. Revised Code, p. 219. May 1784. c. 21.

27. Acts of 1784, c. 31.

28. Acts of 1786, c. 8.

[29. Separate file.]

[30. Is a footnote to Footnote 29, and appears in that file.]

31. C. U. S. Art. 2. §. 1. and Art. 6.

32. C. U. S. Art. 6.

33. Ibidem, Art. 5.