













The public has received the following letters concerning the author of Constitutional History of the United States, and his qualification to write such a work.

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TOPEKA, KAN., July 31, 1903.

DEAR SIR :

I have known Judge Nelson Case, of Oswego, Kansas, for many years, during six of which I served as a member of the Supreme Court of this State, before which court he was an active practitioner. As a lawyer he stands in the very front rank of the profession in this State, and is a citizen of the highest character. I give to him my cordial recommendation.

Respectfully,

FRANK DOSTER,  
Ex-Chief Justice Supreme Court of Kansas.

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TOPEKA, KAN., July 31, 1903.

DEAR SIR :

Judge Nelson Case, of Oswego, Kan., has long been a practitioner in this court. I have had a personal acquaintance with him for twenty-five years, and know him to be a strong, capable lawyer. He has had many cases involving large amounts of money and very important questions and has presented them in a forcible and effective way. He is a close student of the law, including its sources, its history, and its development. He has an excellent standing in the community in which he lives and in the State, not only as a lawyer, but as an upright and honorable citizen.

Very respectfully,

W. A. JOHNSTON,  
Chief Justice of the Supreme Court of Kansas.





CONSTITUTIONAL HISTORY  
OF THE  
UNITED STATES

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CONSTITUTIONAL HISTORY  
OF THE  
UNITED STATES

BY  
NELSON CASE  
OF THE KANSAS BAR  
AUTHOR OF "EUROPEAN CONSTITUTIONAL HISTORY"

1904

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# CONSTITUTIONAL HISTORY

## OF THE

# UNITED STATES

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## INTRODUCTION

IN the work now presented I have tried to bring within the compass of a medium-sized volume the essential historical facts necessary to gain a clear and comprehensive view of our national Constitution as it exists at the present time. The fact is historically indisputable that our Constitution has been a subject of growth. What was placed in the written document by the constitutional fathers, who assembled in Philadelphia in 1787, was the condensed wisdom of a century and a half of colonial experience in Constitution forming and in contending for constitutional principles, in addition to all the knowledge they could gather from the study of the history of other nations. But the fathers who drew the Constitution in 1787 had little conception of what that instrument would become through a century's growth, because they could not at that time comprehend what a marvellous expansion there would be of the national germ which they saw sprout and commence to

grow, and which the succeeding generations have seen come to a fuller perfection.

Important additions have been made to the original Constitution by way of amendment, but scarcely more so than those which have come to it through the process of the gradual unfolding of its unexpressed meaning, which has naturally followed the expansion of our national domain, the development of our national resources, the meeting of new responsibilities in government, the contending with new difficulties which have confronted us in the execution of our newly acquired powers.

While we have a written, and therefore, in a certain sense, a settled Constitution, it is an elastic one. Had the original Constitution of 1787 been so limited by its own terms that it could not have been construed to mean more than was actually and clearly expressed by the language in which it was clothed, our Government would soon have gone to wreck or have remained a feeble and insignificant member of the sisterhood of nations, unless by amendment of the old, or by the adoption of a new constitution new power had been given it. Fortunately it was not so framed.

With no express power in the Constitution for the general government assuming the debts of the several States contracted during the Revolutionary War, nor for funding the entire national debt thus increased, nor for establishing a national bank, Hamilton was able to find authority in the Constitution for each of these



measures when that instrument was interpreted in the light of the financial needs of the country and with a desire to carry into effect the purpose for which the Constitution was framed and adopted. While there is no section in the Constitution having the slightest reference to an expansion of our territorial limits, authority to make such extension was found by statesmen to whom that problem was presented, even though Jefferson was unable to see it clearly. Although the Constitution gives Congress no express authority to construct, or to aid in constructing, canals or railroads, the discovery of such a power inhering in a government which was authorized to regulate commerce has made it possible to connect the Atlantic with the Pacific by both iron and water. Buchanan and his school could find no authority in the Constitution to coerce a sovereign State. But because such authority was there found by those who succeeded him in the administration of the Government we have one strong nation to-day instead of two or more weak confederacies.

It is well for us as a people that the Constitution, in addition to the powers expressly conferred and enumerated, contains the provision that Congress shall have power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

That the Constitution contains inherent powers which

are found in no one section, which are not definitely expressed or described in any language that we can there read, was believed at the time of its adoption, and has been the prevailing opinion of the greatest statesmen who have lived to interpret and administer it since. To somewhat restrict Congress in the exercise of some of these unexpressed powers was the purpose of several of the amendments which were proposed by the conventions of the people who adopted the Constitution, and which were subsequently submitted by Congress and ratified by the States. I have believed it to be proper in a constitutional history to call especial attention to this feature of our Constitution and to make its importance somewhat prominent.

But while our Constitution is, as I have stated, an expanding one, still it is a written one whose meaning is to be sought in the instrument itself. And therefore its interpretation is to be governed by rules very different from those which are applicable in construing the British Constitution. This fact is not to be lost sight of in the matter of writing a constitutional history. Were one writing a constitutional and political history of the two countries the mode of treatment might properly be substantially the same for both. But in writing purely a constitutional history, matter which could very properly form a part of a work treating of an unwritten constitution, like that of the British Empire, might be inappropriate in a work treating of a written constitution, like that of the United States. In the work

here presented I have aimed to treat of no political history which does not have a direct bearing on some feature of constitutional interpretation or growth.

There are those who read history as they read an algebraic problem, and having ascertained a certain number of facts, they seek for the expected result with the same confidence as they look for the unknown quantity at the conclusion of the solution of a problem by the rules of mathematics. I have never believed in that kind of historical research, nor do I believe that a true history, either political or constitutional, will be presented if written from that standpoint. He who believes that all political and governmental action is dictated in the party caucus and convention will never be able to either write or read and interpret American constitutional history.

That through the course of our political development and constitutional growth there has run an influence unknown to any political party, that over our destiny as a nation a power has presided of which both the politician and the statesman have generally been ignorant, that results in government have been reached and ends attained in the establishment of popular rights which were contrary to the expectation of those who supposed they were directing public affairs, is a fact so evident that to disregard or deny it is to banish from our consideration one of the controlling elements in the evolution of our constitutional government.

We read of an Eastern monarch who, because of his assumption of power and disregard of God's claims, was

driven from men and compelled to make his habitation with beasts, and to eat grass as oxen, until he learned that "the Most High ruleth in the kingdom of men and giveth it to whomsoever He will." Some of our modern statesmen and writers have not been as good students of history as was Nebuchadnezzar, for they have never learned what he, in his retirement, was brought to acknowledge, that before the Most High "all the inhabitants of the earth are reputed as nothing; and He doeth according to His will in the army of heaven and among the inhabitants of the earth; and none can stay His hand, or say unto Him, What doest thou?"

In the preparation of this volume I have entertained the belief that there is a divine control in the affairs of men, and that this control is manifested in many ways in the development of the government and institutions of a people. It seems to me that through the gradual unfolding of a lofty purpose in the development of the people is the divine plan most clearly manifested. And because of such divine manifestation I believe that most of that which is worth preserving comes from the people. I have felt that the best results in government and the highest standard of constitutional attainment are to be looked for in those efforts which have sprung directly from the people. It took a century of the best thought of the people to reach the truest and the most approved construction of our fundamental law. We rightly attribute great merit to Hamilton, and Marshall, and Story, and Webster, for their masterly exposition of our

Constitution. But the best thoughts of the greatest minds have, in some way, been made possible by, and are but the concentrated thought of, the people. The highest morality is worked out by a desire on the part of the people to live better lives. And the best conception of constitutional government yet attained has not sprung alone from some master mind, but has been developed through the experience of the people in their daily lives. I have, therefore, thought it necessary in order to get a true understanding of our constitutional history to trace the line of development which has taken place in the experience of the people and which has finally crystallized into constitutional law. In so far as I have made this plain I feel that I have succeeded in accomplishing the object I had in view in writing this volume.

## I

## PERIOD OF COLONIZATION

## CONDITIONS IN ENGLAND AT TIME OF COLONIZATION

As individual ability, habits, and character are to be studied in the light of inherited tendencies through generations of ancestry, so American constitutional history is to be fully understood only by looking into those institutions out of which our own have sprung. If one would ascertain the origin of the Constitution of this country he must seek for it among the records treating of the fierce conflicts between king and people, of the growth of chartered rights, of the development of parliamentary government, in the island home of those who first planted free institutions on the American continent.

In "European Constitutional History" I have traced somewhat in detail the growth of English liberty and the history of representative government. In reference to this preliminary work I shall do no more in this connection than to state conclusions. American colonization was commenced and, except as their rule was interrupted by Parliament and Cromwell, for three-quarters of a century was continued under the rule of the Stuarts. During the reigns of the Houses of York and Tudor the

crown had, in a large measure, concentrated in itself the exercise and control of those forces in government which the people had theretofore, by centuries of contest with royalty, secured as the safeguard of their civil liberties. But popular liberty was dormant rather than dead, and only needed favorable influences to cause it to spring forth anew and with greater vigor than ever. The high ideas of royal prerogative entertained by the several members of the House of Stuart, their natural tendency to absolutism in government and tyrannical rule, added to their general lack of ability, formed the occasion for the people to reassert their ancient rights and privileges.

Each time the King interfered with the legitimate exercise of parliamentary rights the people became more determined than before to relieve themselves from arbitrary rule. Forced benevolences, compulsory payment of ship money, and illegal taxation of every kind which the King could devise for the purpose of filling his exchequer were insufficient to meet the necessary expenses of government, and, though unwillingly, the people had to be appealed to for parliamentary aid. Thus, during all the history of this House, notwithstanding the most strenuous exertions of the King to maintain, strengthen, and extend the royal prerogatives, were the rights of the people and the constitutional doctrine that Parliament alone was invested with authority to enact laws and levy taxes, being better established and more generally exercised.

It was in these struggles and amid the development

of these principles that those champions of human liberty were reared who planted, and through their early years nourished, the free institutions which we to-day enjoy. While England had no one document embodying her constitution and the fundamental rights of the people, she had her Magna Charta, her almost numberless royal charters confirming the liberties of the people, her Petition of Rights, and from these the early settlers of this country could well understand the advantages of written documents embodying a statement of the fundamental rights of the people and expressing the limitations of power in the government which should be established over them. It was in the light of this history and of these achievements that our forefathers commenced making and writing our constitutional history.

The spirit of civil liberty, of personal rights, of self-government, of taxation only by the people themselves, of the responsibility of rulers to the people as the final depository of power, was firmly inwrought into the very being of those who crossed the Atlantic to plant new homes in the wilderness, and those rights and privileges they sought from the first to make sure for themselves and their posterity by embodying their doctrine in fundamental laws. The American colonists commenced writing their constitutions in the light of the English doctrine, irrevocably fixed by Magna Charta, and sanctioned by four centuries of national history and experience, that "We will cause nothing to be done by anyone, either by ourselves or any other person, by means of which any



one of these concessions and liberties shall be revoked or diminished, and if any such thing may have been caused to be done, let it be held null and void, and we will never make use of it, by ourselves or by anyone else." This established doctrine of Magna Charta, embodied in principle though not in the same language in the early American constitutions, was finally stated, when our national Constitution was prepared, in a way that has made our rights as secure as did Magna Charta make secure the rights of Englishmen; this declaration in our fundamental law is that this constitution, which declares and limits the powers of the government and secures the rights of the governed, shall be the supreme law of the land. There is no room here for tyrannical rule or arbitrary government.

The colonists before starting for America sought to secure charters, embodying these doctrines of liberty and self-government, under the royal hand and seal and acknowledged by him to be their fundamental right. In some instances these charters were almost all that could be desired, while in other cases they but partially stated the rights, or left an inference that they were subject to be modified or revoked by the granting power.

#### EFFECT OF RELIGIOUS THOUGHT ON THE CONSTITUTION

There can be no doubt that the constitutional history of America, as well as that of Europe in general, was largely influenced, and the course of its current con-

trolled, by the Protestant Reformation. Its establishment of the doctrine of freedom of conscience and the right of private judgment had the effect of creating a spirit opposed to absolutism in State as well as Church, and forced on those in authority the adoption of liberal principles in government.

Nearly all the settlers who came to America had imbibed these principles. Some of them, it is true, in place of Roman absolutism had adopted an intolerance of their own, but it had no such controlling effect on the masses of the people as Romanism had exerted, and a large proportion of the colonists entertained the most liberal Christian views. Such persons would be satisfied with nothing less in government than freedom of thought and action.

#### EARLY CLAIMS FOR COLONIAL INDEPENDENCE

There was always a conflict of opinion between the English Government and the colonies as to the rights of the latter. Whether the colony was under, what was termed, a proprietary, a provincial, a royal, or a charter government, the claims of the colonists and their actual exercise of authority were always greater than their theoretical rights according to the interpretation placed on the grant or charter by the English Government. In the proprietary government sovereignty was supposed to reside in the King, but the proprietary was given that full measure of government and control that belonged

to a feudatory lord of a county under the feudal system. The proprietary was, in effect, what would have been termed a count palatine of the old feudal government. In a royal government sovereignty and power of government were claimed to remain with the King. In a charter government those to whom the charter was granted were supposed to have about the same rights as belonged to members of any civil corporation. But in each of these forms of government the colonists claimed much more than the English Government conceded.

When the claim put forth by the British Government, that Parliament had unlimited authority to legislate for the colonies in all cases, was once definitely stated it was from the first vigorously denied and contested by the colonists. However, the nature of the colonial government, the situation of the colonists and their relation to the mother country, and the practice of governments under which colonies have been planted and maintained, seem to warrant a claim to some sort of home legislative authority. If such claim had been put forth in a more moderate form and a less objectionable way, probably it would not have met with strong resistance. The charters themselves, in some instances, at least, impliedly recognized the legislative authority of Parliament to some extent. But probably this never included the parliamentary right to tax the colonies.

Although the English lawyers generally did not concede it, and law writers denied it, the colonists always claimed that as British subjects they were entitled to all

the legal protection of Englishmen, and that they brought with them to this country the common law of England, as modified by parliamentary enactments up to the time of their migration. This has always been the American doctrine. With the common law in full force the colonists generally claimed the right of independent legislation, subject to no interference or control by the crown or Parliament of Great Britain.

While a difference of opinion existed in England and America as to the authority of the parent government over the colonies, still no serious conflict arose till about the middle of the eighteenth century. But when England commenced to enforce her navigation laws, and more especially when she entered on the policy of internal taxation of the colonists by means of the stamp act, the old conflict of opinion arose and came to be more clearly defined, and the position of the colonists was more boldly and vigorously proclaimed and enforced. But even then there was not a unanimity of opinion either in England or America. In England probably the prevailing opinion was that Parliament had full power of legislation over the colonies in all matters, including taxation. But a very respectable number, headed by the elder Pitt, while claiming for Parliament legislative jurisdiction over the colonies in all matters of general concern, including navigation and commerce, conceded to the colonies the exclusive right of taxation, and denied to Parliament any authority to levy taxes on the colonists in any manner or for any purpose. But in America

the prevailing opinion was that all legislative authority resided with the colonies, and they were under no obligation to submit to any act of Parliament interfering with their colonial affairs. However, even here a very large number of the leading colonists conceded to Parliament authority nearly as extensive as claimed for it by Pitt, but, with him, denied absolutely any right in Parliament to levy taxes on the colonies. If Pitt, instead of Grenville, had been prime minister, no stamp act would have been passed and, in all probability, it would have been many years before any serious conflict of authority would have arisen between the home and colonial governments. With as strong a sentiment as at that time prevailed in America in favor of parliamentary authority over trade no strong resistance would have been urged had parliamentary legislation been confined to that.

The basis on which Americans claimed exemption from parliamentary taxation, and so far as that claim extended, from general parliamentary legislation, was not solely nor principally because of their chartered rights; indeed, many refused to place it on that ground at all. But they claimed that the parliamentary right of legislation and taxation had always been limited to those who were represented in that legislative body; that the colonists were not, and in the nature of things could not be, represented in Parliament; that their colonial legislatures had exercised, and by the mother country had been conceded to possess, full legislative powers. The colonists asserted that they were not bastards but

sons of England, and therefore were entitled to all the rights of Englishmen; that to submit to the imposition of taxes by a body in which they were not represented was to concede themselves as unworthy the descent of freeborn Englishmen. In the main, Pitt and his associates followed the line of argument which had been put forth and furnished them by the Americans.

After the restoration of the Stuarts there was an almost uninterrupted series of acts on the part of the parent government put forth with a view of bringing all the American colonies under the complete control of the crown and Parliament. Until about 1680 most of the colonies were undisturbed in the administration of justice through their own courts. But from that time the crown was constantly asserting its inherent right to hear and determine appeals from the colonial courts. This was firmly resisted in most of the colonies, and successfully so in a number of them, for many years. From about 1700 most of the colonies gave way to the royal will and appeals to the King in council were allowed in certain cases. By means of these appeals decisions were made, and constructions were given to their statutes, which greatly changed the fundamental laws of the colonies.

I need not further particularize, but, especially after the accession of Charles II down to the American Revolution, a constant contest was going on between the British and the colonial governments over a variety of questions, including disputes as to the regulation of

commerce, the support of royal colonial officers by permanent and fixed salaries to be raised by the colonies, appeals from the colonial courts to the home government, the right of the colonists to the same judicial privileges as Englishmen at home, including the right of the writ of *habeas corpus*, and the claim of the home government to a right to legislate for the colonies in all matters. These contests, instead of drawing the parties nearer together, were constantly estranging the contestants, and making a reconciliation practically impossible.

These contests of which I have spoken extended, in a greater or less degree, to all the colonies, and the discussions respecting them were participated in by all the leading colonists, and affected the thought and action of the whole body of Americans. They not only had an influence in shaping the government of the time, but they so entered into the composition of American public sentiment that all political action thereafter taken was, in a great degree, controlled by it. The American conception of the rights of the people thus instilled into their very life-blood at last found permanent expression in the framing and adoption of the Constitution of the United States.

#### VIRGINIA .

When the First Colony of Virginia left England in the latter part of 1606 it was to found a colony in the

control and management of which they had no voice whatever. Not even the London Company, which sent it out, could make for it any law or regulation without permission of the King. James I could not be quite absolute in the government of England, but his desire for absolute rule was to be given full sway in Virginia. Full legislative as well as executive authority remained with the King.

Two years after the settlement of Jamestown the London Company was granted a new charter which conferred upon the company the power which in the first had been reserved to the King. Executive and legislative authority was to be exercised by the council in London, which was elected by the shareholders.

In the third charter, granted two years later, in 1612, supreme power was granted directly to the whole company, and not to the council, as theretofore. When George Yeardley came over as governor, in 1619, he brought with him authority from the company to confer political rights on the colonists. Whereupon an assembly, composed of representative burgesses from each plantation in the colony, was called to meet in Jamestown in July, 1619. This was the first representative assembly convened in America. In July, 1621, the company granted the colony a written Constitution by which the people were secured in substantially all the rights of Englishmen at home, both in the administration of government and in the security of person and property. We can hardly overestimate the importance



of this document as a precedent for constitutional government in the New World.

In 1624, by a judgment of the court of king's bench, in a proceeding in *quo warranto*, the liberal charter which King James had granted the London Company, and which he had in vain sought to induce the company to voluntarily surrender, was declared forfeited. His death soon after this event prevented the King from exercising any of those arbitrary powers which he probably had in view, and his son, Charles I, on ascending the throne, had so much trouble with affairs at home that he exercised less power abroad than he might have done under other circumstances. Notwithstanding this resumption of full royal authority, the rights and privileges of the colonists were not in any way interfered with. Their assembly continued to meet, and under the experience they were acquiring they grew more independent and outspoken, and put forth a series of legislative enactments that does credit alike to their intelligent grasp of the colony's needs and to the spirit of free men who were to be followed by an illustrious posterity.

When Parliament assumed the government of England and came to deal with the colony which had been adhering to the royal cause, it guaranteed full English liberty to the colonists whose business was permitted to continue under the control of their own assembly. But no action was taken on the colonists' request that no taxes nor customs should be levied, nor forts erected,

without their representatives' consent. Control over these matters had for some years been exercised by the assembly, had been by it claimed as a right, and had been acquiesced in by the royal government. During the protectorate of Cromwell suffrage was made universal to all who paid a poll-tax. The colonists were allowed to elect their executive officers as well as their legislators.

After the restoration of the Stuarts the popular party, which had been in control of the colonial government, was supplanted by the element possessing more of an aristocratic tendency. Suffrage was greatly curtailed and popular elections could hardly be said to prevail. The Anglo-Saxon tendency to personal liberty which allowed the child of a slave mother to take the condition of the free father was changed by statute, which adopted the harsh Roman rule that the condition of the offspring followed that of the mother, and thus placed the child of a slave mother in the ranks of bondmen.

In the colony generally the rule of primogeniture prevailed, although a different law of inheritance sprang up in certain counties. The Anglican Church was the religion of the state and was supported at public charge. There was no public provision for popular education. In 1661 Lord Berkeley, the royal governor, thanked God that Virginia had no free schools nor printing-presses, and he hoped she would not have for hundreds of years to come. A favored aristocracy was a

natural product of the system of civilization developed in this colony.

Of course many changes in government, as well as in public sentiment on various questions, were made between the time of which I have spoken and the American Revolution. But nothing took place which materially modified the trend of constitutional history. What I have already stated in respect to the government of this colony will fairly show her important place in the development of constitutional government in this country.

#### MARYLAND

At the time when religious controversy ran so high in England Lord Baltimore, who had for years been deeply interested in the settlement of America, and who had himself planted a colony in Newfoundland, visited Virginia to see about selecting a more favorable site for his colony. His religious convictions would not allow him to take the oath of supremacy which the laws of England and the instructions to the Governor of Virginia required of the inhabitants of that colony; hence there could be no peaceable settlement of his colony within the territory of Virginia. But the charter of the London Company had now been forfeited and the King claimed complete proprietorship of the New World, notwithstanding the land may have been embraced within the grant of an old charter. There was, therefore, no reason, from the King's standpoint, why he might not

bestow on this worthy lord the right of establishing a colony in a more favorable clime.

Under date of June 20, 1632, the charter which had been intended for his father was given to the younger Lord Baltimore, making him and his heirs full proprietors of the province of Maryland. By the terms of the charter the King relinquished and renounced forever, for himself and successors, the right to impose any impost, custom, or tax upon the inhabitants of the province. Nor was the royal consent required to the validity of provincial legislation or the proprietor's appointments to office. The charter required the approbation of a majority of colonists, or their deputies, for the validity of legislation. Large powers were given the proprietor in the way of establishing, by ordinance of his own creation, aristocratic institutions, including at least some features of the feudal system. But the provision for independent and supreme legislation, and absolute control over taxation, by a colonial legislature, was the redeeming feature of this charter.

In March, 1634, the colony of Maryland was formally planted. In February of the following year it was convened for legislation, and all the freemen in the colony seem to have been present and taken part in the business. In January, 1638, the second session of the legislature was held, but this time made up of representatives chosen by the settlers. This legislature acted with a bold and liberal spirit in the interest of free and independent legislation. It refused to ratify a code of

laws presented to it by the proprietor, but asserted the inherent right of legislation as residing in itself. The third session was held in 1639, and was memorable for the declaration of rights which it adopted, somewhat irregularly, it is true, claiming for the inhabitants of the colony the liberties enjoyed by Englishmen at home by virtue of her laws, and asserting for the assembly all the power exercised by the House of Commons in England. Subsequent sessions maintained and strengthened the rights of representative government as thus announced. In 1650 an act was passed giving legal status to what had been practised for several years, of a legislature composed of two houses; but in 1660 the assembly refused to recognize the legality of an upper house and asserted for itself absolute right of independent legislation.

The feudal policy provided for by the charter, and, in a measure, established in Maryland, was so contrary to the spirit of personal liberty which filled the air in every American colony that its extinction was only a question of time. The wise, mild, and, in many respects, liberal government of Lord Baltimore did much to satisfy the people, and probably extended the term of proprietary government much beyond what it would otherwise have been.

The religious character of the proprietary did not save him from the despotic hand of James II. The determination of this monarch to bring all the American colonies under complete royal control led him to cause

the charter of this colony, as well as those of others, to be forfeited under a proceeding by *quo warranto*.

#### PLYMOUTH

By a half century of persecution at home and a decade of suffering in Holland, the Puritans were preparing for the ordeal they were to face in America. The only concession they could obtain from James I was the privilege of being forgotten. Without royal promise of protection or charter for a home or a government, they bound themselves for a term of seven years under the severe terms of a mercantile partnership in order to secure passage to the New World. As they were sent out by no company, and were without government or protection, the colonists, before leaving the *Mayflower*, in November, 1620, entered into a written compact between themselves, which was signed by the head of every family on board, whereby they combined themselves into a body politic with a declared purpose to enact "such just and equal laws, ordinances, acts, constitutions and offices, from time to time, as shall be thought most convenient for the general good of the colony."

Supreme power was conceded to be in the people, who transacted their business in a general meeting in which every person had a vote, and no law could be enacted but by their consent. Pure democracy prevailed at Plymouth for eighteen years. It was not till 1639 that representatives from the several towns met in general

court. Without warrant of royal authority they exercised as firm a government as was found in chartered colonies.

When William and Mary gave a new charter to Massachusetts in 1691 in place of her original charter which James II had caused to be forfeited, they included Plymouth and other settlements with Massachusetts Bay. From this time the original Pilgrim colony formed a part of the leading colony in America.

#### MASSACHUSETTS

The London Company and the Plymouth Company had originally been formed under one charter, the one to lead forth the First Colony of Virginia, to be located in the south, and the other to plant the Second Colony of Virginia, farther north. The Council of Plymouth for New England was incorporated under a new charter in 1620 and given as its absolute property the territory from the fortieth to the forty-eighth parallel of north latitude, extending from ocean to ocean, with unrestricted power of legislation and government. Under this charter the company made many grants, some of which resulted in establishing small settlements along the coast between Cape Cod and the St. Lawrence. In 1628, the Council of Plymouth sold a tract from Charles River on the south to the Merrimac on the north, and extending indefinitely westward, to a party of gentlemen, who thereafter associated others with them and became the Massachusetts Bay Company. A party

went out the same year and founded the first permanent settlement in Massachusetts at Salem.

In 1629, at the request of the Plymouth Company, Charles I granted a charter to the Governor and Company of Massachusetts Bay, in New England, covering the territory embraced in the grant of 1628, the government of which was given to a governor, deputy, and eighteen assistants, to be elected annually by the freemen or members of the company. All the freemen were to meet in general assembly four times a year, but the place of meeting was not named. To the general court thus assembled was given authority to admit an unlimited number of new members, to elect officers, to make laws for the government of the plantation, but the same must not be repugnant to the laws of England. This left the liberty of the subject in the hands of the company, and not of the crown or Parliament. A few weeks after the charter was granted a party of emigrants set sail and joined the settlement already established at Salem, of which John Endicott now became the first governor.

In August of the same year in which the charter was granted, by a vote of the company in England, it was decided to transfer the place of meeting of the general court from England to America. Thus the charter and government became American institutions. Before sending out the next lot of emigrants and the transfer of the charter to America the company elected John Winthrop governor.



In June, 1630, Winthrop and his colony arrived at Salem, but soon thereafter transferred the seat of government to the vicinity of Boston. In October of that year the first general court of that company held in America assembled at Boston. Many new members were admitted into the company. The old officers were re-elected. In 1634 the general mode of voting was changed from a show of hands to that by ballot. The first instance of voting by ballot in America was in 1629 for the election of pastor and teacher for Salem by the emigrants who had recently arrived.

Almost immediately the need of a written constitution was felt and in May, 1635, a commission was appointed to prepare one, but its members were unable to agree and nothing came from this effort. The government having sent out requests therefor, the various towns, in 1638, sent in suggestions as to what they desired embodied in their fundamental law. In December, 1641, after three weeks' deliberation and discussion, the general court adopted what they designated "The Body of Liberties," and which really amounted to a written constitution. Prior to this there had been very little done in this colony in the way of legislation. The officers had exercised a very large discretionary power, which, perhaps, they had not seriously abused; still, it had caused distrust among the people, and the adoption of a written and specific rule for the government of all was the cause of general rejoicing.

This document opened with a bill of rights, which

declared that no man's life, person, honor, family, or estate should be taken away or endangered except by virtue of some express law publicly proclaimed, or, in case of defect of law, according to the principles of the Word of God.

By the provisions of this constitution there were to be annual elections for choosing all their officers, in which all freemen had a right to participate. Deputies to the general court could be chosen by the freemen of each town from their own number, or from the ablest and most gifted elsewhere, as they might think best. The general court could not be adjourned or dissolved without its own consent. Each town was permitted to make its own by-laws for the government of its local affairs, so far as they did not conflict with the public law or the general interest. Selectmen were elected annually by the town to manage its affairs. In both civil and criminal cases the parties might agree on a trial by the court or by a jury. Not only was the right of petition guaranteed, but any freeman might appear in person and present to the general court or the town meeting, in writing or by motion, any matter he chose. The title to all land was declared free and alienable.

In reference to slavery it was declared that "there shall never be any bond slavery, villanage, or captivity among us, unless it be lawful captives taken in just war, and such strangers as willingly sell themselves or are sold to us. And these shall have all the liberties and

Christian usages which the law of God established in Israel concerning such persons doth morally require.”

Provision was also made for free religious worship to all who were orthodox and whose lives were not scandalous.

Of course the customs relating to public worship, the teaching of children, the town meetings, and other matters relating to the general life of the people, and which had been practised from the first settlement, remained in operation unaffected by any written law. The town meeting was from the first the well-established mode of conducting all local affairs. All inhabitants met and took part in this meeting.

In 1644 the general court was divided into two houses—the assistants or magistrates, and the deputies from the towns.

About this time commenced a series of disputes which for a short period threatened trouble. The relation of the Church to the State, the disputed authority of the magistrates, the desire on the part of some for a more democratic government, and other causes, led to a contest between opposing factions which lasted for some time. The only feature of this trouble which is material to our inquiry, and the only one to which I shall refer, was the attempt on the part of some to appeal from the action of the colonial government to the government of the English Parliament. Gorton, one of the disaffected, went to England and procured an order from the parliamentary commission requiring certain things of the

colonists, and assuming that they had the right to reverse the decision of the colonial court. When this order came to Boston all contention between local factions ceased, and both parties rallied to the support of the colonial government. In November, 1646, the general court met to determine what was to be done, and by a practically unanimous vote they decided that the citizens of Massachusetts owed no allegiance to England except such as subjects of a feudal lord owed the sovereign, and that, as they understood it, did not include the exercise of legislative or judicial jurisdiction over them by the parent government. They sent a remonstrance to Parliament against its action, asserting their chartered rights, compared their relation to England with that which she had formerly sustained toward Rome as the head of the Church, and her refusal to be governed by orders from Rome. While conceding the superior ability of Parliament, they denied that said body was as able to intelligently understand and regulate their affairs as were they who were on the ground and knew the conditions more perfectly.

Besides sending this remonstrance to England the general court refused to allow any appeal to be taken from the colonial court to those of England, nor would they in any way acknowledge any right of England to interfere in their internal affairs.

Edward Winslow, whom the colonists sent to England as their agent, expressly denied English jurisdiction, and said to the parliamentary commission: "If the Par-

liament of England should impose laws upon us, having no burgesses in the House of Commons, nor capable of summons by reason of the vast distance, we should lose the liberties and freedom of the English indeed."

After full discussion the parliamentary commission replied to the colonists' remonstrance: "We encourage no appeal from your justice. We leave you with all the freedom and latitude that may, in any respect, be duly claimed by you."

The triumph of the colonists was complete. Their assertion of independence in government was conceded. A safe and important precedent was set for the following century, and a sure step was taken toward political freedom.

Soon after this, when the Long Parliament had abolished royalty, it invited Massachusetts to receive a charter from it. This the colonists respectfully, but firmly, refused. And when, with no concessions being expected from the colony, some of the English friends of Massachusetts offered to secure aid for the colony from the Long Parliament the offer was rejected for the reason that "if we should put ourselves under the protection of the Parliament we must then be subject to all such laws as they should make, or, at least, as they might impose upon us. It might prove very prejudicial to us."

In 1652 a sovereign act was performed by the colony in establishing a mint, and here silver shillings were coined.

On the restoration of the Stuarts, in 1660, the royal authority again began to be asserted over the English colonies. The navigation act was the first measure seriously interfering with colonial rights and interests. By means of this the colonial productions, manufactures, internal traffic, and foreign and domestic commerce were, to a large extent, influenced and controlled for the advantage of English merchants and to the detriment of the colonists. In addition to this the royal government was, from this time on till the Revolution, almost continually asserting her right to bind the colonists by her laws.

In 1660 the general court appealed to Charles II to continue their civil and religious liberty, and, in April, 1661, they published a declaration of rights, claiming their exclusive right to elect their own officers and declare their powers, to exercise, through their executive, legislative, and judicial departments, all the powers of government, with no right of appeal from their decisions, to reject any interference on the part of the English Government with their colonial government or laws. With these rights conceded or established there would have remained little for their allegiance to attach to.

In 1662 Charles II made a number of demands on the colony in reference to the elective franchise, the enactment of laws, the administration of justice, and other matters affecting their relation to the home government. Some of these the colony complied with in so far as she

could without seeming to concede the right of the King to control her affairs, but she refused to concede his right to direct her to perform any of these acts. From this time the relation between the two governments became more and more strained. Whether attempting to exercise it or not, the English Government was constantly asserting its right both to legislate for and to govern the colony. The colonists were just as strongly asserting their entire independence, and that England possessed only such authority over them as was recognized in their charter.

Royal commissioners were sent over whom the colony refused to accept or obey. When the colonists sent their remonstrances to England against the attempt to thus govern them even the friends of Massachusetts in England could not comprehend why they were so excited over the affair, since they made no complaint against the character of the commissioners. They did not see, what was plain to the colonists, that the whole doctrine of colonial subjection to English rule was involved in the question whether or not they were bound to allow these royal commissioners to inquire into the colonial matter of administration.

The inefficiency of the government of Charles II enabled the colonists to withstand the royal purpose much longer than they could otherwise have done. Repeated demands were made on the colonists for a surrender of their charter, but these were always firmly refused. Finally, in 1683, a writ of *quo warranto* was issued

against Massachusetts, and during its pendency another effort was made to induce the colony voluntarily to yield. The general court was convened and the question fully discussed. The upper house, consisting of the governor and assistants, voted to yield to the royal demands. But in the house of delegates it was argued that if the people lost their liberties it was better that they be taken from them forcibly than that they should be surrendered voluntarily, and they refused to yield. In June, 1684, the judgment of the court was conditionally entered, which was soon made final, dissolving and annulling their charter. Before the record of this proceeding reached Boston, Charles II had been succeeded on the throne by his brother, the Duke of York.

The government of James II over the royal colonies was as arbitrary as that which he exercised in England. When the news of his exile reached America Massachusetts at once rose in rebellion, imprisoned the royal governor, and set up the government as it existed when her charter was declared forfeited: Had her charter been taken from her by force and not by legal process, the new sovereigns would undoubtedly have allowed her to resume and continue her government under it without molestation. But as it had been annulled by decree of court it could no longer be said to have an existence; hence it became necessary to provide a new basis for government. The colonists pleaded for a restitution of their old charter, or rather for a new one containing the provisions of the old; but this King William would



not grant. A new charter was issued to the colony in 1691 granting them partial self-government, but reserving to the crown the appointment of her governor, and some other of her executive officers, and also a royal veto on colonial legislation, as well as a right to appeal to the King from the acts of the colonial courts in certain cases.

In May, 1692, the royal governor, with the new charter, arrived in Boston. Under the charter the delegates to the assembly were elected by the people. When the general court met it was found that these delegates were as bold and independent as their predecessors had been. A bill of rights now passed the legislature and received the assent of the royal governor. This enactment asserted the exclusive right of the colony to levy taxes, all taxes levied without their assent to be unlawful, and the right of jury trial. The same year the town meetings, which had been prohibited under the former reign, were restored.

#### CONNECTICUT

On January 14, 1639, the three principal towns in Connecticut, viz., Windsor, Hartford, and Wethersfield, met and voted to unite in forming a commonwealth for their common benefit. A written Constitution was adopted providing that the civil officers should be elected by ballot by the whole body of freemen. The general court was made to consist of the governor, mag-

istrates, and representatives from the towns. All residents on being admitted to the body of freemen were required to take an oath of allegiance to the commonwealth. Thus was established an independent republic, for the settlements had been formed without any charter from England, and the government was now established without warrant or authority from any outside power. This was the first formal written American constitution prepared and adopted by the people for their own government. During this time the New Haven plantation was working under a government of its own formation, but without a formal constitution. This government of the Hartford colony, independent of all English authority, continued till 1662, when it was thought best by the colonists to strengthen themselves by the aid of a chartered government. Through the intercession of the younger Winthrop, and other persons of influence whom he enlisted in their behalf, Charles II granted a charter, joining into one colony the Hartford and New Haven plantations, with absolute right of self-government; the executive, legislative, and judicial branches being each free in its appropriate department. This charter only gave the royal sanction to what the colonists had from the first practised.

In local affairs here, as throughout New England generally, each settlement was a small democracy in which there was absolutely free self-government. Every citizen was free to take part in the town meetings, in which all the local affairs were discussed, the local taxes

imposed, and the local policy to be pursued determined upon.

Both Charles II and James II sought to procure from the colonists a surrender of their charter, but this the colonists strenuously refused to concede. In April, 1687, a writ of *quo warranto* was issued, whereupon the colonial authorities made certain reports and representations which the King construed into a consent to a surrender of the charter; in consequence of this the *quo warranto* proceedings were not pressed to judgment. In October of that year Edmund Andros, the royal governor of all New England, appeared before the colonial assembly and demanded a formal surrender of the charter. During the parley between the governor and the colonial officials the charter was carried away and secreted. Before any further definite action was taken on this subject James II was in exile, and thereupon the colony at once resumed government under the charter. It was admitted in England that these involuntary acts on the part of the colonists did not amount to a surrender, and consequently, as there had been no judicial forfeiture entered, the charter was still in full force.

#### RHODE ISLAND

The Providence and Rhode Island plantations had been started by Roger Williams and those who, in sympathy with him, were seeking the privilege of enjoying religious as well as political liberty, as independent

settlements, under no sanction of any government and without protection from any outside power. Here sprang up a pure democracy where each individual had as many rights as any other, and where the combined power of all did not seek to interfere with the personal views or conscientious convictions of anyone.

But as the settlers were not free from outside dangers they conceived it would be advantageous to procure recognition from the English Government. In March, 1644, Roger Williams, who had gone to England for that purpose, secured from the Long Parliament a charter for the Providence and Rhode Island plantations, which gave them full power to rule themselves under such form of civil government as they might choose. The equality of all men, and their right to take part in the public assemblies, was recognized. The early meetings of this colony—being the expression of a pure democracy—were frequently turbulent, but the public good was usually sought and found by the popular will. Government continued to be administered in this fashion under this parliamentary charter until after the restoration of the Stuarts.

In 1663 this colony received from Charles II a charter granting, if possible, more privileges to the colonists than had been conferred on those of Connecticut the year previous. In addition to securing to the colonists independent self-government the charter provided that "No person within the said colony, at any time hereafter, shall be any wise molested, punished, dis-

quieted, or called in question for any difference in opinion in matters of religion." In May, 1664, the general assembly enacted this principle, expressed in substantially the same language, into a colonial law; and one year later it asserted that personal liberty to worship God as each person thought best had been maintained in the colony from its very beginning. In 1665 the general assembly was divided into two houses.

The efforts of Charles II and James II to bring all the colonies under royal control extended to Rhode Island with the rest. On a refusal to surrender her charter a writ of *quo warranto* issued against Rhode Island in 1687. A report made to the King was taken by him as a concession on the part of the colony to his request for a surrender of her charter; thereupon the *quo warranto* proceedings were discontinued without going to judgment. When news reached America that the King had been dethroned the colonists at once resumed the old charter government, nor were they disturbed therein by the new sovereigns.

#### NEW ENGLAND TOWN MEETINGS

The New England colonies established and maintained a system of local self-government to an extent unknown in other colonies. Perhaps the system of government thus inaugurated has had as much to do in making complete local self-government a permanent and prominent factor in American constitutional government as any ele-

ment which has entered into the formation of our political system.

In each of the New England colonies, from the very commencement of their history, it was the custom of the people in each community to assemble annually, and at such other times as their needs and convenience seemed to make advisable, in public town meeting to discuss and act on such measures as affected their interests. All free-men were allowed to, and in practice did, take part in these meetings.

In the meetings thus constituted the people appointed their ministers, regulated their church affairs and school matters, attended to all their municipal business, elected and instructed their representatives, discussed and acted on all matters affecting their freedom, their business interests, and every matter in which they were generally interested.

It was the Boston town meeting that voiced the sentiments of the liberty-loving inhabitants of Massachusetts when no other method of communication was left open to them. And it was this meeting which the British ministry determined to suppress, and this system of government which that ministry made every effort to overthrow. In 1774, by an act of Parliament, Boston was allowed but two town meetings a year without express permission from the governor, and these were to transact no business except to elect officers. Other repressive measures of a similar character were also attempted.

The liberties of any people are reasonably well assured so long as such a system of local self-government and expression of public sentiment can be maintained as was embodied in the plan of the New England town meeting. Its influence in favor of American liberty was inestimable.

#### THE OTHER COLONIES IN GENERAL

I need not refer in detail to the settlement and development of the governments in the other colonies. The elaborate constitution prepared by John Locke for the Earl of Shaftesbury and his associates, for the government of Carolina, had no bearing on the permanent constitutional development of the country, and need not be discussed here. In spite of the action of the proprietaries looking to the establishment of feudalism and an aristocratic government, the people insisted on taking matters into their own hands to a considerable extent, and some features of popular government were admitted into the administration of colonial affairs in that colony.

The Dutch of New York soon learned some ideas of self-government from their contact with the New England colonists, and soon after 1640 the people began to exercise some influence in the government. Near the close of 1653 the first assembly in New Netherlands was held. It met without authority of law, but asserted its right to deliberate on the condition of the country. The assembly adopted a petition to the States-General which

was so bold in its tone that Governor Stuyvesant soon dissolved the body. In 1663, and again the following spring, popular assemblies were held with the approbation of Governor Stuyvesant.

On the surrender of New Netherlands to the English in 1664 the people were promised popular rights, but all legislative, executive, and judicial authority continued to be exercised by the governor and other officials whom he appointed. However, in 1683, the governor convened a legislative assembly which declared for all the rights and privileges belonging to Englishmen. Its enactments were similar to those of Massachusetts and Virginia. In 1691 an assembly was called by the governor sent over by William and Mary. This body declared all the laws of prior assemblies null and void, and then put forth a declaration in which they asserted the rights of the colonists to be such as are given by Magna Charta and are enjoyed by Englishmen at home. It then enacted a series of laws based on these liberal principles. From this time to the Revolution there was almost constant contest between the representatives of royalty and the people over the right of the latter to take a controlling hand in the matter of government.

New Jersey and Delaware underwent most of the vicissitudes in respect to government that were experienced in New York. When the Duke of York granted the province to a number of proprietors a liberal government was promised. But nothing of the kind was obtained till the territory came into the hands of the



Quakers. In 1677 the Quaker proprietors sent a written constitution to the few settlers then inhabiting their territory which contained as liberal provisions as could be desired. Freedom of conscience and religious opinion, no slavery, trial by jury, no imprisonment for debt, suffrage by ballot, education of orphans at public charge, were among the privileges granted. In 1681 the first Quaker legislative assembly ever held was convened.

In 1681 William Penn was made absolute proprietor of Pennsylvania, and in 1683 he submitted a constitution to the colonists for adoption, which provided for free government by the people. There was not always complete harmony between the proprietary and the colonists. But there was never any attempt on the part of the former to deprive the latter of a fair share in the government. Delaware being, for a time, united with Pennsylvania, had substantially the same system of government.

#### ATTEMPTS AT UNION BEFORE THE REVOLUTION

In May, 1643, Massachusetts, Plymouth, New Haven, and Connecticut entered into a confederation under the name of the United Colonies of New England. The articles of confederation were a sort of constitution and bound the colonies in a perpetual league, offensive and defensive, for the general welfare, including the preserving and the propagating of truth and the liberty of the gospel. Each colony was to choose annually two com-

missioners, all of whom were to be church members in good fellowship, who were to conduct the business of the confederacy. The rights reserved to each colony and the power conferred on the commission had much resemblance to those afterward enumerated in the Articles of Confederation retained by the colonies and given to Congress. This confederacy lasted forty years.

The first use of the term *congress*, as applied to the meetings of deputies from the several colonies, is said to have been in a proposition prepared by the English Government during the reign of William and Mary, for, but perhaps never submitted to, the American colonies, whereby they were requested to send two deputies from each colony to meet in "general congress," under the presidency of a commissioner appointed by the King, to adjust all matters of difference between the colonies, and to consider ways and means to support the union and maintain the safety of the colonies against their common enemies.

In September, 1753, the British Secretary of State requested the commissioners from the several colonies, who were to meet and form a treaty with the Six Nations, to also form a union among the colonies for their mutual protection and defence against the encroachments of the French. In pursuance of this recommendation deputies from New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, and Maryland met at Albany in June, 1754. After concluding a treaty with the Indians the commissioners proceeded to consider

a plan of union. From a number of plans proposed the meeting selected the one prepared by Dr. Franklin as the basis of their action. With some amendments this plan was finally adopted. It was proposed by this that parliamentary sanction be given to a general government for all the English colonies in America. The crown was to appoint a president-general and the colonies were to send deputies to a general council which was to meet at least once a year. This body was to make laws for carrying out the business intrusted to them affecting the general interests, to levy and collect taxes in a manner that would be equal and just, and to do those acts which naturally pertained to their supervision of colonial affairs. This scheme proved unacceptable to either England or America. The British Government thought it left too much power in colonial hands, and the colonies believed it placed too much authority in the hands of the King.

The first colonial congress held in America assembled in New York on the first Tuesday in October, in 1765, on an invitation sent out by Massachusetts, for the purpose of consulting, and to address the King and Parliament for relief. The stamp act received the royal assent on March 22, 1765. The proposition of Lord Grenville to introduce this measure was communicated by him to the agents of the American colonies with a view of obtaining, if possible, their consent to the measure. When the news reached America it caused the most profound feeling of anxiety that had ever been produced by any

measure of the English Government Nearly every colony took strong ground against the act as an infringement of its chartered rights. Most of them sent petitions and remonstrances to Parliament against the passage of the act. Some of these petitions Parliament refused to receive.

As soon as the news of the passage of the act reached America the people commenced to plan for resistance. Under the lead of Patrick Henry the Virginia house of burgesses was the first to lead off by the passage of a series of resolutions which boldly attacked the English policy and asserted American rights. Before news of this action reached the northern colonies Massachusetts had issued the call for a colonial congress to assemble in New York on the first Tuesday in October. In two or three of the colonies the legislatures were not in session and the governors refused to convene them for the purpose of appointing delegates. But Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, and South Carolina sent commissioners. These commissioners came with various instructions, but they all tended toward the end of, in some way, obtaining redress of grievances and relief from this tyrannical measure. On October 19, 1765, this congress, almost unanimously, adopted a declaration of rights and a statement of grievances, and soon thereafter prepared and adopted petitions to be sent to the two houses of Parliament and an address to the King.

This congress was composed of some of the most eminent men in America, and the state papers by it sent out will take rank with any that have been prepared by any body of men since then. It is not the province of this work to discuss them, but they are worthy the study of every patriot. They certainly led to the repeal of the stamp act.

There was no general meeting of the several colonies between 1765 and 1774. The feeling of rejoicing over the repeal of the stamp act which followed the meeting of the first congress was of but short duration. Discerning minds were aware all the time that Great Britain had not surrendered her claim of supremacy over the American colonies. The renewed effort to enforce the navigation acts, the tax on tea and other imports, the introduction of foreign soldiers to enforce the laws, all pointed, as did many other acts of the British Government, to a firmly adopted policy on the part of the ministry to exercise legislative authority, as well as executive and judicial control, over the colonies. The course which events took brought this issue prominently forward in Massachusetts sooner than in the other colonies, but all saw that what the government should accomplish in Massachusetts it would finally carry out in all the colonies.

When it became evident in the spring of 1774 that if any successful resistance to British aggression was to be made it would require the united efforts of all American patriots, Massachusetts again took the lead and ap-

pointed a second American congress to assemble in Philadelphia on September 5, 1774. All the colonies except Georgia sent delegates to this congress.

We have now arrived at a period in our history when nationality really commences to take form. Prior meetings had, in a measure, prepared the colonists for understanding each other's needs, and both the advantages and the practicability of united action. But now such action is to be undertaken on a scale that was surprising to the mother country, and which was to result in the formation of a new nation.

## II

## PERIOD OF THE REVOLUTION

No one can write a treatise on constitutional history in this country without being brought face to face with the question of sovereignty; he cannot avoid discussing it if he would. While writers differ in opinion as to where the people have placed, and to whom they have committed, the exercise of the sovereign power with which they have for the time being parted, no good reason exists why the question should not be discussed as dispassionately and as fairly as any other legal topic. I shall not attempt to say more than a small part of what might be said on this subject, but I shall not intentionally omit or conceal anything simply because it may have a tendency to discredit some of the conclusions at which I have arrived. I am free to concede that to my mind there are many difficulties in the way of arriving at a satisfactory conclusion as to what was the rightful power of the colonies and of the colonial and continental congresses respectively, both before and after the adoption of the articles of confederation. This difficulty is, as I think, very much greater than is that of determining the character of the general government and its relation to the State governments under the Con-

stitution. In my judgment the first of these questions is now of little practical moment, except from a purely historical standpoint. I do not think that a determination one way or the other of the question whether or not the Continental Congress was rightfully possessed with sovereign power or whether such power was, in fact, constantly exercised by it, or whether sovereignty at all times resided with and was exercised by the several colonies, would materially influence the determination of the question whether, under the Constitution, the United States is a Nation or a Confederacy. Still, the former question, as well as the latter, is one on which anyone who would write a constitutional history must necessarily say something. If I regarded it as having more of a direct bearing on the latter question than I do, perhaps I should feel like saying more than I shall say in this place.

Nothing is to be gained by discussing sovereignty as understood in England or as treated by European writers. The American doctrine is, and always has been, that sovereignty inheres in the people and is unalienable. From the planting of the American colonies this doctrine, though not then stated in the broad terms here given, was still to be found in embryo, and since we have been an independent nation there has been no serious controversy over the question.

Government is the representative of the sovereign people, and may be clothed with so much sovereign power as the people, who possess all, may choose to bestow. Gov-



ernmental agencies may be divided according to the will of the supreme force, and changed at its pleasure. There is no inherent power in government; all the power it possesses is derived from, and has been conferred on it by, the sovereign people.

Sovereignty in the British crown was conceded by all the colonies up to the commencement of the revolutionary struggle. I suppose that no one will make any claim for sovereignty in the colonies or their inhabitants prior to the meeting of the Continental Congress in 1774.

Much ingenuity has been shown in formulating arguments, and much space has been used in elaborating them, to show, on the one side, that from the inception of the struggle with England the several colonies were separate, sovereign, and independent commonwealths, and that no sovereignty resided in or was exercised by the Continental Congress; and, on the other side, to prove that there was a Union before there were separate States, that there was no sovereignty in the colonies until after Congress exercised the sovereign act of declaring their independence, that this sovereign power exercised by Congress was never surrendered to nor exercised by the colonies *separately*, that whatever sovereignty the colonies possessed was subordinate to that belonging to Congress, and was attributable to that rightfully belonging to and actually exercised by Congress.

Plausible, frequently forcible, arguments have been presented from time to time for a century and more in support of each of these views. Not unfrequently well-

known historical facts have been ignored, apparently because they did not coincide with the views which the writer desired to maintain. At other times undue stress has been laid on certain forms of expression which have been inadvertently employed, evidently with no thought on the part of the person using them that he was thereby furnishing material for an argument to sustain a view which he had never entertained. I do not think this question was, perhaps, entitled to the consideration it has received, and, as I have already said, especially in view of the fact that with the adoption of the Constitution it ceased to be a living question. I do not think the determination of the question is of much moment, nor that it has much practical bearing on the solution of questions with which we are still concerned. If I should concede all that has been said in support of the position that the Continental Congress never possessed any sovereign authority except such as the several colonies directly bestowed upon it, I should still insist that I had not surrendered any portion of the argument in favor of the claim that the United States is now a sovereign nation. Therefore what I shall now say is merely for the purpose of presenting the historical question in a way that will help to unify our whole constitutional history.

In discussing the question of the relationship existing between the general government, as represented in the Continental Congress, and the several colonies during the time of the revolutionary struggle many facts must

be taken into consideration if one would hope to arrive at anything like a correct conclusion. Many of these facts seem to have been frequently overlooked, or else were not deemed to have a bearing on the question which the writer was discussing. I shall now refer to a few of the matters, which, to my mind, seem especially pertinent to the subject under investigation.

The first Continental Congress met in Carpenter's Hall, Philadelphia, September 5, 1774. It should be borne in mind that this was purely a revolutionary body. It had no legal existence except the inherent right of the people to meet, in person or by representatives, and deliberate concerning matters affecting their general welfare, and to express their wishes to the government. Many of the delegates composing this body had not been appointed by any body or tribunal known to the law. They had been selected by assemblies or temporary organizations in the several colonies spontaneously coming together, and having no shadow of authority under the law. It was the work of the people in their primary capacity. Even in those colonies where the delegates were selected by the popular branch of the general assembly the action had no more validity than did that of the promiscuous meetings just referred to; for, as a part of the legislature these assemblies could only act in conjunction with the governor and council or upper house of the general assembly, and upon questions of legislative cognizance. The members of the assembly thus acting were not elected to send delegates to Con-

gress and had no authority to do so. The highest authority that can be attributed to any of the electoral bodies which sent delegates to this congress is to recognize them as the direct voice of the people. And the only authority which anyone can claim for the Continental Congress is that it was authorized to speak and act as the representative of the people. When' any writer assumes that delegates to the Continental Congress were authorized to represent the colonial governments he is assuming something as a fact which has no existence, and therefore his reasoning thereon is without force.

Of course the several bodies which elected the delegates to this congress acted as citizens of a particular colony, and they assumed to represent only their own colony. In no instance did the people of different colonies unite in electing representatives. Nor did any deputy in Congress assume to act for, represent, or bind any colony except the one from which he was chosen. In so far it is true that the colony rather than Congress was the unit of the body politic. But it was the people and not the colonies that were represented. The question at issue is, or was, did Congress represent one people or thirteen peoples? The delegates to the second Congress which met in May, 1775, were elected in substantially the same manner, and, of course, with the same powers, as those of the preceding year.

As it seems to me little light is thrown on this question by a reference to the title taken by the government or to the terms employed at different times in its history to des-

ignite it, although much has been written on this point. The following are found among the several forms of expression used by the Congress in sending out its acts and recommendations. "The good people of the several colonies (naming them) have severally elected deputies," etc.; "We, His Majesty's most loyal subjects, and delegates of the several colonies," etc.; "Friends and countrymen, we, the delegates appointed by the good people of the several colonies to meet at Philadelphia," etc. It is evident that the delegates recognized themselves as representing particular colonies, or the people of such colonies, and not that either directly represented any colony but the one from which he came.

But the important question is, how did he represent it? With what authority; in what capacity; as an independent unit or as an integral part of a united number whose combined power alone was authorized to represent each and all? The true answer to this question must depend not alone on what was said in their credentials, or in the style of address which they assumed when they became an organized body, although these are to be considered, but more, as I think, upon what they did, with the consent of those whom they represented, either before expressed or afterward fairly implied by their acquiescence in what was done.

It is said that up to the final ratification of the articles of confederation the Continental Congress passed no law or ordinance except those relating to its own organization; that all of its doings were confined to declara-

tions, resolutions, and recommendations. And this is referred to by certain authors, as I suppose, to show that Congress purposely refrained from exercising the sovereign power of legislation. But I apprehend it is not so much a matter of form as of substance that must determine the quality of an act. Whether their enactments took the form of what is usually designated a statute, or were expressed as declarations, is not so material as it is to know what was their purpose and effect.

The first Congress, in 1774, entered into an association for non-intercourse with Great Britain until they could obtain redress of their grievances. After reciting what they hoped to accomplish, they declared: "We do, for ourselves and the several colonies whom we represent, solemnly agree under the sanctities of virtue, honor, and love of our country," to abstain from the acts enumerated. Of course this is not a law, and for its violation no penalties are imposed. But were the delegates acting for one colony or for all; for local governments or for the whole people? When the news of this act reached England would she feel that she had Massachusetts alone to deal with or the people of twelve colonies (Georgia was not represented in the first Congress)?

Take the great Declaration of Rights of October 14, 1774. In this, as in its other papers, Congress speaks with no uncertain tone. The document voices the rights of all the people and not those of any one colony. The body which puts this forth is evidently representing the

people and not political organizations. What Congress said sounds like the voice of sovereignty. Still, it is probably correct to say that most of that which they did was not, strictly speaking, legislation.

Without going into details let us look for a moment at some of the things which Congress did before the articles of confederation were finally ratified. They announced the reasons for taking up arms, they appointed a commander-in-chief, and general officers subordinate to him, they provided for raising, arming, and supporting an army, they declared the independence of the colonies, and such other acts as sovereign governments do in time of war.

I submit that these are acts which have a strong tendency to sustain the contention that the Continental Congress was exercising sovereign power before any such power was delegated to it by the States through the articles of confederation. Many of these acts were done prior to 1776, when no one was making any claim that either colony was a sovereign State. When President Lincoln said in his first message to Congress, which met in special session on July 4, 1861, "The Union is older than any of the States," was he not justified in his statement by the existing facts? If declaring and maintaining the independence of a people are not sovereign acts I should hardly know what to name that are.

But it has been stated that some of the colonies, notably Virginia, had declared their independence prior to the time when Congress took final action on that subject

on July 4, 1776. It is true that in May and June, 1776, Virginia had taken action establishing a State government, with a written Constitution, independent of Great Britain. Some of the other colonies, if not going so far, had taken action in that direction. But looking at the substantial thing, the accomplished fact, can there be any question as to the source of our independence? Is the sovereign act of Congress in declaring independence, and are the steps she took securing it, at all affected by the action taken by Virginia and other separate colonies?

In 1775 Massachusetts, New Hampshire, and South Carolina applied to Congress for advice, which some would claim practically amounted, under the circumstances, to a request for authority to organize State governments independent of those existing under royal authority, or which had existed before they were overthrown by the revolutionary forces. On the advice and recommendation of Congress such governments were established. Similar action was taken in some of the colonies without consulting Congress. I think I am safe in saying that at that time all of the colonies supposed they were acting either under authority of Congress or at least in entire harmony with her wishes. At home and abroad it was Congress, and not any individual colony, that was looked to as the author of those acts which finally resulted in independence.

I have now referred to a sufficient number of acts to indicate pretty clearly the sovereign nature of the



transactions performed by Congress before any sovereign authority was directly conferred upon it by the colonies.

As to the effect of the Declaration of Independence upon the several colonies perhaps there will always be a difference of opinion. If we look at the language used it cannot be said to be opposed to the theory that it was the colonies as united in Congress which were declared independent. "We, therefore, the representatives of the United States of America, in general congress assembled, . . . do, in the name and by authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent states; . . . that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do." It may be noted that it was not the representatives of the *several* colonies, but the "representatives of the United States of America" who acted; that they act in the name, not of the colonies, but of "the good people of these colonies"; it is not the *several* colonies, but the "united colonies" which are declared independent states; and it is only as such that they are declared to have power to levy war, and do the other things which only independent states have a right to do. The language of the declaration and the acts of Congress seem to harmonize and to sustain the view that sovereignty and

independence reside in the "*united colonies*" which now became the United States.

This theory is by no means new. When the report of the committee of the whole, recommending the establishment of a *national government*, was before the Constitutional Convention for discussion and adoption, Mr. Martin, of Maryland, a leader of the federal as opposed to national party, said that by separating from Great Britain, the thirteen colonies were placed in a state of nature toward each other. But Mr. Wilson, of Pennsylvania, and Mr. Hamilton, of New York, contended that it was the *united colonies* which became independent of Great Britain, that they were independent not *individually* but *unitedly*, and it was thus that they became confederated. And this view has prevailed quite generally.

Having called attention to some of the things which go toward sustaining the theory of sovereign independent power residing in Congress from the first, and before it was possessed by the separate colonies, it is but fair to suggest there were certain acts of sovereignty which Congress did not assume to exercise directly, but only acted thereon through the colonies or States. One of these was the important power of taxation. Whether or not Congress might have exercised this power, as well as other sovereign acts which she did perform, had she chosen to do so, need not now be inquired into. It is sufficient that she did not attempt to do so. On many questions Congress made recommendations to and re-

quests of the several colonies for their action. Frequently these recommendations and requests accomplished little in the way of results. Still, there was the recognition that the colonies had the power to act, and there was no claim of right put forth by Congress to do more than to recommend or request.

Taking into consideration all these facts, including both of these lines of action, perhaps it is no more than one might reasonably expect, when we discover them leading to the adoption of two diverging lines of thought, and the formation of two schools of interpretation. But, as I have already said, so far as it affects our present government, I regard the question as immaterial and do not think it profitable to occupy more space in its discussion.

## III

## PERIOD OF THE CONFEDERATION

It was generally felt that there should be a clear understanding between Congress and the several colonies, and also that Congress, which represented the united needs of the colonists, should have facilities for accomplishing such measures as it might deem for the common good. That such facilities had not been furnished, or, at any rate, were not in active operation, was generally conceded. It was hoped by many that this could be done through the measure brought forward, and proposing the formation of a confederation. As early as July 21, 1775, Dr. Franklin presented to Congress a draft of Articles of Confederation and Perpetual Union of the Colonies. While this was not acted on it formed the basis of the report of the committee appointed to prepare a plan of union, and which was submitted to Congress by its chairman, Mr. Dickinson, July 12, 1776, and was adopted by Congress November 15, 1777. These articles were immediately thereafter transmitted to the several States for approval, and were finally ratified by Maryland, the last of the thirteen colonies to act, on March 1, 1781.

It was believed that these articles, if not conferring on Congress any new power, would at least furnish it with more efficient measures for carrying out its plans than it had before that been possessed of.

I think it may well be doubted whether the authority residing in Congress and actually exercised by it, with the tacit consent if not the express approval of the people of the several colonies, from its first meeting, in 1774, till the ratification of the articles of confederation on March 1, 1781, was not even more extensive than was that which was now, by these articles, explicitly conferred. Probably it is not too much to say that the articles of confederation, when put into actual operation, proved much less satisfactory than their friends had hoped they would be. Their inefficiency, as an instrument of government, was apparent almost as soon as they went into operation. As we look at them now and read them in the light of history we can hardly be surprised at the result. We should be profoundly thankful that an all-wise Providence was so forbearing in His dealings with their authors as to permit so much good to be accomplished as our country actually achieved under such defective apparatus. The only good purpose which this instrument seems appropriately designed to subserve is for an object lesson to teach statesmen what not to do. Had there been nothing but these articles to hold the people together we can hardly believe that independence could have been achieved or that the States would have remained united after peace had been concluded.

I do not consider these articles as forming the groundwork of, nor as having any especial bearing on, the Constitution which supplanted them. All I shall say of them is simply from an historical standpoint and not as of an existing, though modified, instrument, replete with life.

The second of the articles of confederation reads, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled." The structure of this sentence clearly indicates that a distinction is intended to be made between the two terms, "sovereignty, freedom, and independence," and "every power, jurisdiction, and right;" and that it is the latter alone that is modified by the remaining parts of the sentence. In other words the statement means that a part of the "power, jurisdiction, and right" has been delegated to Congress, but as to "sovereignty, freedom, and independence" the whole of it remains with the colonies. Still, the powers expressly delegated to Congress in other parts of the articles, or those which are clearly implied as belonging to Congress, are such as are universally recognized as sovereign powers. Whether those who drew and those who adopted these articles supposed that Congress possessed certain sovereign powers, or that sovereignty itself belonged to and remained with the States, while a part of the sovereign power was conferred on Congress, we may not be able to definitely determine. But it is hardly conceivable that they did not regard the

power to levy war, to conclude treaties, and other authority given to Congress, as sovereign powers.

Whatever view we may take of the question as to whether or not Congress was intrusted with sovereign powers under the articles of confederation, it certainly does not follow, as some have claimed, from the language used in said second article, that Congress had never possessed such powers. Before the adoption of these articles the power possessed by Congress was nowhere to be found in writing—certainly it was not contained in any one writing. The credentials of the delegates had professed to state some of their authority. Subsequent action of various colonies, through this legislative or other representative bodies, had conferred on or recognized in them other power and authority. And it is altogether probable that still other powers were exercised by Congress which the people of the whole country approved, but of which there existed no written evidence. Wherever sovereignty was lodged after the declaration of independence, it can hardly be claimed by anyone that before that event it resided in the colonies. Congress exercised sovereign power during that time. When did such power pass from Congress, and to whom did it pass? What necessity was there for the people, through the articles of confederation, to profess to confer that power on Congress if it was already possessed of it?

These matters have been presented for reflection and by way of suggesting some of the difficulties which one encounters who attempts to solve the problems of gov-

ernment. Not unfrequently language used conveys to two persons entirely different meanings. A third person proposes to substitute other words for those which the first two have used; one of them makes no objection, for he sees no material change in the meaning which would be produced by the substitution, while to the other person an entirely different document would thereby be created. All of these matters must be remembered and considered when we are criticising and construing these old documents. From the same instrument people then, as now, constructed governments possessed, as they supposed, of very different powers.

While certainly not free from doubt, and not pretending that the theory which I adopt solves all the difficulties that present themselves, it seems to me that the articles of confederation, whether intended or not, necessarily had the effect of withdrawing from Congress some of the power which it had theretofore possessed, instead of conferring new powers upon it. For the following reasons, viz., because at the opening of the revolutionary struggle, and before the Declaration of Independence, the colonies did not, and under the circumstances could not, possess sovereign power, and therefore could not have conferred it on Congress had they attempted to do so; and because the delegates to Congress were sent by the people and not by the colonies, and in their acts they professed to and did represent all the people of the thirteen colonies and not the people of the separate colonies; and because the language used and the acts



performed by Congress are, as I think, susceptible of no other reasonable construction, and because there is nothing seriously in the way of adopting such view, I am of the opinion that the Declaration of Independence created the United States a sovereign nation, that sovereignty resided in the whole people and was expressed through Congress as their general representative. But beyond this the difficulties thicken.

I see no act done by the people themselves whereby this sovereignty was taken from the people as a whole and, being divided, was transferred to the people of the States severally. And yet, judging by the course of subsequent events, and the views expressed by those who participated in public affairs at the time, and who seem best competent to decide, I am forced to the conclusion that after the ratification of the articles of confederation, and especially after the conclusion of peace, the several States were looked upon as entirely separate, each having the attributes of independence and sovereignty; and that Congress was supposed to possess only that sovereign power which was conferred upon it, or which was recognized as belonging to it, in and by the articles of confederation. I do not see how this change was legitimately made by the articles of confederation themselves, for the reason that they are the work of the States and not of the people. It is true that they were first adopted by Congress, which represented the people and not the States, but they were submitted to the States and not to the people for their ratification. The people

possessed supreme power, and the States only such power as the people had conferred upon them. Consequently, I cannot see how these beings, the State governments, could take sovereignty from the people as a whole and transfer it to themselves, or to the people of the States separately. But as I read the history of these times this is what the people recognized as having been done.

I do not think it strange that among our ablest writers on constitutional law the view should have been entertained that, after as well as before the ratification of the articles of confederation, sovereignty resided in the people of the United States and not in the people of the separate States; that during all that time, sovereign power belonged to Congress as a matter of right, and that Congress was the representative of a sovereign nation. But I am forced to the adoption of a different view, and for the reason, in addition to what I have already said, that the articles of confederation seem to me to be susceptible of no other interpretation; and, by whatever authority adopted, they were accepted by the people as containing the expression of the powers of the general government.

Unless we look to something else as the source of authority then, that the general government, existing under and by virtue of the articles of confederation, was a confederacy and not a nation is beyond question. It is so designated in the bond. The government is called a confederacy, or a confederation, and not a nation. The several States could not *retain* "sovereignty, freedom,

and independence" if they did not possess it. I know that some writers assert that this expression would not have been used unless the States had, from the first, possessed these powers; but I do not concede this, nor do I think it by any means proves that the United States had at no time possessed sovereignty. But I do think that the articles of confederation clearly imply that the States are independent and sovereign commonwealths, and that the Government of the United States, as represented by Congress, had only derivative powers.

It is true, as I have already observed, that even under the articles of confederation Congress was intrusted with the exercise of some sovereign powers, but it was without authority to perform so many sovereign acts which are essential to nationality that no serious claim can be made that under the articles of confederation the general government was anything more than the most loosely bound confederation.

## IV

PERIOD OF PREPARING AND ADOPTING THE  
CONSTITUTION

## MATTERS LEADING TO THE CALL OF THE CONVENTION

Under the government of Congress, both before and after the ratification of the articles of confederation, the want of power in that body was so manifest, and the necessity for a strong government was so pressing, that expressions of anxiety and moves looking to the adoption of some remedy came from time to time from all parts of the country.

In August, 1780, delegates from the New England States met in Boston to consider the general welfare. As a result of this conference the delegates adopted a declaration favoring a more substantial union than was contemplated by the articles of confederation which, at that time, had not been finally ratified. On an invitation sent out by this body another convention, composed of delegates from New York in addition to those from the States which had been represented in the former assembly, convened in Hartford on November 11, 1780. A new plan of government was proposed by this meeting and was sent to Congress and to each of the States, but

no action was taken thereon by the bodies to whom it was sent. Propositions were made by individuals, by State legislatures, and by Congress itself for amending the articles of confederation. On several occasions Congress asked the States for additional authority, especially over commerce and the revenue. The writings and correspondence of the leading statesmen of those times, including Washington, Adams, Jefferson, and Madison, show that they were intensely interested in having the defective government of the confederation remedied by the adoption of something more substantial and efficient.

In March, 1785, commissioners from Virginia and Maryland met at Mount Vernon to agree on a plan for regulating the commerce of Chesapeake Bay and the Potomac River, so far as it was common to the two States. The report of this commission to the legislatures of those two States, and the discussion arising thereon in the two bodies, led to the adoption of a resolution by the legislature of Virginia inviting all the other States to join her in appointing commissioners to meet at a time and place to be agreed on, "to consider how far a uniform system of their commercial intercourse and regulations might be necessary to their common interest and permanent harmony," and to report the result of their deliberations to the several legislatures and to Congress. Most of the States accepted this invitation and appointed commissioners, but only those from five States attended, viz., from Virginia, New York, New Jersey, Pennsylvania, and Delaware. These commis-

sioners met at Annapolis September 11, 1786. When their credentials were presented it was found that New Jersey, in appointing her commissioners, had enlarged on the plan proposed in the Virginia resolution, and had empowered them "to consider how far a uniform system of their commercial regulations, and *other important matters*, might be necessary to the common interest and permanent harmony of the several States," and to report such an act on the subject as when ratified "would enable the United States in Congress assembled *effectually to provide for the exigencies of the Union.*"

On account of such a limited number of States being represented, and believing that the New Jersey plan was far preferable to the Virginia proposition, which all of the States except New Jersey had followed in appointing their commissioners, the convention decided to do nothing farther than to recommend the calling of another convention with enlarged powers. An address was therefore prepared and sent to the State legislatures, and also to Congress, inviting the several States to appoint commissioners "to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union."

## HOW THE CONVENTION WAS CALLED

A great deal has been written concerning the power of the Constitutional Convention of 1787, and much was said in the convention itself by a number of delegates as to the authority that was conferred upon them by their respective States. It was then claimed, and it has been asserted over and over again since by writers in sympathy with the views of the delegates who made such claims, that the only power which the delegates had was to revise and amend the articles of confederation, and that the convention was assembled on the call of Congress for that express purpose. Personally I do not think that this question has any particular merits, and I consider it as of no consequence either the one way or the other, as I shall hereafter more fully explain. But because so much has been made of it perhaps it is just as well to briefly state the facts.

A late writer of some eminence who holds to the theory that our Government is only a confederacy, as well as other writers of more or less note, holds that the convention was assembled on the call of Congress and therefore could do no more than revise and amend the articles of confederation. Let us see how far such an assumption is justified. It is true that Congress did, on February 21, 1787, having under consideration the report made to it by the Annapolis convention, pass the following:

*“Resolved,* That in the opinion of Congress, it is ex-

pedient that, on the second Monday in May next, a convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the articles of confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the States, render the Federal Constitution adequate to the exigencies of government and the preservation of the Union."

Of course it was entirely competent for Congress to pass such a resolution, for the thirteenth of the articles authorizes their amendment by the consent of Congress and all the States. And it is not strange that some persons who have not carefully looked into the matter should assume that this resolution of Congress was the basis for the meeting of the Constitutional Convention. But how an author who shows that he knows of the other actions to which I refer can make such an assumption and still profess to be fair, is more difficult to understand. It seems as though he realizes that his argument in favor of a confederacy will have nothing on which to rest, unless he is able to make out that our Constitution is only a revision of the articles of confederation, and that, to sustain this point, it is essential to show that the holding of the convention originated with Congress.

I have already quoted from the report of the Annapolis convention in September, 1786, calling the Philadelphia convention, and in that call not one word was said about amending or revising the articles of con-



federation, nor were those articles referred to in any way. The report pointed out the defects in the Federal Government, and gave that as a reason why a convention to remedy the evil should be called. But whether the convention shall proceed to provide a remedy through the institution of a new government or by amending and revising the basis of the old one, the call does not say. It may also be said that the call sent out by the Annapolis convention was without any express authority. In fact it was so expressly stated in the report of the convention. But that convention said that in their view the exigencies of the occasion justified their exceeding their powers and proposing the action which they did.

We are now fairly brought to the question: By what authority was the Philadelphia convention convened? Two calls were issued, the first in September, 1786, by the Annapolis convention, the second on February 21, 1787, by Congress. Under the first call the States were asked to send delegates "To take into consideration the situation of the United States, to devise such further provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union." Under the second call the convention was asked to meet "for the sole and express purpose of revising the articles of confederation."

Before any action whatever was taken in Congress six States, viz., New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, and Georgia had appointed

their delegates to the Philadelphia convention on the call of the Annapolis convention, with authority expressed in their credentials in conformity with the said call. The other six States, viz., New Hampshire, Massachusetts, Connecticut, New York, Maryland, and South Carolina, did not appoint their commissioners until after the passage of said resolution by Congress. In the action taken by some of these States it does not appear on which call they are acting. The credentials of the delegates from New Hampshire, Maryland, and South Carolina seem to have been drawn on the basis of the Annapolis call and are broad enough to authorize them to act in accordance with the instructions received by the delegates of the six States first named. Massachusetts, Connecticut, and New York are the only States which instructed their delegates to revise the articles of confederation. Rhode Island took no action whatever and was at no time represented in the convention.

These facts seem to justify but one conclusion and that is that the Philadelphia convention, or at least the controlling part of it, was based on the call of the Annapolis convention. Of course under either call the convention might have revised the articles of confederation, but only on the call of the Annapolis convention, without ignoring the call itself and any authority it might presume to confer, could it proceed to form a new government. As a convention, under their instructions, the delegates met "to render the Constitution of the Federal Government adequate to the exigencies of the Union."

Of course to engage in the establishment of a new government some of the delegates would have to disregard their instructions, but the delegates from a majority of the States were under no such limitation.

#### AUTHORITY OF THE CONVENTION

Having now shown, as I think, that the Philadelphia convention, under the call and the authority conferred on its delegates, was not limited in providing a remedy against the calamity threatening the country, to a revision of the articles of confederation, or to a preservation of the old confederacy, I want to reiterate a statement I made above that, to my mind, this whole matter is of no moment. I have dwelt upon it at this length for the purpose, principally, of showing on what a slender thread some persons will hang an argument. I presume that not a single State legislature which elected delegates, and not one of the delegates elected, had, at the time of their election, any conception of the magnitude of the work which the convention would perform, or of the scope it would cover and the effect it would produce. Perhaps the result of the convention's work, while within the general scope, actually exceeded the specific instructions given to most of the delegates. Some of these instructions at least required the action of the convention to be reported to Congress and to the State legislatures for their approval. This the convention did not do. If the validity of the Con-

stitution, as the basis of a national independent government, depended upon the action of the convention I should be compelled to concede that it was without authority. Neither the body which issued the call, nor the State legislatures which elected the delegates, either singly or combined, had any authority to establish an independent government, and none of them attempted to do so, or to authorize it. While I deny, as a fact, that the convention exceeded the general scope of its authority, I am willing to concede it for the sake of the argument.

The Constitutional Convention did nothing authoritatively. It is hardly worth while to discuss what its powers were or were supposed to be. Whether it did what it was called for, or what it assembled to do, is wholly immaterial. It needed no power or authority from anybody to do what it did; all that it required was ability and a disposition to save the country. The authority of the Constitution does not depend, in the slightest degree, on its adoption by the convention, but alone on its ratification by the people; not on the authority which had been delegated to the convention, but on the power which inheres in the people. So far as authority was concerned, George Washington alone, who was its president, or Dr. Franklin, or Mr. Madison, each of whom was largely instrumental in the preparation of the Constitution, might have done all that the convention did. The fact that the members of the convention were elected by the various State legislatures

added nothing to what they might have done had the same men assembled without such election, and with no credentials but their own interest in the public good as shown by their voluntary presence, farther than that by such election it was made more probable that what they did would receive consideration, and would be more likely to meet the approval of the people when it was submitted to them for their action. This is evident not only from the inevitable conclusion to be drawn from the facts respecting the document itself, but also from the fact that Rhode Island never was represented in the convention at all. If the validity of the Constitution depended on the action of the convention, and of the authority of the delegates, and the delegates following their instructions, then it was necessary that each State to be bound by it be represented by delegates. But Rhode Island, which had no delegates in the convention, was as much bound by the Constitution, after her ratification thereof, as was either of the other States which was represented by delegates, and her rights thereunder were also as great as were those of the other States. This conclusively shows that it was not what was done in the convention, but what the people did thereafter, that gave efficiency to the Constitution.

What came to the convention by reason of its delegates having been elected, which it would not have possessed had they voluntarily appeared and transacted the same business without an election, was rather in the nature of a moral power and influence with the people

than a legal authority. It was the action of the people alone, after the work of the convention was all done, that gave vitality and life to the document which the convention had prepared and sent out. The convention was the attorney who prepared such an instrument as he thought would meet his client's wishes and would protect and advance his interests; the people were the client for whom it acted, and who alone, by approving and executing it, could breathe into it vitality and legal life. Whether the attorney were before chosen and commissioned to do the work, or whether, being conversant with his client's affairs, he conceived that such a document was one which his business interests required to have drawn, and therefore proceeded to prepare it, is entirely immaterial. The important fact, and the only one of any moment, is that the attorney did do the work, that he presented it to his client, that it met the client's approval, and that it was by him executed and made a legal document.

#### WHAT THE CONVENTION THOUGHT IT WAS DOING

In view of the fact that writers still so persistently attribute a *federal* character to our Government, and as one of the reasons in support of such action assert that such was the understanding of the convention which framed the Constitution, it is, perhaps, best to devote some attention to that claim. As I have already remarked on the subject of the authority under which the

convention assembled and performed its work, so I may repeat with reference to what the delegates *thought* they were doing, it is wholly immaterial. Nevertheless, other writers have not so considered or treated it, and, to guard against misconception on that matter, I shall attempt to show what the fact is.

I realize that quoting from two or three delegates, however influential they may have been, may not, by any means, show the general spirit of the convention. Only a few delegates took any prominent part in the discussion of questions before the convention. The views of the main body of the delegates found expression only in the action taken. To have anything like an adequate view of the opinions entertained by the convention, except as they are gathered from the final results of its work, one must go through the various measures presented, the discussions had thereon, and the votes taken; even then he is liable to be mistaken. The reasons for men's actions do not always appear. Frequently delegates vote for propositions which they do not favor, and often the friends of a measure allow its opponents to modify it when, if they chose, they might prevent it, because they believe the proposed modification does not have the effect its movers attribute to it, and by allowing the amendment to pass they may gain its opponents to their side in the final action on the main measure. Several instances of this character actually took place in this convention.

Notwithstanding what I have just said I think that

in a moderately short space I can show satisfactorily what the delegates in general and the convention as a whole thought on the subject of whether or not they were establishing a new government or perpetuating the old confederacy.

Up to the time of the meeting of the convention Mr. Madison was a member of Congress and as such was fully occupied with the business of that body. Nevertheless, being deeply interested in the proposed convention, he carried on quite a correspondence with leading patriots with reference to the course to be pursued. On April 8, 1787, he wrote to Governor Randolph, of Virginia, as follows: "I think, with you, that it will be well to retain as much as possible of the old confederation, though I doubt whether it may not be best to work the valuable articles into the new system instead of engrafting the latter on the former. . . . I hold it for a fundamental point that individual independence of the States is utterly irreconcilable with the idea of an aggregate sovereignty. I think, at the same time, that a consolidation of the States into one simple republic is not less unattainable than it would be inexpedient. Let it be tried then, whether any middle ground can be taken which will at once support a due supremacy of the national authority and leave in force the local authorities, so far as they can be subordinately useful. . . . Let the National Government be armed with a positive and complete authority in all cases where uniform measures are necessary, as in trade, etc. Let it also retain the



power which it now possesses. . . . Let this national supremacy be extended also to the judiciary department. To give the new system its proper energy it will be desirable to have it ratified by the authority of the people, and not merely by that of the legislatures.”

As Mr. Madison felt that he had not the time himself to do so he requested Governor Randolph to prepare a plan of government to submit to the convention when it assembled, and these views which he entertained were communicated to Governor Randolph for his aid in digesting such a plan. When we come to that feature it will be seen that most of Mr. Madison’s views, as communicated to Governor Randolph, entered into the plan which the latter presented to the convention.

The convention met according to its call on May 14, 1787, but it was not till the 25th of that month that a majority of the States were represented. Rhode Island was never represented. The other twelve States sent delegates, but at no time were they all represented at once. The sittings of the convention extended from May 25th to September 17th, with but short intermissions by adjournment. After delegates from a majority of the States appeared, two or three days were occupied in organizing, adopting rules, and getting ready for work.

On May 29th, as the first work of the convention, Mr. Edmund Randolph, of Virginia, introduced a series of resolutions forming an outline plan for the formation of a National Government. This plan provided for the

establishment of a "national legislature" consisting of two Houses with authority to legislate on all matters affecting the general interests, and the right to negative all laws of any State which, in the opinion of the national legislature, contravened the articles of union; a "national executive" with general authority to execute the national laws; a "national judiciary" with jurisdiction over questions of national concern. This plan also provided that the Constitution, when framed, should be submitted to conventions of the people for ratification.

Mr. Charles Pinckney, of South Carolina, introduced a much more formal draft of a constitution than was contained in Mr. Randolph's plan, the first article of which was as follows: "The style of this Government shall be the United States of America, and the Government shall consist of supreme legislative, executive, and judicial powers." The final draft of the Constitution, as passed by the convention, followed quite closely the form and language of this draft presented by Mr. Pinckney.

Both of these plans were then referred to the committee of the whole house, into which the convention was then resolved, for discussion. The convention sat in committee of the whole from May 30th to June 13th and considered minutely the needs of the country and the probability of their being met by the provisions of the documents submitted. Mr. Randolph's plan was taken as the basis for discussion. On June 13th, after the discussion of the Randolph plan was completed and

it was ready for favorable report to the convention, at the request of those who opposed this plan, action thereon was deferred and time given the delegates who were anxious to amend the articles of confederation to mature and present their plan. On June 15th Mr. Patterson, of New Jersey, reported a plan for a Federal Government, the first article of which was as follows: "*Resolved*, That the articles of confederation ought to be so revised, corrected, and enlarged as to render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union." On the question of postponing action on the Randolph plan in order to consider the Patterson plan, Mr. Lansing, of New York, who favored the latter, said: "The two systems are fairly contrasted. The one now offered (by Mr. Patterson) is on the basis of amending the Federal Government, and the other to be reported as a National Government" on propositions which exclude the propriety of amendment. And on the next day, while the two plans were under discussion, Mr. Lansing again said: "This system is fairly contrasted with the one ready to be reported—the one federal, the other national. In the first the powers are exercised as flowing from the respective State governments, the second deriving its authority from the people of the respective States."

The merits of the two plans, Mr. Randolph's for establishing a National Government, and Mr. Patterson's for continuing the confederacy and amending and enlarging the articles of confederation, were discussed in

committee of the whole until June 19th. The want of power on the part of the delegates to take the action contemplated by the Randolph plan was fully stated and earnestly contended for. The danger from a National Government and the merits of a federation were presented at great length. But after the fullest consideration had been given to these claims, and all the arguments opposed to the first and in favor of the second plan had been heard, the committee, by a vote of seven States against three, rejected the Patterson plan and adhered to its former action in favor of the Randolph plan, which was now reported to the convention with a recommendation that it be taken as the basis for the Constitution. The first article of the Randolph plan which was thus favorably reported to the convention by the committee of the whole read as follows: "*Resolved*, That it is the opinion of this committee that a National Government ought to be established, consisting of a supreme legislative, executive, and judiciary."

The report of the committee of the whole being now up for consideration in the convention, after some discussion over terms, such as *States, sovereignty, national, federal*, Mr. Ellsworth, of Connecticut, moved to amend the first resolution, as above quoted, so that it should read, "That the Government of the United States ought to consist of a supreme legislative, executive, and judiciary." Among the reasons he gave for desiring the change was that "He wished, also, the plan of the convention to go forth as an amendment of the articles of

confederation, since, under this idea, the authority of the legislature could ratify it." Mr. Randolph, the author of the plan, consented to the amendment, but said he "apprised the gentleman who wished for it that he did not admit of it for the reasons assigned." And so the amendment was made by unanimous consent without any division being called for. As a consequence the word *national* was stricken from the report wherever it occurred.

This change in the phraseology of the report is the basis for the whole argument put forth by those who assert that the convention supposed it was simply amending the articles of confederation. That any such deduction can fairly be drawn from what was there done and said cannot be sanctioned for a moment. That the Federal party in the convention hoped to secure such amendments to the proposed plan as would, in a measure, carry out their ideas, is quite possible, and perhaps they thought this amendment tended to aid them. But that the convention had any such idea is inconceivable. The day before, on a direct issue between the two plans, the National party had carried the convention by more than a two-thirds majority of the States voting. Nothing had occurred in the meantime to change anyone's opinion. No reason existed on the 20th for surrendering the national plan and adopting the federal that did not exist on the 19th. No one can, for a moment, believe that by voting with the Federalists to strike out the word *national* from the draft, the Nationalists sup-

posed they were in any way modifying their plan. Indeed, Randolph, the leader of the Nationalists, said his agreement to the amendment was for no such purpose, and, in all probability, the other members of his party had the same view. Nor is the change in the language susceptible of any such construction as is attempted to be placed upon it. It is true that the resolution reported from the committee to the convention declared that a *National Government* ought to be established. By the amendment unanimously adopted the word *national* was stricken out. But it now declared that the Government ought to consist of a *supreme* legislative, executive, and judiciary. Such a government could, in the nature of things, be no less than a *national* one. And thus it was evidently understood by the convention. That the convention which adopted the amendment considered the words therein contained as strong as the one which was stricken out is the only fair inference from the record, and no other conclusion can be drawn from the subsequent action of the convention, or from the position assumed by the Federalists as well as by the Nationalists.

After the amendment of the first resolution of the Randolph plan, by a unanimous vote, as just recited, Mr. Lansing moved to change the second resolution respecting the composition of the legislature. The report provided for two Houses; the federal idea was that there should be but one. On his motion to amend Mr. Lansing said: "The true question here was whether the con-

vention would adhere to, or depart from, the foundation of the present confederacy." After being discussed for two days by the ablest members of the convention, and the merits of each system having been elaborately stated, the convention again, by a vote of seven States against three, with Maryland divided, refused to sanction the federal theory, and adopted the resolution as reported in favor of two Houses.

Again, on the third resolution, the Federalists proposed that the first House should be elected by the State legislatures instead of by the people as provided by the resolution reported. This proposed change was voted down by six States against four, Maryland still divided, and South Carolina on this question voting with the Federalists.

With these decisive votes on a direct issue made by the Federalists themselves, and after full and fair debate, can anyone say that by the adoption of the Ellsworth amendment to the first resolution the convention had any idea it was now providing for a confederacy? The same question in a different form was raised from time to time more or less directly, but in no case did the convention recede from the position it had taken. When the last resolution, which provided that the Constitution, when completed, should be submitted to conventions of the people for ratification, came to be considered, Mr. Ellsworth moved that in place of the people it be submitted to the State legislatures for ratification. Of course this raised the whole question of the difference

between a nation and a confederacy, and the matter was again discussed at length. Mr. Gouverneur Morris said: "The amendment moved by Mr. Ellsworth erroneously supposes that we are proceeding on the basis of the confederation. This convention is unknown to the confederation." And Mr. Madison said: "He considered the difference between a system founded on the legislatures only and one founded on the people, to be the true difference between a *league* or *treaty*, and a *constitution*." The motion of Mr. Ellsworth was rejected by a vote of seven States against three.

In reference to the formal closing of the Constitution—"Done in convention by the unanimous consent of the States present," etc., Mr. Madison says: "This ambiguous form had been drawn up by Mr. Gouverneur Morris in order to gain the dissenting members." But none of the delegates seemed to regard it as of any moment, and with few exceptions the delegates signed the document.

That the convention did not understand it was amending the articles of confederation is farther conclusively shown by its action providing for the ratification of the Constitution. The thirteenth of the articles of confederation provided that any proposed amendment thereto should not take effect till approved in Congress and ratified by all the States. Not only did the convention refuse to submit their work to the State legislatures, but it also positively refused to submit it to Congress for its concurrence. It simply sent it to



Congress for it to submit to the people, and not to either approve or reject. On a proposition that the Constitution "should be laid before the United States in Congress assembled, *for their approval*," on a vote of eight States to three the words "*for their approval*" were stricken out, and only the part referring the Constitution to Congress was passed; of course this reference to Congress was made as the proper body to communicate with the people of the several States. There was no misunderstanding about this at the time, for Congress took no action thereon, and made no move to take any, except to send it to the several States for action by the people as the convention had directed.

Now, leaving the proceedings had in convention itself, let us see what some of the leading Federalists thought the convention had done, as shown by what they did and said after the convention had adjourned. New York was represented in the convention by Alexander Hamilton, Robert Yates, and John Lansing, the first being in favor of a strong National Government and the last two in favor of a confederacy. On July 5th, Mr. Yates and Mr. Lansing withdrew from the convention, and, after its adjournment, they wrote a communication to Governor Clinton in vindication of their course. After stating their impression of what, under the circumstances, they ought to do, they gave their reasons for opposing the work of the convention under two heads: "First, the limited and well-defined powers under which we acted, and which could not, on any possible

construction, embrace an idea of such magnitude as to assent to a general Constitution, in subversance of that of the States. Second, a conviction of the impracticability of establishing a general government pervading every part of the United States, and extending essential benefits to all.”

They then state at length what they supposed the legislature expected of them under the power conferred upon them, and also their objection to the Constitution, even if their powers had been such as would have enabled them to act upon it, and thus conclude: “These reasons were, in our opinion, conclusive against any system of consolidated government; to that recommended by the convention we suppose most of them very forcibly apply. . . . We have thus explained our motives for opposing the adoption of the *national Constitution*, which we conceived it our duty to communicate to your Excellency, to be submitted to the consideration of the honorable legislature.”

Mr. Yates was one of the leading lawyers of New York and was thereafter appointed Chief-Justice of the State. No one can doubt his ability to understand the force of what the convention had adopted, and he called its work a *national Constitution*.

Another leading member of the convention, and, perhaps, the one who most ably presented the federal theory, as opposed to the national plan, of all those who took part in the discussion, was Luther Martin, a delegate from Maryland, and, at the time, her attorney-

general. After the adjournment of the convention he delivered a very lengthy address before the legislature of his State in which he detailed the work of the convention and stated his reasons for refusing to support the Constitution. After stating that the convention was made up of three parties, styled by him, first a monarchical party, second a party who wished to secure to the larger States undue power; of the third Mr. Martin said: "A third party was what I considered truly federal and republican; this party was nearly equal in numbers with the other two, and was composed of the delegations from Connecticut, New York, New Jersey, Delaware, and, in part, from Maryland; also some individuals from other representations. This party, sir, were for proceeding on terms of *federal equality*; they were for taking our present federal system as the basis of their proceedings, and, as far as experience had shown us that there were defects, to remedy those defects; as far as experience had shown us that other forces were necessary to the federal government, to give these powers."

Mr. Martin then went on at great length to show that a majority of the convention refused to adopt any feature of the federal policy, but, on the contrary, provided for a strong central government which, in his opinion, was destructive of the principles of liberty. No quotation from this address can be made that will fairly state Mr. Martin's views without being too long to admit of insertion here. But his argument is unmistak-

able, and his conclusion is undisputed, that the convention had refused to base its idea of government on the States as sovereign political bodies, but had made its organic unit the *individual citizen*. Whatever conclusion anyone may come to as to what the convention actually did, he cannot read Mr. Martin's address without the conviction that at least this delegate believed the convention had provided for a dissolution of the confederacy and on its ruins the establishment of a strong National Government, in which the sovereignty of the States was to be lost.

Elbridge Gerry, of Massachusetts, also refused to sign the Constitution, and, in giving his reasons therefor to the legislature of his State, said: "The Constitution proposed has few, if any, federal features, but is rather a system of national government." He submits to his State the propositions: first, "Whether there shall be a dissolution of the federal government; second, Whether the several State governments shall be so altered as in effect to be dissolved; third, Whether, in lieu of the federal and the State governments, the national Constitution now proposed shall be submitted without amendment."

It seems to me that what I have given should be satisfactory proof that the convention understood it was not amending the articles of confederation, but was preparing for the organization of an independent national government.

## WHAT THE CONVENTION DID

I have already spoken, perhaps sufficiently fully, of the argument and deductions made by certain writers, from the discussions had in, and the action taken by, the Constitutional Convention, but I again call attention to the subject in order to guard against being misled by it. The remarks of the delegates and the action of the convention are frequently spoken of as though they were from the *principal*, whose word and act were final; when, in fact, the convention was not even an accredited agent of the principal—the people; it was but a self-constituted agent, or, at best, a subagent—one whose members were appointed, not by the principal, but by another agent of the principal, viz., the State legislatures. This agent was using its best endeavors to prepare a document which it hoped would meet the approval of the principal whom it assumed to represent when it was submitted to it for its consideration. The delegates to this convention were wise, able, honest, and patriotic men, and as such the views which they expressed are entitled to respect and consideration; but it must be remembered that they have no official significance, and are binding on no one. They understood then, as well as we now understand in the fuller light of history, that, with the divergent views entertained by the various members, if they accomplished anything it must be by way of compromise. When they had come to a point where

it seemed that no agreement could be arrived at Dr. Franklin said: "When a broad table is to be made and the edges of the planks do not fit, the joiner takes a little from both and makes a good joint. In like manner, here, both sides must part with some of their demands, in order that they may join in some accommodating proposition." Under such circumstances many delegates advocated and voted for measures which did not express their real view, not what they would have been glad to accomplish, but only what they were willing to see adopted rather than that no result should be reached. Probably not a single member was satisfied with the Constitution which the convention proposed and for which he finally voted. But practically all the delegates supported it in the end as the most perfect plan that could be devised and agreed upon in view of the diversity of opinion prevailing, and as the only means of escaping the perils threatened under the federal system then in operation.

Again, the discussions which took place, the propositions submitted, the amendments offered, and the votes taken in the convention cannot be appealed to as throwing any light on the subsequent action of the people in ratifying the Constitution, for the proceedings of the convention were secret, and were not published till years after the Constitution had been adopted and the Government thereunder had been in operation; being unknown to the people such proceedings could not have influenced their action in voting for or against the Constitution.

The people acted on the instrument as an independent document, and as such it is before us for interpretation as it was before them.

As I have already pointed out the discussions and votes in the convention are, as I think, clearly repugnant to the theory of those who so strenuously insist on the sovereignty of the States under the Constitution, and I should be glad to have every word spoken and every vote taken in the convention fully considered in determining the question I have considered, viz., what the convention thought it was doing. But I insist that such consideration has no place in determining what the instrument is on which the people acted. When presented to the people the Constitution had to speak for itself. To the people who had to act on its adoption the question was, as to us who have to interpret it today it is, not what the convention thought it was doing, but what did it do—not what did the delegates think the instrument meant, but what does it mean—not did a majority of States represented in the convention prefer a confederacy, but did the Constitution which they prepared and asked the people to adopt provide for one?

It is important to have in mind the distinction between the two systems of government, each of which has been supposed by some to have been established by the Constitution. A confederacy is a government in which two or more independent States are united under an agreement or compact entered into between them whereby certain powers are delegated to a general

government which exercises the powers conferred upon it, in so far as they relate to the individual States and their citizens, through the several State governments and not upon individuals directly. In a confederacy the general government recommends but it is left to the States to execute. A nation, on the other hand, is a sovereign, independent people, with a constitution, written or existing in and preserved through tradition, customs, and institutions, whose government operates directly on the individual citizen and not mediately through another government. A confederacy exists through agreement, compact, or similar arrangement. A nation is founded by the sovereign act of the people, and its fundamental law, whether written or unwritten, is termed a constitution.

The discussion of the Constitution after it was framed by the convention and while it was before the people for their adoption or rejection may have had some influence on the people in the formation of their judgment as to whether they would or would not give to it their support. The views thus expressed may, in some measure, be supposed to be the views of the people; of course not necessarily so, and certainly the divergent views held and expressed by different speakers and writers could not all have been accepted by the people as the true interpretation of the instrument on which they were called to act. Still these discussions may be said, in some sense, to be a contemporary interpretation of the Constitution, and are not so irrelevant to a discussion of its



meaning, as understood by the people who adopted it, as are the speeches and acts of the delegates in the convention about which the people knew nothing at the time they voted on its ratification.

In these discussions the series of papers prepared by Hamilton, Madison, and Jay, and universally known and referred to as the *Federalist*, stand pre-eminent alike for boldness, ability, comprehensiveness, and fairness. But in reference to these papers we should remember that the writers are speaking as attorneys rather than as judges. They very much desired the adoption of the Constitution, and, so far as they honestly could, undoubtedly they said such things as they thought would influence people in its favor. Therefore their papers are not to be taken as those full, free, and unbiassed expressions of their individual views which might be looked for had they been given after the Constitution had been adopted. Everyone should understand that the views of these writers are to be gathered not from any one expression, or any one out of a number of papers. A recent writer, of whose work I have already spoken, has sought, inferentially at least, to array Hamilton on his side in favor of an argument in favor of State sovereignty and that the Constitution continued the confederacy instead of creating a nation, and for this purpose he refers to a paper in the *Federalist* wherein Hamilton, in speaking of a possible conflict between the State government and the general Government, says that in a *confederacy* the people may be said to be masters of

their own fate; but this author lays no stress on Hamilton's language in another sentence a little farther along in the same paper, in which he says that State governments will "afford complete security against invasions of the public liberty by the *national* authority." It is hardly fair to Hamilton or to the reader to call special attention to the word *confederacy* and to make no reference to the use of the word *national* when assuming to arrive at Hamilton's idea of the kind of government provided for in the Constitution.

Both Hamilton and Madison, in the *Federalist*, speak of the *federal* government, and use the word *confederacy*, and other terms of similar import, but each uses the term, not as the designation of a confederacy as distinguished from a nation, but simply as a term in general use distinguishing the general from the State government. In the same way are the word *national* and other similar terms used. I do not care to single out and emphasize any of these expressions, for I do not think it would materially add to our knowledge of the Constitution or assist us in its correct interpretation. If the construction which I place on the Constitution cannot be maintained except on such technical quibbles I should not care to contend for it. I place my construction on the broad ground of the evident and plain meaning belonging to the language employed and upon the universally recognized rules of construction. I do not ask anyone to agree with me if he cannot do so for some better reason than through a distorted meaning being

forced into some unguarded language of those who took part in framing and adopting the Constitution. I think that any student of the Constitution can receive great benefit from a careful reading of the *Federalist*, and also from a study of such other discussions of the document as he has access to which took place in the various State conventions when the matter was before them for action. But these documents must never be accepted as authoritative interpretations of the Constitution.

In connection with the conceded fact that the body politic is sovereign while the government is not, it has been said, "Destroy the government of a State and the State still stands; but destroy the government of the United States, and what single body politic remains? All that would remain would be the forty-five bodies politic—the States." The untenableness of this statement and of the inference sought to be drawn therefrom consists in the implied assertion that the States, as such, and as distinguished from the State governments, are indestructible, while the United States, as one people, is destroyed by the destruction of the general government. The States are no more indestructible than is the United States. The perpetuity of either, after the destruction of the respective governments, is conditioned on the will of the people. Destroy the government of Texas, and at the same time that of the general Government, and the people of Texas still remain and, unless deprived thereof by some superior force, are possessed of sov-

ereign power. As such they may decide to form a new government, with the same boundaries and containing all the people who were embraced in the original government. But they are not bound to do so; and, instead of this, they may divide into a number of separate territories, a part of which may, with her consent, join Louisiana; others may form two, three, or more separate State governments. In such event has not the *State* been destroyed? Certainly it is no longer Texas as Texas existed at the time of the supposed destruction of its government. What more destruction would occur to the United States in case of the destruction of the general Government? The people as a whole originally formed that government, could they not do so again? All that can be said is that when government is destroyed governmental powers revert to the people, who may reform the old government, construct a new one on an entirely different basis, or divide up indefinitely, and each part for itself form such government as it pleases. The argument in favor of State sovereignty and a confederacy as the nature of the general government cannot be supported on the theory of the indestructibility of States and the necessary destructibility of the United States as one people on the dissolution of all government.

Of course we can hardly suppose the existence of the United States without the existence of the several States. Indeed, the United States Government could not exist without quite a degree of modification if there

were no State governments. And yet the destruction of all the State governments, and still the preservation of the National Government, with the essential modifications accomplished, is by no means inconceivable. State lines are erasable, while a State body politic is not indispensable, nor are its powers limited to an organization by itself alone. If two States may unite then forty-five may do the same thing.

In each one of the United States there are two sovereignties—the National Government and the State government, each sovereign over the particular subjects which the people have committed to them respectively. So far as relates to the original thirteen colonies, the State governments were in existence before the formation of the National Government, each exercising such sovereign powers as the people had committed to it, and in general these embraced all those executive, legislative, and judicial powers which are exercised by independent governments in reference to their internal affairs. Most of their international affairs had been placed under the care of Congress. He was the rare exception indeed, if anyone at all could be found at the time of the formation of the Constitution, who would take from the States any of the powers of internal administration and government which they were then exercising. Conceding to the States the exercise of most of those powers of which they were already possessed, the problem was how to form the National Government with such powers committed to its keeping as the people desired to bestow

upon it, and at the same time have a harmony in the workings of the two governments.

Of course the Constitution of the United States could not undertake to define the powers possessed by the State governments; it was not framed for that purpose and the State governments being already organized and possessed of their powers there was no need that such powers should be mentioned, except in so far as the people desired to withdraw from the State governments some of the powers they had theretofore conferred upon them, or else to expressly provide that thereafter no part of the people, that is, the people of no State, should confer on their State government certain powers which all the people desired should be possessed by the National Government, or else should remain with the people undisposed of and to be exercised by no government.

The only feasible plan open to the framers of the Constitution was to define the powers that were to be committed to the National Government. Had there been no other government occupying the same territory and exercising authority over the same people, these powers might have been conferred in much more general terms, as had generally been done in the various State constitutions. But as two sets of officers were to exercise executive powers, and two different legislative bodies were to enact laws, and two series of courts were to interpret and declare the law over and for the same people, it was necessary that the powers of each be so defined as that there would be the least possible ground for conflict and

misunderstanding. Those who framed the Constitution of the United States, therefore, undertook to make it specify and define the powers which were to be, by the people, conferred upon the National Government, and to specify the limitations which the people were to place upon the exercise of power by the several State governments.

This distinction between the two governments came to be somewhat generally expressed by saying that the State governments were governments of original powers, while the National Government was one of delegated powers, or by other terms and expressions of similar import. The expression *original powers* as thus applied to the State governments means no more than that these governments originally received their grants of authority from the people in general terms, and being in possession of such powers at the time of the adoption of the national Constitution they were left, in the main, undisturbed as originally given and expressed; while the term *delegated powers* or *defined powers* as applied to the National Government means that its powers, as conferred upon it by the people, are defined in the Constitution which created it. So far as the National Government was concerned the powers of the State governments were original, existing at the time of its creation, not named or defined in the instrument by which it was created, while its own powers were delegated to it at the time, and were defined in the instrument by which it was created.

This distinction between the two governments, or between the two methods of expressing the powers which the people had conferred upon the two governments, naturally led the national courts to adopt this rule of construction, viz., if a power is claimed by, for, or under the National Government it will be denied unless it is conferred in express terms in the Constitution of the United States, or is there found by fair implication; but if a power is claimed by, for, or under a State government, such power will be presumed unless it is in conflict with some power given the National Government, or else is denied to the State government by the terms of the national Constitution, provided, of course, the power claimed is one which appropriately belongs to one of the three departments of government. Of course the presumption here spoken of is not conclusive.

I will now quote from a few authorities in reference to this rule of construction. Mr. Hamilton said: "If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may be safely deemed to come within the compass of the national authority." Mr. Cooley says: "To ascertain whether any power assumed by the Government of the United States is rightfully assumed, the Constitution is to be examined to see whether expressly or by fair implication the power has been granted, and, if the grant does not ap-



pear, the assumption must be held unwarranted. To ascertain whether a State rightfully exercises a power, we have only to see whether by the Constitution of the United States it is conceded to the Union, or by that Constitution or that of the State prohibited to be exercised at all." Mr. Justice Story says: "The Government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." Chief-Justice Marshall says: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In discussing "What the Convention did," it has seemed to me to be necessary, or at least appropriate, to go into these matters of deduction and inference, which might appear to more appropriately belong to an interpretation of the Constitution than to constitutional history, in order to show that the Constitution is more than may at first sight appear on its face. What the convention did was to prepare and recommend a document which is much vaster in its scope and meaning than some persons have been willing to concede. It is this Constitution with a broad and deep meaning, suited to a great and expanding country through a long series of years, that I am trying to present in its historical aspect to my readers.

Professor Tucker, whose work has already been referred to, in order to have any foundation for his theory that the Constitution continued the old confederation and did not establish a sovereign nation, is compelled to make much of a few expressions in the Constitution which really have little significance, and to ignore or explain away the force of many other expressions which are full of meaning. He is thus confronted with the language of the preamble which declares that "We, the people of the United States," do establish this Constitution; and he devotes much space to show that after all it was the States which established the Constitution. It is true he admits it was the people of the States, but the work was, as he says, the work of States as States, and not the work of one people.

Of course it is true that the people of each State acted by itself in the matter of ratification. But they understood that they were acting on an instrument in which they declared themselves one *people*, and by which they, in their sovereign capacity, were establishing for themselves a government over a sovereign nation. Whether the people of all the States all went to the polls on the same day and voted, or were all assembled in one great body and thus voted, or whether they elected delegates to assemble in a number of conventions and there vote for them, made no difference. It is the fact that it was the people in whom sovereignty inheres who ratified the Constitution that is of paramount importance. The language of this preamble cannot be explained away. It

stands as the clear declaration of the party who made the instrument, and who is bound by it, that it is the work of *the people of the United States*.

Whatever others may claim, it is not my position that the United States were one people, in the sense in which I now use that term, viz., as a distinct nation superior to the State governments, at the time of the convening of the Constitutional Convention, nor that they became so by the action of that convention, but only by the adoption of the Constitution by the people. I do not understand why writers labor so hard as some do to demonstrate the fact that it was not *one* people but *thirteen*, which adopted the Constitution. The important fact is not what they were before the adoption of that instrument, but what they became by its adoption. Thirteen men, perfectly free, and under no obligation to each other, consult and cause an instrument to be prepared providing for their forming themselves into a co-partnership. They were thirteen persons, and not one, before the instrument was written, and they so remain until they all execute it. They do not execute it as one person but as thirteen. When it has been fully executed, whether they do it all together in each other's presence, or whether it is done by them separately in thirteen different places, they become, by its very terms, one *person*, for the terms of the partnership. This illustration is given only for the purpose of indicating that a people need not be in one body when they act, and need not act all at once, and need not be united

before the act in order to become *one people*—a new being—by their act.

Preceding and during the convention there was no nation, nothing but a confederacy, in our present territory, and this confederacy was composed of thirteen independent States. There were, strictly, thirteen peoples. They proposed to become one people. They caused an instrument to be prepared providing for uniting them into one people—substituting a nationality for a confederacy. Each of the thirteen people adopted and ratified this instrument. When this was done they were, for governmental purposes, no longer thirteen people but one. It was only upon the ratification of the Constitution that its language, “We, the people of the United States,” became operative.

In the discussion of constitutional questions we need not ignore common facts nor common sense. That the people of the United States have preserved their State organizations, and in each State their several municipal organizations, and that their will is expressed and their local governmental affairs are conducted through them, since the organization of the National Government, in the same way that they were before, is perfectly consistent with nationality, and is exactly what we should expect them to do. Practically there was nothing else for them to do. It would be impossible for them to meet in one body to conduct public affairs, or to take any political action. They must necessarily work through some local organizations in a nation no less than

in a confederacy. The mode of expressing themselves does not render them any the less one people.

It is a rule of universal application in the construction of a legal document that its meaning is to be ascertained from the language which it contains. All that was said by those who drew it and by those who executed it, at, before, and after the time of its execution, all that was said by others, contemporary with its execution, as to what it meant, may, under certain circumstances and within proper limits, be referred to for the purpose of aiding him who is called in to declare what the language means; but these helps are never to be used to overthrow the instrument, or to make it mean something different from what is conveyed by the language actually employed. We may, all of us, who form the court of public opinion, refer to what was said by the delegates in the convention, to what they and others said while the instrument was under discussion before the people preliminary to its ratification, what men of learning and discernment said of it at that time and since, still, all of this is but to aid us in answering the question, What does the Constitution say, what does its language mean? And I insist that all which has ever yet been said on this question has not made out, and cannot make out, that the language, "We, the people of the United States," means that those who adopted it were speaking of thirteen peoples, if that term can be allowed.

The Constitution of the United States is our charter of liberty, it is the security for our persons and property.

It is the safeguard against the destruction of our civil and religious rights, it is the only guaranty for our common right in the blessings that belong to us as citizens of this great nation. Each citizen now has, as those in the past had, the right to insist that its meaning shall be ascertained from the instrument itself, and not from what some one has said of it. If it is only a compact between States, as the old articles of confederation were, then, like that, it may be annulled by any one of them. Rhode Island and North Carolina protested for a long time against the dissolution of the confederacy, but it had nevertheless taken place, and the Government of the United States under the Constitution was proceeding in its work in spite of their protest. If it could now be established that we are living under a federation and not in a nation, then there is no reason why this confederacy might not be dissolved on the wish of any State. Citizens of Kansas might thus be deprived of the benefits of a government embracing under its jurisdiction California and South Carolina.

It is strange that in the face of the language used in the Constitution, notwithstanding the general tenor of the whole instrument, in spite of its provisions for national sovereignty in all the features of general interest, and of the express declaration that this Constitution and the laws and treaties made thereunder shall be the supreme law of the land, politicians and writers may still be found who speak of it as a pact, or compact between the States. Towns and corporations, as well as

States and independent nations, make compacts and agreements. Such agreements are binding only so long as each party chooses to abide by their terms. But the sovereign people of America, standing on the brink of a great political catastrophe from which they were anxious to escape, rising above the bickerings of party and clique, proclaimed to the world a *Constitution*. A confederacy had brought them to the verge of ruin, and now, even those who had been wedded to the idea of State equality and State supremacy joined with those who saw more clearly the defects of such a system, and sank the *confederation* in order to make room for a *nation*.

But it is said the word *nation* is not used in the Constitution. Nor is the word *confederacy* used therein. The absence of one of these terms is no more significant than is that of the other. But the word *confederation* is used in at least two places in the Constitution, and its use is very significant. Section 10 of Article I declares that "No State shall enter into any confederation." And Article VI declares that "All debts contracted and engagements entered into before the adoption of this Constitution, shall be as valid against the United States under this *Constitution* as under the *confederation*." It is the same people and the same territory now that it was before, but formerly this people lived under a *confederation*, consisting of States bound together by an agreement or compact, now they live under a *constitution*. The contrast between the two is recognized in the

Constitution itself. Except for the prohibition that no State shall enter into any *confederation* such a compact might have been formed; it would not have been the formation of a new nation, but merely the making of a compact for their mutual profit. This same section ten also prohibits any State entering "into any agreement or compact with another State" without the consent of Congress.

Section 1 of Article II declares that "No person except a natural born citizen . . . shall be eligible to the office of President." A *natural born citizen* of what? If there was no *nationality* established embracing the citizens of all the States then this provision should have been a citizen of one of the States, but the inevitable inference to be drawn from the language is that the President must be a natural born citizen of the United States.

That the government established by the Constitution is for a *sovereign nation* is also apparent from other provisions of the Constitution. Section 9 of Article I enumerates a number of things which Congress shall not do—among others that the writ of *habeas corpus* shall not be suspended except in case of rebellion or invasion, that no bill of attainder or *ex post facto* law shall be passed, that no title of nobility shall be granted. There is no direct provision in the Constitution for the exercise of either of these powers; why should Congress be prohibited from their exercise? Evidently because Congress, possessing the legislative authority of a sover-



eign nation, had the inherent right to exercise such power, on proper occasions, unless expressly prohibited. Substantially the same principle applies to a consideration of the first ten amendments to the Constitution.

The claim in favor of a confederacy instead of a nation is not strengthened by pointing out, as some writers have done, special provisions in the Constitution recognizing the right of the States, and in some instances limiting their powers. Prior to the adoption of the Constitution the States were, as I think, and as I have stated time and again, sovereign. True, they had parted with the right of exercising certain features of sovereignty, which rights had been conferred on the confederation. But, speaking generally, I would say each State was an independent sovereignty. Neither the convention which framed the Constitution, nor the people who adopted it, had any thought of abolishing the States. Such a purpose was discussed both in the convention and before the people while the Constitution was before them for their action thereon. But no respectable number of people ever contemplated such a scheme. The question which all who had anything to do with it tried to solve was how a strong National Government could be formed and still leave the States in the full enjoyment of all their rights as far as they related to local self-government. The scheme devised seems an admirable one.

Supreme sovereignty, residing with the people, was by them taken from the States and deposited with a new body politic by them created by a union of the

thirteen separate ones which had theretofore existed, and the exercise thereof was conferred on the National Government in all matters affecting the general interest. But only in so far as it was conferred on the National Government was the exercise of sovereignty taken from the States. No State might any longer exercise the sovereign power of making treaties, regulating commerce, levying war, or performing any of the great governmental acts, the management of which was conferred on the general Government. But within their sphere the States remained sovereign. The exclusive power of taxation for all State and local purposes remained with them; over this matter each State is absolutely sovereign. And without going into details, it may be said that respecting local government the State is supreme.

But when this, which everybody concedes, has been stated, and stated as strongly as anyone is capable of expressing it, nothing has been said which, in any manner, weakens the force of the argument in favor of nationality as derived from the language used in the Constitution, and as corroborated by every feature of the people's action in any way connected therewith. Sovereignty and nationality are so unmistakably written in the Constitution that no one can ever hope to have enough ingenuity to devise an argument so strong as to destroy its belief in the minds of the people or to drive from them their faith in its reality.

The equality of States in representation in the United States Senate is no argument for or against the

sovereignty of the nation. Every one at all acquainted with history understands how that feature of our government came to be adopted. Twelve States were represented in the convention. One-third of these, viz., Virginia, Pennsylvania, Massachusetts, and North Carolina, were much more populous than the rest and were termed large States; the other two-thirds were spoken of as the smaller States, although one or two of them usually voted with the larger States on questions affecting their interests. The larger States contended for representation in the Senate, as in the House, in proportion to population. The smaller States would not consent to this, and being clearly in the majority were able to control the convention so as to secure equality of representation in the upper House. As a supposed apparent equivalent they made certain concessions, but there was substantially nothing of value in them. No one at the time considered this as having anything to do with the question of sovereignty.

When the English Government was organized on its modern basis of parliamentary representation, and the admission of the Commons as a controlling force in government, it found counties and boroughs existing as political units for local governmental purposes. Parliament might have organized new electoral districts, but the most natural and convenient thing to do was to make use of these organizations which were already formed, and with which the people were familiar, for the election and return of its members. And so the people of the

United States, when they organized the National Government, already had State governments to which they were strongly attached. They might have provided separate and independent political machinery for use in choosing members of the national legislature. But the natural thing to do was to adopt that already in existence. Senators and representatives are no less the people's representatives in the national legislature than they would be were they elected by a newly organized machinery, acting independently of State control.

State sovereignty as properly understood, State sovereignty limited to matters which only affect State government and local affairs, is the recognized American doctrine. But State sovereignty of the character which claims the right to break up the Union, and to start a new government on its own account, which defies the National Government and refuses to obey its laws, which interprets the Constitution as binding on it only so long as it chooses to remain associated with the Government and to voluntarily recognize its authority, is a doctrine unknown to the Constitution, and which the American people will never tolerate.

I have now shown, so far as I think necessary, what the convention did. I have insisted that what it did shall be sought for in and determined from the result of its entire and complete action as embodied in the Constitution which it sent forth. When thus determined all who carefully and dispassionately consider it must say that the convention provided for the formation of a *National Government*.

## V

### PERIOD OF ADOPTING AND AMENDING THE CONSTITUTION

The preparation and adoption of the Constitution by the Philadelphia convention was secured only after a protracted and earnest discussion and controversy, at times bordering on a permanent division of parties and an abandonment of the work. Its passage through the convention was only secured by mutual concessions and compromises, and the surrender of personal preferences and convictions which betokened an appreciation of the great danger threatening the public peace and security, and the exhibition of a degree of patriotism which was as honorable as it was remarkable.

A conflict no less exciting, a discussion no less earnest, a contest no less protracted, awaited the Constitution when it came before the people for their approval. Some hoped for farther compromises and concessions. But it was evident the period for compromises had passed. No provision existed for any modification of the instrument by the people in their delegated convention. It must either be adopted as a whole or rejected. It was a long time before it was by any means certain that nine States, the number required by its terms to put the Constitution

into operation, could be found which would give their adhesion to the new plan. The question as to the preference for a federation of States or for a nation had been fully discussed in the convention and that body had decided in favor of the latter. But the discussion was by no means ended with the adjournment of the convention, nor was the question yet decided. There was a strong Federal party in many of the States, and in some it seemed that this element might be sufficiently strong to prevent them giving their approval to the Constitution. The eloquence of Patrick Henry had its effect in Virginia. It seemed probable that, except for the masterly arguments of Hamilton, Jay, and Madison, New York would have voted to reject the Constitution.

While there were other objections urged against the Constitution, the one towering above all the rest and which most seriously threatened its rejection was the fear that the State governments must inevitably be swallowed up in the strong National Government for which the Constitution provided, and that personal liberty would perish with the destruction of the State governments.

It should be noted that it was the men who, in the convention, had favored, and who had been instrumental in securing the adoption, by the convention, of this feature of the Constitution, who were now forced to try and make it appear that, properly understood, the instrument was not as objectionable as many supposed it to be. The arguments of Madison and Hamilton are rather those of the attorney than of the judge and

should be so considered when we come to weigh them, as constitutional arguments.

The result of these discussions in the various delegated conventions in the several States was that a series of amendments were formulated which were supposed to make provision for the better security of personal liberty and local self-government than might be expected under the Constitution as prepared by the convention. There was a general understanding and a tacit agreement that these amendments would, as soon as possible, be submitted to the States for ratification, and soon form a part of the Constitution. It was, perhaps, only because of this belief that several of the States gave their adhesion to the proposed government.

By June 17, 1788, nine of the States had ratified the Constitution, and Congress at once proceeded to take the necessary steps to put the Government into operation. Before the organization of the Government under the Constitution, in March, 1789, all of the States except North Carolina and Rhode Island had certified their ratification of the Constitution to Congress.

During its first session under this Constitution Congress approved and passed twelve of the amendments which had tacitly been agreed on in the several State conventions, and submitted them to the several State legislatures for their ratification. Ten of these were ratified by a sufficient number of the States to make them a part of the Constitution; the other two were never

ratified by three-fourths of the States. The amendments thus presented and ratified are the first ten amendments to the Constitution as they now appear.

These ten amendments are frequently spoken of as our bill of rights. They were intended to restrict and limit the power which was supposed to be guaranteed to the general Government by the Constitution. It is somewhat remarkable that, in the light of these amendments, anyone can claim that those who adopted the Constitution and who prepared these amendments, believed they were continuing or forming a confederacy. Substantially the whole argument in the State conventions against the Constitution was that it provided for a strong National Government. To relieve themselves from all danger on that account, they proposed these limitations on the exercise of power by the National Government. It was under such belief and for such purpose that these amendments were proposed by the people, were submitted by Congress, and were ratified by the State legislatures. What stronger testimony than this could be offered as the contemporary construction of the Constitution by the people?

In view of the claim made by the strict constructionists it is also worthy of note that these contemporary constructionists did not thus understand the rule of interpretation, for scarcely a power which these amendments seek to take from the National Government, or of which they seek to deprive the National Government of the right to exercise, belongs to the Government except



as an inferential or constructive power. Nowhere in the Constitution is Congress given express authority to legislate respecting an established religion, nor to prohibit the people from keeping or bearing arms, nor to quarter soldiers on the people, nor to do other of the acts thus prohibited by said amendments.

In 1792 the case of *Chisholm*, executor, against the State of Georgia was commenced in the Supreme Court of the United States to recover a debt. *Chisholm* was a citizen of another State than Georgia. Article III, Section 2, of the United States Constitution provides that "The judicial power shall extend to all cases . . . between a State and citizens of another State." The same section further provides that "In all cases . . . in which a State shall be a party the Supreme Court shall have original jurisdiction." In this case the State challenged the jurisdiction of the court, but the court held, on full consideration, that under the above constitutional provisions it had jurisdiction. This decision was announced at the February, 1793, term of said court.

At the opening of Congress the following December, an amendment to the Constitution was proposed, and subsequently adopted by Congress, excluding jurisdiction of the national courts in cases prosecuted against one of the United States by a citizen of another State or of a foreign country. On January 8, 1798, this amendment was declared a part of the Constitution of the United States, it having been ratified by the requisite

number of States. It is known as the eleventh amendment to the Constitution.

The purpose of this amendment is obvious. The people were jealous of their State's privileges, and were determined that no citizen of another State or country should be allowed to force a State to appear in one of the national courts against its will, and defend against claims which might be asserted against it. The decision in the Georgia case seems to have been fully warranted by the constitutional provision I have quoted, but probably the people in adopting it did not fully comprehend the scope of the section.

In the Presidential election of 1800 Jefferson and Burr received an equal number of votes for President. Of course no one had contemplated such a dilemma; it had been expected that Jefferson would be President and Burr Vice-President. When the result became known Burr not only did not explicitly relinquish any claim to the Presidency, but he and his friends took steps to see if it could not be secured to him. This practical illustration of the danger in which the country could be placed, unintentionally, by an election under the Constitution, showed the defect of the second section of Article II of that instrument, and Congress at once took steps to correct it. The amendment proposed provided for voting for one man for President and for another for Vice-President. This amendment was proclaimed a part of the Constitution on September 25, 1804, and appears as the twelfth amendment.

Other propositions for amending the Constitution were made, but not ratified, prior to the Civil War. The amendments which were the outgrowth of that struggle can better be presented in connection with a discussion of that period than in this place. I will therefore close the period of amendment with this short account of the adoption of the first twelve constitutional amendments,

## VI

PERIOD OF CONSTITUTIONAL CONSTRUCTION  
AND EXPANSION

## BEGINNING OF PARTY CONFLICTS

The Constitution having been adopted and the Government organized thereunder, the question still remained for decision whether, after all, the general Government could, when confronted by an actual test, put the provisions of the Constitution into active operation as against the will of any portion of the people; in other words, whether the confederacy had really been superseded by a nation. The opposition to the adoption of the Constitution rather than amending the articles of the confederation which had been exhibited in the Philadelphia convention, and which had still later opposed the ratification of the Constitution by the several State conventions, was now at work to defeat the adoption of those measures by the general Government which its friends proposed as essential to its success.

To a philosopher in his study, who is acquainted with philology and knows the meaning of words and sentences, it is no difficult matter to determine the meaning of a written Constitution. But to the politician and statesman the problem is very different. In a free govern-

ment a constitution will ultimately be held to mean what the mass of the people believe it means. And in arriving at its meaning not all of them will be guided by a critical definition of words. No one can give an intelligent account of the formation of political parties in this country and arrive at anything like definiteness in assigning reasons why different individuals, as leaders, and those who became associated with them as followers, took the course they did. And yet this is, in a measure, bound up in constitutional history. From the organization of the Government there were two parties, holding divergent views, each striving for supremacy in this country.

Jefferson was abroad at the time of the preparation and adoption of the Constitution and took no part in the public discussion which resulted from the effort put forth to defeat the final success of the measure. But his correspondence indicates that he was favorable to the adoption of the Constitution. While Madison, probably, had really more to do with their preparation than anyone else, Governor Randolph, of Virginia, introduced into the Constitutional Convention the original resolutions which formed the plan on which the convention proceeded with its work and on which the Constitution was based. During the preparation and adoption of the Constitution by the convention and its ratification by the people, Mr. Madison was one of the strongest advocates of the national idea. And it is, perhaps, not too much to say that to him, more than to any other one person, was the country indebted for the Constitution as it was finally

adopted and ratified. Naturally we should expect these men to be found among those who were foremost in defending the Government in the exercise of all those powers which the Constitution confers on the general Government. But, strange as it may seem, these men, almost from the first organization of the Government under the Constitution, were among those who raised objections, who suggested doubts, who openly or secretly opposed the measures and plans for developing and carrying on the Government, proposed by the national party of which Hamilton was the recognized chief.

The change of opinion in these men whom I have named, and in other prominent men associated with them, is not to be attributed to dishonest motives. True, when they had chosen their course, they, as well as others, frequently went to extremes in their opposition, and put forth propositions which one can hardly think they candidly believed, and which were to be expected only from a low-class politician. But we must assume that in their general course they were advocating policies which they honestly believed to be sanctioned by the Constitution. The trend of political influence then at work, personal associations, the general views prevailing in their section of the country, combined, perhaps, with other influences, in producing the changes of political opinion which took place in several of the leading statesmen of the time.

It is well to remember that from the organization of the Government political parties were, to a great extent, divided on geographical lines. Hamilton's adherents in

carrying out a national policy were largely in the North, while a majority of those who clung to the theory of the old confederacy, and who rallied under the standard of Jefferson, were from the South. Persons are drawn to party organizations through different motives. Why the North more than the South should favor a National Government is not easy to determine with any degree of accuracy. Commercial interests, political theories, family alliances, attachment to party leaders, local or sectional pride, added to a large amount of prejudice in many persons, will, in part, account for the political connections that we encounter in the study of history. It seems as though, somewhat intuitively, the two sections of the country thought and acted in different political channels.

Whether or not we agree as to the reasons therefor, the fact cannot be disputed that Washington found himself dealing with two antagonistic forces—one believing in nationality and convinced that a true construction of the Constitution authorized the general Government to adopt those plans, and put in operation those measures, which would effectively carry out the policy of making the National Government independent of State control; the other made up of persons of different views, some strongly tinctured with the idea that the States had not lost their sovereignty, some holding that the general Government could exercise only such powers as were expressly given in the Constitution, others believing that personal liberty was only safe under State control, and

all uniting in opposing any exercise of force by the general Government for the enforcement of any of its measures which met with opposition. Some opposed this exercise of force on the ground of policy and some on the ground of principle. As I have said, the controlling strength of the first of these parties was located in the Northern States, and generally acknowledged Hamilton as the ablest exponent of its principles, while the stronghold of the party which I have last described was in the South, and Jefferson was its admitted chief spokesman.

A correct idea of constitutional history will be obtained only by keeping these general facts in mind and tracing their influence and workings more or less minutely through the administration of the Government during the first half century, and more, of its existence. Jefferson, and after him Randolph, was at the head of the State Department under Washington, and there little opposition to the full exercise of national authority was likely to arise for some time. But Hamilton, at the head of the Treasury Department, was at once called upon to propose plans and recommend measures to carry out which required the exercise of national authority, and this met with immediate and active opposition.

The pressing need of the country was the settlement of its finances. The debt contracted in carrying on the Revolutionary War must be funded and provision made for its payment. If the State debts contracted on that account were assumed by the National Government the creditors would thereby become interested in its preserva-



tion and success; but if the payment of these debts were left to the States, then a large class of people, citizens and foreigners, would have a greater interest in the success of the State than in that of the National Government. On Hamilton's recommendation the general Government assumed the payment of the State debts.

It also fell within Hamilton's sphere to provide means for meeting these vast obligations. The first excise bill proposed was a tax on spirituous liquors. Some other mode for raising the revenue might have been suggested, but Hamilton's idea was that the sooner the people throughout the whole country were brought directly in contact with the general Government, and were made to feel that it exercised a direct power on them individually, the sooner would its authority be acknowledged and the correct interpretation of the Constitution as a national document be established.

The adoption of these measures and their enactment into laws met with serious opposition; and when the law for raising revenue came to be put into operation the opposition which the politicians had expressed in words began to show itself by force on the part of those who were immediately affected by it. Some of the anti-nationalists had asserted that as a matter of policy the Government should not, while others had declared that, in fact, the Government could not, use force to compel obedience to its mandates. The first time this question came up for practical solution was in the whiskey rebellion of western Pennsylvania during the first term of

Washington's administration. Perhaps, so far as numbers were concerned, the country was somewhat equally divided in opinion on this question. But, notwithstanding this general sanction of the doctrine held by the insurgents, when President Washington called on the States for their quota of militia to suppress the insurrection he found no serious difficulty in vindicating the authority of the Government. Thus was the first contest over the theory of nationality decided in favor of the Government.

In 1796 a very able and exciting debate took place in the national House of Representatives over the right of that body to participate in the making of treaties, which embraced within its terms matters over which Congress, by the Constitution, was given jurisdiction. The question arose on a motion asking the President to furnish the House with certain papers relating to the negotiation of the Jay treaty with Great Britain which had been concluded the preceding year. After a full discussion the resolution was adopted by the House, which action amounted to a construction of the Constitution by that body limiting the exclusive authority of the President and Senate to negotiate treaties to those subjects which do not require any affirmative action by Congress to carry them out. President Washington refused to comply with the request on the ground that the House of Representatives was no part of the treaty-making power and consequently to allow them to investigate the action of that department to which the Constitution had committed the

power of making treaties would be a dangerous precedent. Thus did the Constitution receive from the executive a construction directly opposed to that which had been given to it by the House of Representatives. Without directly receding from their position on this question as one of right, the House finally passed a bill carrying into effect the provisions of the treaty.

This same question has arisen in the history of the Government several times since Washington's day. One of the notable instances in which it came practically before the country was in connection with the completion of the purchase of Alaska from Russia. The President and Senate had concluded a treaty for such purchase which involved the obligating our Government to the payment of a large sum of money. When the matter of making the appropriation came before Congress the question was very ably argued in the House of Representatives. This body secured a partial victory for its position by forcing, as a condition to the passage of the bill, a preamble which, in a measure, recognized the right of the House to act independently of the action which had been taken by the President and Senate in concluding the treaty. All that can be said on this question is that, as it now stands, the conflict between the President and the Senate on the one side and the House of Representatives on the other is unsettled, but the theory maintained by the House of Representatives seems likely ultimately to prevail.

## ACQUISITION OF NEW TERRITORY

It may be doubted whether the framers of the Constitution contemplated the enlargement of the territorial limits of the country over what they were at the time that instrument was prepared. Certainly no provision directly authorizing such enlargement, or even seeming to refer to it, is to be found in the Constitution. And nothing appears in the proceedings of the convention, or in the discussions which took place therein, in any way proposing that such a provision should be inserted. It is fair to infer that the matter was not in the mind of the convention; at any rate, it is certain that the Constitution does not directly, or by any necessary implication, provide for acquiring territory.

Both before and after the adoption of the Constitution the question of our national boundary excited a good deal of attention. And, strange as it may seem, there was then a party who favored restricting rather than pressing for an enlarged boundary, when that question was up for settlement. Some of the people, afraid that the development of the West would be detrimental to the prosperity of the Atlantic States, preferred the Alleghany and Appalachian Mountains to the Mississippi River for a boundary on the west. But, of course, the better view of the country was in favor of as extended a boundary as we could obtain. It was only by the most persistent efforts on the part of our commissioners that

the Mississippi River was secured as our western limit. What we thus obtained was not the acquisition of new territory but the determination of what we should have as original territory.

The first time the question of the constitutional authority of our Government to add to our territorial limits arose was in our negotiation with France in 1802-03, for the purchase of Louisiana. The Federalists, who had been supplanted in power by the Republicans, strongly opposed the purchase, partly, but not principally, because of the effect it would have on the slavery question. They bitterly denounced the measure as unwarranted by the Constitution, and against the best interests of the country. President Jefferson frankly conceded that the purchase was not authorized by the Constitution, or rather that the purchase with a clause in the treaty of cessions providing for incorporating the territory into the Union was unauthorized, and he suggested the necessity of a constitutional amendment to meet the emergency. Unlike most of the Federalists, Hamilton, while he was a bitter antagonist of Jefferson, favored the purchase of Louisiana. He evidently saw no constitutional difficulty in the way. It is strange that Jefferson, a strict constructionist, who had been the leader of the opposition to the important measures of Washington's and Adams's administrations, because they were not *directly* authorized by the Constitution, or because they had a tendency to centralization in government, should now assume the responsibility of

such an important act as the purchase of Louisiana, with a provision in the treaty for its incorporation into the Union, when he acknowledged that it was wholly unconstitutional. It is probably an instance of the convictions of the patriot getting the better of the scruples of the politician. His action on this occasion has a tendency to lead one to doubt that his prior opposition to the Government measures was exercised in the best of faith. It may be that his political views underwent a material change when official responsibility rested on his shoulders—when he was called on to act for, instead of to criticise, the Government. His idea was that the purchase would need to be ratified by a constitutional amendment, and he actually drew an amendment covering such act, which he proposed to submit to Congress for adoption.

But Jefferson's apprehensions in reference to the power of the Government to acquire new territory, by purchase or otherwise, and to incorporate the same into the Union, were unnecessary. The purchase was made, no constitutional amendment was passed, or even proposed, all departments of the Government treated the act as constitutional and binding, and scarcely anyone could thereafter be found who had the hardihood to question its wisdom.

Different reasons have been given for upholding the authority of the Government to purchase new territory. Chief Justice Taney, in the Dred Scott case, seems to rely upon the constitutional provision authorizing Con-

gress to admit new States into the Union. But this is certainly a very unsatisfactory reason. At the time of the adoption of the Constitution there was a large extent of territory within our bounds, a part, at least, of which had been ceded by the States to the Union, and this provision of the Constitution undoubtedly had direct reference to such territory. That it could also properly apply to the admission of all States that might thereafter be formed out of newly acquired territory is one of the many evidences of the wonderful adaptability of this document to the growing needs of the country—needs which could not, in the very nature of things, have been anticipated or foreseen by its framers. While it is good authority for the admission of new States, when they have attained that standing which warrants it, it is hard to conceive of a reasonable argument being founded on this constitutional provision in favor of the authority of the Government to purchase boundless tracts of wholly unoccupied territory.

A much stronger reason, as I think, for such authority is that it is one of the inherent rights of a sovereignty. Every nation possesses it. There is no direct limitation in the Constitution on the Government's authority to make treaties with foreign nations. True, other departments than the treaty-making power are given authority respecting many subjects about which treaties may be negotiated, and in a sense some of these may limit the absolute exercise of the authority conferred on the treaty-making power. But in the absence of limitation it may

well be said that the authority of the treaty-making power extends to all questions of national development and growth which are fairly within the general plan of government provided by our Constitution, and which relate to acts which a sovereign nation may perform.

Indeed, as early as 1828, the authority of the Government to acquire the territory of Florida came before the Supreme Court of the United States, and the question was thus disposed of by the court, the opinion being delivered by Chief Justice Marshall: "The Constitution confers absolutely on the Government of the Union the power of making war, and of making treaties; consequently, the Government possesses the power of acquiring territory, either by conquest or by treaty."

The authority of our Government to acquire Texas by treaty or otherwise was strongly denied by John Quincy Adams. But at that time the chief objection to the acquisition of the State was not so much because of the want of power in the Government to make the purchase as it was the unjust course which had been pursued and the inexpediency of securing such additional territory.

While, since the acquisition of the Louisiana territory, there has never been any serious doubt in the minds of most people as to the authority of our Government to acquire new territory, still, whenever that question has arisen, there have always been found some persons who questioned the right. To anyone who makes a close study of this subject it is apparent that, as a rule, the



persons who question the right of the Government to acquire additional territory have other than constitutional objections to such act; and it may well be doubted whether their constitutional doubts do not mainly arise from other sources than a careful study of the Constitution.

The acquisition of Texas raised a constitutional question of great weight. Early in 1844 a treaty was entered into between a representative of the executive branch of our Government and a representative of the republic of Texas, providing for the annexation of the territory embraced in that republic to the United States. The President submitted this treaty to the Senate, where, in June of that year, it was rejected by a large majority. The President then recommended to Congress that Texas be annexed by a joint resolution of Congress, and this course was pursued. This resolution passed the House of Representatives without any great trouble, but encountered serious opposition in the Senate. A number of Senators were of opinion that the only constitutional mode by which annexation could be secured was by treaty, and they refused to consent to the project of annexation by joint resolution of Congress. Finally, a compromise was proposed in the shape of an amendment to the Hoehn resolution giving the President a discretion of negotiating a new treaty or submitting the old treaty of annexation to the Texas government for its approval, & authorized by the House resolution. A sufficient number of Senators who opposed the House resolution on consti-

tutional grounds allowed themselves to be hoodwinked into a belief that their objections were met in the amendment to give a majority of that body in favor of the adoption of the amended resolution. Thus, just before the close of the Tyler administration, the executive and legislative departments of government gave their approval to an unprecedented measure which was, possibly, the most severe strain on constitutional construction which our fundamental charter had ever received.

It is not sufficient to say that the President and both Houses of Congress may certainly do what the President and Senate alone might do, for that is not the question. The Constitution requires the consent of two-thirds of the Senate to ratify and make binding a treaty, and that is frequently impossible to obtain. Indeed, in the case under consideration it could not be obtained, and yet a majority of each House voted for the measure. Experience shows that it is, as a rule, much easier to secure the passage of a law through both Houses of Congress, which requires but a bare majority of each House, than it is to obtain a two-thirds vote of the Senate to the approval of a treaty. By the admission of Calhoun himself, then Secretary of State, he, with the President's approval, chose the mode of annexation provided by the course resolution, rather than that authorized by the amendment, for the reason that a new treaty of annexation would probably share the same fate in the Senate that the old one had sustained, and thus annexation would be defeated. It is thus seen that a measure which

could not, in all probability, have been made to succeed in the ordinary constitutional method was accomplished by this short-cut passage, unknown to the Constitution, and, as it seems to me, in direct conflict with its spirit.

#### POWER OF CONGRESS OVER TERRITORIES

In the Dred Scott case, decided in 1857, the Supreme Court of the United States held that Congress did not have the constitutional power to prohibit slavery in a territory, or to deny to a slave-owner the right to bring his slaves into a territory and then hold them as any person would hold chattel property. This decision, carried to its legitimate results, would be far-reaching. If, under the constitutional provision which gives Congress authority to "make all needful rules and regulations respecting the territory" of the United States, it may not prescribe rules respecting the rights of people therein to enjoy liberty, and to prohibit the establishment of any system or institution in such territory which would forever deprive people therein of their liberty, then it is impossible to say what limitations may not be placed on that provision. It is scarcely conceivable that this construction would have remained in force and been accepted as the true interpretation of that instrument had the administration of government continued in its ordinary course. But it was among the decrees of Providence that this decision should be reversed by another tribunal, and in a way far more effective than would

have been reached by its reconsideration in the Supreme Court when a new set of judges should have succeeded those who announced the Dred Scott decision. That this decision was one of the strong forces which went to make up and hasten the final and irrevocable determination of the question of personal liberty in this country there can be no doubt. When, at the close of our country's remarkable conflict between the Government and those who attempted to secede from its jurisdiction, Mars laid down his axe, the Dred Scott decision, lying on one of the scales in the hand of Minerva, did not have weight enough to require a feather to be placed in the opposite scale to hold it down.

#### SLAVERY AS AFFECTING CONSTITUTIONAL HISTORY

The history of slavery in the United States forms no part of the plan of this work, but the constitutional history of this country cannot be written without giving some consideration to the history of that institution. No one has ever attained great success who has given an affirmative answer to the Master's question: Do men gather grapes of thorns or figs of thistles? Every step taken by any member of this Union in the matter of building a commonwealth on the politically and morally rotten principle that one man has a right to hold another as property, led, as all such steps must lead, toward the abyss of political destruction.

While most of the Northern colonies had but few, at the outbreak of the American Revolution perhaps each

one of the colonies had some, slaves. That at that time the extirpation of slavery was fully expected to gradually take place in all the colonies seemed to be questioned by few. Many, perhaps most, of the leading men in the South, though they owned slaves, condemned the institution as severely as did their countrymen in the North, and confidently looked, and earnestly hoped, for its abolition.

In 1774, and again in 1776, the Continental Congress declared against the further importation of slaves. In drawing the Declaration of Independence Jefferson introduced as one of the charges in the indictment against George III that he had attempted to prevent the colonies from restraining this "execrable commerce." But, at the request of Georgia and South Carolina, Congress struck out this passage. From that time the sentiment of the extreme South seemed to have taken a decided turn in favor of slavery and the slave trade.

In determining the rule for the apportionment of taxation the Continental Congress counted the slaves as equivalent to three-fifths as many whites. And, in 1784, when the proposition was made to exclude slavery from the unoccupied territory south of the Ohio River, ceded to the general Government by North Carolina and Georgia, the measure was defeated in Congress, but six States voting in its favor. However, in 1787, the ordinance for the government of the territory north of the Ohio River, which included an absolute prohibition of slavery, was unanimously passed by Congress.

These, and other historical facts, show that even under the confederation there was something of an issue between the North and the South over the question of slavery. But from the time of the formation of the Constitution this question took a more decided turn. In the Constitutional Convention several propositions were up for discussion which had more or less to do with slavery. One of these related to the prohibition and suppression of the African slave trade, another to the master's right to have fugitive slaves returned, and another to the question of taxation and representation on the basis of the slave population. South Carolina and Georgia absolutely refused to take part in the formation of the Union if the importation of slaves was not allowed. Finally, to obtain their adhesion to the proposition for Union, even most of the Northern members consented to a bargain whereby there was to be equality of representation from all the States in the Senate, commerce was to be under the exclusive control of the National Government, and the slave trade was not to be prohibited prior to 1808. In the contest over allowing representation in Congress for slaves the question was combined with that of apportioning direct taxes, and the rule observed by the Continental Congress was again adopted of counting five slaves as the equivalent of three whites. In arriving at this determination most of the Northern delegates opposed it while most of those from the South favored it.

From the course matters had taken in the Constitutional Convention most of the delegates seemed to appre-

hend that trouble for the new government was likely to arise over contests between the larger and the smaller States. But Madison, more farseeing in his vision than most of his colleagues, said, "It seems now to be pretty well understood that the real difference lay, not between the large and small, but between the Northern and Southern States. The institution of slavery, and its consequences, formed the line of demarcation. There were five States on the southern, eight on the northern side of the line." It was not long till the South took active measures to overcome the political inequality between the two sections which Madison had pointed out.

The first time any controversy arose in the new National Government over the question of slavery was in 1790, when some petitions from certain Quakers were presented to Congress asking that body to do all within its power to abolish the slave trade. Of course all it could do at that time, under the Constitution, was to levy a tax of ten dollars on each slave imported. Nothing unlawful or unconstitutional was asked or even suggested. And yet, in the discussion which took place on a motion to refer these petitions to a committee, that same violent opposition from Southern members occurred which so often characterized their conduct in subsequent years. The defenders and promoters of slavery seemed to be aware that the perpetuity of the system could never be maintained upon the theory of a free discussion and an open consideration of the question on its merits.

It took a number of years for the extreme partisans

of slavery to consolidate the entire slave territory into a force that would stand together under all circumstances when a question arose, which, in any way, affected their institution, but from the foundation of the Government this consolidating process was at work. One can scarcely conceive of the baleful effects of slavery until he has traced the history of its workings through its various stages of insinuation into the legislation and life of the nation. It threw a blight over the prosperity of its own section of the country, and deadened the life-current of every industry which it touched. Its insidious grasp on the legislator, its demoralization of the public conscience, its corrupting influence on the political life of the country, was a steady growth, commencing with the birth of the nation and ending only in the knell of the institution in the cannonading of Sumter in April, 1861.

The debates and votes in Congress on the question of taxing the introduction of slaves, as authorized by the Constitution, on prohibiting the African slave trade, on the bill providing for returning fugitive slaves, on the proposed regulation of the traffic in slaves between the States, on the proposed exclusion of slavery from the territory ceded to the general Government by North Carolina and Georgia, on the proposition to suspend for a term of years the prohibition of slavery in the territory northwest of the Ohio River, as enacted by the Continental Congress in 1787, on the act for the admission of Missouri into the Union, even when we come no



further down than to this event in our history, show a gradual yielding and, in many instances, a cringing spirit, on the part of the Northern members of Congress, and a constantly increasing boldness and shamelessness in the defence of slavery, and for the protection of slavery by the general Government, on the part of the members from the South. The brutal treatment accorded to many persons who went south to make a home, but who refused to subscribe to the dictates of the slave-driver, was almost a necessary consequence from the position which the South had assumed. Slavery could not exist under the burning rays of free public discussion, and the toleration of any sentiment opposed to its legitimacy and morality was suicidal.

It was not wholly, or even chiefly—perhaps it would not be too much to say that it was not in any respect—because the interests of the North and the South in the establishment of a national bank, in internal improvements, in tariff legislation, in the strengthening of foreign commerce, or in a hundred other respects, were opposed to each other, that, to a great extent, the country was divided on these questions by geographical lines, but rather because the dominant issue of slavery absorbed every other question—industrial, commercial, financial, educational, moral—and made them all subservient to its domineering will.

Up to the time when the Missouri territory applied for admission into the Union the debates and contests over the slavery question, while they had frequently been

animated, had, nevertheless, been comparatively mild. But now the time had arrived when slavery must fight for its life—when a victory must be obtained or the institution, by being restricted in territory, must enter on a period of gradual extermination. The slave-holders were fully alive to the importance of the issue, and made a determined stand against every effort looking in any way to a denial of the protection of the law to property in slaves to an equal extent that such protection is cast around other property, including the right to carry slaves into any territory of the Union. Not only was Maine to be kept from becoming a State until Missouri could be admitted without restriction as to slavery, but the concession was to be forced from its opponents that slavery should share equally with freedom in the division of the Louisiana purchase. After a two years' struggle a sufficient number of representatives from the free States yielded to the Southern demands to enable that section to carry her measures through Congress, and the Missouri Compromise of 1820 was an accomplished fact. The line of  $36^{\circ} 30'$  north latitude was to divide the free from the slave territory in that part of the Louisiana purchase which, as yet, formed no part of one of the States in the Union.

Whatever may be thought of the possibility of reconciling the differences between the advocates and opponents of slavery as they existed and had found expression prior to the opening of the contest over the admission of Missouri, it is evident that from that period

the difference was irreconcilable, and that in the end one system or the other—that which defended free labor or that which sanctioned slavery—must become supreme in the Government, or else the nation must be divided. The Master had declared: “I came to set a man at variance against his father, and the daughter against her mother, and the daughter-in-law against her mother-in-law; and a man’s foes shall be they of his own household.” These words had not spent their force. The principle therein announced, when applied to the spiritual realm, had produced a moral revolution in human lives; when applied to the field of politics it was just as certain to produce a revolution in human government. From the opening of the contest in 1818, which resulted in the Missouri Compromise, until the period of reconstruction at the close of the Civil War, slavery was asserting its supreme right to dictate in the affairs of government; and, coupled with this, its advocates were pushing the doctrine of State sovereignty. And all the time over the national head was held the threat that, in case the former was not conceded, by authority of the latter the Union should be dissolved.

I have no hesitancy in presenting slavery as the controlling principle which developed the doctrines of nullification and secession; and therefore I deem it a necessary subject to discuss in treating the constitutional history of our country. To it can be legitimately and directly traced the Civil War which resulted in its overthrow, and from this flowed the wonderful constitutional changes

embodied in the thirteenth, fourteenth, and fifteenth amendments to the Constitution.

Several constitutional questions were raised in the discussion over the admission of Missouri as a State in the Union, but the principle one bearing on constitutional history was that relating to the power of Congress to exclude slavery from the territory belonging to the United States. But, connected with this, was the doctrine of State sovereignty asserted in its boldest form. While, during the course of this discussion, some of the Southern members of Congress took the bold and unqualified stand that a citizen of a State had a right to take his slaves, the same as any chattel property, into any territory of the United States, and that Congress had no power to prevent him, the majority of the members from the South conceded, at least by their silence they acquiesced in, the claim put forth by the Northern members of Congress, that Congress had the constitutional right to exclude slavery from any territory. While the South gained virtually all she asked in the settlement of this controversy in 1820, and certainly achieved a great triumph, the affirmative action excluding slavery from the territory north of  $36^{\circ} 30'$  north latitude was a legislative construction of the Constitution that Congress had authority to legislate respecting slavery in the territories.

The annexation of Texas raised several important questions, some of which had a distinct bearing on constitutional history. As early as 1824 Mexico had pro-

hibited further importation of slaves from foreign countries, and had also declared those thereafter born to be free. This same provision was contained in the Constitution given the provinces of Coahuila and Texas in 1827. And, in 1829, the work of emancipation was completed by a decree of the Mexican Government giving all slaves throughout the republic their freedom.

Notwithstanding these provisions respecting the emancipation of slaves, during all these years settlers from the United States, mostly from the Southern States, had been pouring into Texas, many of them bringing their slaves with them and continuing to hold them in bondage in contempt of the Mexican Government.

Under these influences Texas was fast becoming, in point of fact, an American province. The spirit of the Anglo-Saxon rather than that of the Spaniard dominated public matters. In 1836 Texas declared her independence. It is certainly not too much to say that citizens of the United States, if not the Government of the United States itself, contributed largely in bringing about this event, as well as in the subsequent events resulting in Texan independence and her incorporation into the American Union. From the declaration of Texan independence in 1836, and even prior thereto down to the time of its annexation in 1845, officers and agents of Texas had been negotiating with persons who were presumed to have some authority and, more or less directly, to represent the wishes of the executive department of the Government of the United States, with a

view of securing the annexation of Texas to the United States. Probably there was no direct official authority for most of these acts. Still, the evidence is incontrovertible that the Government of the United States was giving countenance to those acts which must ultimately result in annexation.

One of the important questions connected with this extended controversy concerned the relation of the National Government to slavery. Theretofore no one had presumed that any obligation with respect to the protection of the interest of slavery rested on the general Government, except to provide for the return of fugitive slaves. But now the executive department of the general Government, assumed it to be its duty to interfere for the protection of slave interests in general. In his correspondence with the British Government John C. Calhoun, the Secretary of State, informed that Government that the action of our Government in negotiating with the republic of Texas, in 1845, the treaty for its annexation to the United States, was based on the fear entertained by our Government that slavery was endangered by the avowed purpose of the Government of Great Britain to use its influence toward securing emancipation in Texas. It was believed by the executive that the establishment of a government which did not tolerate slavery, over territory adjoining the slave States of this Union, rendered the maintenance of slavery in the latter insecure, if not impossible, and consequently it became the duty of the National Govern-

ment to take prompt and effective action to prevent such a calamity.

In the opinion of the executive department of the Government the protection of slavery had now become of national importance, even to the extent of interfering in the affairs of foreign nations to secure its preservation and safety. Incredible as it now seems, thus rapidly had the theory of constitutional power, in the keeping of those whose fundamental principle of constitutional law had always been that of a strict construction, been extended by construction. Calhoun made the direct claim that such interference by the general Government was required by the constitutional compact for mutual defence and protection. It would be interesting to know how he would attempt to reconcile this construction of constitutional obligation with his general ideas of State's rights.

Passing over the legislation of 1850 as requiring no extended comment in this connection, the next important events relating to the subject under discussion were connected with the Kansas struggle. It is hard to conceive how an American citizen can read the history of the passage of the Kansas-Nebraska bill without a feeling of the deepest disgust. The contest had its origin in a desire to advance party interests and to subserve personal ambitions. The country had passed through two fierce struggles over questions relating to slavery, both of which had been terminated, or, at least, were supposed to be terminated, by a compromise. By the

Missouri Compromise of 1820 all parties understood that at least one feature of the slavery question was irrevocably settled—that slavery was permanently excluded from all national territory north of  $36^{\circ} 30'$  then within the national domain. It is true that since the passage of the act occasionally its constitutionality had been denied by Calhoun and his friends. And some politicians now made the claim that this was a Northern measure, and that the South simply accepted at that time what the North voluntarily offered them. No one at all conversant with the struggle can fairly make any such claim. It is true that some of the propositions embodied in the settlement were offered by Northern members, and the whole measure was supported by many Northern members; but the act as a whole was a Southern measure, forced through by the power of the South, and by them supposed to be largely to the advantage of the South.

It is folly to attempt to represent that the measure had never been considered as of binding force. In giving it his approval President Monroe had the acquiescence of Calhoun and all the other members of his Cabinet. The President and Cabinet, including Calhoun, as well as the country generally, accepted the compromise as a constitutional exercise of legislative authority, and treated it as such. At the time of the passage of the Missouri bill scarcely anyone, if anyone at all, doubted the power of Congress to fully legislate respecting slavery in the territories, and practically the



whole country accepted the act excluding slavery from all territory north of  $36^{\circ} 30'$  as a constitutional and binding law. And this view, in the main, continued to be entertained in all sections of the country until the question of the repeal of the act was raised in 1854. Its validity had on one or two occasions been recognized by subsequent acts of Congress, and it may be said that all legislation which in any way bore on that question was enacted on the theory of the binding force of that statute.

The second of the great controversies to which I have referred was that of 1850, and the compromise measures of that year were passed without any serious question being raised as to the validity of the Missouri Compromise. Notwithstanding declarations made in 1854 by politicians then interested in avoiding the odium then attached to their acts, it is safe to assert that by the compromise laws of 1850 no one, either in or out of Congress, supposed the Missouri Compromise was impaired.

While it cannot be said that either the North or the South was satisfied with the compromise measures of 1850, still, the country had apparently settled down to an acceptance of the situation, and general tranquillity prevailed. With the antagonistic feelings entertained toward slavery in different parts of the Union it is not at all likely that this condition would have continued any great length of time had matters been left to take their own natural course. But this does not lessen the

responsibility attached to the conduct of those who brought on anew the slavery controversy in order that they might secure personal and selfish ends.

At the opening of 1854 there were practically no white settlers between the Missouri River and the Rocky Mountains. A bill for organizing Nebraska, embracing all this territory, had been pending in Congress for some time; it had passed the House in the session of 1852-53. At the opening of the session in December, 1853, Dodge, of Iowa, had again introduced the bill, and it had been referred to the Committee on Territories, of which Douglas was chairman. In all the discussion that so far had taken place it was not questioned that this territory was now subject to the Missouri Compromise.

There has been some question as to whom the honor, or censure, is due for originating the doctrine of squatter sovereignty. This principle, in general terms at least, seems to have been embraced in the bill for the organization of Oregon Territory in 1848, introduced by Mr. Douglas, which provided that the laws that had already been adopted by the settlers for their own protection should, in so far as consistent with the Constitution and laws of the United States, remain in force till modified or repealed by the territorial legislature. About the same time General Cass had, in a private letter, also expressed an opinion which contained the germ of the doctrine of squatter sovereignty.

If Senator Douglas was not the originator of the

doctrine of squatter sovereignty he appropriated the discovery, and in January, 1854, as chairman of the Senate Committee on Territories, he brought in a bill with a report recommending its passage. This act, as thus reported, organized the territory of Nebraska, and contained a section providing that the question whether slavery should or should not be allowed therein be referred to the people of the territory for their determination. This report, full of false inferences and statements, could not be looked upon in any other light than slavery's challenge to freedom for a renewal of the conflict for supremacy in this country. The champions of freedom could do nothing less than accept the challenge and prepare for the battle. From the first it was evident to discerning eyes that the struggle upon which they were entering was to be no ordinary one.

The discussion of the measure had hardly commenced when the inconsistencies of the report and the defects of the bill were so apparent that the author of the bill felt compelled to alter and amend it. His evident purpose was to destroy the effect of the excluding provision of the law of 1820 without directly repealing the same. All knew very well that a proposed repeal of the Missouri Compromise would be looked upon as the grossest breach of faith, and would necessarily lead to the most bitter feeling between the two parties. But Douglas having opened the question was soon driven into proposing a direct repeal of the Missouri Compromise. And, instead of one territorial government, it was now pro-

posed to establish two, Kansas and Nebraska, with the expectation that under the principle of squatter sovereignty slavery could be introduced at least into the Southern territory. If all this vast country then under consideration were organized into but one territory it was evident a great majority of the settlers would be from the North and would, by their votes, exclude slavery; but with two territories it could be fairly presumed that the settlers from the Southern States would substantially all go into the one nearest them and thus might have, under ordinary circumstances, a fair show of being in the majority.

No one can seriously question that many of the arguments at this time put forth by the advocates of slavery extension in favor of the proposed measure were dictated by the necessities of the situation rather than by a fair consideration of the facts on which they were alleged to be based. It was asserted that the restrictive measure of 1820 had been virtually repealed by the compromise measures of 1850. But no one understood it so at the time, nor had such a claim ever before been put forward. And a reference to the measures which became laws in 1850 favored an acknowledgment of the continued validity of the act of 1820 rather than looked to its repeal. The belief in the unconstitutionality of the act of 1820, now so generally put forward, was not formed so much from a more careful study of the Constitution in its relation to this measure as from a clearer vision that the necessities of slavery demanded such a

construction. It was not, at the time of the passage of the law in 1820, nor for many years thereafter, denied, even by the most pronounced advocates of slavery, that Congress had the authority to exclude slavery from the territories. But as the interests, and, one may say, the very existence, of slavery demanded more room, and as a disposition to restrict its existence became more manifest, its advocates were forced to adopt the theory that Congress was without power to pass restrictive measures. This theory of constitutional interpretation was not generally put forth or seriously insisted on till the contest over the passage of the Kansas-Nebraska act. But whether the Missouri Compromise were a valid act, or whether, on constitutional principles, it were outside the limits of constitutional authority, its repeal at this time cannot be defended on any ground of fair dealing. However, this feature of the question belongs rather to political than to constitutional history. Congress passed the Kansas-Nebraska act with the clause repealing the Missouri Compromise, and with the so-called squatter sovereignty doctrine among its provisions. The era of compromise had now passed. The war of principles now inaugurated was only to end after the fields of carnage, which followed this act as a natural consequence, had again been robed in green, through Nature's munificence..

Except upon the theory of Providential interference in our national affairs to bring about the extinction of slavery no one can give a valid reason for the passage

of the Kansas-Nebraska bill. From the statesman's point of view it was a national blunder. From the practical politics standpoint it was suicidal. Upon any logical theory it was wholly without justification or excuse. From the standpoint of a patriot it was one of the greatest outrages ever perpetrated by our national legislative body.

The fierce conflict and border war that naturally followed the passage of the Kansas-Nebraska bill entered as a controlling factor into the political campaign of 1856, and had no insignificant part among the causes which led to the promulgation of the famous Dred Scott decision by the Supreme Court of the United States. This decision was announced but two days after the inauguration of President Buchanan, and was at once sent broadcast over the land as a campaign document by the promulgators of the slavocratic idea in the United States Senate.

The Dred Scott decision was a matter of great moment in the political history of the country and has an important bearing on constitutional history. It can hardly be expected that the general reader will be familiar with the details of this great case, the record of which covers 240 pages in the official report. Perhaps I can state in a few sentences all that is necessary for one to know in order to understand the general bearing of the decision.

Dred Scott was a negro slave owned by a doctor in the United States army stationed in Missouri. From

there he was taken by his master to Rock Island in the State of Illinois, where he was held some two years and then taken to Fort Snelling in the Louisiana territory north of latitude  $36^{\circ} 30'$ ; after remaining at his post some two years his master took him back to Missouri. In the meantime Dred had married and had a child born to him, as the issue of the marriage, while in free territory. Dr. Emerson, Dred's master, purchased this woman and took her and the child with Dred back to Missouri in 1838. Some six years after this the doctor died, leaving Dred and his family to his widow. Dred, becoming dissatisfied with his treatment, brought an action in the courts of Missouri to recover his freedom. In the lower court the decision was in his favor, but on an appeal to the Supreme Court of the State the decision was reversed. This litigation in the State courts had no connection with the case in the national courts and is only mentioned to guard against confounding the two. While the suit in the State court was pending Mrs. Emerson sold Dred and his family to a relative of hers, a Mr. Sandford, who resided in the State of New York.

Dred now brought his action in the Circuit Court of the United States for the district of Missouri against John F. A. Sandford, who claimed to be his owner, to recover damages for illegally imprisoning him and his family. In his answer, Sandford set up that Dred was a negro, and therefore not a citizen of the State of Missouri, and, as a consequence, he denied that the court

had jurisdiction of the case. The jurisdiction of the court was dependent on the question whether the parties were citizens of different States. Hence, if Dred was not a citizen of Missouri he could not maintain this action. Dred demurred to the defendant's answer and thereby raised the question whether, in law, a negro could be a citizen of Missouri. The Circuit Court overruled the demurrer and held that it had jurisdiction. The defendant then filed additional pleas in which he set up that Dred and family were his slaves, and therefore his restraining them of their liberty was legal. On this issue the parties went to trial, which resulted in a verdict and judgment for the defendant; of course this was on the ground that Dred and his family were the defendant's slaves.

Dred took the case on error to the Supreme Court of the United States, where it was fully and ably argued, both as to the jurisdiction of the court, and on its merits, provided that the court had jurisdiction. The Supreme Court held that a negro could not become a citizen of any State, and therefore, Dred Scott not being a citizen of Missouri, the Circuit Court had no jurisdiction and should have dismissed the case on the pleadings.

On well-founded legal principles this should have ended the Supreme Court's decision, for if the Circuit Court had no jurisdiction there was nothing for it to decide—there was no case pending before it. Had the Supreme Court stopped here no criticism could have been made



upon its action, although the decision itself might well have been criticised and doubted as a correct exposition of the law. But the Supreme Court chose to pass on every question that would have been before it for consideration if the Circuit Court had rightly entertained jurisdiction. And this action subjected it to the severest criticism as being an attempt to control political action, in addition to exception taken to the correctness of the legal principle announced.

The extra-judicial points thus passed on by the Supreme Court were of the most momentous importance, especially in view of the conditions then prevailing in Kansas. In addition to deciding several points which need not be mentioned here, it was held that the Constitution expressly recognized property in slaves, and that it was beyond the power of Congress to prevent a party taking his slaves to any territory and there holding them as securely as he could any chattel property. It was therefore declared that the act known as the Missouri Compromise, which prohibited slavery in the territory north of  $36^{\circ} 30'$  north latitude was unconstitutional.

Without questioning the integrity of the court, or of any member thereof, that, in rendering this decision, they were controlled by political considerations seems beyond question. From the slave-holder's standpoint such a decision was demanded to insure their triumph in the contest in Kansas. As their interests had required it the claim began to be made that the owner had a right to take his slaves into the territories. This was a modern

doctrine and was put forth only because the interests of slavery absolutely demanded it. Such a claim was never thought of during the first half century's existence of the nation, and, except for the pressing need for more slave territory, it would never at any time have been seriously pressed.

The germ of this Southern doctrine was first developed in 1847 in the debate over the organization of the Oregon Territory, and Mr. Rhett, of South Carolina, seems to have been the first to announce and defend it. His claim was that the general Government was not the real owner of the territory acquired since the adoption of the Constitution, but that it held the title to all the land, however acquired, as the agent of the several States, which, as sovereigns, had equal rights therein. And, as the States owned the territory, the citizen of any State could go into such territory with any property he could hold in the State from which he emigrated, and was entitled to the same protection for such property in the territory as he was in the State, both from the State and general Government. The following year this doctrine was further elaborated by Calhoun in the Senate, and the direct claim was then made that Congress had no power to prohibit slavery in the territories.

As I have already said, it was contrary to the well-recognized rule in judicial proceedings for the court to enter on the consideration of this question in the Dred Scott case after it had decided that the Circuit Court had no jurisdiction of the case. That the Supreme

Court should have insisted on considering and deciding the question under such circumstances must be attributed to the desire on its part to stop the agitation in the North over the introduction of slavery into Kansas by deciding that it was already there, and beyond the control of anything that Congress might do in the premises.

That the control of the Supreme Court by Southern interests had been designedly secured has been claimed, and certainly there is much on the face of the record to sustain such a claim. The circuits were so formed as to give the slave States an undue influence in the national judicial system. Of the nine members of the Supreme Court at this time three had been appointed by Jackson, two by Van Buren, one by Tyler, one by Polk, one by Fillmore, and one by Pierce. Five of them, a majority of the court, were from slave States, although, according to population and judicial business, a much larger share should have come from the North. But this is a matter which requires no further discussion in these pages.

If the Dred Scott decision was to stand as the law of the land its effect on the constitutional history of the country was to be almost incalculable. It was a well-known historical fact that in a number of the States negroes were given the right of suffrage and treated as full citizens of such States. By this Dred Scott decision not only their United States citizenship, but also their citizenship in their respective States, was taken

away, or denied to exist, and the constitutional provision that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States" was held not to apply to negroes. There was no rule left determining who were citizens either of the State or the nation. The constitutional provision which I have just quoted received a legislative construction in 1821 which recognized the nationality of citizenship almost as broadly as it was subsequently declared in the fourteenth constitutional amendment. Missouri had provided in her Constitution that free negroes and mulattoes from other States should not be permitted to come within her borders. Congress refused to admit her into the Union except on the condition that this should never be construed to authorize her to exclude the citizens of any other State from rights and immunities to which they were entitled by the Constitution of the United States. Of course the Supreme Court was not bound by this legislative construction, which was intended to and did recognize negroes as national citizens when they were recognized as citizens by the State in which they resided.

Again, historical considerations, the common rules of interpretation, and judicial principles, had to be ignored in order to hold that the right of property in slaves is distinctly and expressly affirmed in the Constitution of the United States, and that, under the Constitution, property in slaves was entitled to the same protection that was accorded to any other kind of property. It

would not be difficult to point out marked differences in the constitutional treatment of slaves and property.

But that the condition of human beings in one of the territories was beyond the power of Congress to legislate upon, or in any manner determine, was a proposition so fraught with evil, so diametrically opposed to the opinion of the whole country, and to the construction which had been given to the Constitution by all departments of government for more than a half century, that the people were in no condition to accept it as a correct interpretation of our fundamental law, even when announced by the Supreme Court of the United States. If, by some means, the country could have found a solution for its troubles through some other tribunal than the fierce arbitrament of war, it can hardly be doubted that the constitutional construction announced in the *Dred Scott* case would have been reversed by the Supreme Court itself when reconstituted and filled by a body of men whose intellect, conscience, and judicial discrimination, had been formed and developed under conditions exempt from the blighting influence and dictatorial views springing from human slavery.

The Presidential campaign of 1860 aroused such a fierce sectional feeling that it could not be allayed when the election was over and the result announced. The Southern politicians had declared that the election of a Republican President would be a sufficient cause for a dissolution of the Union, and upon the election of Mr.

Lincoln they proceeded to put their threats into execution. As soon as the North was convinced that all this was not mere bluster, and that the country was really in a serious danger, a conciliatory disposition was manifested, and concessions were offered by the North which almost went beyond anything which the South had at any previous time asked. It is true that not all of these offers were put in a binding form; but they were favored by so many leading men of the North that it is practically certain many of them, at least, would readily have been granted if the South had manifested any disposition to accept them and desist from its mad course of secession.

One of these offered concessions which took definite shape was a proposed amendment to the Constitution which passed Congress in February, 1861, and was submitted to the States for ratification; this proposed amendment declared that thereafter no amendment should be made to the Constitution which would authorize Congress to abolish or interfere with slavery in any State. The effect of this amendment, had it been ratified, would seem to be to make slavery perpetual. Had not the course of events precipitated the country into a civil war and thereby taken the question of slavery, to a great extent, out of the domain of voluntary settlement, we may not know what would have been the result of this proposed amendment. As it was the New England States rejected it, at least two States adopted it, but in most of the States no action was ever taken upon

it. A patriotic citizen must almost shudder at the thought of this proposed measure forming the thirteenth amendment to the Constitution in place of that which was subsequently adopted as such.

It was not long after the breaking out of the Civil War, in 1861, till the question began to be agitated as to what should be done with several classes of negroes. Some voluntarily came to our camps, some were taken prisoners in the capture of forts and camps, and large numbers came under our control when the lines of the Union armies were advanced into the rebel territory. It was some time, however, before the Government announced any definite policy respecting its attitude toward slavery. But finally, when it became apparent that the war was to be a prolonged one, and that slaves were adding immensely to the strength of the rebel forces, a decisive stand was taken.

Without any prior announcement of what course he proposed to pursue President Lincoln issued his proclamation on September 22, 1862, announcing that in all territory which remained in rebellion on the first of the ensuing year he should declare all slaves free. And on January 1, 1863, in accordance with such preliminary announcement the President issued his proclamation of freedom to all slaves within the rebel States.

The President based this action solely on the war power of the Government. Of course there was difference of opinion among the people as to the final effect of this proclamation on the status of the slaves whom

it proposed to liberate. Fortunately, perhaps, the question never reached the courts. We can only conjecture as to what the Supreme Court would have decided in reference to the relation the rebel master would have sustained to his slaves which the President's proclamation had declared free. Before this could become a practical question for immediate solution the nation had settled the controversy by its sovereign will announced through the thirteenth constitutional amendment. We will not presume that slavery could ever have been established by civil process after the master had lost in his appeal to arms for the purpose of making the institution perpetual. Happy for the country, however, that the question was definitely settled by the people in a constitutional manner without controversy.

#### THE DOCTRINE OF INDESTRUCTIBLE STATEHOOD

Our conception of "State," as applied to the members of the Union, is probably determined, to a great extent, by the idea we derive from the condition of the thirteen original States at the time of the formation of the National Government. But our idea as thus derived can scarcely be appropriately applied to the States subsequently admitted into the Union, and especially to those formed out of territory acquired since the organization of the National Government.

With the original thirteen States we correctly associate the idea of sovereignty. Without again discuss-



ing, what I have spoken of in another place, the question of national sovereignty and State sovereignty under the Constitution, I may say that I think there can be no valid denial of sovereignty, at least in most respects, to each of the original thirteen States at the time of the formation of the Constitution. But this has never been true of the States subsequently organized and admitted into the Union. There has never been a time when these new States have been sovereign in any true meaning of that term. The people of a State, and the State governments organized by them, have many qualities and attributes belonging to sovereignty, and in a limited and qualified sense they may be said to be possessed of sovereignty. But to speak of them as sovereign without an express or clearly implied limitation of the term is to deprive that word of its recognized meaning.

For instance, we sometimes speak of a State as having an unlimited power of taxation, but, in truth, this power is limited to the extent that it cannot tax Government property or credits. When we say a State has the supreme power over the conduct of its citizens we are bound to remember that such power shall not interfere with the duties of such citizens to the general Government. It will thus be seen that upon any careful consideration of the question we cannot attribute sovereignty to a State without, at the same time, limiting the meaning which is usually attributed to that word.

In reference to the original States, while they may be

said to have been sovereign at one time, yet, upon the adoption of the Constitution, the people withdrew from the State and conferred upon the National Government the essence of sovereignty. So that neither the original nor the new States can be spoken of as sovereign when we use that term with its usual and recognized meaning. We are not, therefore, called on to show the authority in the Constitution for the destruction of a sovereign State.

Under our system of government a State is a political subdivision of the country, existing by virtue of fundamental law, possessing certain rights and privileges subject to change or abridgment by action of the people of the whole country, in the manner pointed out in the Constitution, even against the wish and active opposition of a State to be thereby affected, and certain other rights of which it cannot be deprived except by its own voluntary consent.

By action of the people themselves, each of these States is, in certain respects, subject to a superior power. The general Government is given authority to enter and act in every State. It does not ask permission of a State for the establishment of courts, the impanelling of juries, the punishment of criminals, the collection of taxes, and the doing of a hundred other sovereign acts. The National Government is clothed with authority, under certain conditions, to use force in any State. It has a right to the obedience of every citizen to those measures over which it is given jurisdiction. If this

obedience is not rendered voluntarily it may be compelled by force. All citizens must enjoy their State privileges and perform their duties to the State in subordination to their obligations to the general Government.

It necessarily follows that if the citizens of any State fail and refuse to discharge their obligations to the general Government within the sphere of its supremacy it may, by force if necessary, deprive such citizens of the right to enjoy and participate in State privileges, for they are held subordinate to national duties. In this way States may cease to exist as States. The territory remains and the people remain. The territory continues to be subject to the jurisdiction of the general Government, and the citizens continue to owe it duties. They are still citizens although disloyal. Instead of possessing the rights of loyal citizens they have become criminals and may therefore be deprived of the exercise of those rights which they once enjoyed. That tract of country once forming a State may, by this means, become a territory, and, like territories which have never become States, be subject to such restrictions, entitled to such privileges, and placed under such government as Congress may prescribe.

During and at the close of the Civil War there was a great diversity of opinion among statesmen as to the status of the seceded States, and their relation to the Union. For some time the prevailing opinion seemed to be that the States remained intact as they had been

before passing the ordinances of secession, and that, upon the suppression of the rebellion, all that was necessary for such States to do was for their people to satisfy the Government of their loyalty, reorganize their State governments, and then to proceed as though nothing serious had taken place. President Lincoln seems to have entertained substantially this view, and President Johnson was persistent and obstinate in its advocacy. But Congress took a different and a truer view of the subject, and probably the constitutional doctrine may be considered as fairly well established that a State, by the action of its citizens, may be destroyed, so that its future relation to the National Government will be such as may be determined by Congress. I think it may be well questioned whether, under such circumstances, a State may not be divided, notwithstanding the constitutional provision that a State shall not be divided without its own consent.

#### SECESSION UNDER THE CONSTITUTION

The question of the binding force of the Constitution, and its power to hold together, involuntarily if need be, all the States of the Union, is a very old one; but it is a question which did not, for a long time, receive from statesmen that calm and earnest consideration which its merits, as we view it, would seem to require. It is not a question which, as some have assumed, has been uni-

formly assented to by one party and by one section of the country, and opposed by another party and by the other section of the country. Both the old Federalist and Republican parties of the first decade of the republic, or at least large elements of them, were, at different times, on both sides of the question; and, likewise, both the North and the South, at different times, or rather, considerable portions of the people in each of the two sections, advocated secession at one time, and earnestly contended for the power of the general Government to execute its laws at another time. The change of position and the inconsistency of views of the people in different sections of the country, and of political parties, is a matter which must be acknowledged and, perhaps, in a measure accounted for.

A study of this question reveals the fact that during the first quarter of a century of our national life the diverse financial, economic, and probably other interests of the people of this country were so great that they had practically prevented any political union taking place. When the Federalists were in power their political opponents were ready to consider a dissolution of the Union advisable whenever the Government was not administered to their liking. When the Republicans gained the ascendancy the views in reference to dissolving the Union were reversed. Neither party had learned to regard, with an unfaltering conviction, the United States as a *nation*; that is, as possessed of the right, and as being under obligation to use all necessary power

at her disposal for self-preservation, whenever her existence was seriously threatened.

It is not perfectly clear whether many of those who contemplated a division of the Union looked upon such a project as one which might be secured without a violation of the Constitution, or whether they supposed that no serious obstacles would be thrown in the way of carrying out such a scheme when it was attempted. Probably the matter had not been sufficiently considered to enable most of those who talked on engaging in the scheme to have any settled judgment on that subject.

It is evident that, during the time of which I am speaking, the advantages of the Union were but inadequately understood and appreciated. A conviction in favor of nationality would not be determined by the masses from the language of the Constitution alone, because we cannot presume that it would be at all carefully read and studied by them; but such conviction would be, in a measure at least, influenced by what they supposed would be its effect on their general interests, and would be strong or weak in proportion as they regarded it as favorable or detrimental to their happiness and commercial prosperity. There had not then been such a discussion of the question as to make clear to the people the great advantages they possessed as a single nation over what they would enjoy if divided into several small confederacies.

From the time of Washington to Madison Northern as well as Southern statesmen, Federalists as well as Re-

publicans, spoke of a withdrawal of certain States from the Union with little apparent concern, and as an event that might be accomplished with little or no difficulty. And during all this time, and probably still later, it was not uncommon for statesmen to refer to the Constitution as a compact, and the Government as a confederacy, without anyone thinking it necessary to call attention to the inappropriateness of such language, or to controvert the position which it necessarily implied.

As early as 1794, during the time of the whiskey insurrection in western Pennsylvania, the matter of a division of the Union on account of the effort to suppress the revolt was considered as not improbable by North and South alike. Of course I do not mean that anything like the whole number of people in either section entertained such a thought, but large numbers of the people, including many leading men, did so think. When, in 1798, John Taylor, of Virginia, wrote Jefferson in reference to Virginia and North Carolina withdrawing from the Union and forming a confederacy by themselves, Jefferson put his objection to the scheme at the time wholly on the ground of expediency; nothing was said against the principle. Again, in 1803, on the purchase of Louisiana, which was then generally conceded to be unconstitutional, by its friends and opponents alike, threats were made by the opposition that it would dissolve the Union. As yet there was no strength to any of these secession movements, but the

fact that such threats were seriously made is not without great significance.

All the circumstances connected with the movement, in connection with what is said in their writings, seem to make certain what has, for a long time, been generally conceded, that it was after consultation and agreement between them that Jefferson drew the resolutions which were passed by the House of Representatives of the legislature of Kentucky on November 10, 1798, and by the Senate on the 13th of the same month, while Madison drew those which were passed by the House and Senate of the legislature of Virginia respectively on December 21st and 24th of the same year.

The occasion of these resolutions was the passage, by Congress, of what was known as the Alien and Sedition laws, in contemplation of a war with France. These laws were generally denounced by the Republicans as unconstitutional, and the claim was now put forth that each State might determine this question for itself. Jefferson, especially, was glad to have an opportunity, which might fairly serve as an excuse, for the publication of principles which he had for some time entertained, and the promulgation of which he deemed of vital importance to the success of his ambitious schemes. Owing, probably, to the division of sentiment in Virginia, the resolutions passed by the legislature of that State were somewhat milder in expression than were those passed by the Kentucky legislature. But the resolu-



tions of both States declared, in effect, that the bond of union between the States was a *compact*, to which the States are parties; that when the general Government goes beyond the powers conferred by the plain sense and intention of the compact the States have a right, and are in duty bound, to interpose and arrest the evil. The Kentucky resolutions declared "That the Government created by the compact was not made the exclusive or final judge of the extent of the power delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its power; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and manner of redress." A year later the Kentucky legislature declared that "the several States who formed the instrument, being sovereign and independent, have an unquestionable right to judge of the infraction; and that a nullification by the sovereignties, of all unauthorized acts done under color of the instrument, is the rightful remedy."

Here, so far as public and responsible declaration is concerned, is the origin of the political heresy of nullification and State sovereignty. While these doctrines professed to come as the expressed views of the legislative bodies of two States, and, at the time, no one else was known in them, still, as a matter of fact, they originated with Jefferson and Madison, and these parties must be held responsible for the evil consequences

naturally flowing from the promulgation of such opinions. Washington, in writing to Patrick Henry in reference to these resolutions, well said: "Measures are systematically and pertinaciously pursued which must eventually dissolve the Union or produce coercion." It would seem as though no one could view them in a less serious light.

These resolutions were sent to the legislatures of the other States for their approval. Most of the Northern States emphatically repudiated the doctrine therein announced, and at least one entered into a somewhat lengthy argument refuting the doctrine declared in the resolutions.

The war of 1812 with Great Britain was never what may be termed a popular one. The opposition to it, while much stronger in New England than in other portions of the country, extended, to quite a degree, all over the Union. Nor was it confined to the Federal party. It is true that most of the Democrats supported the administration in the prosecution of the war, still, many of them had not been in favor of declaring war, nor were they averse to its determination. In view of all the facts it seems as though too much censure has been cast on the New England States for the course they took in this struggle. But that is a matter not within the scope of this work. The only thing connected with this war which is of importance from a constitutional point of view is connected with the doctrine of national supremacy. It cannot be denied that, to a

considerable extent, the opposition to the party in power now took the position that the Union had only the force of a confederacy, and that the States were not bound together by a national tie. This was not, by any means, the idea of the Federal party in general, but a large number gave their adhesion to this theory. In doing this they were but following in the steps which the present administration party had taken a few years before when the Federalists were in power. In fact, the parties had completely changed position. Those who had before denied the supremacy of the general Government were now asserting it, and were exercising all the authority conferred by the Constitution in maintaining such supremacy, while those who had previously claimed such authority for the general Government were now willing to concede very extensive powers to the States. In speaking thus of parties it must be remembered that what is said does not, by any means, apply in either case to anything like all the members of the two parties. Probably a majority of the Federalists were at all times firm believers in the national character of the Government, and many of the Republicans or Democrats also held the same view. But many of each party at different times held a contrary view, and the position taken by the controlling element in each party depended on whether or not it was in power.

The Hartford convention, held at just the close of the war, and composed of delegates from Massachusetts, Rhode Island, and Connecticut announced substantially

the same constitutional doctrines as those contained in the Virginia and Kentucky resolutions. But the convention had no official character, did not by any means fully represent the views of the three States whose delegates composed it, and was of little political significance.

On the whole the war of 1812 was favorable to the idea of nationality. The war party had taken such decided ground in favor of the exercise of national power by the general Government that it would thenceforth be difficult for it to repudiate such act. In fact, the people in general would have no desire to do so. And the utter failure of any party to make any success in propagating a spirit favoring a separation of the Union, or even favorable to the idea that the Government was only a confederacy, naturally weakened that sentiment even in the minds of those who announced it.

The doctrine that a State had a right to nullify a law of Congress, having been declared in the Virginia and Kentucky resolutions, was occasionally referred to and, in a measure, approved by those in opposition to the Government for several years, but no practical application was attempted to be made of this doctrine until the time of the administration of John Quincy Adams. The Creek and Cherokee tribes of Indians had large possessions within the bounds of the State of Georgia. This State was anxious to have them removed. Their rights were secured by treaties with the Government. An exciting contest between the State and national officers arose respecting the course to be pursued toward

the Indians pending the efforts that were to be made for their removal. For the first time in our national history the doctrine of State sovereignty was now officially declared by the government of Georgia in its broadest form. The right of the National Government to enter the *sovereign* State of Georgia with its civil and military forces to enforce and carry out its treaty with the Indians was absolutely denied by the State officers. The opinion announced by the Supreme Court of the United States was set at defiance, and the jurisdiction of the court would not be recognized.

Jackson, succeeding Adams in the Presidency during the pendency of this controversy, gave way to Southern influence and, in a great measure, permitted the State authorities to carry out their project, and to render the national authority inoperative. Or, rather, perhaps it would be more correct to say, the national executive authority co-operated with the State officers in completing the nullification of the Government's treaties and laws.

It was certainly fortunate for the country that, preceding the attacks on the national authority by South Carolina under the leadership of Calhoun, there had taken place in 1830 the great debate in the Senate of the United States between Hayne and Webster on the Foot resolution. There was nothing in the subject embraced in the resolution to naturally call forth such a discussion. But the South appeared anxious for an opportunity to state her grievances, and to assert the doctrine on which she seemed to rely for an ultimate vindic-

cation of her rights. Hayne was ambitious for the honor of leading the forces naturally tending toward State sovereignty. In his first speech Mr. Hayne made somewhat general charges against those not in sympathy with the institutions of his section of the country, attacked the governmental policy for disposing of the public lands which had been pursued for many years, and stated the doctrine of State's rights to which he declared the South would appeal when necessary, for the preservation and maintenance of her rights.

Mr. Webster replied to this speech and controverted the position assumed by Mr. Hayne. In his second speech Hayne was more specific in his statement of grievances, or, rather, in his complaints against New England, and more boldly announced the doctrine of nullification, which he claimed was a constitutional mode of redress when a State felt that its constitutional rights had been violated.

Hayne was the first person to announce this strange doctrine from the halls of Congress. It is true it was but carrying out the doctrine proclaimed in the Virginia and Kentucky resolutions of 1798. But that was a very different thing from an announcement of the same error by a United States Senator from his place in the Senate.

While this doctrine of nullification had been repeatedly stated in more or less formal manner since 1798 no one had ever stated to the country at large the false premises on which it was based, nor was the country familiar

with the facts and principles sustaining the claim of nationality. In his last speech in reply to Hayne in the debate to which I have referred, Webster most satisfactorily answered all that Hayne had put forward and, more clearly than it had ever been given before, stated the doctrine of American nationality. Probably this speech of Webster had more to do in establishing correct principles in the minds of the people on the subject of nationality and State's rights than all that had ever been said prior thereto.

The Georgia incident to which I have referred, and the debate in the Senate of which I have just spoken, were soon followed by a proceeding in South Carolina of a still more serious character than the one in which the Georgia officials had participated. The tariff laws had, in a measure, been based on the theory of protection to American industries from the foundation of the Government. The tariff acts of 1816 and 1824 were supplanted by one somewhat more protective in its tendency in 1828. While the South had quite generally favored former tariff acts she looked upon the act of 1828 as calculated to offer protection to free labor, and now put forth the claim that the law was unconstitutional. It was thought by many that the election of Jackson to the Presidency this same year would probably lead to the repeal of the tariff law of 1828 and an abandonment of the protective policy. But Jackson's position on this question was somewhat equivocal, and the friends of protection still maintained a majority in

Congress. The extreme opponents of protection were disappointed and believed that some strong and decisive measures were necessary in order to preserve their rights. The centre of the opposition to the tariff was South Carolina, and Calhoun was now the recognized champion of that faction. He had been elected to the Vice-Presidency on the ticket with Jackson, and the two were, in a measure, but by no means wholly, in accord in their political views.

During the second year of Jackson's administration he and Calhoun were completely estranged personally over a matter that had taken place some years before, but which had not, until that time, come to Jackson's knowledge. Calhoun now saw that his own political ambition, which was the Presidency, as well as the policy of his State, could be assured, if at all, only by a bold course in resisting national authority.

In 1831 Calhoun commenced the public discussion of the doctrine of State sovereignty, and the consequent right of nullification. The germ of the entire doctrine which he now put forth had already appeared in the Virginia and Kentucky resolutions of 1798, which had been somewhat elaborated from time to time since then. There was nothing new in what Calhoun said. But never before had the question received that careful consideration of a strong logician which was bestowed upon it by Calhoun. His several papers prepared at this time contain practically all that has ever been advanced in favor of the theory which he espoused. By his argu-



ments he probably did not so much hope to convert his opponents as to consolidate and strengthen those who already adopted his conclusions.

The whole force of the argument for nullification lies in the assumption that the Constitution is only a compact, that the States are sovereign, that the bond between them is only that of a treaty of alliance between foreign nations. Grant these premises and the conclusions which Calhoun and his followers drew therefrom naturally followed. But there is nothing on which his premises can rest. Starting out with a true statement, viz., that at the formation of the Constitution each of the thirteen States was sovereign and independent, he ignored the other truth that several independent States, and their citizens, may agree to surrender their individual sovereignty, either in whole or in part, and unite to form one new State with complete sovereign powers, when the people of all the States uniting have consented that such power shall belong to it.

Calhoun contended that because the Constitution was not the work of the people collectively there was no such political body as the American people; that the people had been united, not as individuals, but as political communities—as States; that as such they had formed and adopted the Constitution. His fault lay in discarding or ignoring the truth that the people are supreme; that whether they act in one aggregate body or, by agreement, in groups, their action is authoritative; that they may agree to have several sovereignties or one, and

whichever plan is by them adopted is absolutely conclusive. By the articles of confederation the States agreed—the people were not consulted—to remain sovereign. By the Constitution the people—the whole people, not acting in one aggregate body, it is true, for under the circumstances that was impracticable, but while acting in groups still acting in union—agreed to abandon the policy of supporting several sovereignties which they had theretofore approved, and out of them to form one sovereign nation, retaining the State organizations for purposes of local government. It was as competent for the people now to form one sovereignty as it had been for them originally to establish thirteen. Their action in groups was no less binding on all, when all had given their assent in that form, than it would have been had it been taken in the aggregate.

Calhoun says there is no direct relation between the citizen and the general Government. Had he said this of the old confederacy he would have been correct, but certainly he is incorrect in making such an assertion of the relationship of the citizen to our present Government, for such direct relationship is formed by the Constitution itself. Every provision of the Constitution implies this, and the force of the whole Constitution is based on this fact. This is the distinguishing feature between the articles of confederation and the Constitution, and the fact plainly appears on the face of the two instruments.

It is absurd to say, as Calhoun does, that, “It be-

longs to the State as a member of the Union, in her sovereign capacity in convention, to determine definitely, as far as her citizens are concerned, the extent of the obligation which she contracted." These citizens, *in their sovereign capacity*, had already agreed that this Constitution was the supreme law of the land, and that the national courts should have jurisdiction of all questions which should arise thereunder. The Constitution does not pretend to act upon the States, but directly on the people. It uses the States as convenient means of division for apportionment and other purposes. But the National Government derives its revenue from the people, it gets its soldiers from the people, its judicial process extends to the people.

The efforts of Calhoun resulted in a call by the South Carolina legislature, on the recommendation of the Governor, for a convention to take the necessary steps to prevent the collection of the tariff duties within the State. The convention met November 19, 1832, and, five days later, adopted an ordinance of nullification, whereby the tariff laws of 1828 and 1832 were declared null and void. It was further declared that in case of an attempted coercion on the part of the general Government the State would henceforth hold herself absolved from any obligation to maintain further political communication with the other States. Decisive measures were taken by the legislature under this ordinance to enforce its provisions.

On December 11, 1832, President Jackson issued his

famous proclamation in which he asserted the supremacy of the National Government, and announced his determination to enforce the laws. About this time Hayne succeeded Hamilton as Governor of South Carolina, and was succeeded in the Senate of the United States by Calhoun, who resigned the Vice-Presidency to accept the position of Senator. The two contending forces having taken their stand the question was whether there was any way of avoiding a conflict without one or the other abandoning its position. Neither party was desirous of entering upon a conflict which all could see would be severe, if once commenced.

Propositions were now made in Congress for a modification of the tariff, and also to give the President additional authority which would enable him to enforce the law. The result was that concessions were made on both sides. On the face of the record the administration carried its point. The force bill was passed and the revenue was collected. Still, quite a material change was made in the tariff duties which enabled South Carolina to give way without acknowledging that she had in any manner abandoned her position. For the time being the constitutional principle of nationality was successfully asserted, and its moral effect throughout the Union in strengthening the feeling opposed to State sovereignty was very great.

In connection with the subject of secession, and as throwing light on the spirit of the South, an incident connected with the proceedings of Congress may be here

referred to. Excitement over the matter of presenting petitions for the abolition of slavery in the District of Columbia had been intense for months, and even years, past. In December, 1837, a number of such petitions were presented, and, in connection therewith, a motion was made by a Northern representative that they be referred to a special committee with instructions to bring in a bill for the abolition of slavery and also of the slave trade in the District of Columbia. No proposition going to this extent had ever, prior to this, been introduced into Congress. The South was in a rage, and the anti-slavery members from the North were hoping for an opportunity to discuss slavery on its merits, and to administer to their antagonists some wholesome truths. But parliamentary rules were invoked which practically cut off discussion and closed the mouths of the anti-slavery members. While the controversy over this question was in progress several Southern representatives called on their colleagues to leave the House with them. While nothing farther in this direction was done until after, on call of the roll, the House had, by a large majority, voted to adjourn, still, the Southern members were thereafter in the habit of referring to this incident as the *secession* of the representatives from the South from the House of Representatives.

On the following day the incident was closed by the adoption of the ordinary mouth-closing resolution, declaring that all resolutions in any way relating to slavery be laid on the table without being read, printed,

or referred, and that no further action be taken thereon.

This occurrence was supposed to have some influence by giving the country a practical illustration of what the South would do whenever she felt that her interests called for so decisive an action. That her representatives in Congress were ready to *secede* whenever circumstances demanded it they had now, as they supposed, sufficiently demonstrated.

A threat of the dissolution of the Union for a reason other than one directly relating to slavery, although that question may also have entered into it, is here mentioned in order to show as fully as I can, within reasonable space, the scope of the anti-national feeling. Quite a strong opposition to the acquisition of the territory of Louisiana, in 1803, had been manifested in the North, but it was not till 1811, when Louisiana applied for admission into the Union as a State, that this opposition was seriously and passionately urged in Congress. John Quincy Adams, leading a large Northern element, took strong ground against the constitutionality of acquiring foreign territory, and especially of the admission into the Union of a State formed from such territory. And he went so far as to say that such an act would be such a flagrant violation of the Constitution as to morally release any State from its obligation to the Union, and might require some of the States to separate from the Union, either peaceably or forcibly.

This same doctrine was again advanced in 1844 when

it was proposed to admit Texas into the Union. When that matter was under consideration in Congress the legislature of Massachusetts, under the lead of Charles Francis Adams, passed resolutions denying the power of Congress to incorporate foreign territory as a State in the Union, and declaring that such project, if persisted in, might lead to a dissolution of the Union. Not only did these resolutions apparently assert the right of separation, but they contained language so full of heresy that one might think they had been dictated by Calhoun. They spoke of the Constitution as a compact, and the duty of the State to observe its terms as she understood it. In fact, one would naturally look for such a document, if at any point within the United States, in the archives of South Carolina rather than in those of Massachusetts. Nothing came of either of these objections to the admission of Louisiana and Texas, and the matter is mentioned here to show how widespread was the idea of separation, or the power on the part of a State to dissolve the Union.

In response to an invitation from a convention held in Mississippi in October, in 1849, to the Southern States to meet and take action which would put a stop to Northern aggressions on Southern rights, there assembled in Nashville, in June, 1850, a convention composed of delegates from most of the Southern States. While nothing was said in the call which looked *definitely* toward dissolution, still, the Mississippi convention did propose that if the Nashville convention failed in its purpose

the Southern States, in their sovereign capacity, should provide a remedy.

After the passage of the compromise measures in Congress in the summer of 1850 the Nashville convention resumed its sitting and sent forth a declaration to the effect that when any State felt the circumstances justified such a course it was authorized to resume the powers it had on becoming a member of the Union, conferred on the general Government. It borders on the ridiculous to hear States formed out of territory purchased by the general Government from a foreign country, which never had any political existence or government except such as was given them by Congress, talk about powers which they had conferred on the general Government, and their right to resume such powers.

In May, 1851, the Southern Rights Association of South Carolina held a convention in Charleston which declared the State would take such action as its honor and its interest demanded. Following this the legislature passed a law providing for appointment of delegates to a Congress of the Southern States which was expected to initiate a secession movement among all the slave States. But when the election in South Carolina for delegates to this Congress took place, to the surprise of all the politicians, a very large majority of the delegates were opposed to secession, and nothing resulted from this move.

From this time until its actual occurrence threats of secession by the Southern leaders accompanied nearly



every important political movement. The passage of the Kansas-Nebraska bill, in 1854, was the commencement of a new struggle between freedom and slavery for dominion in the territories. During the controversy following this act the claims of slavery were pushed to a limit which they had never before approached. Not only the right of the slave-holder to take his slaves into any territory of the United States, and there hold them as owners held other property, was now asserted, but the further claim was put forth that if the territorial legislature failed to give him adequate protection it was the duty of the general Government to come to his relief and furnish him as full protection against, and relief for, interference with his slaves as was accorded to owners of any kind of property.

This claim of the Southern politicians was almost invariably accompanied by a threat that if their demands were not acceded to they would seek protection in a dissolution of the Union. The Kansas struggle was memorable not only by reason of the physical conflict that took place on her soil, but no less because of the political discussion to which it gave rise, both within the halls of Congress and throughout the whole extent of the country. In no previous discussion had the demands of slavery been so boldly and vigorously combated and so successfully resisted. The sophistry in the argument and the untenable conclusions reached in the majority opinion of the judges of the United States Supreme Court in announcing the decision of that tribu-

nal in the Dred Scott case were held up to the public gaze by the advocates of freedom with as little concern as they felt in tearing to shreds the falsehoods embodied in the popular sovereignty doctrine through which it was supposed slavery might be successfully introduced into Kansas. The spirit of the free North had broken the shackles in which it had so long been held in subjection to the slaveholding South. In 1856 this independent spirit on the part of the advocates of freedom was, for the first time in our national history, manifested in the organization of the National Republican party, which explicitly declared in favor of restraining slave territory within its present limits.

In the continuance of the contest between these opposing forces which took place during the next four years little attention was paid by their opponents to the threats of Southern leaders that a failure on the part of the nation to recognize their demands would inevitably lead to a dissolution of the Union. No doubt these threats were often made for the purpose of influencing political action, and to secure results which could not otherwise be attained. But that the South realized its weakness more clearly than it had ever been comprehended by the North seems certain. The South saw that to circumscribe slavery and confine it to the limits it then occupied was to decree its gradual extinction. Hence, with the champions of slavery it was a life and death struggle for more slave territory. And, if this could not be secured in the Union, their only resource was to

seek for it outside. Therefore, what was by many throughout the country taken as an idle boast was, by the Southern leaders who made it, meant in the most solemn earnest, and may be said to have been the necessary conclusion to which they were forced unless they were content to look for the final extinction of slavery.

The conflict of opinion respecting slavery, and the claims of slavery on the Government, which had been growing in intensity for a number of years, had, to a great extent, divided the country into two sections, and had become the dominant question of politics. In the spring of 1860 Jefferson Davis introduced into the United States Senate a series of resolutions setting forth some of the demands of the South. It was evident that this action was intended to give shape to the course to be pursued by at least one political convention which was soon to convene, and to influence the result of the ensuing Presidential campaign. Every movement taken by the Democratic politicians made it more probable that the conflict of which I have spoken had so gotten hold of their party that the division therein was likely to become as serious as was that in the country at large. The Democratic convention met in Charleston the latter part of April, 1860. The one question at issue was the declaration which it would put forth respecting the claims of slavery upon the general Government. For the first time in the history of the party the Northern Democrats refused to accede to Southern demands. As a result the party was split, and two Democratic tickets were subse-

quently put in the field. From this time it was practically determined that neither Democratic candidate could secure a majority of the Presidential electors. Either the Republican candidate would be elected or the election would be thrown into the House of Representatives. The result was likely to be reached which the South had declared would dissolve the Union.

No statement was more frequently made during the campaign of 1860 than that by all the Democratic orators of the South that, if the Republican candidate was elected President, the Southern States would secede from the Union, and, perhaps, no other statement was taken by the people of the North less seriously. And yet the ballots were scarcely counted until this threat began to be put into execution.

Of all the States in the Union South Carolina was the only one whose Presidential electors were chosen by the legislature instead of by a direct vote of the people. As, under the law, the electors had to be chosen on the same day throughout the Union it became necessary for the Governor of South Carolina to convene the legislature in special session to select her electors on November 6th. In his message the Governor requested the legislature to remain in session until after the result of the election was known in order that they might take the necessary steps to secure their rights in case the Republican candidate was elected President.

On the day following the Presidential election steps were taken in the legislature which resulted in calling a

convention to convene on December 17, 1860, and decide whether or not South Carolina should secede from the Union. At the same time most of the national officers within the State tendered their resignations, or declared their intention so to do, and her United States Senators did the same. I need not follow the history of these proceedings. In reference to the determination of the South to force her views on the North, or else to dissolve the Union, evidently the North had been mistaken. The movement in South Carolina was not an idle bluff, but was the expression of an earnest purpose. The example set by South Carolina was soon followed by other of the cotton States, and before the close of President Buchanan's administration seven States had proved, so far as was in their power to do so, that secession was possible under the United States Constitution, and had actually organized a new government on the *confederate* instead of the *national* idea.

Unless one refuses to give credit to the good faith of what is said and done in a whole section of country he is bound to concede that the great body of the people of the Southern States had brought themselves to believe fully in two propositions—first, that slavery was a divine institution, and therefore for the best interest of both master and slave; and, second, that the States were sovereign, and therefore the citizen's first allegiance was due the *State*; that only in a secondary sense and a subordinate degree did he owe allegiance to the general Government. That either of these propositions should

have been accepted as true by any large number of people in a free and enlightened State, indeed, seems almost incredible; but to doubt the fact that such belief was general is to fail to grasp the reason for the strength and endurance of the Southern confederacy.

No one can read the history of the secession movement in this country, as a substantial danger to the Government, and have any doubt that its source is to be found alone in slavery. That from the assembling of the constitutional convention in Philadelphia there was an opposition to the organization of a National Government is indisputable. That, to a certain degree, this sentiment continued to prevail for many years after the organization of the Government is abundantly shown by history. That this feeling was entertained in the North as well as in the South is also true. That this opposition found expression in words on more than one occasion is not to be denied. But this sentiment on the part of a few people scattered over the nation was in no sense the origin of the idea of secession. The doctrine of secession was not found in the Constitution, nor was it deduced from it, but was an invention studied out by ingenious politicians to meet what was felt to be a pressing need.

Slavery was sectional and not national. Its existence was recognized without being sanctioned in the Constitution. The system was not only debasing in morals but was a blight on industry and progress. It could exist only by virtue of positive law. The slave-masters saw the public domain appropriated by settlers impelled

by the spirit of freedom, with whom the institution of slavery could find no favor. They saw themselves likely to be cut off from the outside world, and be surrounded by free labor and free institutions. They put forth every effort which ingenuity could devise, and which affrontery could dictate, to bring the National Government to a recognition of slavery as a legitimate institution in all national territory, and as entitled to all the protection belonging to the rights of property. Their efforts proved unavailing.

In proportion as the slavocracy saw their endeavors to bring the National Government to a full recognition of their claims fail of realization did they endeavor to find a way by which they might escape the doom they saw awaiting them. The theory of State sovereignty, invented by those who, in the early days of the republic, were opposed to the doctrine of nationality, and of which Calhoun had been the most eminent and persistent advocate, now became the prevailing belief. On this theory of States' rights was engrafted the more modern doctrine of secession, and the struggle from 1860 to 1865 was the result.

Neither State sovereignty, as claimed by the Southern people, nor secession, as invented and advocated by them, found any countenance in the Constitution. They were both political heresies, purely the invention of necessity, brought forth to give countenance and strength to a plan for making sectional claims paramount to national rights. Their originators and promulgators submitted

the correctness of the doctrine which they embodied to the decision of a tribunal which recognized no appeal. The decision against them was so marked and conclusive that we can hardly conceive of these issues arising again to array sections of the country against each other or to threaten the nation's peace.

#### THE GOVERNMENT'S RIGHT OF SELF-PRESERVATION

Threats to break up the Union were of long standing and frequently made, but seldom has there been any direct attempt to put them into operation and to forcibly assail the life of the nation. The nullification ordinance of South Carolina, in 1832, practically amounted to this, but the firm hand of Jackson arrested the conspiracy almost in its inception, and some concessions made by Congress helped to soothe the wounded feelings of the proud nullifiers when they found it necessary to acknowledge the authority of the Government, so that open opposition to the Government ceased and those who had attempted a rebellion were measurably satisfied with the conditions of affairs under the Government.

For a decade prior to 1860 the air was full of the claims of State sovereignty, of secession, of the inability of the Government to coerce a sovereign State—of almost every conceivable claim which looked toward a dissolution of the Union. The people in general did not take most of this talk as seriously intended, but rather looked upon it as a sort of bluff by means of which those



who indulged in it hoped to extort from the Government the most favorable action which it was possible to obtain in favor of Southern measures.

Even after the Presidential election in 1860 most people were slow to believe that any serious trouble awaited the Government. But those who took this view were probably guided by their desires rather than by their judgment. When words were followed by acts it was certainly time for the people to seriously consider existing facts.

Prior to the meeting of Congress in 1860 President Buchanan had asked and received the views of his Attorney-General concerning the President's duty in view of the threatened crisis. What course the President would have felt called upon to pursue independently of the opinion of the Attorney-General, or had that opinion been in favor of the exercise of force, if need be, we may not, perhaps, know with certainty. But, in accordance with that opinion, both his acts and his words were uniformly in consonance with the theory that the Government had no power to protect its own life by the use of force. It is true the President denied the right of secession, and said that it was nothing less than revolution. He argued that the Government might use its army as a *posse comitatus* in aid of the civil power to enforce its orders. But this position of the President was absolutely ridiculous. In his view the Government might suppress a small revolt that opposed the execution of process by the United States Marshal, but when the re-

volt had reached the proportions that frightened both judge and marshal into resigning, had taken possession of the Government building, and had destroyed all semblance of the exercise of local authority by the Government officers, the National Government was then without rightful authority to use force to execute the national will.

In his last annual message, at the opening of the last session of the Thirty-sixth Congress, in December, 1860, President Buchanan said: "The course of events is so rapidly hastening forward that the emergency may soon arise when you may be called on to decide the momentous question whether you possess the power, by force of arms, to compel a State to remain in the Union. I should feel myself recreant to my duty were I not to express my opinion on this important subject.

"The question fairly stated is, Has the Constitution delegated to Congress the power to coerce a State into submission which attempts to withdraw, or has actually withdrawn, from the confederacy? If answered in the affirmative it must be on the principle that the power has been conferred on Congress to declare and make war against a State. After much serious reflection I have arrived at the conclusion that no such power has been delegated to Congress, or to any other department of the Federal Government."

Did anyone, on any other occasion, ever hear from the head of any government such a pusillanimous confession? Buchanan had already, in this same message, asserted

that secession found no countenance in the Constitution, and that an instrument conceding such a right would be but a rope of sand. But what shall we say of a Constitution which withholds from the Government which it establishes the authority to employ the force under its control for the suppression of opposition which is confessedly illegally put forth for the destruction of the national life? Much better that the Constitution should concede the right of secession than to deny the right but withhold from the Government the authority to suppress it.

Buchanan attempted to support his opinion by a reference to the debates in the convention which framed the Constitution. In my judgment these debates, when carefully considered in connection with the various propositions which were before the convention, do not, by any means, bear out the theory advanced by the President or justify the conclusion he deduced from them. But I shall not occupy space in referring to these discussions; anyone interested can study them in Madison's Notes, or Elliott's Debates, or in other works where they have been given. Even if the proceedings did show that such a view was entertained by the convention, or by some of its members, as I have said in other parts of this work, I should not consider it as of any great moment in determining what the correct view of the Constitution is. What the people adopted, and what we are to construe, is what the convention put into the Constitution, and not what its members said about it.

Each member of that convention, and every citizen who is under the jurisdiction of the Government, was and is bound to know the meaning of the language used in the fundamental charter of government in which are expressed his rights and duties. Only in the event of great doubt as to the meaning of the language used would the President or anyone else be justified in leaving the Constitution itself and appealing to the opinion of some member of the convention when seeking for its true meaning and its correct interpretation.

There are many reasons why President Buchanan should have come to a different conclusion respecting the powers of the Government from the one which he communicated to Congress. In the very organization of an independent State there is the implied right for the use of all force necessary for its preservation. Were the Constitution silent on the subject the right would inhere in the Government by virtue of its organization. This right being in the Government, the constitutional provision that Congress should have authority to make all laws necessary and proper for carrying into execution all powers vested by the Constitution in the Government, or in any department or officer thereof, would seem to be broad enough to authorize the passage of a law directing the employment of its army in suppressing revolts against the powers of the Government. Again, the constitutional oath required of the President that he will "*preserve . . .* the Constitution of the United States," if it is to be given any force, should be

held to carry with it the right and the duty to put forth some exertion to restrain and suppress organized bodies of men who are bent on the destruction of the Constitution and the Government.

But the Constitution is not silent on the question of defending the life and vitality of the nation. Congress is given authority "To provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion." The laws of the Union provide for the organization and maintenance of a national judiciary which is to sit and administer justice in every State, for the carrying of the mails throughout all the States, for the collection of customs and taxes all over the country, for the purchase of sites and the erection and maintenance of Government buildings thereon wherever the same are needed, as well as putting into operation many other Government agencies. Secession means the destruction of these institutions as a feature of governmental machinery for the country, and the impeding or the prohibition of the operation of these laws in the State where secession is proclaimed. If the power to provide and use an army to execute the laws of the Union does not cover the cases I have suggested, of what force is the said constitutional provision? And yet President Buchanan, "after much serious reflection" could find no authority in the Constitution for the forcible enforcement of law.

Nearly forty years before President Buchanan sent this message to Congress, Chief Justice Marshall, in an-

nouncing the unanimous opinion of the Supreme Court of the United States, in the case of *Cohens vs. Virginia*, had used this language: "It is true that whenever hostility to the existing system shall become universal it will be also irresistible. The people made the Constitution, and the people can unmake it. It is the creation of their own will, and lives only by their will. But this supreme and irresistible power to make or unmake resides only in the whole body of the people, not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it. The acknowledged inability of the Government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation acting in opposition to the general will. . . . The framers of the Constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the States or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think they have attempted it."

I do not see how the situation confronting President

Buchanan in the closing months of his administration could be more correctly characterized than by applying the language of the learned Chief Justice which I have quoted. If, in place of what the President put in his message to Congress, he had quoted this language, or used other of similar import, and then had made his actions correspond to such declaration, his reputation would have suffered less, his efforts would be held in more grateful remembrance, and the horrors of a long and bloody civil war might have been avoided. The President could at least have thrown on Congress the responsibility of granting or refusing him the authority to use the whole force of the nation for the preservation of its life. He chose to advise Congress that they had no such right, and on him must rest the responsibility for the Government's inactivity in the most critical point in its history.

The constitutional right of the Government to use force "to execute the laws of the Union, suppress insurrections and repel invasions," clear to one who has no thought but to read the Constitution for its meaning, with no desire to find an excuse for law-breakers, even before Lincoln's inauguration, was rendered irrefutable by the logic of events which succeeded his induction into office. It is to be hoped that the occasion for the assertion of this doctrine will never again arise, but if it does the *non-coercion* theory will hardly find anyone so self-deceived as to advocate its claim. The nation has written in blood its condemnation of secession, and aslo its constitutional right to protect its own life. This in-

terpretation of the Constitution, vindicated at such an enormous cost of treasure and blood, will never be reversed, and probably will never again be questioned.

CONSTITUTIONAL CHANGES AS A RESULT OF  
THE CIVIL WAR

That the Civil War inaugurated by the Southern States immediately on the close of the Presidential campaign of 1860 was directly traceable to slavery there can be no doubt. It was slavery which consolidated the South against the Government, and it was the friends, or at least the excusers, of slavery which caused most of the criticism of the Government in the North during the progress of the war. Almost of necessity an institution so intimately associated with such an important event was bound to be greatly affected, either favorably or disastrously, by the result of the war.

The first national act in any way looking toward giving freedom to slaves on account of the rebellion was a section in the confiscation law passed at the special session of Congress which convened on July 4, 1861, which provided that when slaves were employed in the rebel army, or in forts or other places of defence, for any purpose whatever, their owner should forfeit all claim to them, and, if such slaves escaped, they could not be recovered by their owner.

Early in the war General Butler declared that all negroes escaping from the rebel army and coming within



the Union lines were contrabands of war and should not be delivered up to their former owners.

Soon after the assembling of Congress in December, 1861, a bill was introduced, which became a law in April, 1862, abolishing slavery in the District of Columbia. In June, 1862, a law was passed prohibiting slavery in any territory of the United States.

In July, 1862, Congress passed a law to suppress insurrection, and for other purposes, which provided as a part of the punishment for treason that upon the conviction of anyone of treason all his slaves, if he had any, should be declared free. And, in the same act, the President was authorized to use negroes in suppressing the rebellion.

On September 22, 1862, President Lincoln issued his preliminary proclamation of emancipation, in which he warned those in rebellion that in any State or district which should be in rebellion on January 1, 1863, he should declare all slaves free. And on January 1, 1863, the President issued his proclamation announcing emancipation to all slaves in the rebel States.

Many believed that the emancipation of the slaves in the rebel States through the President's proclamation did not rest on a sufficiently strong foundation, and, besides that, it did not cover all the slave territory in the Union. Consequently, it was determined to reach the evil through a constitutional amendment. Such an article was first proposed in Congress in January, 1864. It soon passed the Senate but failed of the necessary two-

thirds majority in the House. A reconsideration was thereafter moved and carried during the next session, a two-thirds vote at this time being secured, and in February, 1865, the thirteenth amendment was submitted to the States for ratification. Soon after the meeting of Congress the following December the amendment had been ratified by three-fourths of the States and proclaimed a part of the national Constitution.

We have now reached a period in our constitutional history which is full of perplexing questions, the solution of which is surrounded with many difficulties. In judging of men and of measures one should use forbearance and be willing to consider more than the mere matter in discussion. We had just passed through a great civil war in which all the energies of the nation had been taxed for its own preservation. A great work still remained to be done to bring the revolted people, and the local governments that must be carried on by them, back into harmonious working relations with the Union.

In considering the constitutional history of this period one must not overlook the situation of the majority party in Congress any more than the condition of the country. The Vice-President had succeeded to the Presidency. He was a man of very different temper from the one whose place he had taken. He had, probably honestly, come to believe that the safety and welfare of the nation were largely in his keeping. He strongly mistrusted either the ability or the patriotism of Con-

gress. Through a series of events which I do not deem it necessary to relate, the President broke with the party which had elected him and depended on the opposition party to enable him to carry out his own policy.

President Johnson, claiming to be following Mr. Lincoln's idea and to be carrying out the policy which Mr. Lincoln had inaugurated and had intended to pursue, held to the idea of the indestructibility of the State. Early in his administration President Johnson proceeded to reorganize the governments in the so-called rebel States, apparently without the remotest idea that Congress had anything whatever to do with the subject. Before the meeting of Congress in 1865 conventions had been held in most of the seceded States, changes had been made in the old State constitutions, State officers had been elected, and Senators and Representatives had been chosen and were now ready to demand their places as legal and authorized members of the two houses of Congress.

On its assembling in annual session these matters were, by the President, reported to Congress as accomplished facts. The policy which the President had pursued did not meet the approval of Congress. In its view a State was not an indestructible unit. Congress was of the opinion that the seceded States had, by their own act, destroyed their State governments and forfeited all rights they had once enjoyed. It believed that the suppression of the rebellion had left these States as conquered territory belonging to the United States. Or,

if this position were a too strong statement of the case, still, it asserted that these once States of the Union had, by their act of rebellion, placed themselves under the control of Congress for the establishment of such government as might be just. The claim of Congress was that the reorganization of government in the late seceded States was a legislative and not an executive act.

While it seems probable that, up to the time of his death, Mr. Lincoln had no fixed, definite, and clearly defined plan for the reconstruction of the seceded States, that he was not satisfied that any one plan would answer, but that several might be required, according to circumstances, that he did not feel bound by what he had done in Louisiana and Alabama to pursue the same course elsewhere, still, I think we may safely assume from all that he had done and said, that he regarded the States then or lately in rebellion as existing political organizations; that he probably, though perhaps somewhat unconsciously, and without having carefully thought the subject out on principle, held the doctrine of indestructible statehood; that he looked upon reconstruction as an act properly falling within executive cognizance, and not as a political measure under the exclusive jurisdiction of the legislative department of government. I have thus stated what I believe to have been Mr. Lincoln's position on this controverted question, tentatively assumed rather than firmly held, in order to give Mr. Johnson all the benefit that may in any way be fairly claimed for him as following the line of policy

which Mr. Lincoln had indicated. It must not be forgotten that during Mr. Lincoln's life these questions had scarcely been raised and had not received that thorough discussion which was given to them when Congress took hold of the matter of reconstruction. There is no reason to believe that, had he lived, Mr. Lincoln would have been found in antagonism with Congress on the subject of reconstruction.

With the divergent views, which I have indicated, held by President Johnson and Congress there would, almost of necessity, be trouble over the matter of reconstruction, even though each party should be disposed to be mindful of the other's rights. But when, instead of a conciliatory spirit, each party approached the subject with something of a determination to carry out its own ideas regardless of those entertained by the other, no one could look for anything less than a serious conflict.

Under the President's policy the seceded States were to be restored to their old relation to the Union on the theory that they had always been States in the Union, whose active relation therein had been temporarily suspended on account of certain acts of their citizens. Those acts having ceased, the States were now, as the President maintained, entitled to all their old rights and privileges.

The congressional plan, on the other hand, proposed a treatment of the people in these several districts, formerly forming States in the Union, as having forfeited their rights and now being under the control of Con-

gress, and, with no right of statehood until that should be conferred on them by Congress; they must, as a consequence, accept such local government as Congress might choose to confer upon them. Involved in this controversy, of course, was the new and important question of what rights and privileges should be guaranteed to the freedmen.

The contest between the President, supported by the opposition element which I have suggested, on the one side, and the majority party in Congress on the other side, over the policy to be adopted and pursued for a reconstruction of the seceded States, and the defining and enforcing of the rights of the freedmen, now became serious, and proceeded on two boldly drawn and diametrically opposed lines of policy, and widely differing interpretations of the Constitution.

The congressional plan was, as I think, dictated by true constitutional construction, correct political principles, and sound political morality. It rightly looked upon the freedmen, in a large measure, as wards of the Government, whose rights were to be protected by national authority, by virtue of the thirteenth constitutional amendment, against the aggressions of their former masters. This consideration of national obligation was practically excluded from the President's plan.

Probably no one, at this day, who is at all informed, will attempt to justify either the President or Congress in all the acts by them respectively performed during the

period of reconstruction. In the first place the question confronting the Government was so different from any that had ever before arisen in our history that it might well be expected that wise and patriotic men would differ in their views of how it should be treated. The constitutional question was a delicate one. I have no doubt that the President's theory of the rights of the seceded States was absolutely wrong, and that, in the main, the congressional view was correct. But that, on more than one occasion, Congress, in carrying out its policy, allowed itself to be controlled, to a certain extent, by a feeling of resentment toward the President, and a determination, at all events, to circumvent his plan, seems beyond question. That some of the bills passed by Congress over the President's veto contained provisions which were unconstitutional, and many more that were unwise, no one will to-day dispute. Many of these acts which we cannot attempt to justify we may, perhaps, excuse on the ground that excitement and passion ran high, that the safety of the country was in peril, that the rights of the freedmen were seriously threatened, and that, under the circumstances, a somewhat liberal discretion must be accorded to a legislative body in framing its measures to meet these demands. Some of these considerations must also be kept in mind when we are passing on the acts of the President. But when we have made all the concessions for each party which fair dealing requires at our hands we cannot point to the reconstruction acts as models on which we would want any

subsequent work of a like kind to be carried out should we ever again be subject to such great national calamity. Perhaps as wise measures were framed, and as good results reached as we could expect when the whole subject is looked at fairly ; still, the fact remains that great mistakes were committed. The President was not as bad as his antagonists represented him to be, but his plan of reconstruction is indefensible, and one might almost say inexcusable, from a constitutional standpoint. Congress was, on the whole, patriotic, and based its action on a theory which, when properly pursued, was in accord with the correct constitutional principles, but in carrying out its policy it committed many mistakes, some of which were hardly to be excused. All I need here add is that the constitutional history of this period must be looked at with much indulgence, with many misgivings, and its results must be scanned with great discrimination.

The contest which arose in Congress over the reconstruction of the seceded States, and, as an incident therein, the contest of which I have just spoken between Congress and the President as to which policy should be pursued, led to a further amendment of the Constitution.

Early in 1866 Congress had under consideration, and finally passed, two important measures, one known as the Freedmen's Bureau Bill, and the other the Civil Rights Bill. The provisions of these bills certainly contemplated an extension of national jurisdiction, to an extent



never before thought of, into matters which had theretofore rested entirely under State control. The relations between the President and Congress, which before this had been somewhat cool, now became excessively strained. The President's veto of the Freedmen's Bureau Bill embittered the friends of that measure, but his ill-advised speech to a crowd who called upon him to congratulate him on the event was far more exasperating.

The Civil Rights Bill, which was passed over the President's veto, was the first national measure defining and enforcing civil rights. The rebellion had made clear that for the safety of our institutions and the preservation of personal liberty greater power must be conferred on and exercised by the National Government. The adoption of the thirteenth amendment was a great start in this direction, and now Congress proposed to follow it up by a still further broadening of the field of national jurisdiction.

Several of the bodies acting as legislatures of the so-called reconstructed States, formed and recognized by the President, had passed laws intended to deprive the freedmen of all substantial benefits of freedom, and to again reduce them to a condition of vassalage. I shall not give any analysis of the civil rights bill, but it for the first time defined citizenship and made provision for the protection of the rights of citizens, and especially of the freedmen. This was a vast stride in advance of the old theory of State and national relationship

respecting personal rights. If the provisions of this bill had been acquiesced in by the President and the Southern leaders perhaps no further amendments of the Constitution would have been soon proposed.

But all of this legislation was opposed by the President, and its constitutionality was denied by the South and the opposition party in Congress. This naturally led Congress to plan a safer and more enduring measure to secure the end it was seeking. It was now still more apparent than it had been at any previous time that civil liberty should be defined and made secure under a national conception of rights rather than be left to be dealt with by the several States under such local views as might prevail in different parts of the country. Naturally, too, the scope of the measure broadened as it was discussed, and so the idea expressed in the civil rights bill was greatly enlarged when it took form in a constitutional amendment.

In June, 1866, the fourteenth amendment passed Congress and was submitted to the States for their ratification. The discussion of this policy, both in and out of Congress, aroused the whole country and demonstrated the necessity for embodying this truly national measure in the Constitution. It was not till July, 1868, that three-fourths of the States had given it their approval and thereby made it a part of our charter of rights. Perhaps no other addition has been made to our Constitution since its first adoption as it came from the hands of the convention which framed it so far reaching

and important in its character as the fourteenth amendment. Even the thirteenth amendment, which abolished slavery, can hardly be said to equal it in importance. For, at the time of the adoption of the thirteenth amendment the slavery question was in such a condition in this country that it was scarcely possible for it to again assume anything like national proportions. The abolition of slavery in the seceded States by the President's proclamation had been so far effective that it could not be effectively revived, with the spirit of the nineteenth century, not only in America but throughout Europe, so strongly arrayed against it. And with the institution dead in those States which had been its stronghold it could not long survive in those States where there had always been a sentiment against its expediency if not its morality. But without the fourteenth amendment, the standing and the civil rights of more people than the freedmen must ever have been a question subject to agitation, in which local sentiment would play a conspicuous part.

The ratification of both the fourteenth and the fifteenth constitutional amendments was, to some extent, secured by compulsion; or rather the action of certain States ratifying said amendments was obtained because they were given to understand that until their affirmative action thereon was had they would not be admitted to representation in Congress. This fact has been used by some as an argument in favor of the theory that the States were always in the Union, and were, as soon as

secession ceased, entitled to representation in Congress. But this conclusion by no means follows from the congressional requirement. That, at that time, it would have been unwise to have taken the vote of three-fourths of the loyal States as sufficient to have made the ratification of a constitutional amendment binding most persons will certainly accept. The binding force of the Constitution is to be accepted by all the people. At that time many of the people did not believe that when rebellion has actually destroyed all constitutional government in a State as found under our National Constitution and has turned all the forces of the State against those of the nation, it has so far ceased to be a State in the Union that it has no right to representation in Congress, that it may not take part in selecting a President, and need not be taken into account in determining the number of States necessary to ratify a proposed constitutional amendment in order to make it binding. While I think a State in the condition I have described is no more to be taken into consideration for any of the purposes I have just mentioned than is one of our territories, still, I think it the part of wisdom, for the purpose of satisfying the judgment of all the people, to secure the ratification of the disorganized States as well as the others; or, rather, to count such States along with the others, and secure the consent of three-fourths of the whole number to a proposed constitutional amendment. I think this should have been done, as it was, in reference to the thirteenth, fourteenth, and fifteenth amendments, not

because it was necessary under the Constitution, but rather for the purpose of satisfying doubtful judgments. If the seceded States were to be counted in arriving at the number required for a three-fourths majority then, of course, their ratification was sufficient, and was as binding as that of any other State. But if they were not to be counted in arriving at such determination then their act of ratification should not be considered and there should be a ratification of three-fourths of all the other States in order to make an amendment a part of the Constitution. All of these three amendments were properly ratified whichever view was to be taken as correct, and whichever method of computation should be followed.

In the ratification of the fourteenth amendment a constitutional question was settled, so far as the action of the legislative and the executive departments of the Government can settle it; this question relates to the authority of a State to reverse its action and withdraw its consent when it has once ratified a proposed amendment. New Jersey and Ohio, after ratifying the fourteenth amendment, by vote of their legislatures attempted to withdraw their ratification. But both the executive and legislative departments of the Government counted them among the ratifying States. And this was undoubtedly a correct constitutional construction. The action of the States in ratifying a proposed amendment is not an agreement among themselves which may be withdrawn at any time. But it is an action of a con-

stituent part of the Government, authorized by the Constitution, and when once given and officially reported is beyond the power of the State to recall or modify.

The question of a national restriction on the power of a State to limit the right of suffrage sprang wholly from the results of the Civil War. As the difficulties attending reconstruction developed, and the defiant spirit of the people of the seceded States became more manifest, a feeling sprang up in the nation, and grew in favor, as it was considered that both justice and good policy required that suffrage should be extended to negroes. The first congressional legislation on this subject was an act which passed Congress in December, 1866, extending the right of suffrage to negroes in the District of Columbia. This bill was vetoed by the President, but became a law in January, 1867, by its passage over the President's veto. This action was considered as a proper, if not necessary, preliminary measure to the conferring of suffrage on the negroes throughout the seceded States, which was done later this same year by certain provisions in the reconstruction act which became a law notwithstanding the President's veto.

The impropriety of forcing negro suffrage on the South, and refusing to provide for it in the North, became so apparent that Congress determined on extending the plan to the whole country. Another reason for this course was to make its adoption in the South permanent. In February, 1869, Congress passed and sub-

mitted to the States for their approval the fifteenth amendment to the Constitution. This question had been generally discussed in the campaign of the preceding year, and most of the legislatures had been elected with the expectation of being called on to vote on such a measure. As a consequence the approval of the amendment was quite rapid, and in March, 1870, it was proclaimed as a part of the Constitution. The wisdom of this measure need not be discussed here, but it was the completion of a national scheme for the protection of the rights of a people who had spent hundreds of years in bondage.

## VII

SEVERAL TOPICS BEARING ON THE GENERAL  
SUBJECT

## PRELIMINARY REMARKS

IN a constitutional history mention might properly be made and, if of sufficient importance; a discussion presented concerning the principle, of any subject involving an application of constitutional law. In a government like ours these questions must necessarily be very numerous. Some of them are far reaching in their consequences and permanently affect the construction of the Constitution. Such topics should certainly find a place in any work that professes to furnish anything like a full and comprehensive constitutional history. Many more of these questions are not of so important a nature, and are not likely to be cited as precedents, nor are they likely to determine the course of constitutional law. While these latter topics would probably receive treatment in an exhaustive work on constitutional and political history, they cannot be said to be a necessary part of a constitutional history which does not profess to discuss the details of movements which have led to general results. In a work confined to the limits within



which this is to be restricted some things must be omitted which would find treatment in a larger work.

In the somewhat miscellaneous matter to be brought in review under the topic given above I propose to mention, and briefly discuss, several subjects which have arisen in the course of our national history, and have had more or less influence in the development of some phase of constitutional history. If they have not been turning-points in our history they at least help to mark the course it has taken and are useful landmarks along the way.

#### RELATION OF THE GOVERNMENT TO SLAVERY

The Seminole War, which broke out in 1835, and which lasted several years, was, in a large measure, caused by disputes between the people of Georgia and the Indians over reclaiming runaway slaves. In the course of the war the national army was used to capture these slaves. Some of them thus captured were the descendants of slave parents, but had been born among the Indians and had never been in actual slavery. These, when captured, were turned over to the masters of their parents.

There was also paid out of the national treasury large sums of money which had been promised the soldiers as a bounty for bringing in alive fugitive slaves, and some of these, by the terms of the capture and the negotiations in reference thereto, the Government became the

owners of, and it also held an interest in others. Probably most people would seek in vain for a constitutional provision, or any legal principle, justifying many of these proceedings by the national authorities. Certainly it was never contemplated that the general Government should become a slave-holder.

During the slavery controversy it used to be frequently asserted by Southern politicians that the Constitution recognized slaves as property, and even some courts were supposed to have so held in some of their decisions. But whatever courts may have said it cannot be successfully maintained that slaves are recognized as property, either directly or indirectly, anywhere in the Constitution. The Constitution inferentially recognized the existence of an institution called slavery as prevailing in certain States, and provided that "*persons*" which this institution decreed to render service should be returned to their masters if they escaped to another State. This was perhaps equivalent to recognizing the fact that in certain States such *persons* were treated as property. But that was a very different thing from the recognition in and by the Constitution of property in persons; and such a recognition can nowhere be found in or gathered from the Constitution. On no foot of soil did slavery exist by virtue of the Constitution. Into no part of the territory subject to its jurisdiction could a slave be carried because of the national Constitution, when reasonably interpreted and fairly administered.

The claims of the South respecting slavery differed

from time to time, and different representatives of Southern sentiment held different views as to the relation of the Constitution and the general Government to slavery. Sometimes Congress was asked to provide for the protection of slavery in the territories, and sometimes it was claimed that Congress had no right to exclude slavery from the territories, or, indeed, to legislate upon it in any respect whatever. Finally the Southern claim reached the point that under the Constitution a citizen of any State might rightfully take his slaves into any territory of the United States and there hold them as securely as any other property could be held; that Congress had no power over slavery in the territories, and could not pass a law prohibiting it, or even authorizing the people of the territory to do so while it remained a territory. The untenableness of this position has, perhaps, already been sufficiently shown.

#### THE TERRITORIES UNDER THE CONSTITUTION

In 1849, under a proposition to organize territorial governments for California and New Mexico, and to extend the Constitution and laws of the United States over said territories, the question was seriously debated whether or not the Constitution extends *proprio* and *eo ipso* to the territories. Calhoun maintained that it did while Webster argued that it required congressional legislation to put the Constitution in force in territory

acquired from a foreign nation since the adoption of the Constitution. Both recognized there was a difference in the relation sustained to the Union by States and territories. But Calhoun's position was that the territories were subject to the obligations and entitled to the privileges and protection provided for in the Constitution all the time, even though it required congressional action to make them available, while Webster claimed that the Constitution was made for States alone, those originally adopting it and those which should thereafter be admitted into the Union, and that territories were not a *part* but a *possession* of the United States.

In point of practice the rule as contended for by Webster seems to have prevailed from the organization of the Government, and to have been recognized by all its departments. In most of the treaties under which foreign territory has been acquired provision has been made for incorporating the same into the Union in due time. Congress has repeatedly enacted laws extending the Constitution and certain national legislation over the territories. A number of the decisions of the Supreme Court, if not going to the extent of holding such legislation necessary, have at least recognized the existence of such rule. It is true that the language of the court in announcing its decision in at least one case seems to favor the rule as contended for by Calhoun. But on the whole, it seems to me the rule established, or at least recognized, by the three departments of the Government requires congressional legislation to put the Constitution

and national laws in force in territory acquired from a foreign government.

This question came directly before the Supreme Court of the United States after our acquisition of the Philippines and Porto Rico. By a divided court it was held that by the transfer of these islands from Spain to the United States under the treaty of Paris, they did not become a part of the United States, within the meaning of that term as used in the Constitution, and that it required congressional action to place them under the provisions of the United States Constitution and laws. A minority of the court took strong ground in favor of a contrary rule, but the doctrine announced by the court through a majority of its members will probably be received as the settled policy of the Government.

#### THE PRESIDENT'S RELATION TO LEGISLATION

The constitutional limitation on the right of the President to participate in legislation has never been clearly defined. In 1832 Congress passed a law renewing the charter of the Bank of the United States. Jackson vetoed the bill, and in his message to Congress containing his reasons for the veto he informed that body if they had consulted him he would have furnished the frame of a law which would have been constitutional, and not open to the other objections contained in the bill which they had passed.

## POWER OF THE PRESIDENT TO DECLARE WAR

While the Constitution confers on Congress the authority to declare war, experience proves that this right may practically be usurped by the President. One can hardly read the history of the transactions of our Government, and especially of the executive department thereof, with Mexico, for several years prior to the declaration of war in May, 1846, without a clear conviction that they were conducted with a view of involving the governments in war, unless, without resorting to that necessity, our Government could attain her object, which was the acquisition of more territory.

It is true that in the end Congress declared war, or assumed that because of Mexico's aggressions war existed. But it is also true that for months, and one may almost say for years, before that time the executive had so conducted diplomatic and military operations as practically to leave Mexico no option but to meet force with force, unless she chose to voluntarily concede all of our demands. Our diplomatic correspondence was so conducted as to prevent a spirited people's accepting our propositions, and our forces were so stationed as naturally to lead to a collision with Mexican troops; and then, as a consequence, a declaration of war followed.

Probably the President did not violate the letter of the Constitution, but its spirit was certainly severely

strained by a course of conduct, without the knowledge or approval of Congress, and which no public exigency called for, which naturally and almost inevitably made it incumbent on Congress to declare war, or else to compel our Government to recede from the position taken by the executive, after the armies of the two countries had come into actual conflict.

#### CONGRESSIONAL CONTROL OVER ITS RECORDS

The power of each house over its own records was raised in 1837 when the Senate passed a resolution expunging from its record a resolution passed by that body a few years previous censuring the President of the United States for certain conduct.

It was contended that inasmuch as the Constitution required each house to keep a record of its proceedings it was beyond the authority of either house to destroy such record. No question was made that this record correctly stated the action taken. It was said the only right which the Senate then had to affect it in any way was by rescinding what it had formerly passed, or in some other way declare its present dissent from the views theretofore expressed. Notwithstanding these objections a majority of the Senate voted to expunge. It certainly seems very doubtful if such action was not beyond its constitutional right.

## FREEDOM OF SPEECH

The bitter contest over the slavery question which was waged so long led to an attempt on the part of the champions of slavery to restrict the right of members of Congress to express their sentiments, even in debates in Congress. Early in 1842 John Quincy Adams presented a petition asking that on account of irreconcilable differences regarding slavery, Congress take steps to secure a peaceable dissolution of the Union, and moved its reference to a committee with instructions to state the reasons why the petition should not be granted. The most exciting debate, perhaps, which had ever occurred in Congress up to that time, took place over resolutions to censure Adams for his conduct in presenting such a petition, which were at once introduced. Adams made a most masterly defence, and amply vindicated his right as a member of the House. At the close of the debate, which extended through several days, the resolutions of censure were laid on the table.

Soon after the incident just related Joshua R. Giddings was severely censured for certain resolutions which he introduced in the House. He at once resigned his seat and appealed to the country for his vindication. He was triumphantly re-elected. The right of a member to present any appropriate matter for consideration, and to freely speak and express his views thereon, may be said to have been established from this



time, but his constitutional right so to do was not recognized until after these contests.

#### FREEDOM OF THE PRESS

The constitutional right of the freedom of the press was endangered during Jackson's administration by an attempt to exclude from the mails all abolition papers and documents, on the ground that they had a tendency to incite insurrection among the slaves of the South. A bill was introduced into the Senate, but did not pass, which provided that when the laws of any State prohibited any class of papers or documents from circulating among the inhabitants of such State, such papers or documents should not be transmitted through the United States mail.

#### THE RIGHT OF PETITION

The right of petition is a fundamental privilege in a republican government. It existed in this country before the Constitution, and its existence under the Constitution is recognized, rather than provided for, in the first amendment which declared that the *right*, which already existed, should not be *abridged*. The right to petition implies that the petition shall be received and considered. Not necessarily that it shall be discussed at length, but that the person or body to whom it is addressed shall be made acquainted with its contents and that, when it

is addressed to a body composed of a number of members, any member shall have an opportunity to propose measures which he thinks will carry out the wishes of the petitioners. To deny this is to practically deny the right of petition, as much so as it is to refuse to receive the petition at all.

This constitutional privilege was first attacked and, for a time, seriously threatened by the defenders of slavery, who feared to have the merits of that institution pass under public discussion, which would have resulted from a consideration of the petitions in reference thereto as they were presented to Congress.

In the latter part of 1831 John Quincy Adams presented to the House of Representatives a number of petitions asking that slavery be abolished in the District of Columbia. These petitions were referred to the committee on the District, which reported that they should be denied, and the House so voted. Before this some action had been taken in Congress in reference to this same subject, but this was the beginning of that remarkable series of petitions which created such intense excitement.

Early in 1833 a petition, similar to those just referred to, was presented to the House, when a motion to lay it on the table was made but defeated, and the petition was referred to the standing committee on the District. Just two years after this a petition of the same character from a large number of women from New York was laid on the table by a large majority of the vote of the House.

A little later in the session a number of similar petitions were presented to the House, and a motion was made to have the petitions printed. This led to a long and an angry debate in which the North was bitterly arraigned for permitting to be sent forth publications which were prohibited circulation by severe penalties in nearly all the Southern States. The first decided action taken by the House infringing the constitutional right of petition was in May, 1836, when, by a large majority, it adopted a resolution that thereafter all petitions presented to that body which in any way referred to the subject of slavery should be laid on the table without being printed or referred. This action was boldly denounced by Adams as unconstitutional and a violation of the rights of his constituents.

Some four months prior to this, in January, 1836, in the Senate, Calhoun had moved that some petitions of this nature be not received. This elicited a very noteworthy discussion in which the right of petitions, as well as the general subject of slavery, was elaborately considered. This discussion ran through several weeks, at the conclusion of which Calhoun's motion was defeated by more than a three-fourths vote. But, at the same time, an understanding was had in the Senate that all similar petitions should be formally rejected without reference or debate. Thus, while a formal recognition of the constitutional guaranty was observed, its practical effect was destroyed, and the spirit of the Constitution was as clearly violated as would have been done by

the adoption of Calhoun's motion to not receive such petitions. And the same may be said of the resolution adopted by the House, to which reference has been made above.

It was a foregone conclusion that an institution which could only be supported and preserved by a suppression, in public discussion, of all reference to its existence and character must either perish or destroy the Constitution itself. It was, perhaps, well for the country that thus publicly and authoritatively was placed on record the absolutely irreconcilable difference between slavery and free speech, and that unless the people were prepared to surrender this palladium of their liberties they must throttle, at whatever cost, the enemy which demanded its destruction.

I do not care to occupy much space in referring to the flimsy excuse of a reason put forth in this discussion that there was no violation of the Constitution in the passage of such a resolution, as was adopted by the House, directing that all petitions which in any way referred to slavery should lie on the table without any publicity whatever being given to their contents. It was said the Constitution declared that no *law* should be passed abridging the right of petition; and, as this was not a *law* but only a *resolution*, it did not contravene the constitutional provision. Who but an advocate of such an institution as they were trying to uphold could put forth such a reason—that the House might do with impunity what both houses and the President could not do

together? It was also urged that the right of petition was not denied for the petitions themselves were received. But of what advantage to anyone was it for the House to receive a paper which no one was allowed to open, read, or in any way ascertain its contents? The principle announced by the House resolution, if adhered to, was an important step toward supplanting personal freedom by the rule of absolutism.

From 1836 to 1840 the House continued to adopt, from session to session, by a larger or a smaller majority, the same gag resolution, with various modifications somewhat broadening its scope. But in 1840 the House of Representatives came up to Calhoun's standard and adopted the rule, which four years before he had proposed to the Senate, that no resolution relating to the subject of abolishing slavery should be received. It would seem as though the House had now reached the lowest point to which it could descend respecting the subject of petition. But it was destined to propose a measure so far transcending what it had theretofore done that even those who had theretofore placed their necks under the slave-holder's yoke now refused to make themselves responsible for carrying through the proposed act of infamy.

In January, 1842, John Quincy Adams presented petitions from citizens of Massachusetts asking that Congress take steps to secure a peaceable dissolution of the Union, and moved their reference to a committee with instructions to report reasons why the petitions should

not be granted. The reason given in the petitions why their prayer was made was the difference then existing between the two sections of the country over the question of slavery. There was no limit to the anger of the Southern members of Congress over this action. The most bitter denunciations were heaped on Adams, and resolutions proposing the most severe censure the House could inflict were introduced. Adams's defence was masterly, and when he was through the backbone of gag rule had been broken. The smallest part of the victory was the complete exoneration of Adams, for a censure, however severe, from such a power would not have hurt him; but from this time the country could rest easier on one question at least—the right of petition had been vindicated. Before this the petition itself was to be suppressed, but now the proposition had been to punish the party who had the hardihood to present it. We can hardly presume that this battle will ever again have to be fought over in any American legislature.

From 1836, when he commenced the struggle for the reception of petitions for the abolition of slavery in the District of Columbia, till his proud triumph over the enemies of petition and free speech in 1842, when the slave power had sought to crush him, John Quincy Adams was the unflinching champion of the cause of the constitutional right of petition and free speech. The spirit of the Constitution was as much violated by the House resolution of 1836, which placed all petitions of a certain character on the table without publicity, as it

was by that of 1840, which absolutely refused to receive them, or by the resolution of 1842, which proposed to punish a member for introducing such a petition in the House. But it was not till the shamelessness of the latter opened the eyes of some of the members of Congress that the constitutional right of the citizen could be vindicated. No one can compete with John Quincy Adams for the honor of vindicating this important principle.

In this important contest over the right of petition amid much that was heroic and not a little that was almost tragic, there was some of the ludicrous. When Adams presented a petition the supposition was, without inquiry, that it was for the abolition of slavery in the District of Columbia. In February, 1837, he informed the House that he held in his hands a petition which he would not present till the speaker ruled on the question whether or not it was covered by the rule the House had adopted respecting laying on the table all petitions relating to slavery. He said that the petition came from slaves, but he did not say what request the petition contained. Of course the House supposed it was the abolition of slavery, and for this reason, but more especially because it came from slaves, the Southern members were furious. A petition from slaves had never before been heard of. Resolutions censuring Adams were introduced. He allowed matters to take their natural course until the slavocrats had fully committed themselves, and then he informed them that the petition did not ask for the abolition of slavery, but for the reverse. When they

saw the ridiculous position into which Adams had led them, or rather had allowed them to place themselves, the Southern leaders were more furious than ever. But there was no escape for them. No bare reference to this transaction can give the reader any fair conception of the situation. Under all the circumstances it was really a very important affair, but to be appreciated the discussion must be read in full.

#### CONSTITUTIONALITY OF THE LEGAL-TENDER ACT

The Continental Congress authorized the issue of bills of credit for the purpose of defraying the expenses of the Government in organizing armies and carrying on the war, and went so far as to declare that if anyone should be so unpatriotic as to refuse to receive them as money he should be deemed and treated as an enemy of his country. And, on the recommendation of Congress, the several colonies made these bills of credit a legal tender, and declared that by their tender, notwithstanding they were refused, the debt should be cancelled.

The Constitution confers no direct power on Congress to issue bills of credit, nor does it directly prohibit the same. Such power is, however, directly withheld from the States. Notwithstanding the silence of the Constitution on the subject, the power of Congress to direct the issue of Government bills, without the legal tender



quality, is conceded by all parties as one of the implied powers of Government.

While treasury notes or bills of credit had frequently been issued by the Government they had never, prior to 1862, been given the quality of a legal tender in the payment of debts. Up to that time gold and silver had formed the only money of the country since the foundation of the Government.

At the opening of the Civil War in 1861 the Government found itself without either money or credit. Either designedly or through culpable carelessness those who had been in charge of the Government had failed to provide any adequate revenue for carrying on its business, even on a peace basis, and had so conducted its financial measures that capitalists were afraid to loan their funds on the Government's promise. The inauguration of war of course greatly increased this difficulty. At the special session of Congress which convened on July 4, 1861, an attempt was made to meet this difficulty by authorizing an additional issue of treasury notes, by a further issue of Government bonds, and by an increase of revenue through taxation. But this by no means solved the difficulty. And by the close of the year it was practically impossible to meet the Government obligations.

Under these conditions a bill was introduced into Congress in December, 1861, authorizing the Government to issue its notes, which, with certain exceptions, should be a legal tender for debts, public and private. This was

not only a new but a bold undertaking. The proposition at once encountered the most determined opposition. Its friends and its enemies were not divided by party lines. It is true that the great majority of those who supported it were members of the party which was in control of the Government, while most of those who opposed the measure were in the minority party in Congress. Still, many leading Republicans vigorously opposed the bill, and several Democrats in the Senate voted for it. Nor were the friends and opponents of the bill divided on lines of recognized standing or want of ability in the field of finances. While the bill was championed by many whose authority on the money question was recognized everywhere, at the same time some of the leading financiers of the country were as earnestly opposing its passage.

Both the constitutionality and the feasibility of the bill were attacked. Its opponents asserted that no constitutional provision could be pointed to which in any way authorized the act, that it was in conflict with the whole practice of the Government since its organization, that it was a direct violation of contract, that it was taking private property without due process of law, and that, instead of relieving the national difficulty, it would plunge the Government into still deeper trouble.

On the other hand, the supporters of the bill rested their adhesion to the measure on various grounds. It was admitted, by many at least, that it might, in a measure, at times tend to impair the obligation of con-

tracts, but it was said there was no constitutional restraint as to this action on the part of the general Government, that restriction resting alone on the States. It was said that because the Government had never before attempted to exercise the power was no argument against either its existence or the expediency of exercising it at this time, for the Government had never before confronted such financial difficulties as it had to grapple with at that time. Some found authority for the bill in the necessities of war, others asserted the authority to be incident to the general power of Congress over commerce, and therefore the medium whereby commerce is carried on. The general power of Congress over the currency of the country was also appealed to as favoring the provisions of the bill.

The debate in both Houses of Congress was able and exhaustive. Few bills have ever received more careful consideration, or been passed after a more earnest and elaborate discussion, participated in by a very large number of the leading men of both parties. The bill, having finally received a large majority in each House of Congress, was approved by the President and became a law on February 25, 1862.

When the legal tender acts got into court they, perhaps, underwent a severer contest and a more searching scrutiny than they had received in Congress. Mr. Chase, who, as Secretary of the Treasury at the time the first act was introduced into Congress, had recommended its passage, was now Chief Justice of the Supreme Court

of the United States, and as such elaborately and ably argued against the constitutionality, and therefore the validity of the law.

When the case involving the constitutionality of the legal tender acts was first argued in the Supreme Court that tribunal was composed of eight justices. But in January, 1870, after the case had been argued and the judgment of the court determined on, but not announced, one member resigned, leaving the court composed of but seven members. Of these the Chief Justice and three associate justices were of the opinion that the act was unconstitutional, and this opinion was shared by the justice who but a few days prior to the announcement of the decision had resigned, while only three justices voted to sustain the validity of the law. This decision was announced on February 7, 1870.

An application being made therefor a rehearing was granted by the court. In the meantime, however, the court had been increased by the appointment of two new associate justices, making it thereby to consist of nine members. The entire question of the constitutionality of the legal tender acts was again ably argued before the whole court. Whereupon the former decision against the validity of the law was reversed by a vote of five justices to four, in a decision which was announced on May 1, 1870. The Chief Justice and the three associate justices who had agreed with him in the first decision still adhered to their original opinion, while the two new justices joined the three who had before formed

the minority of the court and now constituted the majority, by whom the law was pronounced constitutional and binding.

The question so far discussed and determined related to the power of the Government to issue legal tender notes in time of war. But in 1884 the question of the legality of such notes issued in time of peace came before the court, and, with but one justice dissenting, it was held that such notes were also constitutional and valid. In the opinion of the court, therefore, the basis for the right of the Government to issue this quality of paper is not the exigencies of war.

The discussion of this measure in Congress, at the bar, and by the court, to say nothing of the scarcely less able discussion throughout the country, shows how divided was the opinion of those who are qualified to speak on the question of the authority of the Government to make its promises of payment a legal tender in the discharge of debts and the transaction of other business. My own views are decidedly with those who maintained the constitutionality of the law. Not to have exercised this power at the time of the passage of the first act on that subject seems to me would have been disastrous to the Government. Experience has, as I think, demonstrated the wisdom of the measure when looked at from the standpoint of policy and expediency, and when viewed from the standpoint of constitutional power I think the argument is very much stronger for than opposed to the right of the Government to exercise

such authority. From what has been done by the various departments of the Government the right of the Government to issue legal tender notes whenever it deems such action best would now seem to be fully established.

#### GOVERNMENT BY INJUNCTION

New developments in social and business life call for the exercise of new features in the powers of the Government. It may be the adoption of new methods or it may be simply a new application, in some slightly different manner, perhaps, of old and well recognized principles of government. There may be times when disorder and an unusual exercise of physical force by unauthorized powers are necessary for the attainment of the highest and best ends in human society. But, as a rule, civilization requires government and not anarchy, orderly conduct and not mob violence.

In 1894 occurred the great industrial strike which, for the first time in our history, called into exercise the national forces to regulate and control forces set in operation by a contest between organized operatives and their employees. There had been strikes before this, but nothing of the kind which, for magnitude and the interests thereby put at stake, had any comparison with the one in 1894. Originating in a controversy between a company engaged in manufacturing and operating sleeping-cars and its employees over their wages, it ex-

tended to all the principal lines of railroad service in the country, and then to several other general industries.

The centre of the strike and its disorders was located in the city of Chicago, but its territory extended to the shores of the Pacific. The interference by the National Government was caused, primarily, by the strikers' obstruction of the United States mails. The judicial department of the Government was appealed to for relief, and the courts issued injunctions against those who were directing the disorderly elements, restraining their interference with the mails and with inter-state commerce. These orders were disregarded, and the arrest and imprisonment of Eugene V. Debs and his associates for contempt of court followed. The Debs case went to the Supreme Court of the United States, where the principle applied by the Circuit Court was fully sustained. The inability of the civil officers to enforce the orders of the court called for the employment of the military power, and the regular army was called into active operation. All of these measures of the National Government were unqualifiedly condemned by the strikers as an unwarranted and unconstitutional exercise of power. President Cleveland's firm course met the approval of the business interests, and generally of the orderly people of the country. Apparently it was the only thing which could have prevented the greatest destruction of life and property, and a complete prostration of business.

If the action of the courts was warranted then the use

of the military followed as a matter of course. So that, in discussing the question constitutionally, nothing need be said of the use of the army. That may always be used to enforce the decrees of the court when the civil officers are unable to do so with the forces at their disposal.

The issuance of injunctions in these strike cases was no new departure in government. It was but the application of a well-recognized legal remedy to new phases of public conduct. The popular cry against "Government by Injunction" which followed the measures to which I have referred was only the objection of those who want to be a law unto themselves against the exercise of restraint by the strong hand of the law, constitutionally administered. There was no element of despotism in this action on the part of the Government, but only the effort of society to protect itself against anarchy through somewhat new, but perfectly constitutional means.



## APPENDIX A

## ARTICLES OF CONFEDERATION

*And Perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.*

ARTICLE I. The stile of this confederacy shall be "The United States of America."

ARTICLE II. Each State retains its sovereignty, freedom and Independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the peo-

ple of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled,

for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies

shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures,

provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the

judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the

Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the Government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated “a Committee of the States,” and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States on account of the sums of money so borrowed or remitted—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and



cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

ARTICLE X. The committee of the States, or any nine of them shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for

payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the Independence of America.

*On the part & behalf of the State of New Hampshire.*

JOSIAH BARTLETT,

JOHN WENTWORTH, JUNR.

*On the part and behalf of the State of Massachusetts Bay.*

JOHN HANCOCK,

FRANCIS DANA,

SAMUEL ADAMS,

JAMES LOVELL,

ELDRIDGE GERRY,

SAMUEL HOLTEN.

*On the part and behalf of the State of Rhode Island and Providence Plantations.*

WILLIAM ELLERY,

JOHN COLLINS.

HENRY MERCHANT,

*On the part and behalf of the State of Connecticut.*

ROGER SHERMAN,

TITUS HOSMER,

SAMUEL HUNTINGTON,

ANDREW ADAMS.

OLIVER WOLCOTT,

*On the part and behalf of the State of New York.*

JAS. DUANE,  
FRA. LEWIS,

WM. DUER,  
GOUV. MORRIS.

*On the part and in behalf of the State of New Jersey.*

JNO. WITHERSPOON,

NATHL. SCUDDER.

*On the part and behalf of the State of Pennsylvania.*

ROBT. MORRIS,  
DANIEL ROBERDEAU,  
JONA. BAYARD SMITH,

WILLIAM CLINGAN,  
JOSEPH REED.

*On the part & behalf of the State of Delaware.*

THO. M'KEAN,  
JOHN DICKINSON,

NICHOLAS VAN DYKE.

*On the part and behalf of the State of Maryland.*

JOHN HANSON,

DANIEL CARROLL.

*On the part and behalf of the State of Virginia.*

RICHARD HENRY LEE,  
JOHN BANISTER,  
THOMAS ADAMS,

JNO. HARVIE,  
FRANCIS LIGHTFOOT LEE.

*On the part and behalf of the State of No. Carolina.*

JOHN PENN,  
CORNS. HARNETT,

JNO. WILLIAMS.

*On the part & behalf of the State of South Carolina.*

HENRY LAURENS,  
WILLIAM HENRY DRAYTON,  
JNO. MATHEWS,

RICHD. HUTSON,  
THOS. HEYWARD, JUNR.

*On the part & behalf of the State of Georgia.*

JNO. WALTON,  
EDWD. TELFAIR,

EDWD. LANGWORTHY.

The Articles of Confederation were agreed to and adopted by Congress on November 15, 1777. After some delay they were submitted to the Legislatures of the several States for their approval. On July 9, 1778, the delegates from several of the States having been authorized by the Legislatures so to do, signed the Articles and thereby gave effect to their States' ratification thereof. The last State to ratify was Maryland; by direction of her Legislature her delegates in Congress affixed their names to the Articles on March 1, 1781; on the following day Congress assembled for the first time under the powers conferred by the Articles of Confederation.

## APPENDIX B

## CONSTITUTION OF THE UNITED STATES

We 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 ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

## ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of

Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Ap-

pointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meetings shall be on the first Monday in December, unless they shall by Law appoint a different Day.



SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any

Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the

Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless

in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of

the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act. as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies



that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affect-

ing Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

## ARTICLE IV

SECTION 1. Full faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Preju-

dice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names,

Attest,

WILLIAM JACKSON, *Secretary.*

Go. WASHINGTON—Presidt.

and deputy from Virginia.

*New Hampshire*

JOHN LANGDON,

NICHOLAS GILMAN.

*Massachusetts*

NATHANIEL GORHAM,

RUFUS KING.

*Connecticut*

WM. SAM'L. JOHNSON,                      ROGER SHERMAN.

*New York*

ALEXANDER HAMILTON.

*New Jersey*

WIL: LIVINGSTON,                      WM. PATERSON,  
DAVID BREARLEY,                      JONA: DAYTON,

*Pennsylvania*

B. FRANKLIN,                              THOS. FITZSIMONS,  
THOMAS MIFFLIN,                      JARED INGERSOLL,  
ROBT. MORRIS,                              JAMES WILSON,  
GEO. CLYMER,                              GOUV. MORRIS.

*Delaware*

GEO: READ,                              RICHARD BASSETT,  
GUNNING BEDFORD, jun.,              JACO: BROOM.  
JOHN DICKINSON,

*Maryland*

JAMES MCHENRY,                      DANL. CARROLL.  
DAN OF ST. THOS. JENIFER,

*Virginia*

JOHN BLAIR—                              JAMES MADISON, Jr.

*North Carolina*

WM. BLOUNT,                              HU WILLIAMSON.  
RICHD. DOBBS SPAIGHT,

*South Carolina*

J. RUTLEDGE,  
CHARLES COTESWORTH  
PINCKNEY,

CHARLES PINCKNEY,  
PIERCE BUTLER.

*Georgia*

WILLIAM FEW,

ABR. BALDWIN.

## AMENDMENTS TO THE CONSTITUTION

## ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## ARTICLE II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

## ARTICLE III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

## ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

#### ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

#### ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

#### ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be other-



wise re-examined in any Court of the United States, than according to the rules of the common law.

#### ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

#### ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

#### ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

#### ARTICLE XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

#### ARTICLE XII

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of

all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

## ARTICLE XIII

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whercof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

## ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherco they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens

shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

#### ARTICLE XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation—

Congress proposed twelve amendments to the Constitution on September 25, 1789. The first two were never ratified by the requisite number of States. The other ten were ratified by more than three-fourths of the States before the close of 1791 and became the first ten amendments to the Constitution.

At the first session of the third Congress, which began December 2, 1793, and closed July 9, 1794, Congress proposed the eleventh amendment; it was proclaimed a part of the Constitution on January 8, 1798. The twelfth amendment was proposed by Congress on December 12, 1803, and on September 25, 1804, it was declared a part of the Constitution. Congress proposed the thirteenth amendment on February 1, 1865, and on December 18, 1865, it was proclaimed a part of the Constitution. The fourteenth amendment was proposed by Congress on June 16, 1866, and proclaimed a part of the Constitution on July 28, 1868, by the Secretary of State under instructions from Congress adopted July 21, 1868. On February 27, 1869, the fifteenth amendment was proposed by Congress and on March 30, 1870, it was proclaimed a part of the Constitution.



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