

**A VIEW OF THE CONSTITUTION OF THE
UNITED STATES OF AMERICA**

By William Rawle

SECOND EDITION

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A V I E W

OF THE

C O N S T I T U T I O N

OF THE

United States of America.

BY WILLIAM RAWLE, LL.D.

SECOND EDITION.

PHILADELPHIA :
PHILIP H. NICKLIN, LAW BOOKSELLER,
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1829.

Eastern District of Pennsylvania, to wit.

BE IT REMEMBERED, That on the twenty-ninth day of January, in the forty-ninth year of the Independence of the United States of America, A. D. 1825, WILLIAM RAWLE, Esquire, of the said district, has deposited in this office the title of a book, the right whereof he claims as author in the words following, to wit:

“A View of the Constitution of the United States of America By William Rawle.”

In conformity to the Act of the Congress of the United States, entitled “An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the times therein mentioned.”—And also to the act entitled “An act supplementary to an act entitled ‘An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the times therein mentioned,’ and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.”

D. CALDWELL,
Clerk of the Eastern District of Pennsylvania.

PREFACE.

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

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

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

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

TABLE OF CONTENTS.

INTRODUCTION.		Page
Of Political Constitutions in General: of the Nature of Colonial Governments: and of the British Colonies in North America, - - - - -		9
CHAPTER I.		
The Constitution of the United States, - - - - -		28
CHAPTER II.		
Of the Legislative Power, - - - - -		33
CHAPTER III.		
Of the Senate, - - - - -		36
CHAPTER IV.		
Of the House of Representatives, - - - - -		41
CHAPTER V.		
Of the President's Participation in the Legislative Power,	50	
CHAPTER VI.		
Of the Manner of Exercising the Legislative Power, -	60	
CHAPTER VII.		
Of the Treaty making Power, - - - - -		63

	Page
CHAPTER VIII.	
Of Laws enacted by Congress, - - - - -	77
CHAPTER IX.	
Of the Enumerated Powers of Congress, - - - - -	79
CHAPTER X.	
Of the Restrictions on the Powers of Congress—and on the Executive and Judicial Authorities—Restrictions on the Powers of States, and Security to the Rights of Indi- viduals, - - - - -	115
CHAPTER XI.	
Of the Crime of Treason, - - - - -	139
CHAPTER XII.	
On the Executive Power, - - - - -	147
CHAPTER XIII.	
Of the Means provided for the Performance of the Execu- tive Duties, - - - - -	151
CHAPTER XIV.	
Of the Appointment to Offices, - - - - -	162
CHAPTER XV.	
On the Liability of Executive Officers, - - - - -	168
CHAPTER XVI.	
On Communications to be made by the President to Con- gress, - - - - -	171
CHAPTER XVII.	
Of the Power to grant Pardons, - - - - -	174
CHAPTER XVIII.	
Of Compensations to Public Officers, - - - - -	179

CONTENTS.

vii

CHAPTER XIX.

Page

Of Incompatible Offices, - - - - - 184

CHAPTER XX.

Of some arduous Parts of the President's Duties, - - 193

CHAPTER XXI.

Of the Judicial Power, - - - - - 199

CHAPTER XXII.

Of Impeachments, - - - - - 209

CHAPTER XXIII.

Of another Special Jurisdiction, - - - - - 220

CHAPTER XXIV.

Of General Tribunals, and first of the Supreme Court, - 222

CHAPTER XXV.

Of Tribunals Inferior to the Supreme Court, - - - 229

CHAPTER XXVI.

Removal from State Courts, - - - - - 233

CHAPTER XXVII.

Of the Places in which the Jurisdiction is to be exercised, 236

CHAPTER XXVIII.

Of the Appellate Jurisdiction, - - - - - 241

CHAPTER XXIX.

Of the Rules of Decision, - - - - - 253

CHAPTER XXX.

Of Checks and Restraints on the Judicial Branch, - - 274

	page
CHAPTER XXXI.	
Of Checks and Controls on other Branches of the Govern- ment, - - - - -	282
CHAPTER XXXII.	
Of the Permanence of the Union, - - - - -	295
APPENDIX, No. I. - - - - -	311
No. II. - - - - -	316
No. III. - - - - -	325

INTRODUCTION.

OF POLITICAL CONSTITUTIONS IN GENERAL OF THE
NATURE OF COLONIAL GOVERNMENTS, AND OF THE
BRITISH COLONIES IN NORTH AMERICA.

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

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

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

A successful conqueror establishes such a form of government as he thinks proper. If he deigns to give it the name of a constitution, the people are instructed to consider it as a donation from him; but the danger to his power, generally

induces him to withhold an appellation, of which, in his own apprehension, an improper use might be made.

In governments purely despotic, we never hear of a constitution. The people are sometimes, however, roused to vindicate their rights, and when their discontents and their power become so great as to prove the necessity of relaxation on the part of the government, or when a favourable juncture happens, of which they prudently avail themselves, a constitution may be exacted, and the government compelled to recognise principles and concede rights in favour of the people.

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

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

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

In a pure monarchy all the power is vested in a single head. He may be authorized to make and expound, and execute the

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

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

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

If an hereditary monarch abuses his power, the people seldom obtain relief without insurrection; and thus, between the ambition of princes on the one side, and the sense of injury on the other, the peace of the country is constantly endangered. If the monarch be elected for life, a young aspiring prince may

* Cicero de Republica.

continue the grievances of the state for a long time, and unless there be an express provision for deposing him, the choice of another in his place, would involve the whole body in tumult and disorder.

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

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

It has been reserved for modern times and for this side of the Atlantic, fully to appreciate and soundly to apply the principle of representation in government. The advantages, which occasionally arise to an individual, of being able to commit his cares and concerns to another, who in the exercise of such authority is considered as the principal himself, are elevated and ennobled by being transferred to the concerns of an entire community. Without the representative principle,

one of two consequences must follow ; either the whole body must be assembled and act together, or a few, who may have possessed themselves of sufficient force, will undertake to dictate and give laws to the whole. But a wise people sees and dreads its own danger in large assemblies. Experience tells them that they cannot trust themselves when thus collected together ; that sudden bursts of feeling are likely to predominate over their own judgment ; that facts and causes are often misrepresented or misunderstood, and the deliberate judgment, which alone ought to be solely exercised, is overpowered by unaccountable excitement and precipitate impulse. It was forcibly said in reference to the popular assemblies of Athens, that if every Athenian were a Socrates, still every Athenian assembly would be a mob.

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

In England, of three co-ordinate parts, one only is supposed by the constitution to represent the authority of the people, and at what time this representation was introduced among them, is not clearly settled by their own jurists and antiquarians. That it existed before the Norman Conquest in some form, now not exactly ascertained, is indeed agreed ; but on the

subversion of the Saxon institutions, effected by William, the practice was, at least, suspended until the reign of Henry III. The provincial constitutions of America were, with two exceptions, modelled with some conformity to the English theory; but the colonists of Rhode Island and Providence Plantations were empowered to choose all their officers, legislative, executive, and judicial; and about the same time a similar charter was granted to Connecticut. "And thus," complains Chalmers, a writer devoted to regal principles, "a mere democracy or rule of the people was established. Every power deliberative and active was invested in the freemen or their delegates, and the supreme executive magistracy of the empire, by an inattention which does little honour to the statesmen of those days, was wholly excluded." He expresses his own doubts whether the king had a right to grant such charters.*

But, although in all the other provinces, the charters were originally granted or subsequently modified so as to exclude the principle of representation from the executive department, these two provinces, at the time of our revolution, retained it undiminished. The suggestion of the full unqualified extension of the principle of representation may therefore be justly attributed to the example of Rhode Island and Connecticut, which, when converted into States, found it unnecessary to alter the nature of their governments, and continued the same forms, in all respects, except the nominal recognition of the king's authority, until 1818, when Connecticut made some minor changes and adopted a formal Constitution. Rhode Island,

* Political Annals of the British Colonies.

however, is still satisfied with the charter of Charles II. from which it has been found sufficient to expunge the reservation of allegiance, the required conformity of its legislative acts to those of Great Britain, and the royal right to a certain portion of gold and silver ores, which happily for that state, have never been found within it.

As representation is sometimes partial in respect to the proportion of the powers of government to be exercised, so it is sometimes confined to a portion only of those governed. In this respect it is perhaps still more objectionable. The power of electing the great officers of the state belonged in Venice to a few families; the people at large had no voice, and it was therefore indifferent to the Venetians, whether they became the subjects of France, or were ceded by her to Austria; or whether they continued to be governed by those in whose appointments they had not the least share. With us, representation is in its nature universal, but in practice there are some exceptions which will be noticed in a subsequent place. They are few, and do not impair the principle.

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

be the inferior, is placed above that which should be the superior, and the legislature is enabled to alter the constitution at its pleasure.

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

Vattel* justly observes, that the perfection of a state, and its aptitude to fulfil the ends proposed by society, depend on its constitution—the first duty to itself is, to form the best constitution possible, and one most suited to its circumstances; and thus it lays the foundation of its safety, permanence and happiness. But the best constitution which can be framed with the most anxious deliberation that can be bestowed upon it, may, in practice, be found imperfect and inadequate to the true interests of society. Alterations and amendments then become desirable—the people retains—the people cannot perhaps divest itself, of the power to make such alterations. A moral power equal to and of the same nature with that which made, alone can destroy. The laws of one legislature may be repealed by another legislature, and the power to repeal

* Book I. ch. 3. .

them cannot be withheld by the power that enacted them. So the people may, on the same principle, at any time alter or abolish the constitution they have formed. This has been frequently and peaceably done by several of these states since 1776.* If a particular mode of effecting such alterations has been agreed on, it is most convenient to adhere to it, but it is not exclusively binding. We shall hereafter see the careful provision in this respect, contained in the Constitution of the United States, and the cautious and useful manner in which it has hitherto been exercised. Indeed it is a power which, although it cannot be denied, ought never to be used without an urgent necessity. A good constitution is better understood and more highly valued, the longer it continues. Frequent changes tend to unsettle public opinion, and in proportion to the facility with which they are made, is the temptation to make them. The transactions in France since the year 1791 support these remarks.

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

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

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

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

might be supposed to be particular sacrifices, were compensated by the general advantage, in which they were to participate.

The constitution thus became the result of a liberal and noble sacrifice of partial and inferior interests, to the general good ; and the people, formed into one mass, as citizens of the Union, yet still remaining distinct, as citizens of the different states, created a new government, without destroying those which existed before, reserving in the latter, what they did not surrender to the former, and in the very act of retaining part, conferring power and dignity on the whole.

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

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

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

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

This relation produced certain consequences which were considered beneficial to both. The internal administration of the colony was either immediately directed by the parent state or subjected to her revision, and its trade was either confined to their mutual intercourse, or sparingly allowed to be shared with other countries.

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

Frenchman or an Englishman, born in either of their colonies, is a natural born subject of the country from which his ancestors migrated.*

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

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

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

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

The discoveries made in America by Europeans, being considered as conferring an exclusive right of occupancy on the sovereign under whose authority they had sailed, various

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

parts of this continent were appropriated by the British crown to the establishment of colonies; sometimes by extensive grants to favoured individuals, sometimes by encouraging settlers at large, reserving the general domain to the crown.

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

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

In some of them the power of legislation was uncontrolled by the parent state. In others, the laws that were passed were to be transmitted to England, and if disallowed by the king in council, they lost their force; but until his disapprobation was announced, they were binding on the colony, if enacted according to their respective charters. In most of the colonies,

appeals were allowed to the same authority, from the decisions of the highest provincial tribunals. There is no reason to believe that these appeals were in general otherwise decided than the justice of the case required; but the power of rejecting the acts of the legislature, was sometimes capriciously exercised. It may perhaps have been deemed expedient by the English ministry, to keep alive the sense of colonial dependance whenever the charter afforded the opportunity.

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

But, for a long time, Great Britain abstained from imposing internal taxation. On some great public exigencies, when their own safety was endangered, the colonists spontaneously rendered assistance to the extent of their ability, and with these filial efforts, and with the revenue derived from imposts on trade, the parent country appeared to be satisfied. But at length the increase and prosperity of the colonies suggested to the ministry, the idea of a new contributory fund, to be subject to their own power and not to be dependent on

voluntary grants. The principle that the right of taxation depends on representation, one of the greatest beauties in the ancient constitution of England, though now reduced almost to a shadow, was disregarded, or the British subject was supposed to have suspended his claim for it, by residence in a distant colony. The chartered rights, which in the reign of the Stuarts had been frequently trampled on, were again set at nought, and a scheme of internal taxation was adopted, which it was supposed might be easily enforced, and would gradually introduce a systematic extraction of internal revenue. Stamp duties were imposed on most of the instruments in common use, and were to be paid to officers appointed by the crown. But the people of America were too sagacious not to perceive the danger of submitting to the first inroads upon their rights, and too firm not to resist them. By a simultaneous impulse, from one end of our continent to the other, a concerted abstinence from the use of stamps and the resignation of many of the officers employed, the measure was rendered impracticable.

The common danger suggested the idea of an union for common defence. A precedent for a congress of the provinces was not wanting. In the year 1753, deputies from several of them had assembled at Albany for a different purpose. The apprehensions of a war between France and Great Britain, in which, as we have already observed, the colonies of each would be necessarily involved, led to this assembly, the object of which was to increase the means of defence by forming an union of the provinces. The plan was disapproved by the British ministry, because it was apprehended that it might produce a concert of measures opposing the supremacy

of the mother country.* In 1765, the object of a congress was still defence, but against an enemy of a different description; against the invasion of a ministry supported by acts of parliament which they could procure at pleasure. Remonstrance and entreaty were, however, the only weapons wielded, and these, combined with the practical opposition every where experienced, produced a change in the ministry and an abandonment of the measure. But although the law was repealed, the ministry thought it expedient to assert by a declaratory act, the right to bind their colonies, by acts of parliament, in all cases whatever; a declaration disregarded by the colonists; who now began to feel their own power, till it was endeavoured to be enforced by the imposition of a duty on tea, glass, and a few other articles, expressly for the purpose of raising a revenue to defray part of the colonial expenses. The spirit which had been raised was not however easily allayed. The same indications of resistance were now renewed, but the military force in this country was increased by detachments from the regular army in Great Britain—and the ministry avowed a determination to persevere. Another congress was convened, and a second course of complaint and supplication, unavailingly pursued. The language was still that of faithful, though injured subjects: their grievances were imputed not to the monarch, but to his ministers—and in the ardent expressions of hope that they should not be deprived of the rights enjoyed by their fellow subjects, they admitted their own subjection. Even after

* Marshall's Life of Washington, Vol. I. p. 300, Vol. II. p. 90.

the fatal blow was struck at Lexington in 1775, and the whole country was in arms, the most dutiful language of subjects towards a sovereign was retained. But this incongruity ceased, when the people, perceiving no relaxation of the efforts to subdue them, boldly resolved to throw off a yoke too heavy to be borne, and no longer contenting themselves with claiming the rights of British subjects, asserted those of independent man.

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

It soon was found expedient to devise some explicit form of association, by which the powers granted to the congress or retained by the new states, should be distinctly ascertained. Articles of confederation were therefore prepared, (and with the exception of one state, which, however, afterwards came into them,) speedily adopted, by which the United States were formed into a federal body, with an express reservation to each state, of its freedom, sovereignty and independence, and of every power, right, and jurisdiction, not expressly delegated to the United States in Congress assembled. The federal powers were declared to be those of making war and peace, coining money and issuing bills of credit, establishing courts of admiralty, building and equipping a navy, ascertaining the number of men to be raised for the army, making requisitions on each state for its quota, regulating the trade and managing all affairs with the

Indians, establishing post-offices, and some other matters of less importance; but for many of these, even for agreeing on the number of ships to be built, and the appointment of a commander in chief of the army or navy, the consent of at least nine states, in congress assembled, was requisite. From this outline it is obvious that the congress still continued in a great degree dependent on the individual states, which alone possessed the means of raising supplies. The power to coin money, when it did not possess the bullion, to emit bills of credit when it had no funds to redeem them, was purely nominal. Even the expenses of its own members, were to be defrayed by the respective states which sent them, and which retained the dangerous power to recall them at pleasure. Yet such was the fervour of freemen engaged in a common cause, that, while the war continued, the mere recommendations of congress carried with them the force of mandates, and it was not until after the peace of 1783, that the necessity of giving to the head of the union the means of supporting its own government was universally felt and acknowledged. After some ineffectual substitutes had been proposed, a convention of delegates from the different states was assembled at Philadelphia in 1787. The members were appointed by the legislatures of the respective states. The result of their deliberations was again to become a matter of recommendation which required the assent of the people to give it effect. It was communicated by the convention to congress, and by congress to the several legislatures, in order to be submitted to a convention of delegates chosen in each state by the people. This course, which had been

recommended by the general convention itself, eventuated in its final adoption by all the states. But the assent of nine was sufficient for its commencement, and on the 2d of July, 1788, congress was informed, that nine states had adopted it. On the 13th of September, they fixed the time for the appointment and meeting of electors, and “commencing proceedings under the new constitution.”

INDEX.

	A.		
Abjuration - - - -	98	Checks and restraints, on the judicial power - - -	274
Abuse of a constitution more difficult to rectify than to form a new one - - - -	10	— on the legislative - - -	282
Accused person allowed counsel and other rights - - -	128	— on the executive - - -	286
Acquittal, effect of, - - -	132	Clearances - - - -	116
Adjournment of congress - -	48	Coining money - - - -	102
Age, qualification of, for certain offices - - - -	287	Colonies, their legal nature - -	19
Alien - - - -	87	— British - - - -	21
— suits by an - - - -	231	Colonial commerce - - - -	23
Alliance, no state allowed to enter into - - - -	136	Commerce - - - -	82
Allegiance, how far indefeasible. -	87	Compensation to public officers -	179
Alteration of constitution ought not to be in power of the legislature - - - -	16	Communications by president to congress - - - -	171
— impolicy of frequent alterations - - - -	<i>ib.</i>	Congress of provinces - - -	26
Amendments to the constitution -	120	— of United States - - -	27
American people, their character -	290	— its enumerated powers - -	77
Appellate jurisdiction, its nature and necessity - - - -	231	— to lay and collect taxes -	<i>ib.</i>
Apportionment of representation among the states - - - -	42	— to borrow money on the credit of the United States -	81
— of direct taxation - - -	80	— to regulate internal and external commerce - - -	<i>ib.</i>
Appointments to office - - - -	162	— to establish a uniform system of naturalization - -	84
Appropriations of public moneys -	70	— to pass uniform laws on the subject of bankruptcy -	101
Aristocracy - - - -	36	— to coin money and to provide for the punishment for counterfeiting the current coin of U. States - - - -	102
Arms, right of people to bear - -	125	— to establish post offices and post roads - - - -	103
Arsenals - - - -	238	— to grant patents for inventions, &c. - - - -	104
Athenian assembly - - - -	13	— to define and punish piracies and felonies committed on the high seas - - - -	106
Attainder, bills of - - - -	119	— to define and punish offences against the law of nations -	108
— corruption of blood upon, - - - -	143	— to declare and carry on war - - - -	109
B.		— to provide for calling out the militia, and on what occasions, &c. - - - -	111
Bankruptcy - - - -	101	— to exercise exclusive legislation over a district of ten miles square - - - -	112
Bills of credit - - - -	102	— to make all laws which shall be necessary for carrying the foregoing into execution -	114
— of rights not found in all the state constitutions - - -	120	— is restricted from laying	
Borrowing money by U. States - -	81		
Britain, Great 1. 19. 24. 69. 75. 91.	95		
C.			
Caucus - - - -	58		
Census, see Enumeration.			
Citizenship - - - -	86		

a tax or duty on articles exported from any state - - -	115	Court for the trial of impeachments, see impeachments.	
Congress is restricted from giving a preference by any regulations of commerce or revenue to the ports of one state over those of another - - -	116	— martial - - -	220
— from passing a bill of attainder or <i>ex post facto</i> law - - -	119	— Supreme, of U. States - - -	222
— from granting titles - - -	<i>ib.</i>	— its powers - - -	<i>ib.</i>
— from passing any law respecting the establishment of religion, or preventing the free exercise of it - - -	121	— cases in which it has original jurisdiction - - -	<i>ib.</i>
— from passing any law to impair the liberty of the press - - -	123	— when appellate - - -	226
— from passing any law to prevent the people from peaceably assembling and petitioning - - -	124	— circuit, - - -	227
Confederation - - -	26	— district, - - -	231
Consuls - - -	234	— territorial - - -	<i>ib.</i>
Consuls and vice consuls, prosecutions against - - -	232	— their jurisdiction - - -	<i>ib.</i>
Connecticut originally chartered on the principle of representation - - -	14	Crimes, impossibility of fully describing them by statutes - - -	262
Consolidation, the U. States, not a consolidated government - - -	243	— liable to punishment by law of nature - - -	268
Convention of 1787 - - -	27	— against U. States, means, against people of U. States - - -	262
Contagious disorders - - -	116	— consequences deduced therefrom - - -	<i>ib.</i>
Constitutions, their general meaning - - -	9		
— and principles - - -	17	D.	
— more readily formed on a single principle - - -	10	Decision, rules of - - -	53
— need not be in writing - - -	15	Democracy - - -	10
— of U. States - - -	17	Districts, appropriated for arsenals, &c. - - -	238
— mode of construing it recommended - - -	31	— seat of government - - -	113, 238
Contempts of the legislative body - - -	47	— judicial, U. States divided into - - -	236
— power to punish, and principles on which it is founded not declared by statute - - -	272	Dockyards - - -	238
Convicts - - -	101		
Contracts, laws impairing the obligation of, prohibited to states - - -	136	E.	
Construction of constitution, power of, belongs to judiciary, and not to legislature - - -	227	Elections of members of house of representatives - - -	41
Copy right - - -	104	— each house to judge of those of its own members - - -	46
Corruption of blood - - -	143	— of president and vice president - - -	51
Courts, United States, cases in which they have exclusive jurisdiction - - -	202	England, its constitution - - -	13
— admiralty and maritime - - -	<i>ib.</i>	— may be altered at the pleasure of legislature - - -	26
— affecting ambassadors, &c. - - -	203	Enumeration, decennial - - -	42
— for the recovery of debts or damages due to U. States in state courts - - -	<i>ib.</i>	— peculiar to America that it should be required by the constitution - - -	44
— difficulty of, in regard to criminal cases - - -	205	— its effects - - -	45
— their concurrent jurisdiction with those of states - - -	202, 205	Enumerated powers of congress, vide congress.	
		Equity, construction given to the word - - -	257
		Executive power - - -	147
		— constitutional description of its extent and limitation - - -	149
		— unity of it desirable and unattended by danger - - -	150
		— duties of president, means provided for their performance - - -	151
		— the command of the military forces - - -	158
		—, the qualified power of appointing to executive and judicial offices - - -	162

Executive officers, liability	- 163	L.	
to the state	- <i>ib.</i>	Law, Cicero's remarks on	- 260
to individuals	- <i>ib.</i>	common	- 255
contrasted with the		of nature	- 270
practice of foreign nations	- <i>ib.</i>	of nations	- 108
influence, little danger		Laws enacted by congress form	
to be apprehended from the		the third rule of obligation	- 77
undue exercise of	- 286	Legislative action cannot be sus-	
Expatriation	- 90	pended by an act of the execu-	
Exportation	- 115	tive	- 34
<i>Ex post facto</i> law	- 119	Libels punishable	- 123
Expulsion, power of	- 47	Literary property	- 105
		M.	
F.		Mail, robbing the	- 205
Federal, the word, improperly		Marque and reprisal, letters of	- 136
applied to the courts of the U.		Militia, nature of	- 163
States	- 252	advantages and disadvan-	
Felonies	- 106	tages	- 153
Foreign States, &c. presents or		instances of their efficiency	<i>ib.</i>
emoluments from	- 120	subjection to the orders of	
Fugitives from justice	- 100	president and congress	- 155
service	- <i>ib.</i>	cases arising out of this, &c.	<i>ib.</i>
		N.	
G.		Nation, term applied to the United	
Governors of states, when to obey		States not strictly applicable to	
orders of president	- 155. 160	individual states	- 31
their prompt co-operation		Nations, law of	- 108
with the measures of the		Naturalization	- 84
general government	- 78	Neutrality	- 75
Guarantee of republican form of		Nobility, titles of	- 119
government	- 295	O.	
		Offences, see crimes.	
H.		Offices, appointment to executive	
<i>Habeas corpus</i>	- 117	and judicial, in whom vested	- 162
		when incompatible with	
I.		each other	- 184
Impeachment	- 209. 273	oath of	- 190
Independence declared	- 28	Officers whose appointment re-	
Indictment	- 132	quires the consent of the se-	
Information	- <i>ib.</i>	nate	- 163
Insurrection	- 193	the secre-	
		tary of state	- 165
J.		of the	
Jeopardy of life or limb, no one		treasury	- <i>ib.</i>
to be twice put in for the same		of the navy	<i>ib.</i>
offence	- 132	of war	<i>ib.</i>
Judicial districts	- 128	Officers, their commissions	- 166
power	- 199	delivery not essential to	
offices, tenure of	- 277	the validity of a commission	- <i>ib.</i>
Jury, trial by	- 134	duration of commissions	- <i>ib.</i>
Jurisdiction in suits by or against		executive, their liability	- 168
states	- 203	Organization of judiciary	- 276
admiralty and mari-			
time	- 202	P.	
Jurisdiction, concurrent, between		Pardon	- 174
U. States and state courts—see		not grantable on convic-	
courts.		tions by impeachments, and why	- 293
appellate of supreme		Patents for useful inventions	- 105
court of United States, in what			
cases	- 241		

Petitioning, right of, secured	124	Quarantine	116
Piracies	106	Quartering soldiers	126
Post office and post roads	103	Quorum	40. 48
Powers of government, how to be divided	12		
Press, freedom of	123		
President, present mode of election	53		
former mode	<i>ib.</i>		
provision for a vacancy in the office	55		
qualifications in candidates	287		
participation in legislative power	50		
comparison between the American and European system as to the <i>veto</i> of the executive	62		
his power in making treaties	63		
to enforce them	75		
instance thereof	<i>ib.</i>		
his power of granting pardons	174		
advantages of vesting it in him	178		
extends to all cases except impeachments and contempts of either house of the legislature	176. 177		
communications to be made by him to congress	171		
his duty in respect to furnishing information upon the request of either house of congress	<i>ib.</i>		
former practice of congress upon receiving a message from	172		
his duty as to carrying on intercourse with foreign nations	171		
neutrality maintained by him	75		
his power as to acknowledging the new establishment of a foreign nation	195		
his duty in case of war breaking out between two or more external nations in respect to preserving neutrality	197		
may require the opinions of the principal executive officers	194		
Presidential electors, appointment of	57		
Private property, when it may be taken for public use	133		
Provincial governments	22		
Punishments	268		
		Q.	
		Religious opinions not to be controlled	121
		two states in which disqualifications as to religious opinions still exist	122
		Removal from state courts	233
		from office	278
		Representation, its value	12
		in England	44
		tabular view of it in U. States	45
		anomaly in present system	46
		Representatives, number of determined by a decennial census	42
		house of, founded on the principle of the representation of the people, though not purely and abstractedly	41
		composed of representatives of the people of the several states, not of the people at large; advantages of this mode	<i>ib.</i>
		its power as to judging of returns and qualifications and punishment of its own members	46
		its duty and powers in case of attempt to assail the freedom or corrupt the integrity of any of its members	47
		majority constitutes a quorum	48
		but a smaller number may adjourn <i>de die in diem</i> and may be authorized to compel the attendance of members	49
		cannot adjourn for more than three days, nor to a different place	<i>ib.</i>
		journal of its proceedings	<i>ib.</i>
		Restrictions	115. 282
		Revenue defined	71
		bills for raising must originate in the house of representatives	<i>ib.</i>
		Rhode Island, its charter	14
		Rotation in office	288
		Royal governments	22
		S.	
		Search warrants	127

Seizures under laws of impost, &c.	231	Treaties, effect of	63
Secession from union	297	case of treaty of Nov.	
effects of	306	19, 1794	68
Senate, its legislative power	33	correspondence be-	
its treaty making power	64	tween house of representatives	
its judicial power	209	and president Washington on	
Senators, their appointment	39	the subject	68
qualifications	<i>ib.</i>	resolutions of house of	
number from each state	<i>ib.</i>	representatives	70
duration of office	39	their effect on state con-	
mode of supplying va-		stitutions and laws	74. 324
cancies	<i>ib.</i>	disposition of money by	
majority of members,		treaty	70
not of states, constitutes a quo-		plaintive letter of the	
rum	40	old congress on the subject of	316
question arising from		Treason against U. States	139
the majority of states refusing		Trial by jury	128
to appoint	303	rights of the person accused	
not bound by instruc-		on	<i>ib.</i>
tions	39	Truces	110
Slave trade	117		
Speech, freedom of	123	U.	
Statutes	78	Uniformity in organizing the mi-	
States, members of the union	30	litia	111
but not in a federate capa-		Union, permanence of	295
city	31		
jurisdiction of suits by and		V.	
against	226	Vacancies in the senate	39
sovereignty of, how pre-		in the house of repre-	
served	31	sentatives	46
		in the office of president	
T.		and vice president	55
Taxation	79		
Territories	237	W.	
Treaties, their nature, and lan-		War	109. 110
guage of the constitution con-		Washington's administration	198
cerning them	63	farewell address	308
their formation and rati-		Witnesses, process to bring them	
fication, how, when, and by		in allowed to the accused	129
whom	<i>ib.</i>	Writs of error	226. 234