



**A BRIEF ENQUIRY INTO THE TRUE  
NATURE AND CHARACTER OF OUR  
FEDERAL GOVERNMENT:**

**BEING A REVIEW OF JUDGE STORY'S COMMENTARIES  
ON THE CONSTITUTION OF THE UNITED STATES,**

**BY ABEL P. UPSHUR**

**WITH AN INTRODUCTION AND COPIOUS  
CRITICAL AND EXPLANATORY NOTES.**

**by**

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**INTRODUCTION BY THE EDITOR**

The author of this volume was considered one of the ablest legal minds in the United States. He studied law under William Wirt, the eminent author of the Life of Patrick Henry, and his practiced profession with great success from 1810 to 1824. After an interval of retirement, he held a high judicial position as Judge of the General Court of Virginia, from 1826 to 1841; at which time he entered Mr. Tyler's Cabinet as Secretary of the Navy. On Mr. Webster's retirement, in the spring of 1843, Judge Upshur succeeded him as Secretary of State. On the 28th of February 1844, the explosion of the great gun ("Peacemaker") on board the steamer Princeton killed this eminent jurist and statesman. His reputation in private life was as spotless as his public fame was exalted and unrivaled.

This review of Judge Story's Commentaries on the Constitution of the United States is perhaps the ablest analysis of the nature and character of the Federal Government that

has ever been published. It has remained unanswered. Indeed, we are not aware that any attempt has been made to invalidate the soundness of its reasoning. As a law writer, Judge Story has been regarded as one of the ablest of his school, which was that of the straightest type of "Federalists" of the elder Adams's party. His commentaries are a good deal marred with the peculiar partisan doctrines of that school of politicians; indeed, they may be looked upon as a plea for the severe political principles which ruled the administration of President John Adams. The Alien and Sedition Laws, which have long since passed into a by-word of reproach, will still find abundant support in Judge Story's Commentaries. He perpetually insisted on construing the Constitution from the standpoint of that small and defeated party in the Federal Convention which wanted to form a government on the model of the English monarchy in everything but the name. This party was powerful in respectability and talents, but weak or few in numbers -- and after it was so signally defeated in the Constitutional Convention, it still held on to its monarchical principles, and sought to invest the new government with kingly powers, notwithstanding the Constitution had been constructed upon principles entirely opposite to its doctrine. In a letter of U. S. Senator John Langdon, of New Hampshire to Samuel Ringgold, of the date of October 10th, 1800, he says: "Mr. Adams certainly expressed himself that he hoped, or expected to see the day when Mr. Taylor, and his friend, Mr. Giles, would be convinced that the people of America would never be happy without a hereditary Chief Magistrate and Senate or at least for life." Mr. Rose, a Senator from Pennsylvania, and a friend of the Adams party, left the table of Mr. Hollines, of Philadelphia, when "the Constitution of the United States" was given as a toast. John Wood, the historian of the time, speaking of the principles of the Federalists, says: "They bestowed unbounded panegyrics upon Alexander Hamilton, because this gentleman acted the part of Prime Minister to the President. They thought the administration and the government ought to be confounded and identified; that the administration was the government, and the government the administration; and that the people ought to bow in tame submission to its whim and caprice." Writing of Mr. Adams, Jefferson says: "Mr. Adams had originally been a Republican. The glare of royalty and nobility, during his mission in England, had made him believe their fascination to be a necessary ingredient in government. His book on the American Constitution had made known his political bias. He was taken up by the monarchical Federalists in his absence, and was by them, made to believe that the general disposition of our citizens was favorable to monarchy."

At a dinner given by Mr. Jefferson, when he was a member of Washington's Cabinet, he declares that, "after dinner, Mr. Adams said: 'Purge the British Constitution of its corruption, and give to its popular branch equality of representation, and it would be the most perfect Constitution ever devised by the wit of man.' Hamilton replied: 'Purge it of its corruption, and give to its popular branch equality of representation, and it would become then an impracticable government. As it stands at present, with all its supposed defects, it is the most perfect government that ever existed.'" Mr. Jefferson adds: "Hamilton was not only a monarchist, but for a monarchy bottomed on corruption." The Federalists having a majority in Congress, passed an act to continue in force during the administration of Mr. Adams, declaring that "if any person should write or publish, or cause to be published, any libel against the Government of the United States, or either House of Congress, or against the President, he shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years." A great many editors, and other gentlemen, were imprisoned under this act. Even to ridicule the President was pronounced by the corrupt partisan judges a violation of the law. Men were beaten almost to death for neglecting to pull off their hats when the President was passing, and every man who did not instantly prostrate himself before the ensigns of

Federal royalty, was denounced as the enemy of his country. The following letter, addressed to President John Adams by the merchants of Boston, shows to what lengths that party had dragged the public mind in the direction of monarchy:

"We, the subscribers, inhabitants and citizens of Boston, in the State of Massachusetts, deeply impressed with the alarming situation of our country, and convinced of the necessity of uniting with firmness at this interesting crisis, beg leave to express to you, the Chief Magistrate and supreme ruler over the United States, our fullest approbation of all the measures, external and internal, you have pleased to adopt, under direction of divine authority. We beg leave also to express the high and elevated opinion we entertain of your talents, your virtue, your wisdom and your prudence; and our fixed resolution to support, at the risk of our lives and fortunes, such measures as you may determine upon to be necessary for promoting and securing the honor and happiness of America."

Any one can see that men who could address the President after this fashion, had a great deal less respect for the restraints and limitations of a written Constitution, than for the will and force of individual power. That was the drift of a certain portion of public opinion in America at that time. But the tyrannical excesses of that party soon brought it into such odium, that it was driven from power by the election of Mr. Jefferson to the Presidency. Though defeated, its partisans never ceased to labor to drag the Constitution away from its Democratic foundations, by giving the Constitution a construction utterly antagonistic to the intentions of the Convention which framed and of the States which adopted it. The great vice of the Federalists consisted in desiring to clothe the Federal Government with almost monarchical powers; whereas the States had carefully and resolutely reserved the great mass of political power to themselves. The powers which they delegated to the Federal Government were few, and were general in their character. Those which they reserved embraced their original and inalienable sovereignty, which no State imagined it was surrendering when it, adopted the Constitution. Mr. Madison dwelt with great force upon the fact that "a delegated is not a surrendered power."

The States surrendered no powers to the Federal Government. They only delegated them. The powers of the States are original. Those of the Federal Government are only derived and secondary; and they were delegated, not for the purpose of aggrandizing the Federal Government, but for the sole purpose of protecting the rights and sovereignty of "the several States." The Federal Government was formed by the States for their own benefit. The Federal Government is simply an agency, commissioned by the "several States" for their own convenience and safety. In the Convention of Virginia, Patrick Henry said: "Liberty, sir, is the primary object. Liberty, the greatest of all earthly blessings -- give us that precious jewel, and you may take away everything else." And, with an eloquence more powerful than that which shook the throne of Macedon, he demonstrated that the battles of the Revolution were fought, not to make "a great and mighty empire," but "for liberty." It was for liberty -- for the liberty of the people of the "several States" that the Federal Government was established. Not for the kingly grandeur and power of government, but for the happiness, safety and liberty of "the people of the several States." Nothing could possibly be stronger than the determination pervading the mind of the Federal Convention to sacrifice no iota of the essential sovereignty of the States in the formation of the general Union. This feeling was most happily expressed by Chief Justice Ellsworth, of Connecticut, in, the Convention that framed our Constitution, in the following words:

"I want domestic happiness as well as general security. A General Government will never grant me this, as it cannot know my wants, nor relieve my distress. My State is only as one out of thirteen. Can they, the General Government, gratify my wishes? My happiness depends as much on the existence of my State Government as a new-born infant depends upon its mother for nourishment."

In the Convention of Massachusetts, Fisher Ames said:

"A consolidation of the States would subvert the new Constitution, and against which this article is our best security. Too much provision cannot be made against consolidation. The State Governments represent the wishes and feelings, and local interests of the people. They are the safeguard and ornament of the Constitution; they will protract the period of our liberties; they will afford a shelter against the abuse of power, and will be the natural avengers of our violated rights."

Such were the views and sentiments of the men who framed and who adopted the Federal Constitution. But Judge Story belonged to another school of politicians, and his Commentaries upon the Constitution were written in the interests of the Consolidationists, who have ever insisted on giving that instrument an interpretation in harmony with their wishes and ideas. This review of Judge Upshur, however, does not leave a single point of the Federalistic heresy unanswered. It will ever stand as a text-book of the true theory of our government. We are confident that no book has ever appeared in this country which so thoroughly meets the demands of the present hour. With this book in his hand, the Democratic statesman or orator is armed at every point against the sophistries of the foes of State sovereignty and self-government. There is no vital point which it does not discuss and settle upon the basis of invulnerable truth.

The Notes which we have added, we hope, will be found useful to the unprofessional reader. They will show that the author's reasoning is confirmed by our Constitutional history and by the early decisions of the Supreme Court.

In every instance, our own Notes are distinguished from those of the author by our initials -- "C. C. B."

## **PREFACE BY THE AUTHOR**

The book to which the following pages relate has been for several years before the public. It has been reviewed by some of the principal periodicals of the country, and recommended in the strongest terms to public favor. I have no disposition to detract from its merits as a valuable compendium of historical facts, or as presenting just views of the Constitution in many respects. My attention has been directed to its political principles alone, and my sole purpose has been to inquire into the correctness of those principles, so far as they relate to the true nature and character of our Federal Government, it may well excite surprise, that so elaborate a work as this of Judge Story, and one so well calculated to influence public opinion, should have remained so long unnoticed by those who do not concur in the author's views. No one can regret this circumstance, more than I do; for I would willingly have devolved upon abler hands the task which I now have undertaken. I offer no apology for the manner in which that task has been performed. It is enough for me to say, that the reader, howsoever favorable his opinion of this essay may be will not be more sensible of its imperfections than I am. I know that the actual practice of the Federal Government for many years past, and the strong tendencies of

public opinion in favor of federal power, forbid me to hope for a favorable reception, except from the very few who still cherish the principles which I have endeavored to reestablish.

The following essay was prepared about three years ago, with a view to its publication in one of our periodical reviews. Circumstances, which it is unnecessary to mention, prevented this from being done, and the work was laid aside and forgotten. My attention has been again called to it within a few weeks past, and I am now induced to give it to the public, under the hope that it may not be without its influence in directing the attention of those, who have not yet lost all interest in the subject, to the true principles of our constitution of government.

I do not claim the merit of originality. My conclusions are drawn from the authentic information of history, and from a train of reasoning, which will occur to every mind, on the facts which history discloses. My object will be answered, if even the few by whom these pages will probably be read shall be induced to re-examine, with a sincere desire after truth, the great principles upon which political parties in our country were once divided, but which there is much reason to fear are no longer respected, even if they be not wholly forgotten.

I do not offer this essay as a commentary on the Federal Constitution. Having proposed to myself but a single object, I have endeavored to compress my matter within as small a compass as possible, consistent with a due regard to clearness, and a proper reference to authorities, where authorities are relied on.

## **THE TRUE NATURE AND CHARACTER OF OUR FEDERAL GOVERNMENT**

### **CHAPTER I - THE CHARACTER OF JUDGE STORY'S COMMENTARIES ON THE CONSTITUTION**

It came within the range of Judge Story's duties, as Dane Professor of Law in Harvard University, to expound and illustrate the Constitution of the United States. His lectures upon that subject have been abridged by himself, and published in a separate volume. Although the work is given to the public as an abridgment, it is nevertheless, as it professes to be, "a full analysis and exposition of the constitution of government of the United States and presents, in the opinion of the author himself, the "leading doctrines" of the original, "so far as they are necessary to a just understanding of the actual provisions of the Constitution."

The author professes to have compiled it "for the use of colleges and high schools," but as it contains all the important historical facts, and all the leading reasons upon which his own opinions have been based, and as it has been prepared with elaborate care in other respects, we may reasonably suppose, without impeaching his modesty, that he expected it to be received as a complete work. It is, indeed, quite as full as any such work needs to be, for any purpose, except, perhaps, the very first lessons to the student of constitutional law. The politician and the jurist may consult it, with a certainty of finding all the prominent topics of the subject fully discussed.

A work presenting a proper analysis and correct views of the Constitution of the United States has long been a desideratum with the public. It is true that the last fifteen years have not been unfruitful in commentaries upon that instrument; such commentaries, however, as have, for the most part met a deserved fate, in immediate and total oblivion. Most of them have served only to throw ridicule upon the subject which they professed to illustrate. A few have appeared, however, of a much higher order, and bearing the stamp of talent, learning, and research. Among these, the work before us, and the Commentaries of Chief Justice Kent, hold the first rank. Both of these works are, as it is natural they should be, strongly tinged with the political opinions of their respective authors; and as there is a perfect concurrence between them in this respect, their joint authority can scarcely fail to exert a strong influence upon public opinion. It is much to be regretted that some one, among the many who differ from them in their views of the Constitution, and who possess all the requisite qualifications for the task, should not have thought it necessary to vindicate his own peculiar tenets, in a work equally elaborate, and presenting just claims to public attention. The authority of great names is of such imposing weight, that mere reason and argument can rarely counterpoise it in the public mind; and its preponderance is not easily overcome, except by adding like authority to the weight of reason and argument, in the opposing scale. I hope it is not yet too late for this suggestion to have its effect upon those to whom it is addressed.

The first commentary upon the Constitution, the Federalist, is decidedly the best, which has yet appeared. The writers of that book were actors in all the interesting scenes of the period, and two of them were members of the convention which formed the Constitution. Added to this, their extensive information, their commanding talents, and their experience in great public affairs, qualified them, in a peculiar degree, for the task which they undertook. Nevertheless, their great object was to recommend the Constitution to the people, at a time when it was very uncertain whether they would adopt it or not; and hence their work, although it contains a very full and philosophical analysis of the subject, comes to us as a mere argument in support of a favorite measure, and, for that reason, does not always command our entire confidence. Besides, the Constitution was and its true character, which is to be learned only from its practical operation, could only be conjectured. Much has been developed, in the actual practice of the government, which no politician of that day could either have foreseen or imagined. New questions have arisen, not then anticipated, and difficulties and embarrassments, wholly unforeseen, have sprung from new events in the relation of the States to one another, and to the general government. Hence the Federalist cannot be relied on, as full and safe authority in all cases. It is, indeed, matter of just surprise, and affording the strongest proof of the profound wisdom and far-seeing sagacity of the authors of that work, that their views of the Constitution have been so often justified in the course of its practical operation. Still, however, it must be admitted that the Federalist is defective in some important particulars, and deficient in many more. The Constitution is much better understood at this day than at the time of its adoption. This is not true of the great principles of civil and political liberty, which lie, at the foundation of that instrument; but it is emphatically true of some of its provisions, which were considered at the time as comparatively unimportant, or so plain as not to be misunderstood, but which have been shown, by subsequent events, to be pregnant with the greatest difficulties, and to exert the most important influence upon the whole character of the government. Contemporary expositions of the Constitution, therefore, although they should be received as authority in some cases, and may enlighten our judgments in most others, cannot be regarded as safe guides, by the expounder of that

instrument at this day. The subject demands our attention now as strongly as it did before the Federalist was written.<sup>1</sup>

It is not surprising, therefore, that the work now under consideration should have been hailed with pleasure and received with every favorable disposition. Judge Story fills a high station in the judiciary of the United States, and has acquired a character, for talents and learning, which ensures respect to whatever he may publish under his own name. His duty, as a Judge of the Supreme Court, has demanded of him frequent investigations of the nicest questions of constitutional law; and his long service in that capacity has probably brought under his review every provision of that instrument in regard to which any difference of opinion has prevailed. Assisted as he has been by the arguments of the ablest counsel, and by the joint deliberations of the other judges of the court, it would be indeed wonderful, if he should hazard his well-earned reputation as a jurist, upon any hasty or unweighed opinion, upon subjects so grave and important. He has also been an attentive observer of political events, and although by no means obtrusive in politics, has yet a political character, scarcely less distinguished than his character as a jurist. To all, these claims to public attention and respect, may be added a reputation for laborious research, and for calm and temperate thinking. A work on the Constitution of the United States, emanating from such a source, cannot fail to exert a strong influence upon public opinion, and it is, therefore, peculiarly important that its real character should be understood. Whatever may be the cast of its political opinions, it can scarcely fail to contain many valuable truths, and much information which will be found useful to all classes of readers. And, so far as its political opinions are concerned, it is of the highest importance to guard the public mind against the influence which its errors, if errors they be, may borrow from the mere authority of the distinguished name under which they are advanced.

The plan of the work before us is very judicious. In order to a correct understanding of the Constitution, it is absolutely necessary to understand the situation of the States before it was adopted. The author, acting upon this idea, distributes his work into three great divisions. "The first will embrace a sketch of the charters, constitutional history, and anterevolutionary jurisprudence of the Colonies. The second will embrace the constitutional history of the States, during the Revolution, and the rise, progress, decline, and fall of the Confederation. The third will embrace the history of the rise and adoption of the Constitution, and a full exposition of all its provisions, with the reasons on which they were respectively founded, the objections by which they were respectively assailed, and such illustrations drawn from contemporaneous documents, and the subsequent operations of the government, as may best enable the reader to estimate for himself, the true value of each." This plan is at once comprehensive and analytical. It embraces every topic necessary to a full understanding of the subject, while, at the same time, it presents them in the natural order of investigation. It displays a perfect acquaintance with the true nature of the subject, and promises every result which the reader can desire. The first part relates to a subject of the greatest interest to every American, and well worthy the study of philosophical enquirers, all over the world. There is not, within

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1 General Hamilton one of the principal writers of the Federalist, was undoubtedly at heart a monarchist. On more than one occasion he plainly avowed himself such. In the convention which framed the Constitution, he exerted his commanding influence to impart centralized, consolidated, or monarchical powers to the Federal Union. But, signally failing in this, in his subsequent interpretations of the Constitution he did what he could to bend the instrument to suit his views. Judge Story and Chief Justice Kent, and, earlier, Chief Justice Jay, belonged to the same political party as General Hamilton. They were Federalists, and so odious did this party become to the American people, that it was driven out of power at the expiration of old John Adams's single presidential term in 1800. -- [C. C. B.]

the whole range of history, an event more important, with reference to its effects upon the world at large, than the settlement of the American Colonies. It did not fall within the plan of our author to enquire very extensively, or very minutely, into the mere history of events which distinguished that extraordinary enterprise. So far as the first settlers may be regarded as actuated by avarice, by ambition, or by any other of the usual motives of the adventurer, their deeds belong to the province of the historian alone. We, however, must contemplate them in another and a higher character. A deep and solemn feeling of religion, and an attachment to, and an understanding of, the principles of civil liberty, far in advance of the age in which they lived, suggested to most of them the idea of seeking a new home and founding new institutions in the western world. To this spirit we are indebted for all that is free and liberal in our present political systems, it would be a work of very great interest, and altogether worthy of the political historian, to trace the great principles of our institutions back to their sources. Their origin would probably be discovered at a period much more remote than is generally supposed. We should derive from such a review much light in the interpretation of those parts of our systems as to which we have no precise rules in the language of our constitutions of government. It is to be regretted that Judge Story did not take this view of the subject. Although not strictly required by the plan of his work, it was, nevertheless, altogether consistent with it, and would have added much to its interest with the general reader. His sources of historical information were ample, and his habits and the character of his mind fitted him well for such an investigation, and for presenting the result in an analytical and philosophical form. He has chosen, however, to confine himself within much narrower limits. Yet, even within those limits, he has brought together a variety of historical facts of great interest, and has presented them in a condensed form, well calculated to make a lasting impression on the memory. The brief sketch which he has given of the settlement of the several colonies, and of the charters from which they derived their rights and powers as separate governments, contains much to enable us to understand fully the relation which they bore to one another and to the mother country. This is the true starting point in the investigation of those vexed questions of constitutional law which have so long divided political parties in the United States. It would seem almost impossible that any two opinions could exist upon the subject; and yet the historical facts, upon which alone all parties must rely, although well authenticated and comparatively recent, have not been understood by all men alike. Our author was well aware of the importance of settling this question at the threshold of his work. Many of the powers which have been claimed for the Federal Government, by the political party to which he belongs, depend upon a denial of that separate existence, and separate sovereignty and independence, which the opposing party has uniformly claimed for the States. It is, therefore, highly important to the correct settlement of this controversy, that we should ascertain the precise political condition of the several colonies prior to the Revolution. This will enable us to determine how far Judge Story has done justice to his subject, in the execution of the first part of his plan; and by tracing the colonies from their first establishment as such, through the various stages of their progress up to the adoption of the Federal Constitution, we shall be greatly aided in forming a correct opinion as to the true character of that instrument.

## **CHAPTER II - THE NON-RELATION OF THE COLONIES TO EACH OTHER -- THEY WERE NOT ONE PEOPLE**

It appears to be a favorite object of Judge Story to impress upon the mind of the reader, at the very commencement of his work, the idea that the people of the several colonies were, as to some objects, which he has not explained, and to some extent which he has

not defined, "one people." This is not only plainly inferable from the general scope of the book, but is expressly asserted in the following passage "But although the colonies were independent of each other in respect to their domestic concerns, they were not wholly alien to each other. On the contrary, they were fellow-subjects, and for many purposes one people.

Every colonist had a right to inhabit, if he pleased, in any other colony, and as a British subject he was capable of inheriting lands by descent in every other colony. The commercial intercourse of the colonies, too, was regulated by the general laws of the British empire, and could not be restrained or obstructed by colonial legislation. The remarks of Mr. Chief Justice Jay are equally just and striking: "All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him, and all the civil authority then existing or exercised here flowed from the head of the British empire. They were in a strict sense fellow-subjects and in a variety of respects one people. When the Revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain, and Spain, while Roman provinces, to wit, only that affinity and social connection which results from the mere circumstance of being governed by the same prince."

In this passage the author takes his ground distinctly and boldly. The first idea suggested by the perusal of it is, that he discerned very clearly the necessity of establishing his position, but did not discern quite so clearly by what process of reasoning he was to accomplish it. If the passage stood alone, it would be fair to suppose that he did not design to extend the idea of a unity among the people of the colonies beyond the several particulars which he has enumerated. Justice to him requires that we should suppose this; for, if it had been otherwise, he would scarcely have failed to support his opinion by pointing out some one of the "many purposes," for which the colonies were, in his view of them, "one people." The same may be said of Mr. Chief Justice Jay. He also has specified several particulars in which he supposed this unity to exist, and arrives at the conclusion, that the people of the several colonies were, "in a variety of respects, one people." In what respect they were "one," except those which he has enumerated, he does not say and of course it is fair to presume that he meant to rest the justness of his conclusion upon them alone. The historical facts stated by both of these gentlemen are truly stated; but it is surprising that it did not occur to such cool reasoners, that every one of them is the result of the relation between the colonies and the mother country, and not the result of the relation between the colonies themselves. Every British subject, whether born in England proper or in a colony, has a right to reside anywhere within the British realm; and this by the force of British laws. Such is the right of every Englishman, wherever he may be found. As to the right of the colonist to inherit lands by descent in any other colony than his own, Judge Story himself informs us that it belonged to him "as a British subject." That right, indeed, is in consequence of his allegiance. By the policy of the British constitution and laws, it is not permitted that the soil of her territory should belong to any from whom she cannot demand all the duties of allegiance.

This allegiance is the same in all the colonies as it is in England proper and, wherever it exists, the correspondent right to own and inherit the soil attaches. The right to regulate commercial intercourse among her colonies belongs, of course, to the parent country, unless she relinquishes it by some act of her own; and no such act is shown in the present case. On the contrary, although that right was resisted for a time by some of the American colonies, it was fully yielded, as our author himself informs us, by all those of

New England, and I am not informed that it was denied by any other. Indeed, the supremacy of Parliament, in most matters of legislation which concerned the colonies, was generally -- nay, universally -- admitted up to the very eve of the Revolution. It is true, the right to tax the colonies was denied, but this was upon a wholly different principle. It was the right of every British subject to be exempt from taxation, except by his own consent; and as the colonies were not, and from their local situation could not be, represented in Parliament, the right of that body to tax them was denied, upon a fundamental principle of English liberty. But the right of the mother country to regulate commerce among her colonies is of a different character, and it never was denied to England by her American colonies, so long as a hope of reconciliation remained to them. In like manner, the facts relied on by Mr. Jay, that "all people of this country were then subjects of the King of Great Britain, and owed allegiance to him" and that "all the civil authority then existing or exercised here flowed from the head of the British empire," are but the usual incidents of colonial dependence, and are by no means peculiar to the case he was considering. They do, indeed, prove a unity between all the colonies and the mother country, and show that these, taken altogether, are in the strictest sense of the terms, "one people"; but I am at a loss to perceive how they prove, that two or more parts or subdivisions of the same empire necessarily constitute "one people." If this be true of the colonies, it is equally true of any two or more geographical sections of England proper; for every one of the reasons assigned applies as strictly to this case as to that of the colonies. Any two countries may be "one people," or "a nation de facto," if they can be made so by the facts that their people are "subjects of the King of Great Britain, and owe allegiance to him," and that "all the civil authority exercised therein flows from the head of the British empire."

It is to be regretted that the author has not given us his own views of the sources from which these several rights and powers were derived. If they authorize his conclusion, that there was any sort of unity among the people of the several colonies, distinct from their common connection with the mother country, as parts of the same empire, it must be because they flowed from something in the relation betwixt the colonies themselves, and not from their common relation to the parent country. Nor is it enough that these rights and powers should, in point of fact, flow from the relation of the colonies to one another; they must be the necessary result of their political condition. Even admitting, then, that they would, under any state of circumstances, warrant the conclusion which the author has drawn from them, it does not follow that the conclusion is correctly drawn in the present instance. For aught that he has said to the contrary, the right of every colonist to inhabit and inherit lands in every colony, whether his own or not, may have been derived from positive compact and agreement among the colonies themselves; and this presupposes that they were distinct and separate, and not "one people." And so far as the rights of the mother country are concerned, they existed in the same form, and to the same extent, over every other colony of the empire. Did this make the people of all the colonies "one people?" If so, the people of Jamaica, the British East India possessions, and the Canadas are, for the very same reason, "one people" at this day. If a common allegiance to a common sovereign, and a common subordination to his jurisdiction, are sufficient to make the people of different countries "one people," it is not perceived (with all deference to Mr. Chief Justice Jay) why the people of Gaul, Britain, and Spain might not have been "one people," while Roman provinces, notwithstanding "the patriots" did not say so. The general relation between the colonies and the parent country is as well settled and understood as any other, and it is precisely the same in all cases, except where special consent and agreement may vary it. Whoever, therefore, would prove that any peculiar unity existed between the American colonies, is bound to

show something in their charters, or some peculiarity in their condition, to exempt them from the general rule. Judge Story was too well acquainted with the state of the facts to make any such attempt in the present case. The Congress of the nine colonies, which assembled at New York, in October, 1765, declare that the colonists "owe the same allegiance to the Crown of Great Britain, that is owing from his subjects born within the realm, and all due subordination to that august body, the Parliament of Great Britain." "That the colonists are entitled to all the inherent rights and liberties of his [the King's] natural born subjects within the Kingdom of Great Britain," We have here an all-sufficient foundation of the right of the Crown to regulate commerce among the colonies, and of the right of the colonists to inhabit and to inherit land in each and all the colonies. They were nothing more than the ordinary rights and liabilities of every British subject; and, indeed, the most that the colonies ever contended for was an equality, in these respects, with the subjects born in England. The facts, therefore, upon which Judge Story's reasoning is founded, spring from a different source from that from which he is compelled to derive them, in order to support his conclusion.

So far as Judge Story's argument is concerned, the subject might be permitted to rest here. Indeed, one would be tempted to think, from the apparent carelessness and indifference with which the argument is urged, that he himself did not attach to it any particular importance. It is not his habit to dismiss grave matters with such light examination, nor does it consist with the character of his mind to be satisfied with reasoning which bears even a doubtful relation to his subject. Neither can it be supposed that he would be willing to rely on the simple ipse dixit of Chief Justice Jay, unsupported by argument, unsustained by any reference to historical facts, and wholly indefinite in extent and bearing. Why, then, was this passage written? As mere history, apart from its bearing on the Constitution of the United States, it is of no value in this work, and is wholly out of place. All doubts upon this subject will be removed in the progress of this examination. The great effort of Judge Story, throughout the entire work, is to establish the doctrine, that the Constitution of the United States is a government of "the people of the United States," as contradistinguished from the people of the several States; or, in other words, that it is a consolidated, and not a federative system. His construction of every contested federal power depends mainly upon this distinction; and hence the necessity of establishing a oneness among the people of the several colonies, prior to the Revolution. It may well excite our surprise, that a proposition so necessary to the principal design of the work, should be stated with so little precision, and dismissed with so little effort to sustain it by argument. One so well informed as Judge Story, of the state of political opinions in this country, could scarcely have supposed that it would be received as an admitted truth, requiring no examination. It enters too deeply into grave questions of Constitutional law, to be so summarily disposed of. We should not be content, therefore, with simply proving that Judge Story has assigned no sufficient reason for the opinion he has advanced. The subject demands of us the still farther proof that his opinion is, in fact, erroneous, and that it cannot be sustained by any other reasons.

In order to constitute "one people," in a political sense, of the inhabitants of different countries, some thing more is necessary than that they should owe a common allegiance to a common sovereign. Neither is it sufficient that, in some particulars, they are bound alike, by laws which that sovereign, may prescribe; nor does the question depend on geographical relations. The inhabitants of different islands may be one people, and those of contiguous countries may be, as we know they in fact are, different nations. By the term "people," as here used, we do not mean merely a number of persons. We mean by it a political corporation, the members of which owe a common

allegiance to a common sovereignty, and do not owe any allegiance which is not common; who are bound by no laws except such as that sovereignty may prescribe; who owe to one another reciprocal obligations; who possess common political interests; who are liable to common political duties; and who can exert no sovereign power except in the name of the whole. Anything short of this, would be an imperfect definition of that political corporation which we call a people."

Tested by this definition, the people of the American colonies were, in no conceivable sense, "one people." They owed, indeed, allegiance to the British King, as the head of each colonial government, and as forming a part thereof; but this allegiance was exclusive, in each colony, to its own government, and, consequently, to the King as the head thereof, and was not a common allegiance of the people of all the colonies, to a common head.<sup>2</sup> These colonial governments were clothed with the sovereign power of making laws, and of enforcing obedience to them, from their own people. The people of one colony owed no allegiance to the government of any other colony, and were not bound by its laws. The colonies had no common legislature, no common treasury, no common military power, no common judicatory. The people of one colony were not liable to pay taxes to any other colony, nor to bear arms in its defence; they had no right to vote in its elections; no influence nor control in its municipal government; no interest in its municipal institutions. There was no prescribed form by which the colonies could act together, for any purpose whatever; they were not known as "one people" in any one function of government. Although they were all, alike, dependencies of the British Crown, yet, even in the action of the parent country, in regard to them, they were recognized as separate and distinct. They were established at different times, and each under an authority from the Crown, which applied to itself alone. They were not even alike in their organization. Some were provincial, some proprietary, and some charter governments. Each derived its form of government from the particular instrument establishing it, or from assumptions of power acquiesced in by the Crown, without any connection with, or relation to, any other. They stood upon the same footing, in every respect, with other British colonies, with nothing to distinguish their relation either to the parent country or to one another. The charter of any one of them might have been destroyed, without in any manner affecting the rest. In point of fact, the charters of nearly all of them were altered, from time to time, and the whole character of their government changed. These changes were made in each colony for itself alone, sometimes by its own action, sometimes by the power and authority of the Crown; but never by the joint agency of any other colony, and never with reference to the wishes or demands of any other colony. Thus they were separate and distinct in their creation; separate and distinct in the changes and modifications of their governments, which were made from time to time; separate and distinct in political functions, in political rights, and in political duties.

The provincial government of Virginia was the first established. The people of Virginia owed allegiance to the British King, as the head of their own local government. The authority of that government was confined within certain geographical limits, known as Virginia, and all who lived within those limits were "one people." When the colony of Plymouth was subsequently settled, were the people of that colony "one" with the people of Virginia? When, long afterwards, the proprietary government of Pennsylvania was established, were the followers of William Penn "one" with the people of Plymouth and Virginia? If so, to which government was their allegiance due? Virginia had a

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<sup>2</sup> The resolutions of Virginia, in 1765, show that she considered herself merely as an appendage of the British Crown; that her legislature was alone authorized to tax her; and that she had a right to call on her King, who was the King of England, to protect her against the usurpations of the British Parliament.

government of her own, and Massachusetts a government of her own. The people of Pennsylvania could not be equally bound by the laws of all three governments, because those laws might happen to conflict; they could not owe the duties of citizenship to all of them alike, because they might stand in hostile relations to one another. Either, then, the government of Virginia, which originally extended over the whole territory, continued to be supreme therein, (subject only to its dependence on the British Crown), or else its supremacy was yielded to the new government. Every one knows that this last was the case; that within the territory of the new government the authority of that government alone prevailed. How then could the people of this new government of Pennsylvania be said to be "one" with the people of Virginia, when they were not citizens of Virginia, owed her no allegiance and no duty, and when their allegiance to another government might place them in the relation of enemies of Virginia? <sup>3</sup>

In farther illustration of this point, let us suppose that some one of the colonies had refused to unite in the Declaration of Independence, what relation would it then have held to the others? Not having disclaimed its allegiance to the British Crown, it would still have continued to be a British colony, subject to the authority of the parent country, in all respects as before. Could the other colonies have rightfully compelled it to unite with them in their revolutionary purposes, on the ground that it was part and parcel of the "one people," known as the people of the colonies? No such right was ever claimed, or dreamed of, and it will scarcely be contended for now, in the face of the known history of the time. Such recusant colony would have stood precisely as did the Canadas, and every other part of the British empire. The colonies, which had declared war, would have considered its people as enemies, but would not have had a right to treat them as traitors, or as disobedient citizens resisting their authority. To what purpose, then, were the people of the colonies "one people," if, in a case so important to the common welfare, there was no right in all the people together, to coerce the members of their own community to the performance of a common duty?

It is thus apparent that the people of the colonies were not "one people," as to any purpose involving allegiance on the one hand, or protection on the other. What, then, I again ask, are the "many purposes" to which Judge Story alludes? It is certainly incumbent on him who asserts this identity, against the inferences most naturally deducible from the historical facts, to show at what time, by what process, and for what purposes, it was affected. He claims too much consideration for his personal authority, when he requires his readers to reject the plain information of history, in favor of his bare assertion. The charters of the colonies prove no identity between them, but the reverse; and it has already been shown that this identity is not the necessary result of their common relation to the mother country. By what other means they came to be "one," in any intelligible and political sense, it remains for Judge Story to explain.

If these views of the subject be not convincing, Judge Story himself has furnished proof, in all needful abundance, of the incorrectness of his own conclusion. He tells us that,

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3 At this time all the colonies were in the habit of calling England "home," and the "mother country," but no such language as "our sister colonies" was in vogue. There was little or no intercourse between the colonies. Their first intimate acquaintance with each other grew out of incidents connected with the older, French war in 1756. When Mr. Quincy of Boston, visited Charleston, S. C., 1773, he spoke of that colony as, "this distant shore." When the first Congress assembled in 1774, the members all met as "strangers." And they came together with no design to amalgamation or to blend their separate and, as to each other, independent sovereignties, but simply to combine against a common foe. They no more proposed to blend their separate sovereignties than a community of gentlemen propose to make common stock of all their property when they to take means to detect and punish burglars and horse-thieves. -- [C.C.B.]

"though the colonies had a common origin, and owed a common allegiance, and the inhabitants of each were British subjects, they had no direct political connection with each other. Each was independent of all the others; each, in a limited sense, was sovereign within its own territory. There was neither alliance nor confederacy between them. The assembly of one province could not make laws for another, nor confer privileges which were to be enjoyed or exercised in another, farther than they could be in any independent foreign States. They were known only as dependencies, and they followed the fate of the parent country, both in peace and war, without having assigned to them, in the intercourse or diplomacy of nations, any distinct or independent existence. They did not possess the power of forming any league or treaty among themselves, which would acquire an obligatory force, without the assent of the parent State. And though their mutual wants and necessities often induced them to associate for common purposes of defense, these confederacies were of a casual and temporary nature, and were allowed as an indulgence, rather than as a right. They made several efforts to procure the establishment of some general superintending government over them all; but their own difference of opinion, as well as the jealousy of the Crown, made these efforts abortive."

The English language affords no terms stronger than those which are here used to convey the idea of separateness, distinctness, and independence, among the colonies. No commentary could make the description plainer, or more full and complete. The unity, contended for by Judge Story, nowhere appears, but is distinctly disaffirmed in every sentence. The colonies were not only distinct in their creation, and in the powers and faculties of their governments, but there was not even "an alliance or confederacy between them." They had "no general superintending government over them all," and tried in vain to establish one. Each was "independent of all the others," having its own legislature, and without power to confer either right or privilege beyond its own territory. "Each, in a limited sense, was sovereign within its own territory"; and to sum up all, in a single sentence, "they had no direct political connection with each other!" The condition of the colonies was, indeed, anomalous, if Judge Story's view of it be correct. They presented the singular spectacle of "one people," or political corporation, the members of which had "no direct political connection with each other," and who had not the power to form such connection, even "by league or treaty among themselves."

This brief review will, it is believed, be sufficient to convince the reader that Judge Story has greatly mistaken the real condition and relation of the colonies, in supposing that they formed "one people," in any sense, or for any purpose whatever. He is entitled to credit, however, for the candor with which he has stated the historical facts. Apart from all other sources of information, his book affords to every reader abundant materials for the formation of his own opinion, and for enabling him to decide satisfactorily whether Judge Story's inferences from the facts, which he himself has stated, be warranted by them or not.

### **CHAPTER III - RELATION OF THE COLONIES TO EACH OTHER DURING THE REVOLUTION – THEY WERE NOT THEN ONE PEOPLE**

In the execution of the second division of his plan, very little was required of Judge Story, either as a historian or a commentator. Accordingly, he has alluded but slightly to the condition of the colonies during the existence of the revolutionary government, and has sketched with great rapidity, yet sufficiently in detail, the rise, decline and fall of the Confederation. Even here, however, he has fallen into some errors, and has ventured to

express decisive and important opinions, without due warrant. The desire to make "the people of the United States" one consolidated nation is so strong and predominant, that it breaks forth, often uncalled for, in every part of his work. He tells us that the first Congress of the Revolution was "a general or a national government"; that it "was organized under the auspices and with the consent of the people, acting directly in their primary sovereign capacity," and without the intervention of the functionaries to whom the ordinary powers of government were delegated in the colonies. He acknowledges that the powers of this Congress were but ill-defined; that many of them were exercised by mere usurpation, and were acquiesced in by the people, only from the confidence reposed in the wisdom and patriotism of its members, and because there was no proper opportunity, during the presence of the war, to raise nice questions of the powers of government. And yet he infers, from the exercise of powers thus ill-defined, and, in great part, usurped, that "from the moment of the Declaration of Independence, if not for most purposes at an antecedent period, the united colonies must be considered as being a nation de facto," &c.

A very slight attention to the history of the times will place this subject in its true light. The colonies complained of oppressions from the mother country, and were anxious to devise some means by which their grievances might be redressed. These grievances were common to all of them; for England made no discrimination between them in the general course of her colonial policy. Their rights, as British subjects, had never been well defined; and some of the most important of these rights, as asserted by themselves, had been denied by the British Crown. As early as 1765 a majority of the colonies had met together in congress, or convention, in New York, for the purpose of deliberating on these grave matters of common concern and they then made a formal declaration of what they considered their rights, as colonists and British subjects. This measure, however, led to no redress of their grievances. On the contrary, the subsequent measures of the British Government gave new and just causes of complaint; so that, in 1774, it was deemed necessary that the colonies should again meet together, in order to consult upon their general condition, and provide for the safety of their common rights. Hence the Congress which met at Carpenters' Hall, in Philadelphia, on the 5th of September, 1774. It consisted of delegates from New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut from the city and county of New York, and other counties in the province of New York, New Jersey, Pennsylvania, New Castle, Kent, and Sussex in Delaware, Maryland, Virginia, and South Carolina. North Carolina was not represented until the 14th September, and Georgia not at all. It is also apparent that New York was not represented as a colony, but only through certain portions of her people;<sup>4</sup> in like manner, Lyman Hall was admitted to his seat, in the

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4 The historical fact here stated, is perfectly authenticated and has never been disputed; nevertheless, the following extracts from the Journals of Congress may not be out of place:  
"Wednesday, September 14, 1774. Henry Wisner, a delegate from the county of Orange, in the colony of New York, appeared at Congress, and produced a certificate of his election by the said county, which being read and approved, he took his seat in Congress as a deputy from the colony of New York."  
"Monday, September 20, 1774, John Hening, Esq., a deputy from Orange county, in the colony of New York, appeared this morning, and took his seat as a deputy from that colony."  
"Saturday, October 1, 1774 Simon Bocrum, Esq., appeared in Congress as a deputy from King's county, in the colony of New York, and produced the credentials of his election, which being read and approved, he took his seat as a delegate from that colony."  
It is evident, from these extracts, that although the delegates from certain portions of the people of New York were admitted to seats in Congress as delegates from the colony, yet, in point of fact, they were not elected as such, neither were they ever recognized as such, by New York herself. The truth is, as will presently appear, the majority of her people were not ripe for the measures pursued by Congress, and would not have agreed to appoint delegates for the whole colony.

succeeding Congress, as a delegate from the parish of St. John's, in Georgia, although he declined to vote on any question requiring a majority of the colonies to carry it, because he was not the representative of a colony. This Congress passed a variety of important resolutions, between September, 1774, and the 22nd October, in the same year; during all which time Georgia was not represented at all; for even the parish of St. John's did not appoint a representative till May, 1775. In point of fact, the Congress was a deliberative and advisory body, and nothing more; and, for this reason, it was not deemed important, or, at least, not indispensable, that all the colonies should be represented, since the resolutions of Congress had no obligatory force whatever. It was appointed for the sole purpose of taking into consideration the general condition of the colonies, and of devising and recommending proper measures for the security of their rights and interests. For these objects no precise powers and instructions were necessary, and beyond them none were given. Neither does it appear that any precise time was assigned for the duration of Congress. The duty with which it was charged was extremely simple; and it was taken for granted that it would dissolve itself as soon as the duty should be performed.<sup>5</sup>

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5 A reference to the credentials of the Congress of 1774 will show, beyond all doubt, the true character of that assembly. The following are extracts from them:

- New Hampshire. "To devise, consult and adopt such measures as may have the most likely tendency to extricate the colonies from their present difficulties; to secure and perpetuate their rights, liberties, and privileges, and to restore that peace, harmony, and mutual confidence, which once happily subsisted between the parent country and her colonies."
- Massachusetts. "To consult on the present state of the colonies, and the miseries to which they are, and must be reduced, by the operation of certain acts of Parliament respecting America; and to deliberate and determine upon wise and proper measures to be by then recommended to all the colonies, for the recovery and establishment of their just rights and liberties, civil and religious, and the restoration of union and harmony between Great Britain and the colonies, most ardently desired by all good men."
- Rhode Island. "To consult on proper measures to obtain a repeal of the several acts of the British Parliament for levying tax on his Majesty's subjects in America without their consent, and upon proper measures to establish the rights and liberties of the colonies upon a just and solid foundation, agreeably to instructions given by the general assembly."
- Connecticut "To consult and advise on proper measures for advancing the beat good of the colonies, and such conference to report from time to time to the Colonial House of Representatives."
- New York. Only a few of her counties were represented, some by deputies authorized to "represent," and some by deputies authorized to "attend Congress."
- New Jersey. "To represent the colony in the General Congress."
- Pennsylvania. "To form and adopt a plan for the purposes of obtaining redress of American grievances, ascertaining American rights upon the most solid and constitutional principles, and for establishing that union and harmony between Great Britain and the colonies which is indispensably necessary to the welfare and happiness of both."
- Delaware. To consult and advise with the deputies from the other colonies, to determine upon all such prudent and lawful measures as may be judged most expedient for the colonies immediately and unitedly to adopt, in order to obtain relief for an oppressed people, (a) and the redress of our general grievances."
- Maryland. "To attend a general congress, to effect one general plan of conduct operating on the commercial connection of the colonies with the mother country, for the relief of Boston, and the preservation of American liberty."
- Virginia. "To consider of the most proper and effectual manner of so operating on the commercial connection of the colonies with the mother country as to procure redress for the much injured province of Massachusetts Bay, to secure British America from the ravage and ruin of arbitrary taxes, and speedily to procure the return of that harmony and union, so beneficial to the whole empire, and so ardently desired by all British America."

It is perfectly apparent that the mere appointment of this Congress did not make the people of all the colonies "one people," nor a "nation de facto." All the colonies did not unite in the appointment, neither as colonies nor by any portion of their people acting in their primary assemblies, as has already been shown. The colonies were not independent, and had not even resolved to declare themselves so at any future time. On the contrary, they were extremely desirous to preserve and continue their connection with the parent country, and Congress was charged with the duty of devising such measures as would enable them to do so, without involving a surrender of their rights as British subjects. It is equally clear that the powers, with which Congress was clothed, did not flow from, nor constitute "one people," or "nation de facto," and that that body was not "a general or national government," nor a government of any kind what ever. The existence of such government was absolutely inconsistent with the allegiance which the colonies still acknowledged to the British Crown. Judge Story, himself informs us, in a passage already quoted, that they had no power to form such government, nor to enter into "any league or treaty among themselves." Indeed, Congress did not claim any legislative power whatever, nor could it have done so consistently with the political relations which the colonies still acknowledged and desired to preserve. Its acts were in the form of resolutions, and not in the form of laws; it recommended to its constituents whatever it believed to be for their advantage, but it commanded nothing. Each colony,

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- North Carolina. "To take such measures as they may deem prudent to affect the purpose of describing with certainty the rights of Americans, repairing the breach made in those rights, and for guarding them for the future against any such violations done under the sanction of public authority." For these purposes the delegates are "invested with such powers as may make any acts done by them obligatory in honor, on every inhabitant hereof, who is not an alien to his country's good, and an apostate to the liberties of America."
  - South Carolina. "To consider the acts lately passed, and bills depending in Parliament with regard to the port of Boston, and the colony of Massachusetts Bay; which acts and bills, in the precedent and consequences, affect the whole Continent of America. Also the grievances under which America labors, by reason of the several acts of Parliament that impose taxes or duties for raising a revenue, and lay unnecessary restraints and burdens on trade; and of the statutes, parliamentary acts, and royal instructions, which make an invidious distinction between his Majesty's subjects in Great Britain and America, with full power and authority to conceit, agree to and prosecute such legal measures as in the opinion of the said deputies, so to be assembled, shall be most likely to obtain a repeal of the said acts, and a redress of those grievances.

[The above extracts are made from the credentials of the deputies of the several colonies, as spread upon the Journal of Congress, according to a copy of that bound (as appears by a gilt label on the back hereof) for the President of Congress -- now in possession of B. Tucker, Esq.) It is perfectly clear from these extracts, 1. That the colonies did not consider themselves as "one people," and that, they were therefore bound to consider the quarrel of Boston as their own; but that they made common cause with Massachusetts, only because the principles asserted in regard to her, equally affected the other colonies; 2. That each colony appointed its own delegates, giving them precisely such power and authority as suited its own views; 3. That no colony gave any power or authority, except for advisement only; 4. That so far from designing to establish "a general or national government," and to form, themselves into "a nation de facto," their great purpose was to bring about a reconciliation and harmony with the mother country. This is still farther apparent from the tone of the public addresses of Congress. 5. That this Congress was not "organized under the auspices and with the consent of the people, acting directly in their primary, sovereign capacity, and without the intervention of the functionaries to whom the ordinary powers of government were delegated in the colonies," but, on the contrary, that it was organized by the colonies as such, and generally through their ordinary legislatures; and always with careful regard to their separate and independent rights and powers. If the Congress of 1774 was "a general or national government," neither New York nor Georgia was party to it; for neither of them was represented in that Congress. It is also worthy of remark that the Congress of 1774 had no agents of its own in foreign countries, but employed those of the several colonies. See the resolutions for delivering the address to the King passed October 25, 1774, and the letter to the agents, approved on the following day. (a) Massachusetts, the particular wrongs of which are just before recited at large.

and the people thereof, were at perfect liberty to act upon such recommendation or not, as they might think proper.<sup>6</sup>

On the 22nd October, 1774, this Congress dissolved itself, having recommended to the several colonies to appoint delegates to another Congress, to be held in Philadelphia in the following May. Accordingly delegates were chosen, as they had been chosen to the preceding Congress, each colony and the people thereof acting for themselves, and by themselves; and the delegates thus chosen were clothed with substantially the same powers, for precisely the same objects, as in the former Congress. Indeed, it could not have been otherwise; for the relations of the colonies were still unchanged, and any measure establishing "a general or national government," or uniting the colonies so as to constitute them "a nation de facto," would have been an act of open rebellion, and would have severed at once all the ties which bound them to the mother country, and which they were still anxious to preserve. New York was represented in this Congress precisely as she had been in the former one, that is, by delegates chosen by a part of her people; for the royal party was so strong in that colony, that it would have been impossible to obtain from the legislature an expression of approbation of any measure of resistance to British authority. The accession of Georgia to the general association was not made known till the 20th of July, and her delegates did not take their seats till the 13th of September. In the meantime Congress had proceeded in the discharge of its duties, and some of its most important acts, and among the rest the appointment of a commander-in-chief of their armies, were performed while these two colonies were unrepresented. Its acts, like those of the former Congress, were in the form of resolution and recommendation; for as it still held out the hope of reconciliation with the parent country, it did not venture to assume the function of authoritative legislation. It continued to hold this attitude and to act in this mode till the 4th of July, 1776, when it declared that the colonies there represented (including New York, which had acceded after the Battle of Lexington), were, and of right ought to be, free and independent States.<sup>7</sup>

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6 The Journals of Congress afford the most abundant and conclusive proofs of this. In order to show the general character of their proceedings, it is enough for me to refer to the following: On the 11th October, 1774, it was "Resolved unanimously, That a memorial be prepared to the people of British America, stating to them the necessity of a firm, united and invariable observation of the measures recommended by the Congress, as they tender the invaluable rights and liberties derived to them from the laws and Constitution of their country." The memorial was accordingly prepared, in conformity with the resolution. Congress having previously had under consideration the plan of an association for establishing non-importation, &c., finally adopted it, October 20, 1774. After reciting their grievances, they say: "And, therefore, for ourselves and the inhabitants of the several colonies whom we represent, firmly agree, and associate, under the sacred ties of virtue, honor and love of our country, as follows." They then proceed to recommend a certain course of proceeding, such as non-importation and non-consumption of certain British productions; they recommended the appointment of a committee in every county, city and town, to watch their fellow-citizens, in order to ascertain whether or not "any person within the limits of their appointment has violated this association"; and if they should find any such, it is their duty to report them, "to the end, that all such foes to The rights of British America may lie publicly known, and universally contemned as the enemies of American liberty; and, thenceforth, we respectively will break off all dealings with him or her." They also resolve, that they will "have no trade, commerce, dealings or intercourse whatsoever, with any colony or province in North America, which shall all not accede to, or which shall hereafter violate this association, but will hold them as unworthy of the rights of freemen, and as inimical to the liberties of their country." This looks very little like the legislation of the "general or national government" of a "nation de facto." The most important measures of general concern are rested upon no stronger foundation than "the sacred ties of virtue, honor, and the love of our country," and have no higher sanction than public contempt and exclusion from the ordinary intercourse of society.

7 That the powers granted to the delegates to the second Congress were substantially the same with those granted to the delegates to the first, will appear from the following extracts from their credentials:

It is to be remarked, that no new powers were conferred on Congress after the Declaration of Independence. Strictly speaking, they had no authority to make that Declaration. They were not appointed for any such purpose, but precisely the reverse;

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- New Hampshire. "To consent and agree to all measures, which said Congress shall deem necessary to obtain redress of American grievances." Delegates appointed by a Convention.
- Massachusetts. "To concert, agree upon, direct and order (in concert with the delegates of the other colonies) " such further measures as to them shall appear to be the best calculated for the recovery and establishment of American rights and liberties, and for restoring harmony between Great Britain and the colonies" Delegates appointed by Provincial Congress.
- Connecticut. "To join, consult and advise with the other colonies in British America, on proper measures for advancing the best good of the colonies." Delegates appointed by the Colonial House of Representatives. The colony of New York was not represented in this Congress, but delegates were appointed by a convention of deputies from the city and county of New York, the city and county of Albany, and the counties of Dutchess Ulster, Orange, Westchester, Kings and Suffolk. They gave their delegates power to "concert and determine upon such measures as shall be judged most effectual for the preservation and re-establishment of American rights and privileges, and for the restoration of harmony between Great Britain and the colonies." Queen's County approved of the proceeding.
- Pennsylvania. Simply to "attend the general Congress." Delegates appointed by Provincial Assembly.
- New Jersey. "To attend the continental Congress, and to report their proceedings at the next session of the General Assembly." Delegates appointed by the Colonial Assembly.
- Delaware. "To concert and am upon such further measures, as shall appear to them best calculated for the accommodation of the unhappy differences between Great Britain and the colonies on a constitutional foundation, which the House most ardently wish for, and that they report their proceedings to the next session of General Assembly." Delegates appointed by the Assembly.
- Maryland "To consent and agree to all measures, Which said Congress shall deem necessary and effectual to obtain a redress of American grievances; and this province bind themselves to execute to the utmost of their power, all resolutions which the said Congress may adopt." Delegates appointed by Convention, and subsequently approved by the General assembly.
- Virginia. "To represent the colony in general Congress, to be held, &c." Delegates appointed by Convention.
- North Carolina. "Such powers an may make any acts done by them, or any of them, or consent given in behalf of this province, obligatory in honor upon every inhabitant thereof," Delegates appointed by Convention and approved in General Assembly.
- South Carolina. "To concert, agree to, and effectually prosecute such measures, as in the opinion of the said deputies, and the deputies to be assembled shall be most likely to obtain a redress of American grievances." Delegates appointed by Provincial Congress. In the copy of the Journals of Congress now before me, I do not find the credentials of the delegates from Rhode Island. They did not attend at the first meeting of Congress, although they did at the subsequent period. Georgia was not represented in this Congress until September, 1775. On the 13th May, 1775, Lyman Hall appeared as a delegate from the parish of St. Johns and he was admitted to his seat, "subject to such regulations as the Congress shall determine, relative to his voting." He was never regarded as the representative of Georgia, nor was that colony then considered as a party to the proceedings of Congress. This is evident from the fact that, in the address to the inhabitants of Great Britain, they use the style, "The twelve United Colonies, by their delegates in Congress, to the inhabitants of Great Britain," adopted on the 8th July, 1775. On the 20th of that month Congress were notified that a convention of Georgia had appointed delegates to attend them, but none of them took their seats till the 13th September following. They were authorized "to do, transact, join and concur with the several delegates from the other colonies and provinces upon the Continent, on all such matters and things as shall appear eligible and fit, at this alarming time, for the preservation and defence of our rights and liberties, and for the restoration of harmony, upon constitutional principles, between Great Britain and America." Some of the colonies appointed their delegates only for limited times, at the expiration of which they were replaced by others, but without any material change in their powers. The delegates were, in all things, subject to the orders of their respective colonies.

and although some of them were expressly authorized to agree to it, yet others were not. Indeed, we are informed by Mr. Jefferson, that the Declaration was opposed by some of the firmest patriots of the body, and among the rest, by R. R. Livingston, Dickenson, Wilson, and E. Rutlege, on the ground that it was premature; that the people of New York, New Jersey, Maryland and Delaware were not yet ripe for it, but would soon unite with the rest, if not indiscreetly urged. In entering upon so bold a step, Congress acted precisely as they did in all other cases, in the name of the States whose representatives they were, and with a full reliance that those States would confirm whatever they might do for the general good. They were, strictly, agents or ministers of independent States, acting each under the authority and instructions of his own, State, and having no power whatever, except what these instructions conferred. The States themselves were not bound by the resolves of Congress, except so far as they respectively authorized their own delegates to bind them. There was no original grant of powers to that body, except for deliberation and advisement; there was no constitution, no law, no agreement, to which they could refer, in order to ascertain the extent of their powers. The members did not all act under the same instructions, nor with the same extent of authority. The different States gave different instructions, each according to its own views of right and policy, and without reference to any general scheme to which they were all bound to conform. Congress had in fact no power of government at all, nor had it that character of permanency which is implied in the idea of government. It could not pass an obligatory law, nor devise an obligatory sanction, by virtue of any inherent power in itself. It was, as already remarked, precisely the same body after the Declaration of Independence as before. As it was not then a government, and could not establish any new or valid relations between the colonies, so long as they acknowledged themselves dependencies of the British Crown, they certainly could not do so after the Declaration of Independence, without some new grant of power. The dependent colonies had then become independent States; their political condition and relations were necessarily changed by that circumstance; the deliberative and advisory body, through whom they had consulted together as colonies, was *functus officio*; the authority which appointed them had ceased to exist, or was suspended by a higher authority. Everything which they did, after this period and before the Articles of Confederation, was without any other right or authority than what was derived from the mere consent and acquiescence of the several States. In the ordinary business of that government *de facto*, which the occasion had called into existence, they did whatever the public interest seemed to require, upon the secure reliance that their acts would be approved and confirmed. In other cases, however, they called for specific grants of power; and in such cases, each representative applied to his own State alone, and not to any other State or people. Indeed, as they were called into existence by the colonies in 1775, and as they continued in existence, without any new election or new grant of power, it is difficult to perceive how they could form a "general or national government, organized by the people." They were elected by subjects of the King of England; subjects who had no right, as they themselves admitted, to establish any government whatever; and when those subjects became citizens of independent States, they gave no instructions to establish any such government. The government exercised was, as already remarked, merely a government *de facto*, and no farther *de jure* than the subsequent approval of its acts by the several States made it so.

This brief review will enable us to determine how far Judge Story is supported in the inferences he has drawn, in the passages last quoted. We have reason to regret that in these, as in many others, he has not been sufficiently specific, either in stating his proposition or in citing his proof. To what people does he allude, when he tells us that the "first general or national government" was organized" by the people?"

The first and every recommendation to send deputies to a general Congress was addressed to the colonies as such; in the choice of those deputies each colony acted for itself, without mingling in any way with the people or government of any other colony; and when the deputies met in Congress, they voted on all questions of public and general concern by colonies, each colony having one vote, whatever was its population or number of deputies. If, then, this government was organized by "the people" at all, it was clearly the people of the several colonies, and not the joint people of all the colonies. And where is Judge Story's warrant for the assertion, that they acted "directly in their primary sovereign capacity, and without the intervention of the functionaries, to whom the ordinary powers of government were delegated in the colonies"? He is in most respects a close follower of Marshall, and he could scarcely have failed to see the following passage, which is found in a note in the 168th page of the second volume of the Life of Washington. Speaking of the Congress of 1774, Marshall says: "The members of this Congress were generally elected by the authority of the colonial legislatures, but in some instances a different system had been pursued. In New Jersey and Maryland the elections were made by committees chosen in the several counties for that particular purpose; and in New York, where the royal party was very strong, and where it is probable that no legislative act, authorizing an election of members to represent that colony in Congress, could have been obtained, the people themselves assembled in those places, where the spirit of opposition to the claim of Parliament prevailed, and elected deputies, who were very readily received into Congress," Here the general rule is stated to be, that the deputies were elected by the "colonial legislatures," and the instances in which the people acted "directly in their primary, sovereign capacity, without the intervention of the ordinary functionaries of government," are given as exceptions. And even in those cases, in which delegates were appointed by conventions of the people, it was deemed necessary in many instances, as we have already seen, that the appointment should be approved and confirmed by the ordinary legislature, As to New York, neither her people nor her government had so far lost their attachment to the mother country as to concur any measure of opposition until after the battle of Lexington in April, 1775; and, the only representatives which New York had in the Congress of 1774 were those of a comparatively small portion of her people. It is well known -- and, indeed, Judge Story himself so informs us -- that the members of the Congress of 1775 were elected substantially as were those of the preceding Congress; so that there were very few of the colonies, in which the people performed that act in their "primary, sovereign capacity," without the intervention of their constituted authorities. It is of little consequence, however, to the present inquiry whether the deputies were chosen by the colonial legislatures, as was done in most of the colonies, or by conventions, as was done in Georgia and some others, or by committees appointed for the purpose, as was done in one or two instances, or by the people in primary assemblies, as was done in part of New York. All these modes were resorted to, according as the one or the other appeared most convenient or proper in each particular case. But, whichever mode was adopted, the members were chosen by each colony in and for itself, and were the representatives of that colony alone, and not of any other colony, or any nation de facto or de jure. The assertion, therefore, that "the Congress thus assembled exercised de facto and de jure a sovereign authority, not as the delegated agents of the government de facto of the colonies, but in virtue of the original powers derived from the people," is, to say the least of it, very bold, in one who had undoubtedly explored all the sources of information upon the subject. Until the adoption of the Articles of Confederation, Congress had no "original powers," except only for deliberation and advisement, and claimed no "sovereign authority" whatever. It was an occasional, and not a permanent body, or one renewable from time to time. Although

they did, in many instances, "exercise de facto" a power of legislation to a certain extent, yet they never held that power "de jure," by any grant from the colonies or the people; and the acts became valid only by subsequent confirmation of them, and not because they had any delegated authority to perform them. The whole history of the period proves this, and not a single instance can be cited to the contrary. The course of the revolutionary government throughout attests the fact, that, however the people may have occasionally acted, in pressing emergencies, without the intervention of the authorities of their respective colonial governments, they never lost sight of the fact that they were citizens of separate colonies, and never, even impliedly, surrendered that character, or acknowledged a different allegiance. In all the acts of Congress, reference was had to the colonies, and never to the people. That body had no power to act directly upon the people, and could not execute its own resolves as to most purposes, except by the aid and intervention of the colonial authorities. Its measures were adopted by the votes of the colonies as such, and not by the rule, of mere numerical majority. Which prevails in every legislative assembly of an entire nation. This fact alone is decisive to prove, that the members were not the representatives of the people of all the colonies, for the judgment of each colony was pronounced by its own members only, and no others had any right to mingle in their deliberations. What, then, was this "sovereign authority?" What was the nature, what the extent of its "original powers?" From what "people" were these powers derived? I look in vain for answers to these questions to any historical record which has yet met my view, and have only to regret that Judge Story has not directed me to better guides.

#### **CHAPTER IV - THE NATURE AND EXTENT OF POWERS EXERCISED BY THE REVOLUTIONARY GOVERNMENT DID NOT MAKE THE COLONIES ONE PEOPLE**

Judge Story's conclusion is not better sustained by the nature and extent of the powers exercised by the revolutionary government. It has already been stated, that no original powers of legislation were granted to the Congresses of 1774 and 1775; and it is only from their acts that we can determine what powers they actually exercised. The circumstances under which they were called into existence precluded the possibility of any precise limitations of their powers, even if it had been designed to clothe them with the functions of government. The colonies were suffering under common oppressions, and were threatened with common dangers, from the mother country. The great object which they had in view was to produce that concert of action among themselves which would best enable them to resist their common enemy, and best secure the safety and liberties of all. Great confidence must necessarily be reposed in public rulers under circumstances of this sort. We may well suppose, therefore, that the revolutionary government exercised every power which appeared to be necessary for the successful prosecution of the great contest in which they were engaged; and we may, with equal propriety, suppose that neither the people nor the colonial governments felt any disposition to scrutinize very narrowly any measure which promised protection and safety to themselves. They knew that the government was temporary only; that it was permitted only for a particular and temporary object, and that they could at any time recall any and every power which it had assumed. It would be a violent and forced inference, from the powers of such an agency, (for was not a government, although I have sometimes, for convenience, called it so), however great they might be, to say that the people, or States, which established it, meant thereby to merge their distinctive character, to surrender all the rights and privileges

which belonged to them as separate communities, and to consolidate themselves into one nation.

In point of fact, however, there was nothing in the powers, exercised by the revolutionary government, so far as they can be known from their acts, inconsistent with the perfect sovereignty and independence of the States. These were always admitted in terms, and were never denied in practice. So far as external relations were concerned, Congress seems to have exercised every power of a supreme government. They assumed the right to "declare war and to make peace; to authorize captures; to institute appellate prize courts; to direct and control all national military and naval operations; to form alliances and make treaties; to contract debts and issue bills of credit on national account." These powers were not "exclusive," however, as our author supposes. On the contrary, troops were raised, vessels of war were commissioned, and various military operations were conducted by the colonies, on their own separate means and authority. Ticonderoga was taken by the troops of Connecticut before the Declaration of Independence; Massachusetts and Connecticut fitted out armed vessels to cruise against those of England, in October, 1775; South Carolina soon followed their example. In 1776, New Hampshire authorized her executive to issue letters of marque and reprisal.

These instances are selected out of many, as sufficient to show that in the conduct of the war Congress possessed no "exclusive" power, and the colonies (or States) retained, and actually asserted, their own sovereign right and power as to that matter. And not as to that matter alone, for New Hampshire established post offices. The words of our author may, indeed, import that the power of Congress over the subject of war was "exclusive" only as to such military and naval operations as he considers national, that is, such as were undertaken by the joint power of all the colonies; and, if so, he is correct. But the comma after the word "national" suggests a different interpretation. At all events, the facts which I have mentioned prove that Congress exercised no power which was considered as abridging the absolute sovereignty and independence of the States.

Many of those powers which, for greater convenience, were entrusted exclusively to Congress, could not be effectually exerted except by the aid of the State authorities. The troops required by Congress were raised by the States, and the commissions of their officers were countersigned by the Governors of the States. Congress were allowed to issue bills of credit, but they could not make them a legal tender, nor punish the counterfeiter of them. Neither could they bind the States to redeem them, nor raise by their own authority the necessary funds for the purpose. Congress received ambassadors and other public ministers, yet they had no power to extend to them that protection which they receive from the government of every foreign nation. A man by the name of De Longchamps entered the house of the French Minister Plenipotentiary in Philadelphia, and there threatened violence to the person of Francis Barbe Marboise, Secretary of the French Legation, Consul General of France, and Consul for the State of Pennsylvania; he afterwards assaulted and beat him in the public street. For this offence, he was indicted and tried in the Court of Oyer and Terminer of Philadelphia, and punished under its sentence. The case turned chiefly upon the law of nations, with reference to the protection which it affords to foreign ministers. A question was made, whether the authorities of Pennsylvania should not deliver up De Langechamps to the French Government, to be dealt with at their pleasure. It does not appear that the Federal Government was considered to possess any power over the subject, or that it was deemed proper to invoke its counsel or authority in any form. This case occurred in 1784, after the adoption of the Articles of Confederation; but if the powers of the Federal

Government were less under those articles than before, it only proves that, however great its previous powers may have been, they were held at the will of the States, and were actually recalled by the Articles of Confederation. Thus it appears that, in the important functions of raising an army, of providing a public revenue, of paying public debts, and giving security to the persons of foreign ministers, the boasted "sovereignty" of the Federal Government was merely nominal, and owed its entire efficiency to the co-operation and aid of the State governments. Congress had no power to coerce these governments; nor could it exercise any direct authority over their individual citizens.

Although the powers actually assumed and exercised by Congress were certainly very great, they were not always acquiesced in, or allowed, by the States. Thus, the power to lay an embargo was earnestly desired by them, but was denied by the States. And in order the more clearly to indicate that many of their powers were exercised merely by sufferance, and at the same time to lend a sanction to their authority so far as they chose to allow it, it was deemed necessary, by at least one of the States, to pass laws indemnifying those who might act in obedience to the resolutions of that body.<sup>8</sup>

A conclusive proof, however, of the true relation which the colonies hold to the revolutionary government, even in the opinion of Congress itself, is furnished by their own journals. In June, 1776, that body recommended the passing of laws for the punishment of treason; and they declare that the crime shall be considered as committed against the colonies individually, and not against them all, as united or confederated together. This could scarcely have been so, if they had considered themselves "a government de facto and de jure," clothed with "sovereign authority." The author, however, is not satisfied to rest his opinion upon historical facts; he seeks also to fortify himself by a judicial decision. He informs us that, "soon after the organization of the present government, the question [of the powers of the Continental Congress] was most elaborately discussed before the Supreme Court of the United States, in a case calling for an exposition of the appellate jurisdiction of Congress in prize causes, before the ratification of the Confederation. The result of that examination was, that Congress, before the Confederation, possessed, by the consent of the people of the United States, sovereign and supreme powers for national purposes; and, among others, the supreme powers of peace and war, and, as an incident, the right of entertaining appeals in the last resort, in prize causes, even in opposition to State legislation. And that the actual powers exercised by Congress, in respect to national objects, furnished the best exposition of its constitutional authority, since they emanated from the people, and were acquiesced in by the people."

There is in this passage great want of accuracy, and perhaps some want of candor. The author, as usual, neglects to cite the judicial decision to which he alludes, but it must be the case of *Penhallow* and others against Doane's administrators. (3 Dallas' Reports, 54.) Congress, in November, 1775, passed a resolution, recommending to the several colonies to establish prize courts, with a right of appeal from their decisions to Congress. In 1776, New Hampshire accordingly passed a law upon the subject, by which an appeal to Congress was allowed in cases of capture by vessels in the service of the united colonies; but where the capture was made by "a vessel in the service of the united colonies and of any particular colony or person together," the appeal was allowed to the Superior Court of New Hampshire. The brigantine *Susanna* was captured by a vessel owned and commanded by citizens of New Hampshire, and was duly condemned as prize by her own Court of Admiralty. An appeal was prayed to Congress and denied; and thereupon an appeal to the Superior Court of New Hampshire was prayed and allowed.

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8 This was done by Pennsylvania. -- [Sec 9 2 Dallas, Col. L. of Penn. 3.]

From the decision of this Court an appeal was taken to Congress, in the mode prescribed by their resolution, and the case was disposed of by the Court of Appeals, appointed by Congress to take cognizance of such cases. After the adoption of the present Constitution and the organization of the judiciary system under it, a libel was filed in the District Court of New Hampshire, to carry into effect the sentence of the Court of Appeals above mentioned. The cause being legally transferred to the Circuit Court, was decided there, and an appeal allowed to the Supreme Court. That Court, in its decision, sustains the jurisdiction of the Court of Appeals established by Congress. Mr. Justice Patterson's opinion is founded mainly upon these grounds: That the powers actually exercised by Congress ought to be considered as legitimate, because they were such as the occasion absolutely required, and were approved and acquiesced in by "the people"; that the authority ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign, supreme power of war and peace; that this power was lodged in the Continental Congress by the consent and acquiescence of "the people"; that the legality of all captures on the high seas must be determined by the law of nations; that New Hampshire had committed herself upon this subject, by voting in favor of the exercise of the same power by Congress in the case of the brig Active; and as the commission, under which the capture in the case under consideration was made, was issued by Congress, it resulted, of necessity, that the validity of all captures made by virtue of that commission, should be judged of by Congress, or its constituted authority, because "every one must be amenable to the authority under which he acts." It is evident that this opinion, while it sustains the authority of Congress in the particular case, does not prove its general supremacy, nor that the States had surrendered to it any part of their sovereignty and independence. On the contrary, it affirms that the "sovereign and supreme power of war and peace" was assumed by Congress, and that the exercise of it became legitimate, only because it was approved and acquiesced in; and that thus legitimated, the appellate jurisdiction in prize cases followed as a necessary incident. All the powers, which Patterson contends for as exercised by Congress, may all be conceded, without in the slightest degree affecting the question before us; they were as consistent with the character of a federative, as with that of a consolidated government. He does not tell us to what people he alludes, when he says the powers exercised by Congress were approved and ratified by "the people." He does not, in any part of his opinion, authorize the idea of the author, that "Congress possessed, before the Confederation, by the consent of the people of the United States, sovereign and supreme powers for national purposes." On the contrary, as to one of these powers, he holds the opposite language; and, therefore, it is fair to presume, that he intended to be so understood in regard to all the rest. This is his language: "The authority exercised by Congress, in granting commissions to privateers, was approved and ratified by the several colonies or States, because they received and filled up the commissions and bonds, and returned the latter to Congress." This approval and ratification alone rendered, in his opinion, the exercise of this, and other similar powers assumed by Congress, legitimate.

Judge Iredell, in delivering his opinion, goes much more fully into the examination of the powers of the revolutionary government. He thinks that, as the power of peace and war was entrusted to Congress, they held, as a necessary incident, the power to establish prize courts; and that whatever powers they did in fact exercise, were acquiesced in and consented to, and, consequently, legitimated and confirmed. But he leaves no room to doubt as to the source whence this confirmation was derived. After proving that the several colonies were, to all intents and purposes, separate and distinct, and that they did not form "one people" in any sense of the term, he says: "If Congress, previous to

the Articles of Confederation, possessed any authority, it was an authority, as I have shown, derived from the people of each province, in the first instance." "The authority was not possessed by Congress, unless given by all the States." "I conclude, therefore, that every particle of authority, which originally resided either in Congress or in any branch of the State governments, was derived from the people who were permanent inhabitants of each province, in the first instance, and afterwards became citizens of each State; that this authority was conveyed by each body separately, and not by all the people in the several provinces or States jointly." No language could be stronger than this, to disarm Judge Story's conclusion, that the powers exercised by Congress were exercised "by the consent of the people of the United States." Certainly, Iredell did not think so.

The other two Judges, Blair and Cushing, affirm the general propositions upon which Patterson and Iredell sustained the power of Congress in the particular case, but lend us no support to the idea of any such unity among the people of the several colonies or States, as our author supposes to have existed. Cushing, without formally discussing the question, expressly says that "he has no doubt of the sovereignty of the States."

This decision, then, merely affirms, what no one has ever thought of denying, that the revolutionary government exercised every power which the occasion required; that, among these, the powers of peace and war were most important, because Congress, alone, represented all the colonies, and could, alone, express the general will, and wield the general strength; that wherever the powers of peace and war are lodged, belongs also the right to decide all questions touching the laws of nations; that prize causes are of this character; and, finally, that all these powers were not derived from any original grant, but are to be considered as belonging to Congress, merely because Congress exercised them, and because they were sustained in so doing by the approbation of the several colonies or States, whose representatives they were. Surely, then, our author was neither very accurate nor very candid in so stating this decision as to give rise to the idea that, in the opinion of the Supreme Court, Congress possessed original sovereign powers, by the consent of "the people of the United States." Even, however, if they court had so decided, in express terms, it would have been of no value in the present inquiry, as will by-and-by be shown.

The examination of this part of the subject has probably already been drawn out to too great an extent; but it would not be complete without some notice of another ground, upon which our author rests his favorite idea -- that the people of the colonies formed, "one people," or nation. Even if this unity was not produced by the appointment of the revolutionary government, or by the nature of the powers exercised by them, and acquiesced in by the people, he thinks there can be no doubt that this was the necessary result of the Declaration of independence. In order that he may be fully understood upon this point, I will transcribe the entire passage relating to it: "In the next place, the colonies did not severally act for themselves, and proclaim their own independence.<sup>9</sup> It is true that some of the States had previously formed incipient

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9 This statement of Judge Story is in opposition to the following language of Judge Henry Baldwin, who was confessedly one of the ablest jurists who has graced the bench of the Supreme Court of the United States: "Their SEPARATE INDEPENDENCE WAS PROCLAIMED, and they remained towards each other as they were before, as colonies, and then as States; they did not alter their relations; the same delegates from the colonies acted as the representatives of The States; so declared themselves, and continued their session without new credentials. The appointing power being the same, the separate legislature of each State, as a State, nation, or empire; THE PEOPLE the supreme head, as the King, the Emperor, the Sovereign. These colonies were not declared to be free and independent States by

governments for themselves; but it was done in compliance with the recommendations of Congress. Virginia, on the 29th of June, 1776, by a convention of delegates, declared 'the government of this country, as formerly exercised under the Crown of Great Britain, totally dissolved,' and proceeded to form a new constitution of government. New Hampshire also formed a new government, in December, 1775, which was manifestly intended to be temporary, 'during,' as they said, 'the unhappy and unnatural contest with Great Britain.' New Jersey, too, established a frame of government, on the 2d July, 1776; but it was expressly declared that it should be void upon a reconciliation with Great Britain. And South Carolina, in March, 1776, adopted a constitution of government; but this was in like manner 'established until an accommodation between Great Britain and America could be obtained.' But the declaration of the independence of all the colonies was the united act of all. It was 'a declaration of the representatives of the United States of America, in Congress assembled;' 'by the delegates appointed by the good people of the colonies,' as in a prior declaration of rights, they were called. It was not an act done by the State governments then organized, nor by persons chosen by them. It was emphatically the act of the whole people of the united colonies, by the instrumentality of their representatives, chosen for that, among other purposes. It was an act not competent to the State governments, or any of them, as organized under their charters to adopt. Those charters neither contemplated the case nor provided for it. It was an act of original, inherent sovereignty by the people themselves, resulting from their right to change the form of government, and to institute a new government, whenever necessary for their safety and happiness. So the Declaration of Independence treats it. No State had presumed, of itself, to form a new government, or to provide for the exigencies of the times, without consulting Congress on the subject; and when they acted, it was in pursuance of the recommendation of Congress. It was, therefore, the achievement of the whole, for the benefit of the whole. The people of the united colonies made the united colonies free and independent States, and absolved them from allegiance to the British Crown. The Declaration of Independence has, accordingly, always been treated as an act of paramount and sovereign authority, complete and perfect per se; and ipso facto working an entire dissolution of all political, connection with, and allegiance to, Great Britain. And this, not merely as a practical fact, but in a legal and constitutional view of the matter by courts of justice." The first question which this passage naturally suggests to the mind of the reader is this: if two or more nations of people, confessedly separate, distinct and independent, each having its own peculiar government, without any "direct political connection with each other," yet owing the same allegiance to one common superior, should unite in a declaration of rights which they believed belonged to all of them all, would that circumstance alone make them "one people?" Stripped of the circumstances with which Judge Story has surrounded it, this is, at last, the only proposition involved. If Spain, Naples, and Holland, while they were "dependencies" of the Imperial Crown of France, had united in declaring that they were oppressed, in the same mode and degree, by the measures of that Crown, and that they did, for that reason, disdain all allegiance to it, and assume the station of "free and independent States," would they thereby have become one people? Barely this will not be asserted by any one. We should see, in that act, nothing more than the union of several independent sovereignties, for the purpose of effecting a common object, which each felt itself too weak to effect alone. Nothing would be more natural, than that nations so situated should establish a common military power, a common treasury, and a common agency, through which, to carry on their intercourse with other powers; but that

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substituting Congress in the place of King and Parliament; nor by the people of the States, transferring to the UNITED STATES that allegiance they had owed to the Crown." Bald. 29. -- [C. C. B.]

all this should unite them together, so as to form them into one nation, is a consequence not readily perceived. The case here supposed is precisely that of the American colonies, if those colonies were, in point of, fact, separate, distinct, and independent of one another. If they were so, (and I think it has been shown that they were), then the fact that they united in the Declaration of Independence does not make them "one people" any more than a similar declaration would have made Spain, Naples and Holland one people; if they were not so, then they were one people already, and the Declaration of Independence did not render them more or less identical. It is true, the analogy here supposed does not hold in every particular; the relations of the colonies to one another were certainly closer, in many respects, than those of Spain, Naples and Holland, to one another. But as to all purposes involved in the present inquiry, the analogy is perfect. The effect attributed to the Declaration of Independence presupposes that the colonies were not "one people" before; an effect which is in no manner changed or modified by any other circumstance in their relation to one another. That fact, alone, is necessary to be inquired into; and until that fact is ascertained, the author's reasoning as to the effect of the Declaration of Independence, in making them "one people," does not apply. He is obliged, therefore, to abandon the ground previously taken, to wit: that the colonies were one people before the Declaration of Independence. And having abandoned it, he places the colonies, as this question, upon the footing of any other separate and distinct nations; and, as to these, it is quite evident that the conclusion which he has drawn, in the case of the colonies, could not be correct, unless it would be equally correct in the case of Spain, Naples and Holland, above supposed.

## **CHAPTER V - THE DECLARATION OF INDEPENDENCE DID NOT CONSOLIDATE THE COLONIES INTO ONE PEOPLE**

The mere fact, then, that the colonies united in the Declaration of Independence, did not necessarily make them one people. But it may be said that this fact ought, at least, to be received as proof that they considered themselves as one people already. The argument is fair, and freely let it go for what it is worth. The opinion of the Congress of 1775, whatever it may have been, and however strongly expressed, could not possibly change the historical facts. It depended upon those facts, alone, whether the colonies were one people or not. They might by their agreement, expressed through their agents in Congress, make themselves one people through all time to come; but their power, as to this matter, could not extend to the time past. Indeed, it is contended, not only by Judge Story, but by others, that the colonies did, by and in that act, agree, to become "one people" for the future. They suppose that such agreement is implied, if not expressed, in the following passages: "We, therefore, the representatives of the United States of America," "do, in the name and by the 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." Let us test the correctness of this opinion, by the history of the time, and by the rules of fair criticism.

The Congress of 1775, by which independence was declared, was appointed, as has been before shown, by the colonies in their separate and distinct capacity, each acting for itself, and not conjointly with any other. They were the representatives each of his own colony, and not of any other; each had authority to act in the name of his own colony, and not in that of any other; each colony gave its own vote by its own representatives, and not by those of any other colony. Of course, it was as separate and distinct colonies that they deliberated on the Declaration of Independence. When, therefore, they declare, in the adoption of that measure, that they act as "the

representatives of the United States of America," and "in the name and by the authority of the good people of these colonies," they must of course be understood as speaking in the character in which they had all along acted; that is, as the representatives of separate and distinct colonies, and not as the joint representatives of any one people. A decisive proof of this is found in the fact that the colonies voted on the adoption of that measure in their separate character, each giving one vote by all its own representatives, who acted in strict obedience to specific instructions from their respective colonies, and the members signed the Declaration in that way. So, also, when they declared that "these united colonies are, and of right ought to be, free and independent States," they meant only that their respective communities, which until then had been dependent colonies, should thereafter be independent States, and that the same union, which existed between them as colonies, should be continued between them as States. The measure under consideration looked only to their relation to the mother country, and not to their relation to one another; and the sole question before them was, whether they should continue in a state of dependence on the British Crown or not. Having determined that they would not, they from that moment ceased to be colonies, and became States; united, precisely as before, for the common purpose of achieving their common liberty. The idea of forming a closer union, by the mere act of declaring themselves independent, could scarcely have occurred to any one of them. The necessity of such a measure must be apparent to all, and it had long before engaged their attention in a different form. Men, of their wisdom and forecast, meditating a measure so necessary to their common safety, would not have left it as a mere matter of inference from another measure in point of fact, it was already before them, in the form of a distinct proposition, and had been so ever since their first meeting in May, 1775,<sup>10</sup> it is impossible to suppose, therefore, in common justice to the sagacity of Congress, that they meant anything more by the Declaration of Independence, than simply to sever the tie which had theretofore bound them to England, and to assert the rights of the separate and distinct colonies, as separate and independent States particularly as the language which they use is fairly susceptible of this construction. The instrument itself is entitled, "The Unanimous Declaration of the Thirteen United States of America"; of States, separate and distinct bodies politic, and not of "one people" or nation, composed of all of them together; "united," as independent States may be, by compact or agreement, and not amalgamated, as they would be, if they formed one nation or body politic.

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10 A document which I have so met with elsewhere but which may be found in the Appendix to Professor Tucker's elaborate and instructive Life of Jefferson, affords important evidence upon this point. As early as May, 1775, the plan of a "confederation and perpetual union" among the colonies, was prepared and proposed for adoption. It was not in fact adopted, but its provisions show, in the strongest manner, in what light the colonies regarded their relation to one another. The proposed union was called "a firm league of friendship"; each colony reserved to itself "as much as it might think proper of its own present laws, customs, rights, privileges, and peculiar jurisdictions, within its own limits; and may amend its own Constitution as may seem best to its own Assembly or Convention"; the external relations of the colonies were to be managed by their general government alone, and all amendments of their "Constitution," as they termed it, were to be proposed by Congress and "approved by a majority of the colony assemblies." It can scarcely be contended that this "league of friendship," this "confederation and perpetual union," would, if it had been adopted, have rendered the people of the several colonies less identical than they were before. If, in their opinion, they were "one people" already, no league or confederation was necessary, and no one would have thought of proposing it. The very fact, therefore, that it was proposed, as a necessary measure "susceptible for their common defence" against their enemies, for the security of their liberties and their properties, the safety of their persons and families, and their mutual and general welfare," proves that they did not consider themselves as already "one people," in any sense or to any extent which would enable them to effect those important objects.

This proposition was depending and undetermined at the time of the declaration of independence.

Is it true, then, as Judge Story supposes, that "the colonies did not severally act for themselves, and proclaim their own independence?" It is true that they acted together; but is it not equally true that each acted for itself alone, without pretending to any right or authority to bind any other? Their declaration was simply their joint expression of their separate wills; each expressing its own will, and not that of any other; each bound by its own act, and not responsible for the act of any other. If the colonies had severally declare their independence through their own legislatures, and had afterwards agreed to unite their forces together to make a common cause of their contest, and to submit their common interests to the management of a common council chosen by themselves, wherein would their situation have been different? And is it true that this Declaration of Independence "was not an act done by the State governments then organized, nor by persons chosen by them?" that "it was emphatically the act of the whole people of the united colonies, by the instrumentality of their representatives chosen for that, among other purposes?" What representatives were those that were chosen by "the people of the united colonies?" When and how were they chosen? Those who declared the colonies independent, were chosen more than a year before that event; they were chosen by the colonies separately, and, as has already been shown, through the instrumentality of their own "governments then organized"; they were chosen, not for the "purpose" of declaring the colonies independent, but of protecting them against oppression, and bringing about a reconciliation with the parent country, upon fair terms, if possible. (Jefferson's Notes, 1st ed., 128, 129.) If there were any other representatives than those concerned in the Declaration of Independence, if that act was performed by representatives chosen by the whole people of the colonies, for that or any other purpose, if any such representatives could possibly have been chosen by the colonies as then organized, no historical record, that has yet met my view, contains one syllable of the matter.

The author seems to attach but little importance to the fact, that several of the colonies had established separate governments for themselves, prior to the Declaration of Independence. He regards this as of little consequence; because he thinks that the colonies so acted only in pursuance of the recommendation of Congress, and would not have "presumed" to do it, "without consulting Congress upon the subject"; and because the governments so established were, for the most part, designed to be temporary, and to continue only during the contest with England. Such recommendation was given in express terms, to New Hampshire and South Carolina, in November, 1775, and to Virginia in December of that year; and on the 10th May, 1776, "it was resolved to recommend to the respective, assemblies and conventions of the united colonies where no government sufficient to the exigencies of their affairs had been established, to adopt such a government as should, in the opinion of the representatives of the people, best conduce to the happiness and safety of their Constituents in particular, and of America in general." The preamble to this resolution was not adopted till, the 15th May. (1 Elliott's Debates, 80, 83.) It is evident from the language here employed, that Congress had no power over the colonies as to this matter, and no right to influence or control them in the exercise of the important function of forming their own governments. It recommended only; and contemplating the colonies as separate and distinct, referred it to the assembly or convention of each, to establish any form of government which might be acceptable to its own people. Of what consequence was it whether the colonies acted upon the recommendation and advice of others, or merely upon their own will and counsels? With whatever motive the act was performed, it was one of supreme and sovereign power, and such as could not have been performed except by a sovereign people. And whether the government so established was intended to last forever, or only for a limited time, did

not affect its character as an act of sovereign power. In point of fact, then, the colonies which established such governments did, by that very act, assert their sovereignty and independence. They had no power under their charters, to change their governments. They could do so only by setting their charters aside, and acting upon their inherent, sovereign right: and this was revolution. In effect, therefore, many of the colonies had declared their independence prior to the 4th July, 1776; they had commenced the revolution, and were considered by England as in a state of rebellion. Of Virginia this is emphatically true. Her declaration of rights was made on the 12th of June, 1776; and her Constitution was adopted on the 28th of the same month. This Constitution continued until 1829. Her subsequent declaration of independence, on the 4th of July, in common with the other colonies, was but a more public, though not a more solemn affirmation of what she had previously done; a pledge to the whole world, that what she had resolved on in her separate character, she would unite with the other colonies in performing. She could not declare herself free and independent more distinctly, in that form, than she had already done, by asserting her sovereign and irresponsible power, in throwing off her former government, and establishing a new one for herself.<sup>11</sup>

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11 In point of fact, Virginia declared her independence on the 15th of May, 1776. The following beautiful allusion to that scene is extracted from an address delivered by Judge Beverly Tucker, of William and Mary College, before the Petersburg Lyceum, on the 15th of May, 1848:

That spectacle, on this day sixty-three years, Virginia exhibited to the world; and the memory of that majestic scene it is now my task to rescue from oblivion. It was on that day that she renounced her colonial dependence on Great Britain, and separated herself forever from that kingdom.

Then it was that, bursting the manacles of a foreign tyranny, she, in the same moment imposed on herself the salutary restraints of law and order. In that moment she commenced the work of forming a government, complete within itself; and having perfected that work, she, on the 29th of June in the same year, performed the highest function of independent sovereignty, by adopting, ordaining, and establishing the Constitution under which all of us were born. Then it was that, sufficient to herself for all the purposes of government, she prescribed the oath of fealty and allegiance to her solo and separate sovereignty, which all of us, who have held any office under her authority, have solemnly called upon the Searcher of Hearts to witness and record. In that hour, gentlemen, it could not be certainly known, that the other colonies would take the same decisive step. It was indeed, expected. In the same breath in which she had declared her own independence, Virginia had advised it. She had instructed her delegates in the General Congress to urge it; and it was by the voice of one of her sons, whose name will ever proudly live in her history, that the word of power was spoken, at which the chain that bound the colonies to the parent kingdom fell asunder, as flax that severs at the touch of fire. But even then, and while the terms of the general Declaration of Independence were yet unsettled, hers had already gone forth. The voice of her defiance was already ringing in the tyrant's ears; hers was the cry that summoned him to the strife; hers was the shout that invited his vengeance: "Me! me! Adsum qui feci; in me, converlute ferrum."

This beautiful address, abounding in patriotic sentiments, and sound political doctrines, clothed in the richest language, ought to be in the hands of every citizen, particularly of those of Virginia. The following extract from the Journals of the Convention, containing the history of this interesting event; cannot fail to be acceptable to every American reader:

"Wednesday, May 11th, 1770.

"The convention, then, According to the order of the day, resolved itself into a committee on the state of the colony; and, after some time spent therein, Mr. President resumed the chair, and Mr. Cary reported that the committee had, according to order, had under consideration the state of the colony; and had come to the following resolutions thereupon; which he had read in his place, and afterwards delivered at the clerk's table, where the same were again twice read, and unanimously agreed to, one hundred and twelve members being present.

"For as much as all the endeavors of the united colonies, by the most decent representations and petitions to the King and Parliament of Great Britain, to restore peace and security to America under the British Government, and a reunion with that people, upon just and liberal terms, instead of a redress of grievances, have produced from an imperious and vindictive administration, increased insult, oppression, and a vigorous attempt to effect our total destruction. By a late act, all the colonies are declared to be in rebellion, and out of the protection of the British Crown, our

There is yet another view of this subject, which cannot be properly omitted. It has already been shown that, prior to the Revolution, the colonies were separate and distinct, and were not, in any political sense, or for any purpose of government, "one people." The sovereignty over them was in the British Crown; but that sovereignty was not jointly over all, but separately over each, and might have been abandoned as to some, and retained so to others. The Declaration of Independence broke this connection. By that act, and not by the subsequent recognition of their independence, the colonies became free States. What then became of the sovereignty of which we speak? It could not be in abeyance; the moment it was lost by the British Crown, it must have vested somewhere else. Doubtless it vested in the States themselves. But, as they were separate and distinct as colonies, the sovereignty over one could not vest, either in whole or in part, in any other. Each took to itself that sovereignty which applied to itself, and for which alone it had contended with the British Crown, to wit: the sovereignty over itself. Thus each colony became a free and sovereign State. This is the character which they claim in the very terms of the Declaration of Independence; in this character they formed the Colonial Government, and in this character that government always regarded them. Indeed, even in the earlier treaties with foreign powers, the distinct sovereignty of the States is carefully recognized. Thus, the treaty of alliance with France, in 1778, is made between "the most Christian King and the United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island, Connecticut," &c., enumerating them all by name. The same form is observed in the treaty of amity and commerce with the States General of the United Netherlands, in 1782, and in the treaty with Sweden, in

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properties subjected to confiscation, our people, then captivated, compelled to join in the plunder and murder of their relations and countrymen, and all former rapine and oppression of Americans declared legal and just. Fleets and armies are raised, and, the aid of foreign troops engaged to assist these destructive purposes. The King's representative in this colony hath not only withheld all powers of government from operating for our safety, but having retired on board an armed ship, is carrying on a piratical and savage war against us, tempting our slaves by every artifice to resort to him, and training and employing them against their masters.

"In this state of extreme danger, we have no alternative left, but an abject submission to the will of those overbearing tyrants, or a total separation from the crown and Government of Great Britain, uniting and exerting the strength of all America for defence, and forming alliances with foreign powers for commerce and aid in war. Wherefore, appealing to the Searcher of all Hearts for sincerity of former declarations, expressing our desire to preserve our connection with that nation, and that we are driven from that inclination by their wicked councils, and the eternal laws of self-preservation; resolved unanimously, that the delegates appointed to represent this colony in general Congress, be instructed to propose to that respectable body, to declare the united colonies free and independent States, absolved from all allegiance to, or dependence upon the Crown or Parliament of Great Britain; and that they give the assent of this colony to that declaration, and to whatever measures may be thought proper and necessary by the Congress, for forming foreign alliances, and a confederation of the colonies, at such time and in such manner as to them may seem best. Provided, that the power of forming government for, and the regulations of the internal concerns of each colony, be left to the respective colonial legislatures.

"Resolved, Unanimously, that a committee be appointed to prepare a declaration of rights, and such a plan, of government, as will be most likely to maintain peace and order in this colony, and secure substantial and equal liberty to the people.

And a committee was appointed of the following gentleman: Mr. Archibald Cary, Mr. Meriweather Smith, Mr. Mercer, Mr. Henry Us, Mr. Treasurer, Mr. Beaty, Mr. Dandridge, Mr. Edmund Randolph, Mr. Gilmer, Mr. Bland, Mr. Digges, Mr. Carrington, Mr. Thomas Ludwel Lee, Mr. Cabell, Mr. Jones, Mr. Blair, Mr. Flaming, Mr. Tazewell, Mr. Richard Cary, Mr. Bullit, Mr. Watts, Mr. Banister, Mr. Page, Mr. Starke, Mr. David Mason, Mr. Adams, Mr. Read, and Mr. Thomas Lewis."

It is impossible to contemplate this proceeding on the part of Virginia, without being convinced that she acted from her own free and sovereign will; and that she, at least, did "presume" to establish a government for herself, without the least regard to the recommendation or the pleasure of Congress.

1783. In the convention with the Netherlands, in 1782, concerning recaptured vessels, the names of the States are not recited, but "the United States of America" is the style adopted; and so also in some others. This circumstance shows that the two forms of expression were considered equivalent; and that foreign nations, in treating with the revolutionary government, considered that they treated with distinct sovereignties, through their common agent, and not with a new nation, composed of all those sovereign countries together. It is true, they treated with them jointly, and not severally; they considered themselves all bound to the observance of their stipulations, and they believed that the common authority, which was established between and among them, was sufficient to secure that object. The provisional articles with Great Britain, in 1782, by which our independence was acknowledged, proceeded upon the same idea. The first, article declares, that "His Britannic Majesty acknowledges the said United States, to wit: New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free, sovereign and independent States that he treats with them as such," &c. Thus the very act, by which their former sovereign releases them from their allegiance to him, confirms to each one by name the sovereignty within its own limits, and acknowledges it to be a free, sovereign, and independent State; united, indeed, with all the others, but not as forming with them tiny new and separate nation. The language employed is not suited to convey any other idea. If it had been in the contemplation of the parties, that the States had merged themselves into a single nation, something like the following formula would naturally have suggested itself as proper: "His Britannic Majesty acknowledges that New Hampshire, Massachusetts Bay, &c., former colonies of Great Britain and now united together as one people, are a free, sovereign and independent State," &c. The difference between the two forms of expression, and the strict adaptation of each to the state of things which it contemplates, will be apparent to every reader.

It requires strong and plain proof to authorize us to say, that a nation once sovereign has ceased to be so. And yet Judge Story requires us to, believe this of the colonies, although he acknowledges that he cannot tell, with any degree of confidence or precision, when, how, or to what extent the sovereignty, which they acquired by declaring their independence, was surrendered. According to him, the colonies are to be presumed to have yielded this sovereignty to a government established by themselves for a special and temporary purpose, which existed only at their will, and by their aid and support; whose powers were wholly undefined, and for the most part exercised by usurpation on its part, and legitimated only by the acquiescence of those who appointed it; whose authority was without any adequate sanction which it could itself apply, and which, as to all the important functions of sovereignty, was a mere name -- the shadow without the substance! If the fact was really so, I venture to affirm that the history of the world affords no similar instance of folly and infatuation.<sup>12</sup>

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12 The language of the Supreme Court is very full in declaring that the colonies did not lose their sovereign independence of each other and become one people by virtue of the Declaration of Independence of Great Britain. "No sovereignty did or could exist over them, unless that of Great Britain should be restored by a reconciliation; which not happening, their Declaration of Independence, in their separate conventions, became absolute, and these States were independent, according to the universal opinion of the country, which is most clearly expressed in the language of this Court." (4 Cranch, 212, *McIlvaine v. Coxe.*), "The authority of this Court is respected, the Declaration of Independence is to the judicial mind what it is to the common eye, a proclamation to the world, by the separate States, assembled in Congress by their respective deputies, voting for and signing the instrument by States, a publication of their existing political condition, each as an independent State." "They declared these united colonies

## **CHAPTER VI - THE ARTICLES OF CONFEDERATION DO NOT IMPAIR THE SOVEREIGNTY OF THE STATES, NOR CONSOLIDATE THEM INTO ONE PEOPLE**

Whatever may have been the condition of the colonies prior to 1781, there is no room for doubt on the subject, after the final ratification of the Articles of Confederation in that year. Those articles declare that "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 obvious construction of this clause requires that we should apply these latter words only to "powers, jurisdiction and rights"; some of which, as enjoyed by the States under the previous government, were clearly surrendered by the Articles of Confederation. But their entire sovereignty, their entire freedom, and their entire independence, are reserved, for these are not partible. Indeed, this is clear enough, from the provisions of that instrument, which, throughout, contemplate the States as free, sovereign and independent.<sup>13</sup> It is singular, too, that it should escape the observation of any one, that the very fact of adopting those articles, and the course pursued in doing so, attest, with equal clearness and strength, the previous sovereignty and independence of the States. What had the States in their separate character to do with that act, if they formed altogether "one people?" And yet the States, and the States alone, performed it, each acting for itself, and binding itself. The articles were confirmed by ten States, as early as 1778, by another in 1779, and by another in 1780; and yet they were not obligatory until Maryland acceded to them, in 1781. Nothing less than the ratification of them by all the States, each acting separately for itself, was deemed sufficient to give them any binding force or authority.

There is much force and meaning in the word "retains," as it occurs in the clause above quoted. Nothing can properly be said to be retained, which was not possessed before; and of course the States possessed before "sovereignty, freedom, and independence." These they retained without any qualification, or limitation, and they also retained every "power, jurisdiction, and right," which they did not then, expressly surrender.

If these views on the subject be not wholly deceptive, Judge Story has hazarded, without due caution, the opinion that the colonies formed "one people," either before or after the Declaration of Independence, and that they are not to be regarded as sovereign States after that event. For myself, I profess my utter inability to perceive, in their condition, any nearer approach to political personality or individuality, than may be found in a mere

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to be independent States, not one State, " (or country)' 16 as the State of Great Britain." "Each declared itself sovereign and independent, according to the limits of their territory." (Baldwin, 74, 15; 12 Wheaton, 522, 7.) In October, 1776, Congress directed that every officer should swear, that "I acknowledge the thirteen United States of America, namely: New Hampshire, &c., to be free, independent and sovereign States" The name of each of the thirteen States was named as a distinct sovereignty. (2 Journal of Congress, 400.) In November of the same year, Congress addressed a circular letter to the respective legislatures of the States, speaking of them as "so many sovereign and, independent communities," and to each respective legislature it is recommended, ' &c. (1 Laws U. S., 12, 13.) How can such language be reconciled with the idea of Judge Story, that "the colonies did not severally act for themselves?" -- [C. C. B.]

- 13 Commenting upon the separate independence of the States, Judge Baldwin says: "Such was the situation of the States and people, from 1770 till 1781, when the several State legislatures made an act of Federation, as ALLIED SOVEREIGNS, Which was only a league or alliance." This confederation of 1781 may be regarded as the actual date of the Union. Some of its details were afterwards modeled, curtailed or extended, but the principle of allied sovereign States was never changed. -- [C. C. B.]

league or confederation between sovereign and independent States; and a very loose confederation theirs undoubtedly was.<sup>14</sup>

## **CHAPTER VII - THE CONSTITUTION DID NOT CHANGE THE SOVEREIGN ATTITUDE OF THE STATES, OR CONSOLIDATE THEM INTO A NATIONAL GOVERNMENT**

The third division of Judge Story's work commences with a history of the adoption of the Constitution. This also is given in an abridged form; but it omits nothing which can be considered material to the inquiry. Perhaps the author has fallen into one error, an important one, certainly, in stating that "at the time and place appointed, the representatives of twelve States assembled." When the deputies first met in Philadelphia, in May, 1787, the representatives of only nine States appeared; they were, soon after, joined by those of three others. The author next proceeds to state the various objections which were urged against the Constitution, with the replies thereto; to examine the nature of that instrument to ascertain whether it be a compact or not; to inquire who is the final judge or interpreter in Constitutional controversies; to lay down rules of interpretation; and, finally, to examine the Constitution in its several departments and separate clauses. In the execution of this part of his task he has displayed great research, laborious industry, and extensive judicial learning. The brief summary which he has given of the arguments by which the Constitution was assailed on the one hand, and defended on the other, is not only interesting as matter of history, but affords great aid in understanding that instrument. We should be careful, however, not to attach to these discussions an undue importance. All the members of the various conventions did not engage in the debates, and, of course, we have no means of determining by what process of reasoning they were led to their conclusions. And we cannot reasonably suppose that the debaters always expressed their deliberate and well weighed opinions in all the arguments, direct and collateral, by which they sought to achieve a single great purpose. We are not, therefore, to consider the Constitution as the one thing or the other, merely because some of the framers, or some of the adopters of it, chose to characterize it in their debates. Their arguments are valuable as guides to our judgments, but not as authority to bind them.

In the interpretation of the Constitution, the author founds himself, whenever he can, upon the authority of the Supreme Court. This was to be expected; for, in so doing, he has, in most cases, only reiterated his own judicial decisions. We could not suppose that one, whose opinions are not lightly adopted, would advance, as a commentator, a principle which he rejected as a judge. In most cases, too, no higher authority in the interpretation of the Constitution is known in our systems, and none better could be desired. It is only in questions of political power, involving the rights of the States in reference to the Federal Government; that any class of politicians are disposed to deny the authority of the judgments of the Supreme Court.<sup>15</sup> We shall have occasion to examine this subject more at large, in a subsequent part of this review.

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14 That the Union in 1781 was simply a league of separate sovereign communities, is sufficiently attested In Article III. of the Confederation: "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, trade, or any other pretense whatever." -- [C. C. B.]

15 Taking the relation of the States to each other, as it exists under the Constitution, and as declared by this Court, in one uniform and consistent series of adjudication, from 6 Cr. 136, to 2 Pet. 590, 1: that "the several States are still foreign to each other, for all but Federal purposes"; their position an "a

In discussing the various clauses of the Constitution, Judge Story displays great research, and a thorough acquaintance with the history of that instrument. It is not perceived, however, that he has presented any new views of it, or offered any new arguments in support of the constructions which it has heretofore received. As a compendium of what others have said and done upon the subject, his work is very valuable. It facilitates investigation, whilst, at the same time, it is so full of matter, as to render little farther investigation necessary. Even in this view of the subject, however, it would have been much more valuable if it had contained references to the authorities on which its various positions are founded, instead of merely extracting their substance. The reader who, with his book as his guide, undertakes to acquaint himself with the Constitution of the United States, must take the authority of the author as conclusive, in most cases; or else he will often find himself perplexed to discover the sources from which he derives his information. This is a great defect in a work of this sort, and is the less excusable, because it might have been easily avoided. A writer who undertakes to furnish a treatise upon a frame of government, in relation to which great and contested political questions have arisen, owes it alike to his reader and to himself, to name the sources whence he draws whatever information he ventures to impart, and the authorities upon which he founds whatever opinions he ventures to inculcate. The reader requires this for the satisfaction of his own judgment; and the writer ought to desire it as affording the best evidence of his own truth and candor.

In this division of the work, the author pursues the idea cautiously hinted in the first division, and more plainly announced in the second; and he now carries it out boldly in its results. Having informed us that, as colonies, we were "for many purposes one people," and that the Declaration of Independence made us "a nation de facto," he now assumes the broad ground that this "one people," or nation de facto, formed the Constitution under which we live. The consequences of this position are very apparent throughout the remainder of the work. The inferences fairly deduced from it impart to the Constitution its distinctive character, as the author understands it; and, of course, if this

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single unconnected sovereign power" before and without any confederation between them, is an inevitable consequence." (Baldwin, 83.) "As the States are still foreign to each other, for all but Federal purposes, the United States could have neither a right of soil nor jurisdiction, propriety or dominion, within any particular State, but by a cession from the State by its legislature, or a convention of the people. \* \* The Constitution is a cession of jurisdiction only, made by the people of a State," (Baldwin, 94.) But the United States must have the "consent of a State," and "purchase from the owners of the soil it before it can build a post-office, custom-house, fort, dock-yard, or any other public structure. Thus the sovereignty of a State over its own territory has not been ceded by the adoption of the Constitution. "By the treaty of peace with Great Britain, the powers of government, and the right of soil, which had previously been in Great Britain, passed definitely to these States." (8 Wheaton, 584.)" Then there could be no mode by which the United States could acquire either 'the powers of government,' or the 'right of soil' in any territory, but by a cession from the States. \* \* And it was held by this Court, that the only territory which in fact belonged to the United States in 1787 was acquired by the cession from Virginia." "What then is the extent of jurisdiction which a State possesses? We answer without hesitation the Jurisdiction of a State is co-extensive with its legislative power." (5 Wheat., 375; Baldwin, 87, 88.) The right of soil and general jurisdiction over the whole territory, within the boundaries of the several States, was invested in the people of each State, as absolute sovereigns of both; neither right can be exercised but by a grant from them, and what is not given away by cession, still remains with them." (Baldwin, 99; 2 Peters, 468.) In 1795, Georgia, which had ceded none of its territory, made sale of a large tract, on the Yazoo River. The United States denied the right of Georgia to make such sale. The question was brought before the Supreme Court in the case of Fletcher P. Peck, and the Court decided that the title of the land was in Georgia. (6 Cranch 142.) Referring to the formation of the Union, the Court held that: "A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems. (10 Wheaton, 46) " The power having existed prior to the Constitution, and not having been prohibited by that instrument, remains with the States." (5 Wheaton, 16, 17; 2 Peters, 466.) -- [C. C. B.]

fundamental position be wrong, that instrument is not in many of its provisions, what he represents it to be. The reader, therefore, should settle this question for himself in the outset; because, if he differ from the author upon this point, he will be compelled to reject by far the most important part of the third and principal division of these commentaries.

The opinion, that the Constitution was formed by "the people of the United States," as contradistinguished from the people of the several States, that is, as contradistinguished from the States as such, is founded exclusively on the particular terms of the preamble. The language is: "We, the people of the United States, do ordain and establish this Constitution for the United States of America." "The people do ordain and establish, not contract and stipulate with each other." "The people of the United States, not the distinct people of a particular State with the people of the other States." In thus relying on the language of the preamble, Judge Story rejects the lights of history altogether. I will endeavor, in the first place, to meet him on his own ground.

It is an admitted rule, that the preamble of a statute may be resorted to in the construction of it; and it may, of course, be used to the same extent in the construction of a constitution, which is a supreme law. But the only purpose for which it can be used is to aid in the discovery of the true object and intention of the law, where these would otherwise be doubtful. The preamble can, in no case, be allowed to contradict the law, or to vary the meaning of its plain language. Still less can it be used to change the true character of the lawmaking power. If the preamble of the Constitution had declared that it was made by the people of France or England, it might, indeed, have been received as evidence of that fact, in the absence of all proof to the contrary; but surely it would not be so received against the plain testimony of the instrument itself, and the authentic history of the transaction. If the convention which formed the Constitution was not, in point of fact, a convention of the people of the United States, it had no right to give itself that title; nor had it any right to act in that character, if it was appointed by a different power. And if the Constitution, when formed, was adopted by the several States, acting through their separate Conventions, it is, historically untrue that it was adopted by the aggregate people of the United States. The preamble, therefore, is of no sort of value in settling this question; and it is matter of just surprise that it should be so often referred to, and so pertinaciously relied on, for that purpose. History alone can settle all difficulties upon this subject.

The history of the preamble itself ought to have convinced our author, that the inference which he draws from it could not be allowed. On the 6th of August, 1787, the committee appointed for that purpose reported the first draft of a Constitution. The preamble was in these words: "We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, do ordain, declare and establish the following Constitution, for the government of ourselves and our posterity." (1 Elliott's Debates, 255.) On the very next day this preamble was unanimously adopted; and the reader will at once perceive, that it carefully preserves the distinct sovereignty of the States, and discountenances all idea of consolidation. (Ib. 263.) The draft of the Constitution thus submitted was discussed, and various alterations and amendments adopted, (but without any change in the preamble), until the 8th of September, 1787, when the following resolution was passed: "It was moved and seconded to appoint a committee of five, to revise the style of, and arrange the articles agreed to by, the House; which passed in the affirmative." (Ib. 324.) It is manifest that this committee had no power to change the meaning of anything which had been adopted, but were authorized merely to "revise the style," and arrange the matter in

proper order. On, the 12th of the same month they made their report. The preamble, as they reported it, is in the following words "We, the people of the United States, in order to form a more perfect union,<sup>16</sup> to 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." (Ib. 326.) It does not appear that any attempt was made to change this phraseology in any material point, or to reinstate the original. The presumption is, therefore, that the two were considered as substantially the same, particularly as the committee had no authority to make any change except in the style. The difference in the mere phraseology of the two was certainly not overlooked; for on the 13th September, 1787, "it was moved and seconded to proceed to the comparing of the report from the committee of revision, with the articles which were agreed to by the House, and to them referred to for arrangement; which passed in the affirmative. And the same was read by paragraphs, compared, and, in some places, corrected and amended," (Ib. 338.) In what particulars these corrections and amendments were made, we are not very distinctly informed. The only change which was made in the preamble, was by striking out the word "to," before the words "establish justice"; and the probability is, that no other change was made in any of the articles, except such as would make "the report of the committee of revision" "correspond with the articles agreed to by the House." The inference, therefore, is irresistible, that the convention considered the preamble reported by the committee of revision, as substantially corresponding with the original draft, as unanimously "agreed to by the House."

There is, however, another and a perfectly conclusive reason for the change of phraseology, from the States by name, to the more general expression "the United States"; and this, too, without supposing that it was intended thereby to convey a different idea as to the parties to the Constitution. The revised draft contained a proviso, that the Constitution should go into operation when adopted and ratified by nine States. It was, of course, uncertain whether more than nine would adopt it or not, and if they should not, it would be altogether improper to name them as parties to that instrument. As to one of them, Rhode Island, she was not even represented in the convention, and, consequently, the others had no sort of right to insert her as a party. Hence it became necessary to adopt a form of expression which would apply to those who should ratify the Constitution, and not to those who should refuse to do so. The expression actually

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16 The phrase "to form a more perfect union" has been sometimes quoted to prove that the new Constitution was designed to alter fundamentally the confederate nature of the Union. But it is surprising that any gentleman capable of comprehending the force of language should make such a mistake as to imagine that the phrase "more perfect union" is implied a consolidation of the States. UNION and CONSOLIDATION are words of a very different signification. The object was not to sink the Union in consolidation, but to "form a MORE PERFECT Union." The name of our federation is not CONSOLIDATED STATES but UNITED STATES. A number of States held together by coercion, or the point of the bayonet, would not be a UNION. Union is necessarily voluntary -- the act of choice, free association. Nor can this VOLUNTARY system be changed to one of force without the destruction of "THE UNION." The Austrian Empire is composed of several States, as the Hungarians, the Poles, the Italians, etc., but it cannot be called a UNION -- it is a despotism. Is the relation between Russia, and bayonet-held Poland a UNION? Is It not an insult and a mockery to call the compulsory relation between England and Ireland a UNION? In all these cases there is only such a union as exists between the talons of the hawk and the dove, or between the jaws of the wolf and the lamb. A UNION OF STATES necessarily implies separate sovereignties, voluntarily acting together. And to bruise these distinct sovereignties into one mass of power is, simply, to destroy the Union -- to overthrow our system of government. The Supreme Court has always been clear enough on this point: "No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people Into one common mass. Of consequence, when they act, they ad in their States," (4 Wheaton, 403 McCullough v. Maryland) -- [C. C. B.]

adopted answers that purpose fully. It means simply: "We, the people of those States who have united for that purpose, do ordain," &c. This construction corresponds with the historical fact, and reconciles the language employed with the circumstances of the case. Indeed, similar language was not unusual, through the whole course of the Revolution. "The people of His Majesty's colonies," "the people of the united colonies," "the people of the United, States," are forms of expression which frequently occur, without intending to convey any other idea than that of the people of the Several colonies or States.

It is, perhaps, not altogether unworthy of remark, in reference to this inquiry, that the word "people" has no plural termination in our language. If it had, the probability is that the expression would have been "we, the peoples," conveying, distinctly, the idea of the people of the several States. But, as no such plural termination is known in our language, the least that we can say is, that the want of it affords no argument in favor of the author's position.

This brief history of the preamble, collected from the Journals of the Convention, will be sufficient to show that the author has allowed it an undue influence in his construction of the Constitution. It is not from such vague and uncertain promises, that conclusions, so important and controlling, can be wisely drawn. Judge Story, however, is perfectly consistent in the two characters in which he appears before us; the commentator takes no ground which the judge does not furnish. It is remarkable that although this question was directly presented in the case of *Martin vs. Hunter's Lessees*, and although the fact that the Constitution of the United States "was ordained and established, not by the States in their sovereign capacities, but emphatically by the people of the United States," is made the foundation of the judgment of the Supreme Court in that case; yet, Judge Story, in delivering the opinion of the Court, rests that position upon the preamble alone, and offers no other argument whatever to support it. And this, too, although in his own opinion, upon the right decision of that case rested "some of the most solid principles which have hitherto been supposed to sustain and protect the Constitution of the United States." It is much to be regretted, that principles so important should be advanced as mere dogmas, either by our judges or by the instructors of our youth.

In this case, as in others, however, we ought not to be satisfied with simply proving that the author's conclusions are not warranted by the facts and arguments from which he derives them. Justice to the subject requires a much more full and detailed examination of this important and fundamental question. I have endeavored to show, in the preceding part of this review, that the people of the several States, while in a colonial condition, were not "one people" in any political sense of the terms; that they did not become so by the Declaration of Independence, but that each State became a complete and perfect sovereignty within its own limits; that the revolutionary government, prior to the establishment of the confederation, was, emphatically, a government of the States as such, through Congress, as their common agent and representative, and that by the Articles of Confederation, each State expressly reserved its entire sovereignty and independence. In no one of the various conditions, through which we have hitherto traced them, do we perceive any feature of consolidation; but their character as distinct and sovereign States is always carefully and jealously preserved. We are, then, to contemplate them as sovereign States, when the first movements towards the formation of the present Constitution were made.

Judge Story has given a correct history of the preparatory steps towards the call of a convention. It was one of those remarkable events, (of which the history of the world affords many examples), which have exerted the most important influence upon the

destiny of mankind, and yet have sprang from causes which did not originally look to any such results. It is true, the defects of the confederation, and its total inadequacy to the purposes of an effective government, were generally acknowledged; but I am not aware that any decisive step was taken in any of the States, for the formation of a better system, prior to the year 1786. In that year the difficulties and embarrassments under which our trade suffered, in consequence of the conflicting and often hostile commercial regulations of the several States, suggested to the Legislature of Virginia the necessity of forming among all the States a general system, calculated to advance and protect the trade of all of them. They accordingly appointed commissioners, to meet at Annapolis, commissioners from such of the other States as should approve of the proceeding, for the purpose of preparing a uniform plan of commercial regulations, which was to be submitted to all the States, and, if by them ratified and adopted, to be executed by Congress. Such of the commissioners as met, however, soon discovered that the execution of the particular trust with which they were clothed, involved other subjects not within their commission, and which could not be properly adjusted without a great enlargement of their powers. They, therefore, simply reported this fact, and recommended to their respective legislatures to appoint delegates to meet in general convention in Philadelphia, for the purpose not merely of forming a uniform system of commercial regulations, but of reforming the government in any and every particular in which the interests of the States might require it. This report was also submitted to Congress, who approved of the recommendation it contained, and on the 21st of February, 1787, resolved, "that in the opinion of Congress, it is expedient 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." (1 Elliott's Debates, 185.)

Such was the origin of the Convention of 1787. It is apparent that the delegates to that body were to be appointed by the "several States," and not by "the people of the United States"; that they were to report their proceedings to "Congress and the several legislatures," and not to "the people of the United States"; and that their proceedings were to be part of the Constitution, only when "agreed to in Congress and confirmed by the States," and not when confirmed by "the people of the United States." Accordingly, delegates were, in point of fact, appointed by the States; these delegates did, in point of fact, report to Congress and the States; and Congress did, in point of fact, approve, and the States did, in point of fact, adopt, ratify and confirm the Constitution which they formed. No other agency than that of the States as such, and of, Congress, which was strictly the representative of the States, is to be discerned in any part of this whole proceeding. We may well ask, therefore, from what unknown source our author derives the idea, that the Constitution was formed by "the people of the United States," since the history of the transaction, even as he has himself detailed it, proves that "the people of the United States" did not appoint delegates to the Convention, were not represented in that body, and did not adopt and confirm its act as their own!

Even, however, if the question now before us be not, merely and exclusively, a question of historical fact, there are other views of it scarcely less decisive against our author's position. In the first place, I have to remark, that there were no such people as "the people of the United States," in the sense in which he uses those terms. The Articles of Confederation formed, at that time, the only government of the United States; and, of course, we are to collect from them alone the true nature of the connection of the States

with one another. Without deeming it necessary to enumerate all the powers which they conferred on Congress, it is sufficient to remark that they were all exercised in the name of the States, as free, sovereign and independent States. Congress was, in the strictest sense, the representative of the States. The members were appointed by the States, in whatever mode each State might choose, without reference either to Congress or the other States. They could, at their own will and pleasure, recall their representatives, and send others in their places, precisely as any sovereign may recall his minister at a foreign court. The members voted in Congress by States, each State having one vote, whatever might be the number of its representatives! There was no President, or other common executive, head. The States alone, as to all the more important operations of the government, were relied on to execute the resolves of Congress. In all this, and in other features of the confederation, which it is unnecessary to enumerate, we recognize a league between independent sovereignties, and not one nation composed of all of them together. It would seem to follow, as a necessary consequence, that if the States, thus united together by league, did not form one nation, there could not be a citizen or subject of that nation. Indeed, Congress had no power to make such citizen, either by naturalization or otherwise. It is true, the citizens of every State were entitled, with certain exceptions, such as paupers, vagabonds, &c., to all the privileges of citizens of every other State, when within the territories thereof; but this was by express compact in the Articles of Confederation, and did not otherwise result from the nature of their political connection. It was only by virtue of citizenship in some particular State, that its citizens could enjoy within any other State the rights of citizens thereof. They were not known as citizens of the United States, in the legislation either of Congress or of the several States. He who ceased to be a citizen of some particular State, without becoming a citizen of some other particular State, forfeited all the rights of a citizen in each and all of the States. There was no one right which the citizen could exercise, and no one duty which he could be called on to perform, except as a citizen of some particular State. In that character alone could he own real estate, vote at elections, sue or be sued and in that character alone could he be called on to bear arms, or to pay taxes.

What, then, was this citizenship of the United States, which involved no allegiance, conferred no right and subjected to no duty? Who were "the people of the United States?" Where was their domicil, and what were the political relations which they bore to one another? What was their sovereignty, and what was the nature of the allegiance which it claimed? Whenever these questions shall be satisfactorily answered, designating the people of the several States, distinctively as such, I shall feel myself in possession of new and unexpected lights upon the subject.

Even, however, if we concede that there was such a people as "the people of the United States," our author's position is still untenable. I admit that the people of any country may, if they choose, alter, amend or abrogate their form of government, or establish a new one, without invoking the aid of their constituted authorities. They may do this, simply because they have the physical power to do it, and not because such a proceeding would be either wise, just, or expedient. It would be revolution in the strictest sense of the term. Be this as it may, no one ever supposed that this course was pursued in the case under consideration. Every measure, both for the calling of the convention and for the ratification of the Constitution, was adopted in strict conformity with the recommendations, resolutions and laws of Congress and the State legislatures. And as "the people of the United States" did not, in point of fact, take the subject into their own hands, independent of the constituted authorities, they could not do it by any agency of those authorities. So far as the Federal Government was concerned, the Articles of

Confederation, from which alone it derived its power, contained no provision by which "the people of the United States" could express authoritatively a joint and common purpose to change their government. A law of Congress authorizing them to do so, would have been void, for want of right in that body to pass it. No mode, which Congress might have prescribed for ascertaining the will of the people upon the subject, could have had that sanction of legal authority, which would have been absolutely necessary to give it force and effect. It is equally clear that there was no right or power reserved to the States themselves, by virtue of which any such authoritative expression of the common will and purpose of all the States could have been made. The power and jurisdiction of each State was limited to its own territory; it had no power to legislate for the people of any other State. No single State, therefore, could have affected such an object; and if they had all concurred in it, each acting, as it was only authorized to act, for itself, that would have been strictly the action of the states as such, and as contradistinguished from the action of the mass of the people of all the States. If "the people of the United States" could not, by any aid to be derived from their common government, have effected such a change in their Constitution, that government itself was equally destitute of all power to do so. The only clause in the Articles of the Confederation, touching this subject, is in the following words:

"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 Congress of the United States and be afterwards confirmed by the legislature of every State."

Even if this power had been given to Congress alone, without subjecting the exercise of it to the negative of the States, it would still have been the power of the States in their separate and independent capacities, and not the power of the people of the United States, as contradistinguished from them. For Congress was, as we have already remarked, strictly the representative of the States; and each State, being entitled to one vote, and one only, was precisely equal, in the deliberation of that body, to each other State. Nothing less, therefore, than a majority of the States could have carried the measure in question, even in Congress. But, surely there could be no doubt that the power to change their common government was reserved to the States alone, when we see it expressly provided that nothing less than their unanimous consent, as States, should be sufficient to effect that object.

There is yet another view of this subject. It results from the nature of all government, freely and voluntarily established, that there is no power to change, except the power which formed it. It will scarcely be denied by anyone, that the confederation was a government strictly of the States, formed by them as such, and deriving all its powers from their consent and agreement. What authority was there, superior to the States, which could undo their work? What power was there, other than the States themselves, which was authorized to declare that their solemn league and agreement should be abrogated? Could a majority of the people of all the States have done it? If so, whence did they derive that right? Certainly not from any agreement among the States, or the people of all the States; and it could not be legitimately derived from any other source. If therefore, they had exercised such a power, it would have been a plain act of usurpation and violence. Besides, if we may judge from the apportionment of representation as proposed in the convention, a majority of the people of all the States were to be found in the four States of Massachusetts, New York, Pennsylvania and Virginia; so that, upon this idea, the people of less than one-third of all the States could change the Articles of

Confederation, although those articles expressly provided that they should not be changed without the consent of all the States! There was then no power superior to the power of the States; and, consequently, there was no power which could alter or abolish the government which they had established. If the Constitution has superceded the Articles of Confederation, it is because the parties to those articles have agreed that it should be so. If they have not so agreed, there is no such Constitution, and the Articles of Confederation are still the only political tie among the States. We need not, however, look beyond the attestation of the Constitution itself, for full evidence upon this point. It professes to have been "done by the unanimous consent of the States present, &c.," and not in the name or by the authority of "the people of the United States."

But it is not the mere framing of a constitution which gives it authority as such. It becomes obligatory only by its adoption and ratification; and surely that act, I speak of free and voluntary government, makes it the constitution of those only who do adopt it. Let us ascertain, then, from the authentic history of the times, by whom our own Constitution was adopted and ratified.

The resolution of Congress already quoted, contemplates a convention "for the sole and express purpose of revising the Articles of Confederation," and reporting suitable "alterations and provisions therein." The proceedings of the convention were to be reported to Congress and the several legislatures, and were to become obligatory, only when "agreed to in Congress and confirmed by the States." This is precisely the course of proceeding prescribed in the Articles of Confederation. Accordingly, the new Constitution was submitted to Congress; was by them approved and agreed to, and was afterwards, in pursuance of the recommendation, of the convention, laid before conventions of the several States, and by them ratified and adopted. In this proceeding, each State acted for itself, without reference to any other State. They ratified at different periods; some of them unconditionally, and others with provisos and propositions for amendment. This was certainly State action, in as distinct a form as can well be imagined. Indeed, it may well be doubted whether any other form of ratification, than by the States themselves, would have been valid. At all events, none other was contemplated, since the Constitution itself provides, that it shall become obligatory, "when ratified by nine States," between the States ratifying the same. "The people of the United States," as an aggregate mass, are no where appealed to, for authority and sanction to that instrument. Even if they could have made it their Constitution, by adopting it, they could not, being as they were separate and distinct political communities, have united themselves into one mass for that purpose, without previously overthrowing their own municipal governments; and, even then, the new Constitution would have been obligatory only on those who agreed to and adopted it, and not on the rest.

The distinction between the people of the several States and the people of the United States, as it is to be understood in reference to the present subject, is perfectly plain. I have already explained the terms "a people," when used in a political sense. The distinction of which I speak may be illustrated, by a single example. If the Constitution had been made by "the people of the united states," a certain portion of those people would have had authority to adopt it in the absence of all express provision to the contrary, we may concede that a majority would, *prima facie*, have had that right. Did that majority, in fact, adopt it? Was it ever ascertained whether a majority of the whole people were in favor of it or not? Was there any provision, either of law or constitution, by which it was possible to ascertain that fact? It is perfectly well known that there was no such provision; that no such majority was ever ascertained, or even contemplated.

Let us suppose that the people of the States of Massachusetts, New York, Pennsylvania and Virginia, containing, as we have seen they probably did, a majority of the whole people, had been unanimous against the Constitution, and that a bare majority of the people, in each of the other nine States acting in their separate character as States, had adopted and ratified. There can be no doubt, that it would have become the Constitution of the United States; and that, too, by the suffrages of a decided minority, probably not exceeding one-fourth of the aggregate people of all the States. This single example shows, conclusively that the people of the United States, as contradistinguished from the people of the several States, had nothing to do, and could not have an thing to do with the matter.

This brief history of the formation and adoption of the Constitution, which is familiar to the mind of every one who has attended to the subject at all, ought, as it seems to me, to be perfectly satisfactory and conclusive, and should silence for ever all those arguments, in favor of consolidation, which, are founded on the preamble to that instrument. I do not perceive with what propriety it can be said, that the "people of the United States" formed the Constitution, since they neither appointed the convention, nor ratified their act, nor otherwise adopted it as obligatory upon them. Even if the preamble be entitled to all the influence which has been allowed to it, Judge Story's construction of its language is not, as has already been remarked, the only one of which it is susceptible. "We, the people of the United States," may, without any violence to the rules of fair construction, mean "we, the people of the States united." In this acceptation, its terms conform to the history of the preamble itself, to that of the whole Constitution, and those who made it. In any other acceptation, they are either without meaning, or else they affirm what history proves to be false.<sup>17</sup>

It would not, perhaps, have been deemed necessary to bestow quite as much attention on this part of the work, if it were not evident that the author himself considered it of great consequence, not as matter of history, but as warranting and controlling his construction of the Constitution, in some of its most important provisions. The argument

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17 The phrase, "WE THE PEOPLE OF THE UNITED STATES," in the preamble to the Constitution, railed upon by the friends of the monarchist principles of government, to prove the consolidated nature of Federal Union, has been twisted into most absurd shapes. The phrase is, WE, THE PEOPLE OF THE STATES, not the people of AMERICA. The very phrase shows the Federal Union to be a government of States, and not of the people of all America, as a consolidated body. "UNITED STATES" has a very different legal signification to that of consolidated States. "The people of the United States," in the preamble of the Constitution, has the same meaning as "the people of the several STATES," In the second section of Article First of the same instrument The idea of severalty or separateness, and not that of consolidation, is clearly implied. Indeed, this is the grammatical meaning of the phrase. The qualifying adjective "united" is annexed to the word states, and not to the word "people." It is precisely the same meaning as the phrase "Les Etas Unis" in the French language, i. e., the "states united." When Patrick Henry indignantly asked, "What right had the framers of the Constitution to say, ' We, the people,' instead of 'we, the States?'" Mr. Madison replied: "Who are the parties to the government? The people; but then not the people as composing ONE GREAT BODY; but the people as composing THIRTEEN SOVEREIGNTIES." The Constitution of the United States is a grant by grantors to a grantee. The grantors are the "several States," not as a consolidated people, but as separate and independent sovereignties -- "the people" as organized into "several" distinct sovereign communities. Thus the Supreme Court of the United States declares that "the States form a confederated government; yet the several States retain their individual sovereignties, and with respect to their municipal regulations, are to each other sovereign." (2 Peters, 690; 12 Wheaton, 334.) Again: "The powers retained by the States proceed not from the PEOPLE OF AMERICA, but from the people of the SEVERAL STATES, and remain after the adoption of the Constitution what they were before." (4 Wheaton, 193, 17, 54; 203, 9.) Thus all authority proven that the Government of the Union is one of the STATES united, and not of the People consolidated. -- [C. C. B.]

is not yet exhausted, and I am aware that much of what I have said is trite, and that little, perhaps no part of it, is new. Indeed, the subject has been so often and so ably discussed, particularly in parliamentary debates, that it admits very few new views, and still fewer new arguments in support of old views. It is still, however, an open question, and there is nothing in the present condition of public opinion to deprive it of any portion of its original importance. The idea that the people of these States were, while colonists, and, consequently, are now, "one people," in some sense which has never been explained, and to some extent which has never been defined, is constantly inculcated by those who are anxious to consolidate all the powers of the States in the Federal Government. It is remarkable, however, that scarcely one systematic argument, and very few attempts of any sort, have yet been made to prove this important position. Even the vast and clear mind of the late Chief Justice of the United States, which never failed to disembarass and elucidate the most obscure and intricate subject, appears to have shrunk from this. In all his judicial opinions in which the question has been presented, the unity or identity of the people of the United States has been taken as a postulatam, without one serious attempt to prove it. The continued repetition of this idea, and the boldness with which it is advanced, have, I am induced to think, given it an undue credit with the public. Few men, far too few, inquire narrowly into the subject, and even those who do, are not in general skeptical enough to doubt what is so often and so peremptorily asserted; and asserted, too, with that sort of hardy confidence which seems to say, that all argument to prove it true would be supererogatory and useless. It is not, therefore, out of place, nor out of time, to refresh the memory of the reader, in regard to those well established historical facts, which are sufficient in themselves to prove that the foundation on which the consolidationists build their theory, is unsubstantial and fallacious.

I would not be understood as contending, in what I have already said, that the Constitution is necessarily federative, merely because it was made by the States as such, and not by the aggregate people of the United States. I readily admit, that although the previous system was strictly federative, and could not have been changed except by the States who made it, yet there was nothing to prevent the States from surrendering, in the provisions of the new system which they adopted all their power, and even their separate existence, if they chose to do so. The true inquiry is, therefore, whether they have in fact done so or not; or, in other words, what is the true character, in this respect, of the present Constitution. In this inquiry, the history of their previous condition, and of the Constitution itself, is highly influential and important.

The author, carrying out the idea of a unity between the people of the United States, which, in the previous part of his work, he had treated as a postulatam, very naturally, and indeed necessarily, concludes that the Constitution is not a compact among sovereign States. He contends that it is "not a contract imposing mutual obligations, and contemplating the permanent subsistence of parties having an independent right to construe, control, and judge of its obligations. If in this latter sense, it is to be deemed a compact, it must be, either because it contains, on its face, stipulations to that effect, or because it is necessarily implied, from the nature and objects of a frame of government."

There is a want of appositeness and accuracy in the first sentence of this extract, which renders it somewhat difficult to determine whether the author designed it as a single proposition, or as a series of independent propositions. If the first, there is not one person in the United States, it is presumed, who would venture to differ from him. I confess, however, I do not very clearly discern what bearing it has on the question he was examining. It involves no point of difference between political parties, nor does it

propound any question which has heretofore been contested, or which may be expected to arise hereafter, touching the true nature of the Constitution. If he designed a series of propositions, then the two first are so obviously false, that Judge Story himself would not venture to maintain them, and the last is so obviously true, that no one would dream of denying it. For example: he can scarcely mean to say that our government is not a "contract" whether made by the States as such, or by "the people of the United States"; and it is perfectly clear that it "contemplates the permanent subsistence of the parties to it," whoever those parties may be. These two propositions, therefore, taken distinctly, are not true in themselves, and neither of them was necessary, as qualifying or forming a part, of the third. And, as to the third, it is not easy to see why he announced it, since it never entered into the conception of any one, that the parties to the Constitution had "an independent right," as a general right, "to construe, control or judge of its obligations." We all admit that the power and authority of the Federal Government, within its constitutional sphere, are superior to those of the States, in some instances, and co-ordinate in others, and that every citizen is under an absolute obligation to render them respect and obedience: and this simply because his own State, by the act of ratifying the Constitution, has commanded him to do so. We all admit it to be true, as a general proposition, that no citizen nor State has an independent right to "construe," and still less to "control" the constitutional obligations of that government, and that neither a citizen nor a State can "judge," that is, decide, on the nature and extent of those obligations, with a view to control them. All that was ever contended for is, that a State has a right to judge of its own obligations, and, consequently, to judge of those of the Federal Government, so far as they relate to such State itself, and no farther. It is admitted on all hands, that when the Federal Government transcends its constitutional power, and when, of course, it is not acting within its "obligations," the parties to that government, whoever they may be, are no longer under any duty to respect or obey it. This has been repeatedly affirmed by our courts, both State and federal, and has never been denied by any class of politicians. Who, then, is to determine whether it has so transcended its constitutional obligations or not? It is admitted that, to a certain extent, the Supreme Court is the proper tribunal in the last resort, because the States, in establishing that tribunal, have expressly agreed to make it so. The jurisdiction of the federal courts extends to certain cases, affecting the rights of the individual citizens, and to certain others affecting those of the individual States. So far as the Federal Government is authorized to act on the individual citizen, the powers of the one and the rights of the other, are properly determinable by the federal courts. And the decision is binding too, and absolutely final, so far as the relation of the citizen to the Federal Government is concerned. There is not, within that system, any tribunal of appeal, from the decisions of the Supreme Court. And so also of those cases in which the rights of the States are referred to the federal tribunals. In this sense, and to this extent, it is strictly true that the parties have not "an independent right to construe, control and judge of the obligations" of the Federal Government, but they are bound by the decisions of the federal courts, so far as they have authorized and agreed to submit to them. But there are many cases involving the question of federal power which are not cognizable before the federal courts; and, of course, as to these, we must look out for some other umpire. It is precisely in this case that the question, who are the parties to the Constitution, becomes all important and controlling. If the States are parties as sovereign States, then it follows, as a necessary consequence, that each of them has the right which belongs to every sovereignty, to construe its own contracts and agreements, and to decide upon its own rights and powers. I shall take occasion, in a subsequent part of this review, to enter more fully into the question, who is the common umpire? The statement here given, of the leading point of difference between the great political parties of the country, is

designed only to show that the author's proposition does not involve it. That proposition may mislead the judgment of the reader, but cannot possibly enlighten it, in regard to the true nature of the Constitution.

He has been scarcely less unfortunate in the next proposition. Taking his words in their most enlarged sense, he is probably correct in his idea, though he is not accurate in his language; but in the sense in which his own reasoning shows that he himself understands them, his proposition is wholly untenable. If, by the words "stipulations to that effect," he means simply that the effect must necessarily result from the provisions of the Constitution, he has merely asserted a truism which no one will dispute with him. Certainly, if it does not result from the nature of all government, that it is a compact, and if there be nothing in our Constitution to show that it is so, then it is not a compact. His own reasoning, however, shows that he means by the word "stipulations," something in the nature of express agreement or declaration; and, in that sense, the proposition is obviously untrue, and altogether defective as a statement for argument. It is very possible that our Constitution may be a compact, even though it contain no express agreement or declaration so denominating it, and though it may not "result from the nature and objects of a frame of government," that it is so; and this simply because it may "result from the nature and objects of our government" that it is a compact, whether such be the result of other governments or not. If the author designed to take this view of the subject, the examination which he has given of the Constitution, in reference to it, is scarcely as extended and philosophical as we had a right to expect from him. He has not even alluded to the frame and structure of the government in its several departments, nor presented any such analysis of it in any respect as to enable the reader to form any satisfactory conclusion as to its true character in the particular under consideration. Everything which he has urged as argument to prove his proposition, may well be true, and every sentence of the Constitution which he has cited for that purpose, may be allowed its full effect, and yet our government may be a compact, even in the strictest sense in which he has understood the term.

His first argument is, that the "United States were no strangers to compacts of this nature," and that those who ratified the Constitution, if they had meant it as a compact, would have used "appropriate terms" to convey that idea. I have already shown that if he means by this, that the Constitution would have contained some express declaration to that effect, he is altogether inaccurate. He himself knows, as a judge, that a deed, or other instrument, receives its distinctive character, not from the name which the parties may choose to give it, but from its legal effect and operation. The same rule applies to constitutions. Ours is a compact or not, precisely as its provisions make it so, or otherwise. The question, who are the parties to it, may influence, and ought to influence, the construction of it in this respect; and I propose presently to show, from this and other views of it, that it is, in its nature, "a mere confederation," and not a consolidated government, in any one respect. It does, therefore, contain "appropriate terms," if we take those words in an enlarged sense, to convey the idea of a compact.

Our author supposes, however, that a "conclusive" argument upon this subject is furnished by that clause of the Constitution which declares that: "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, anything in the Constitution or laws of any State to the contrary notwithstanding." Hence he concludes that the "people of any State cannot by any form of its own Constitution or laws, or other proceedings, repeal or abrogate, or suspend it."

Here, again, Judge Story displays a want of proper definiteness and precision, in the statement of his proposition. The people who make a law, can, upon the principles of all our institutions, either "repeal or abrogate, or suspend it"; and if, as he supposes, our Constitution was made by "the people of the United States," in the aggregate, then "the people of any State," or of half a State, may repeal, or abrogate, or, suspend it, if they happen to be a majority of the whole. The argument, therefore, if we are to take it in the full latitude in which it is laid down, is not sound, upon the author's own principles; and it can avail nothing, except upon the very supposition which he disallows, to wit: that the Constitution was formed by the States, and not by the people of the United States. Even in this acceptation, however, I am at a loss to perceive how it establishes the proposition with which he set out, to wit: that the Constitution is not a compact. Certainly it is very possible so to frame a compact, that no party to it shall have a right either to "repeal or abrogate, or suspend it"; and if it be possible to do so, then the mere absence of such right does not even tend to disprove the existence of compact. Our own Constitution, even in the opinion of those who are supposed by the author to be least friendly to it, is a compact of precisely this nature. The Nullifier contends only for the right of a State to prevent the Constitution from being violated by the general government, and not for the right either to repeal, abrogate or suspend it. The Seceder asserts only that a State is competent to withdraw from the Union whenever it pleases; but does not assert that in so doing it can repeal, or abrogate or suspend the Constitution, as to the other States. Secession would, indeed, utterly destroy the compact as to the seceding party; but would not necessarily affect its obligation as to the rest. If it would, then the rest would have no right to coerce the seceding State, nor to place her in the attitude of an enemy. It is certain, I think, they would not have such right; but those who assert that they would -- and the author is among the number -- must either abandon that idea, or they must admit that the act of secession does not break up the Constitution, except as to the seceding State. For the moment the Constitution is destroyed, all the authorities which it has established cease to exist. There is no longer such a government as that of the United States, and, of course, they cannot, as such, either make any demand, or assert any right, or enforce any claim.

The conclusion, however, to which our author has arrived upon this point, is not that to which he originally designed that his premises should conduct him. The question of the right of a party to a compact to repeal or abrogate or suspend it, does not enter into his original proposition, nor result from the argument which he had immediately before used to sustain it. The proposition is, that our Constitution is not a compact, and the argument is, that it is not a compact, because it is a supreme law. The same idea is substantially reaffirmed, in the next argument by which he proposes to prove the main proposition. "The design" (of the Constitution) "is to establish a government. This, of itself, imports legal obligation, permanence, and uncontrollability by any, but the authorities authorized to alter or abolish it."

Admitting, as I cheerfully do, that all this is strictly true, I am yet unable to perceive how it demonstrates that our Constitution is not a compact. May not a compact between sovereign States be a government? Is there any such necessary restraint upon, or incident of, sovereign power, that it cannot, in any possible exercise of it, produce such a result? If there is, then it was incumbent on the author to show it, because, if there is not, his argument is of no force; and he himself will admit that the proposition, to say the least of it, is not quite clear enough to be taken as a postulate. His own historical information, if he had drawn on its ample funds, must have furnished him with numerous instances of governments established by compact. He need not, however, have gone beyond our own Confederation, which, although a compact among sovereign States, in

the strictest sense, was yet treated as a government by the people at home, and recognized as such by all foreign powers. It was also "supreme," within its prescribed sphere of action; its rights and powers over the most important subjects of general concern were not only superior to those of the States, but were exclusive. The author's proposition and argument, reduced to their simple terms, may be thus stated: "Our Constitution is not a compact, because it is a government, and because that government is the supreme law."<sup>18</sup> There are few minds, I think, prepared to embrace this conclusion, or to discern the connection which it has with the promises. There are still fewer who will not feel surprise, that our author should have formed such a conclusion, since an instance to disprove it, furnished by the history of his own country, and existing in his own times, had but just passed under his critical examination and review.

The remaining arguments upon this point are merely inferences drawn from the absence of express words in the Constitution, or from the opinions of members of the various conventions, expressed in the debates concerning it. These have already been sufficiently examined. Taking his whole chapter upon this subject together, the reader will probably think that it does not answer the expectations which the public have formed upon the author's powers as a reasoner. His political opponents will be apt to think, also, that he has done something less than justice to them, in the view which he has given of their principles. After laboring, in the way we have seen, to prove that our Constitution is not a compact, he informs us that "the cardinal conclusion for which this doctrine of a compact has been, with so much ingenuity and ability, forced into the language of the Constitution, (for the latter nowhere alludes to it), is avowedly to establish that, in construing the Constitution, there is no common umpire; but that each State, nay, each department of the government of each State, is the supreme judge for itself, of the powers and rights and duties arising under that instrument."

Judge Story must excuse me -- I mean no disrespect to him -- if I express my unfeigned astonishment that he should have admitted this passage into a grave and deliberate work on the Constitution. He must, indeed, have been a most careless observer of passing events, and a still more careless reader of the publications of the last ten years, upon this very point, if he has found either in the one or the other, the slightest authority for the opinion which is here advanced. The most ultra of those who have contended for the rights of the States, have asserted no such doctrine as he has imputed to them. Neither is it the necessary or legitimate consequence of any principle which they have avowed. I cannot impute to an author of his acknowledged ability, the weakness of

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18 This assertion of Judge Story is contradicted, not only by the organization of the government, but by the uniform language of those who framed and adopted it. Both Hamilton and Madison constantly spoke of the Union as a "compact." In the Eighty-fifth Article of the Federalist, Hamilton calls the Constitution a "compact," and says that thirteen Independent States are "the parties to the compact." Madison: "It is a compact between thirteen sovereignties." In the Resolutions of 1798 he says: "The powers of the Federal Government result from a compact to which the States are parties." Again says Madison: "In case of a deliberate, palpable, and dangerous exercise of other powers not granted in the compact, the States who are parties thereto have the right, and are in duty bound to interpose." In the Convention of Massachusetts which adopted the Constitution, Judge Parsons said: "The government and powers which the Congress can administer are the more result of a compact." Washington perpetually spoke of the ratification of the Constitution as ACCEDING to a COMPACT (See letter to Bushrod Washington, Nov. 10, 1797; to General Knox, June 17, 1788; to John Jay, July 20, 1788; to Gouverneur Morris, December 14 1789.) Jefferson, in the Kentucky Resolutions, says: "The States are not united on the principle of unlimited submission to the General Government, but by that of COMPACT," &c. Mr. Webster, in his great speech to the young men of Albany, 1851, called the Constitution a "COMPACT." Thus it is certain that the framers of the Constitution thought they were making a "compact between sovereign States." And the INTENTION of the framers and parties to an instrument is the LAW in the case. -- [C. C. B.]

stating a proposition merely for the sake of the poor triumph of refuting it. With what other motive, then, did he make a statement which is unsupported, as a matter of fact, which involves no disputed or doubted question of constitutional law, and which attributes to a large class of his fellow-citizens opinions which would justly expose them to the scorn of all correct thinkers? That class profess to hold, in their utmost latitude and in their strictest applications, the doctrines of the State Rights' school of politics. They believe that those doctrines contain the only principle truly conservative of our Constitution; that without them there is no effective check upon the Federal Government, and, of course, that that government can increase its own powers to an indefinite extent; that this must happen in the natural course of events, and that, ultimately, the whole character of our government will be so changed, that even its forms will be rejected, as cumbrous and useless, under the monarchy, in substance, into which we shall have insensibly glided. It is, therefore, because they are lovers of the Constitution and of the Union, that they contend strenuously for the rights of the States. They are no lovers of anarchy nor of revolution. Their principles will cease to be dear to them, whenever they shall cease to subserve the purposes of good order, and of regular and established government. It is their object to preserve the institutions of the country as they are, sincerely believing that nothing more than this is necessary to secure to the people all the blessings which can be expected from any government whatever. They would consider themselves but little entitled to respect as a political party, if they maintained the loose, disjointed, and worse than puerile notions, which the author has not thought it improper to impute to them.

It is the peculiar misfortune of the political party to which I have alluded, to be misunderstood and misrepresented in their doctrines. The passage above quoted affords not the least striking instance of this. It is a great mistake to suppose that they have ever contended that the right of State interposition was given in the express terms of the Constitution; and, therefore, they have not "forced this principle into the language of that instrument." The right in question is supposed to belong to the States, only because it is an incident of their sovereignty, which the Constitution has not taken away. The author, it is presumed, could scarcely have failed to perceive the difference of the two propositions, nor could he have been unconscious that they did not depend upon the same course of investigation or reasoning. And it is not true, so far as my information extends, that any political party has ever asserted, as a general proposition, that in construing the Constitution, there is no common umpire. Cases have already been stated, in which the Supreme Court is universally admitted to be the common umpire, and others will be stated when we come more directly to that part of our subject. In the broad sense, then, in which the author lays down the proposition, it has never been contended for by any political party whatever. Neither is it true, as he is pleased to assert, that any political party has ever supposed that each department of the government of each State had a right to "judge for itself, of the powers, rights and duties, arising under" the Constitution. By the word "judge," he must be understood to mean decide finally; and, in this sense, I venture to affirm, that no political party, nor political partizan, even in the wildest dream of political phrensy, has ever entertained the absurd notion here attributed to them. It is difficult to suppose that the author could have been uninformed of the fact, that nothing short of the power of all the State, acting through its own constituted authorities, has ever been deemed of the least force in this matter. The better and more prevalent opinion is, that a State cannot properly so act, except by a convention called for that express purpose. This was the course pursued by South Carolina; but in the case of the Alien and Sedition Laws, Virginia acted through her

ordinary legislature. As to this matter, however, the legislature was very properly considered as representing the power of the whole State.

Thus, in the short paragraph above quoted, Judge Story has fallen into three most remarkable errors, proving that he has, in the strangest way imaginable, misunderstood the principles which he attempted to explain. The young and plastic minds to which he addressed himself, with the professed object of instructing them in the truths of constitutional interpretation, will look in vain for the publication or other authority which sustains him. And the political party whose principles he has endeavored to hold up to reproach, has a right to demand of him why he has chosen to attribute to them absurd and revolutionary notions, unworthy alike of their patriotism and their reason.

It is submitted to the reader's judgment to determine how far the reasoning of the author, which we have just examined, supports his position that our Constitution is not a compact. The opinion of that Congress which recommended the call of the Convention seems to have been very different; they, at least, did not suppose that a compact could not be a government. Their resolution recommends the call of a convention, for the purpose of revising the Articles of Confederation, and reporting such alterations and provisions therein, as would render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union." In the opinion of Congress, the Articles of Confederation, which were clearly a compact, were an inadequate Constitution, and, therefore, they recommended such alterations and provisions therein, as would make the same compact an adequate Constitution. Nothing is said about forming a new government, or changing the essential character of the existing one; and, in fact, no such thing was contemplated at the time.<sup>19</sup> "The sole and exclusive purpose" of the convention was so to amend, or add to, the provisions of the Articles of Confederation, as would form "a more perfect union," &c., upon the principles of the Union already existing. It is clear, therefore, that in the opinion of Congress, and of all the States that adopted their recommendation, that union or compact was a constitution of government.

It is worthy of remark, that of the States, New Hampshire, and the author's own State of Massachusetts, expressly call the Constitution a compact, in their acts of ratification; and no other State indicates a different view of it. This tends to prove that public opinion at the time had not drawn the nice distinction which is now insisted on, between a government and a compact; and that those who had for eight years been living under a compact, and forming treaties with foreign powers by virtue of its provisions, had never for a moment imagined that it was not a government.

But little importance, however, ought to be attached to reasoning of this kind. Those who contend that our Constitution is a compact, very properly place their principles upon much higher ground. They say that the Constitution is a compact, because it was made by sovereign States, and because that is the only mode in which sovereign States treat with one another. The conclusion follows irresistibly from the premises; and those who deny the one, are bound to disprove the other. Our adversaries begin to reason at the very point at which reasoning becomes no longer necessary. Instead of disproving our premises, they assume that they are wrong, and then, triumphantly deny our conclusion also. If we establish that the Constitution was made by the States, and that they were, at

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19 In the Constitutional convention, Governor Patterson, of New Jersey, said: "Let us consider with what powers we are sent here. The basis of our present authority is founded on a revision of the Articles of the present Confederation, and to alter and amend them in parts where they may appear defective. The object was not to form a new government, but to "alter and amend" that which already existed. -- [C. C. B.]

the time, distinct, independent and perfect sovereignties, it follows that they could not treat with one another, even with a view to the formation of a new common government, except in their several and sovereign characters. They must have maintained the same character when they entered upon that work, and throughout the whole progress of it. Whatever the government may be, therefore, in its essential character, whether a federative or a consolidated government, it is still a compact, or the result of a compact, because those who made it could not make it in any other way. In determining its essential character, therefore, we are bound to regard it as a compact, and to give it such a construction as is consistent with that idea. We are not to presume that the parties to it designed to change the character in which they negotiated with one another. Every fair and legitimate inference is otherwise. Its sovereignty is the very last thing which a nation is willing to surrender; and nothing short of the clearest proof can warrant us in concluding that it has surrendered it. In all cases, therefore, where the language and spirit of the Constitution are doubtful, and even where their most natural construction would be in favor of consolidation, (if there be any such case), we should still incline against it, and in favor of the rights of the States, unless no other construction can be admitted.

## **CHAPTER VIII - THE UNION A FEDERATIVE AND NOT A NATIONAL GOVERNMENT**

Having disposed of this preliminary question, we now approach the Constitution itself. I affirm that it is, in its structure, a federative and not a consolidated government; that it is so in all its departments, and in all its leading and distinguishing provisions and, of course, that it is to be so interpreted, by force of its own terms, apart from any influence to be derived from that role of construction which has just been laid down. We will first examine it in the structure of its several departments.<sup>20</sup>

THE LEGISLATURE -- This consists of two houses. The Senate is composed of two members from each State, chosen by its own legislature, whatever be its size or population, and is universally admitted to be strictly federative in its structure. The House of Representatives consists of members chosen in each State, and is regulated in its numbers according to a prescribed ratio of representation. The number to which each State is entitled is proportioned to its own population, and not to the population of the United States; and if there happen to be a surplus in any State less than the established ratio, the surplus is not added to the surplus or population of any other State, in order to

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20 There was a party in the Convention, which, though in the minority, was respectable for its intellect, which wanted to form a national or consolidated government. From the opening of the Convention in May, until the 25th of June, there had been a resolution that "A national government ought to be established." But on the last mentioned date it was moved to strike out this word "National," and insert in its place "United States." This passed overwhelmingly in the affirmative, and thus ended the business of a national government. On this occasion Governor Patterson said: "Can we, on this ground, (of amending the Articles of Confederation), form a national government? I fancy not. Our commissions give no complexion to the business, and we cannot suppose that when we exceed the bounds of our duty, the people will approve our proceedings. We are met here as the deputies of thirteen Independent sovereign States, for federal purposes. Can we consolidate their sovereignty, and form one nation, and annihilate the sovereignties of our States, who have sent us here for other purposes? I declare that I never will consent to such a system. Myself or my State never will submit to tyranny or despotism." Luther Martain said: "The General Government is only intended to protect and guard the rights of the States, AS STATES. The basis of all ancient and modern confederacies is the freedom and the independency of the States composing them." Such were the ideas which prevailed in the framing and adoption of the Constitution. (See Elliot's Debates, Madison's and Martain's Reports.) -- [C. C. B.]

make up the requisite number for a representative, but is wholly unrepresented. In the choice of representatives, each State votes by itself, and for its own representatives, and not in connection with any other State, nor for the representatives of any other State. Each State prescribes the qualifications of its own voters, the Constitution only providing that they shall have the qualifications which such State may have proscribed for the voters for the most numerous branch of its own legislature. And, as the right to vote is prescribed by the State, the duty of doing so cannot be enforced, except by the authority of the State. No one can be elected to represent any State, except a citizen thereof. Vacancies in the representation of any State are to be supplied under writs of election, issued by the Executive of such State. In all this, there is not one feature of nationality. The whole arrangement has reference to the States as such, and is carried into effect solely by their authority. The Federal Government has no agency in the choice of representatives, except only that it may prescribe the "times, places and manner of holding elections." It can neither prescribe the qualifications of the electors, nor impose any penalty upon them, for refusing to elect. The States alone can do these things; and, of course, the very existence of the House of Representatives depends, as much as does that of the Senate, upon the action of the States. A State may withdraw its representation altogether, and Congress has no power to prevent it, nor to supply the vacancy thus created. If the House of Representatives were national, in any practical sense of the term, the "nation" would have authority to provide for the appointment of its members, to prescribe the qualifications of voters, and to enforce the performance of that duty. All these things the State legislatures can do, within their respective States, and it is obvious that they are strictly national. In order to make the House of Representatives equally so, the people of the United States must be so consolidated that the Federal Government may distribute them, without regard to State boundaries, into numbers according to the prescribed ratio; so that all the people may be represented, and no unrepresented surplus be left in any State. If these things could be done under the Federal Constitution, there would then be a strict analogy between the popular branches of the federal and State legislatures, and the former might, with propriety, be considered "national." But it is difficult to imagine a national legislature which does not exist under the authority of the nation, and over the very appointment of which the nation, as such, can exert no effective control.

There are only two reasons which I have ever heard assigned for the opinion that the House of Representatives is national, and not federative. The first is, that its measures are carried by the votes of a majority of the whole number, and not by those of a majority of the States. It would be easy to demonstrate that this fact does not warrant such a conclusion; but all reasoning is unnecessary, since the conclusion is disproved, by the example of the other branch of the federal legislature. The Senate, which is strictly federative, votes in the same way. The argument, therefore, proves nothing, because it proves too much.

The second argument is, that the States are not equally represented, but each one has a representation proportioned to its population. There is no reason, apparent to me, why a league may not be formed among independent sovereignties, giving to each an influence in the management of their common concerns, proportioned to its strength, its wealth, or the interest which it has at stake. This is but simple justice, and the rule ought to prevail in all cases, except where higher considerations disallow it. History abounds with examples of such confederations, one of which I will cite. The States General of the United Provinces were strictly a federal body. The Council of State had almost exclusively the management and control of all their military and financial concerns; and in that body, Holland and some other provinces had three votes each, whilst some had

two, and others only one vote each. Yet it never was supposed that for this reason the United Provinces were a consolidated nation. A single example of this sort affords a full illustration of the subject, and renders, all farther argument superfluous.

It is not, however, from the apportionment of its powers, nor from the modes in which these powers are exercised, that we can determine the true character of a legislative body, in the particular now under consideration. The true rule of decision is found in the manner in which the body is constituted, and that, we have already seen, is, in the case before us, federative, and not national.

We may safely admit, however, that the House of Representatives is not federative, and yet contend, with perfect security, that the legislative department is so. Congress consists of the House of Representatives and Senate. Neither is a complete legislature in itself, and neither can pass any law without the concurrence of the other. And, as the Senate is the peculiar representative of the States, no act of legislation whatever can be performed without the consent of the States. They hold, therefore, a complete check and control over the powers of the people in this respect, even admitting that those powers are truly and strictly represented in the other branch. It is true that the check is mutual; but if the legislative department were national, there would be no federative feature in it. It cannot be replied, with equal propriety, that, if it were federative, there would be no national feature in it. The question is, whether or not the States have preserved their distinct sovereign characters, in this feature of the Constitution. If they have done so in any part of it the whole must be considered federative; because national legislation implies a unity, which is absolutely inconsistent with all idea of a confederation; whereas, there is nothing to prevent the members of a confederation from exerting their several powers, in any form of joint action which may seem to them proper.

But there is one other provision of the Constitution which appears to me to be altogether decisive upon this point. Each State, whatever be its population, is entitled to at least one representative. It may so happen that the unrepresented surplus, in some one State, may be greater than the whole population of some other State and yet such latter State would be entitled to a representative. Upon what principle is this? Surely, if the House of Representatives were national, something like equality would be found in the constitution of it. Large surpluses would be arbitrarily rejected in some places, and smaller numbers, not equal to the general ratio, be represented in others. There can be but one reason for this: As the Constitution was made by the States, the true principles of the confederation could not be preserved, without giving to each party to the compact a place and influence in each branch of the common legislature. This was due to their perfect equality as sovereign States.

THE EXECUTIVE -- In the election of the President and Vice-President, the exclusive agency of the States, as such, is preserved with equal distinctness. These officers are chosen by electors, who are themselves chosen by the people of each State, acting by and for itself, and in such mode as itself may prescribe. The number of electors to which each State is entitled is equal to the whole number of its representatives and senators. This provision is even more federative than that which apportions representation in the House of Representatives; because it adds two to the electors of each State, and, so far, places them on an equality, whatever be their comparative population. The people of each State vote within the State, and not elsewhere; and for their own electors, and for no others. Each State proscribes the qualifications of its own electors, and can alone compel them to vote. The electors, when chosen, give their votes within their respective States, and at such times and places as the States may respectively prescribe.

There is not the least trace of national agency, in any part of this proceeding. The Federal Government can exercise no rightful power in the choice of its own Executive. "The people of the United States" are equally unseen in that important measure. Neither a majority, nor the whole of them together, can choose a President, except in their character as citizens of the several States. Nay, a President may be constitutionally elected, with a decided majority of the people against him.<sup>21</sup> For example: New York has forty-two votes, Pennsylvania thirty, Virginia twenty-three, Ohio twenty-one, North Carolina fifteen, Kentucky fourteen, and South Carolina fifteen. These seven States can give a majority of all the votes, and each may elect its own electors by a majority of only one vote. If we add their minorities to the votes of the other States, (supposing those States to be unanimous against the candidate), we may have a President constitutionally elected, with less than half -- perhaps with little more than a fourth of the people in his favor. It is true that he may also be constitutionally elected with a majority of the States, as such, against him, as the above example shows; because the States may, as before remarked, properly agree, by the provisions of their compact, that they shall possess influence, in this respect, proportioned to their population. But there is no mode, consistent with the true principles of free representative government, by which a minority of those to whom, en masse, the elective franchise is confided, can countervail the concurrent and opposing action of the majority. If the President could be chosen by the people of the "United States" in the aggregate, instead of by the States, it is difficult to imagine a case in which a majority of those people, concurring in the same vote, could be overbalanced by a minority.

All doubt upon this point, however, is removed by another provision of the Constitution touching this subject. If no candidate should receive a majority of votes in the Electoral

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21 This fact proves beyond dispute that the Union is a government of States as independent communities, and not of the people as one body. When the Constitution was adopted and the present Union went into operation in 1799, there were eleven States having fifty-nine representatives, of which four States had thirty-two, while the other seven had but twenty-seven, and yet the minority of the people could elect the President and dispense all the powers of the Union. In 1790, when the first census was taken, four States had a population of one million seven hundred and ten thousand, while the other nine had only one million three hundred and ninety thousand. Thus four States, having a majority of the population, had but eight senators, while the nine States, with a minority of the people, had eighteen senators. That, surely, was not a government of the whole people, as one body, but of the States as sovereign communities. When the second census was taken, in 1800, the total population was four million two hundred and forty-seven thousand, of which four States had two million two hundred and twenty-six thousand, and the other twelve had two million twenty-one thousand. Then four States had a majority of the whole people of two hundred and fire thousand, but they had only eight votes in the Senate, and eighty-two for President; while the twelve States, with a minority of population, had twenty-four votes in the Senate and ninety-one for President. When the third census was taken, In 1810, there were seventeen States, with a total population of five million seven hundred and sixty-five thousand, of which four States had a majority of two hundred and thirty-one thousand, but they had only eight votes In the Senate and one hundred and one for President, while the rest, with a minority of the people, had twenty-six votes in the Senate and one hundred and fourteen for President. When the fourth census was taken, in 1820, six States had a population of four million one hundred and ninety-nine thousand, the other eighteen had but three million six hundred and fifty-seven thousand. Then six States had a majority of five hundred and forty-two thousand of the people, but they had only twelve votes In the Senate and one hundred and twenty-six for President, while the rest had thirty-six votes in the Senate and one hundred and thirty-five for President. At the next census, 1830, six States had a majority of two hundred and twenty-four thousand of the total Population, while they had but twelve votes in the Senate and one hundred and thirty-six for President, and the minority of the people, but the majority of States, had thirty-six senators and one hundred and fifty-three votes for President, Thus, In the Federal Government, the words majority and minority do not apply to the number of people, but to the number of States. Can anything more be required to prove that the Union is a government of States as separate bodies, and not of the people as one population? -- [C. C. B.]

College, the House of Representatives elects the President, from the three candidates which have received the largest electoral vote. In doing this, two-thirds of the States must be present by their representatives, or one of them, and then they vote by States, all the members of each State giving one vote, and a majority of all the States being necessary to a choice. This is precisely the rule which prevailed in the ordinary legislation of that body, under the Articles Confederation and which proved its federative character as strongly as any other provision of those articles. Why, then, should this federative principle be preserved, in the election of the President by the House of Representatives, if it was designed to abandon it, in the election of some officer by the Electoral Colleges? No good reason for it has yet been assigned, so far as I am informed. On the contrary, there is every just reason to suppose, that those who considered the principle safe and necessary in one form of election, would adhere to it as equally safe and necessary in every other, with respect to the same public trust. And this is still farther proved by the provision of the Constitution relating to the election of the Vice-President. In case of the death or constitutional disability of the President, every executive trust devolves on him; and, of course, the same general principle should, be applied, in the election of both of them. This is done in express terms, so far as the action of the Electoral Colleges is contemplated. But if those Colleges should fail to elect a Vice-President, that trust devolves on the Senate, who are to choose from the two highest candidates. Here the federative principle is distinctly seen, for the Senate is the representative of the States.

This view of the subject is still farther confirmed by the clause of the Constitution relating to impeachments. The power to try the President is vested in the Senate alone, that is, in the representatives of the States. There is a strict fitness and propriety in this; for those only, whose officer the President is, should be entrusted with the power to remove him. It is believed to be neither a forced nor an unreasonable conclusion from all this, that the Executive Department is, in its structure, strictly federative.

THE JUDICIARY -- The Judges are nominated by the President, and approved by the Senate. Thus the nominations are made by a federate officer, and the approval and confirmation of them depend on those who are the exclusive representatives of the States. This agency is manifestly federative, and "the people of the United States" cannot mingle in it, in any form whatever.

As the Constitution is federative in the structure of all three of its great departments, it is equally so in the power of amendment. Congress may propose amendments, "whenever two-thirds of both houses shall deem it necessary." This secures the States against any action upon the subject by the people at large. In like manner, Congress may call a convention for proposing amendments, "on the application of the legislatures of two-thirds of the several States." It is remarkable that, whether Congress or the States act upon the subject, the same proportion is required; not less than two-thirds of either being authorized to act. From this, it is not unreasonable to conclude, that the convention considered that the same power would act in both cases; to wit: the power of the States, who might effect their object either by their separate action as States, or by the action of Congress, their common federative agent; but, whether they adopted the one mode or the other, not less than two-thirds of them should be authorized to act efficiently.

The amendments thus proposed "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 Congress." It is the act of adoption or ratification alone which makes a constitution. In the case before us, the States alone can perform that act. The

language of the Constitution admits of no doubt, and gives no pretext for double construction. It is not the people of the United States in the aggregate, merely acting in their several States, who can ratify amendments. Three-fourths of the several States can alone do this. The idea of separate and independent political corporations could not be more distinctly conveyed, by any form of words. If the people of the United States, as one people, but acting in their several States, could ratify amendments, then the very language of the Constitution requires that three-fourths of them shall concur therein. Is it not, then, truly wonderful that no mode has yet been prescribed to ascertain, whether three-fourths of them do concur or not? By what power can the necessary arrangement upon this point be effected? In point of fact, amendments have already been made, in strict conformity with this provision of the Constitution. We ask our author, whether three-fourths of the people of the United States concurred in those amendments or not; and if they did, whence does he derive the proof of it?

If Judge Story, and the politicians of his school, be correct in the idea, that the Constitution was formed by "the people of the United States," and not by the States, as such, this clause relating to amendments presents a singular anomaly in politics. Their idea is that the State sovereignties were merged, to a certain extent, in that act, and that the government established was emphatically the government of the people of the United States. And yet, those same people can neither alter nor amend that government. In order to perform this essential function, it is necessary to call again into life and action those very State sovereignties which were supposed to be merged and dead, by the very act of creating the instrument which they are required to amend. To alter or amend a government requires the same extent of power which is required to form one; for every alteration or amendment is, as to so much, a new government. And, of all political acts, the formation of a constitution of government is that which admits and implies, the most distinctly and to the fullest extent, the existence of absolute, unqualified, unconditional, and unlimited sovereignty. So long, therefore, as the power of amending the Constitution rests exclusively with the States, it is idle to contend that they are less sovereign now than they were before the adoption of that instrument.

The idea which I am endeavoring to enforce, of the federative character of the Constitution, is still farther confirmed by that clause of the article under consideration, which provides that no amendment shall be made to deprive any State of its equal suffrage in the Senate, without its own consent. So strongly were the States attached to that perfect equality which their perfect sovereignty implied, and so jealous were they of every attack upon it, that they guarded it, by an express provision of the Constitution, against the possibility of overthrow. All other rights they confided to that power of amendment which they reposed in three-fourths of all the States; but this they refused to entrust, except to the separate, independent and sovereign will of each State; giving to each, in its own case, an absolute negative upon all the rest.<sup>22</sup>

The object of the preceding pages has been to show that the Constitution is federative, in the power which framed it; federative in the power which adopted and ratified it; federative in the power which sustains and keeps it alive; federative in the power by which alone it can be altered or amended; and federative in the structure of all its departments. In what respect, then, can it justly be called a consolidated or national

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22 So absolutely is the Federal Government dependent on the States for its existence at all times, that it may be absolutely dissolved, without the least violence, by the simple refusal of a part of the States to act. If, for example, a few States, having a majority of electoral votes, should refuse to appoint electors of President and Vice-President, there would be no constitutional Executive, and the whole machinery of government would stop.

government? Certainly, the mere fact that, in particular cases, it is authorized to act directly on the people, does not disprove its federative character, since that very sovereignty in the States, which a confederation implies, includes within it the right of the State to subject its own citizens to the action of the common authority of the confederated States, in any form which may seem proper to itself. Neither is our Constitution to be deemed the less federative, because it was the object of those who formed it to establish "a government," and one effective for all the legitimate purposes of government. Much emphasis has been laid upon this word, and it even has been thought, by one distinguished statesman of Judge Story's school, that ours is "a government proper," which I presume implies that it is a government in a peculiarly emphatic sense. I confess that I do not very clearly discern the difference between a government and a government proper. Nothing is a government which is not properly so; and whatever is properly a government is a government proper. But whether ours is a "government proper," or only a simple government, does not prove that it is not a confederation, unless it be true that a confederation cannot be a government.

For myself, I am unable to discover why States, absolutely sovereign, may not create for themselves, by compact, a common government, with powers as extensive and supreme as any sovereign people can confer on a government established by themselves. In what other particular ours is a consolidated or national government, I leave it to the advocates of that doctrine to show.

## **CHAPTER IX - EXTENT AND LIMITS OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES**

We come now to a more particular and detailed examination of the question, "Who is the final judge, or interpreter in constitutional controversies?" The fourth chapter of this division of Judge Story's work is devoted to this inquiry; and the elaborate examination which he has given to the subject, shows that he attached a just importance to it. The conclusion, however, to which he has arrived, leaves still unsettled the most difficult and contested propositions which belong to this part of the Constitution. His conclusion is, that, "in all questions of a judicial nature," the Supreme Court of the United States is the final umpire; and that the States, as well as individuals, are absolutely bound by its decisions. His reasoning upon this part of the subject is not new, and does not strike me as being particularly forcible. Without deeming it necessary to follow him in the precise order of his argument, I shall endeavor to meet it in all its parts, in the progress of this examination. Its general outline is this: It is within the proper function of the judiciary to interpret the laws; the Constitution is the supreme law, and therefore it is within the proper function of the judiciary to interpret the Constitution; of course, it is the province of the federal judiciary to interpret the Federal Constitution. And as that Constitution, and all laws made in pursuance thereof, are the supreme law of the land, anything in the laws or constitution of any State to the contrary notwithstanding, therefore, the interpretations of that Constitution, as given by the Supreme Court, are obligatory, final and conclusive, upon the people and the States.

Before we enter upon this investigation, it is proper to place the proposition to be discussed in terms somewhat more definite and precise than those which the author has employed. What, then, is meant by "final judge and interpreter?" In the ordinary acceptance of these terms, we should understand by them a tribunal having lawful cognizance of a subject, and from whose decisions there is no appeal. In this view of the question, there can be no difficulty in admitting that the decisions of the Supreme Court

are final and conclusive. Whatever comes within the legitimate cognizance of that tribunal, it has a right to decide, whether it be a question of the law or of the Constitution, and no other tribunal can reverse its decision. The Constitution, which creates the Supreme Court, creates no other court of superior or appellate jurisdiction to it, and, consequently, its decisions are strictly "final." There is no power in the same government to which that court belongs to reverse or control it, nor are there any means therein of resisting its authority. So far, therefore, as the Federal Constitution has provided for the subject at all, the Supreme Court is, beyond question, the final judge or arbiter; and this, too, whether the jurisdiction which it exercises be legitimate or usurped.

The terms "constitutional controversies" are still more indefinite. Every controversy which is submitted to the decision of a judicial tribunal, whether State or federal, necessarily involves the constitutionality of the law under which it arises. If the law be not constitutional, the court cannot enforce it, and, of course, the question whether it be constitutional or not, necessarily arises in every case to which the court is asked to apply it. The very act of enforcing a law presupposes that its constitutionality has been determined. In this sense, every court, whether State or federal, is the "judge or arbiter of constitutional controversies," arising in causes before it and if there be no appeal from its decision, it is the "final" judge or arbiter, in the sense already expressed.

Let us now inquire what "constitutional controversies" the federal courts have authority to decide, and how far its decisions are final and conclusive against all the world. The third article of the Constitution provides that "the judicial powers shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting 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 and the citizens thereof, and foreign States, citizens or subjects."

The eleventh amendment provides that "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 and subjects of any foreign State." It will be conceded on all hands that the federal courts have no jurisdiction except what is here conferred. The judiciary, as a part of the Federal Government, derives its powers only from the Constitution which creates that government. The term "cases" implies that the subject matter shall be proper for judicial decision; and the parties between whom alone jurisdiction can be entertained, are specifically enumerated. Beyond these "cases" and these parties they have no jurisdiction.

There is no part of the Constitution in which the framers of it have displayed a more jealous care of the rights of the States, than in the limitations of the judicial power. It is remarkable that no power is conferred except what is absolutely necessary to carry into effect the general design, and accomplish the general object of the States, as independent, confederated States. The federal tribunals cannot take cognizance of any case whatever in which all the States have not an equal and common interest that a just and impartial decision shall be had. A brief analysis of the provisions of the Constitution will make this sufficiently clear.

Cases "arising under the Constitution" are those in which some right or privilege is denied, which the Constitution confers, or something is done which the Constitution

prohibits, as expressed in the Constitution itself. Those which arise "under the laws of the United States" are such as involve rights or duties, which result from the legislation of Congress. Cases of these kinds are simply the carrying out of the compact or agreement made between the States, by the Constitution itself, and, of course, all the States are alike interested in them. For this reason alone, if there were no other, they ought to be entrusted to the common tribunals of all the States. There is another reason, however, equally conclusive. The judicial should always be at least co-extensive with the legislative power; for it would be a strange anomaly, and could produce nothing but disorder and confusion, to confer on a government the power to make a law, without conferring at the same time the right to interpret and the power to enforce it.

Cases arising under treaties, made under the authority of the United States, and those "affecting ambassadors and other public ministers and consuls," could not properly be entrusted to any other than the federal tribunals. Treaties are made under the common authority of the States, and all, alike, are bound for the faithful observance of them. Ambassadors and other public ministers and consuls are received under the common authority of all the States, and their duties relate only to matters involving alike the interests of all. The peace of the country, and the harmony of its relations with foreign powers, depend, in a peculiar degree, on the good faith with which its duties in reference to these subjects are discharged. Hence it would be unsafe to entrust them to any other than their own control; and even if this were not so, it would be altogether incongruous to appeal to a State tribunal, to enforce the rights, the obligations or the duties of the United States. For like reasons, cases of admiralty and maritime jurisdiction are properly entrusted to the federal tribunals.

Controversies to which the United States shall be a party should, upon general principles, belong only to her own courts. There would be neither propriety nor justice in permitting any one State to decide a case in which all the States are parties. In like manner, those between two or more States -- between a State and citizens of another State, where the State is plaintiff -- (it cannot be sued) -- and between citizens of different States, could not be entrusted to the tribunals of any particular State interested, or whose citizens are interested therein, without danger of injustice and partiality. Jurisdiction is given to the federal courts, in these cases, simply because they are equally interested for all the parties, are the common courts of all the parties, and therefore are presumed to form the only fair and impartial tribunal between them. The same reasoning applies to cases between citizens of the same State, claiming lands under grants of different States. Cases of this sort involve questions of the sovereign power of the States, and could not, with any show of propriety, be entrusted to the decision of either of them, interested as it would be to sustain its own acts, against those of the sister State. The jurisdiction in this case is given upon the same principles which give it in cases between two or more States.

Controversies between a State or the citizens thereof, and foreign States, citizens or subjects, depend on a different principle, but one equally affecting the common rights and interests of all the States. A foreign State cannot, of course, be sued; she can appear in our courts only as plaintiff. Yet, in whatever form such controversies, or those affecting the citizens of a foreign State, may arise, all the States have a deep interest that an impartial tribunal, satisfactory to the foreign party, should be provided. The denial of justice is a legitimate, and not an unfruitful cause of war. As no State can be involved in war without involving all the rest, they all have a common interest to withdraw from the State tribunals a jurisdiction which may bring them within the danger of that result. All the States are alike bound to render justice to foreign States and their people; and this

common responsibility gives them a right to demand that every question involving it shall be decided by their common judicatory.

This brief review of the judicial power of the United States, as given in the Constitution, is not offered as a full analysis of the subject; for the question before us does not render any such analysis necessary. By design has been only to show with what extreme reserve judicial power has been conferred, and with what caution it has been restricted to those cases, only, which the new relation between the States established by the Constitution rendered absolutely necessary. In all the cases above supposed, the jurisdiction of the federal courts is clear and undoubted; and as the States have, in the frame of the Constitution, agreed to submit to the exercise of this jurisdiction, they are bound to do so, and to compel their people to like submission. But it is to be remarked, that they are bound only by their agreement, and not beyond it. They are under no obligation to submit to the decisions of the Supreme Court, on subject matter not properly cognizable before it, nor to those between parties not responsible to its jurisdiction.<sup>23</sup> Who, then, is to decide this point? Shall the Supreme Court decide for itself, and against all the world? It is admitted that every court must necessarily determine every question of jurisdiction which arises before it, and, so far, it must of course be the judge of its own powers. If it be a court of the last resort, its decision is necessarily final, so far as those authorities are concerned, which belong to the same system of government with itself. There is, in fact, no absolute and certain limitation, in any constitutional government, to the powers of its own judiciary; for, as those powers are derived from the Constitution and as the judges are the interpreters of the Constitution, there is nothing to prevent them from interpreting in favor of any power which they may claim. The Supreme Court, therefore, may assume jurisdiction over subjects and between parties, not allowed by the Constitution, and there is no power in the Federal Government to gainsay it. Even the impeachment and removal of the judges, for ignorance or corruption, would not invalidate their decisions already pronounced. Is there, then, no redress? The Constitution itself will answer this question in the most satisfactory manner.

The tenth article of the Amendments of the Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The powers thus reserved, are not

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23 The decisions of the Supreme Court have declared that its jurisdiction is limited by the Constitution, laws and treaties of the United States, and that it has no power of acting, except where the subject is submitted according to the form presented by law. (9 Wheaton, 738; 5 Peters, 2; 6 Wheaton, 264.) The original jurisdiction of the Supreme Court is pointed out by the Constitution, and cannot be lessened nor enlarged by act of Congress; for Congress cannot transcend the powers entrusted to it in the Constitution. (1 Cranch, 187, 175.) The Supreme Court has no Jurisdiction in any case where a State is the defendant (See Eleventh Amendment to the constitution; 9 Wheaton, 732.) Where two parties in a State Court set up conflicting titles under the same act of Congress, the Supreme Court has no power to override the decision of the State Court. The decision of the State Court is final in such cases. (3 Wheaton, 433; 6 Wheaton, 448) The Supreme Court has no authority, on a writ of error, to declare a law of a State void on account of its collision with the Constitution of that State. (3 Peters, 288.) The Supreme Court has no authority to issue a habeas corpus in the case of persons held by the action of the State Court. (1 Wash., 239.) Many other cases might be named which show the limited jurisdiction of the Supreme Court of the United States. It has jurisdiction over no matter which the States have not delegated in the Constitution. Overall matters which the States have not delegated to the Federal Government, the State Courts are supreme. Mr. Chase, the present Chief Justice, speaking of the sovereignty of the State of Ohio in 1854, said: "We have rights which the Federal Government must not invade -- rights superior to its power, on which our sovereignty depends. "Such a proposition necessarily follows from the limited nature of the Federal Government -- [C. C. B.]

only reserved against the Federal Government in whole, but against each and every department thereof. The judiciary is no more excepted out of the reservation than is the legislature or the Executive. Of what nature, then, are those reserved powers? Not the powers, if any such there be, which are possessed by all the States together, for the reservation is to "the States respectively"; that is, to each State separately and distinctly. Now we can form no idea of any power possessed by a State as such, and independent of every other State, which is not, in its nature, a sovereign power. Every power so reserved, therefore, must be of such a character that each State may exercise it, without the least reference to responsibility to any other State whatever.

We have already seen that the Constitution of the United States was formed by the States as such, and the reservation above quoted is an admission that in performing that work, they acted as independent and sovereign States. It is incident to every sovereignty to be alone the judge of its own compacts and agreements. No other State or assemblage of States has the least right to interfere with it, in this respect, and cannot do so without impairing its sovereignty. The Constitution of the United States is but the agreement which each State has made, with each and all the other States, and so distinguishable, in the principle we are examining, from any other agreement between sovereign States. Each State, therefore, has a right to interpret that agreement for itself, unless it has clearly waived that right in favor of another power. That the right is not waived in the case under consideration, is apparent from the fact already stated, that if the judiciary be the sole judges of the extent of their own powers, their powers are universal, and the enumeration in the Constitution is idle and useless. But it is still farther apparent from the following view:

The Federal Government is the creature of the States. It is not a party to the Constitution, but the result of it -- the creation of that agreement which was made by the States as parties. It is a mere agent, entrusted with limited powers for certain specific objects; which powers and objects are enumerated in the Constitution. Shall the agent be permitted to judge of the extent of his own powers, without reference to his constituent? To a certain extent, he is compelled to do this, in the very act of exercising them, but this is always in subordination to the authority by whom his powers were conferred. If this were not so, the result would be, that the agent would possess every power which the constituent could confer, notwithstanding the plainest and most express terms of the grant. This would be against all principle and all reason. If such a rule would prevail in regard to government, a written constitution would be the idlest thing imaginable. It would afford no barrier against the usurpations of the government, and no security for the rights and liberties of the people. If then the Federal Government has no authority to judge, in the last resort, of the extent of its own powers, with what propriety can it be said that a single department of that government may do so? Nay, it is said that this department may not only judge for itself, but for the other departments also. This is an absurdity as pernicious as it is gross and palpable. If the judiciary may determine the powers of the Federal Government, it may pronounce them either less or more than they really are. That government at least would have no right to complain of the decisions of an umpire which it had chosen for itself and endeavored to force upon the States and the people. Thus a single department might deny to both the others salutary powers which they really possessed, and which the public interest or the public safety might require them to exercise; or it might confer on them powers never conceded, inconsistent with private right, and dangerous to public liberty.

In construing the powers of a free and equal government, it is enough to disprove the existence of any rule, to show that such consequences as these will result from it. Nothing short of the plainest and most unequivocal language should reconcile us to the adoption of such a rule. No such language can be found in our Constitution. The only clause, from which the rule can be supposed to be derived, is that which confers jurisdiction in "all cases arising under the Constitution, and the laws made in pursuance thereof"; but this clause is clearly not susceptible of any such construction. Every right may be said to be a constitutional right, because no right exists which the Constitution disallows; and, consequently, every remedy to enforce those rights presents "a case arising under the Constitution." But a construction so latitudinous will scarcely be contended for by any one. The clause under consideration gives jurisdiction only as to those matters, and between those parties, enumerated in the Constitution itself. Whenever such a case arises, the Federal courts have cognizance of it; but the right to decide a case arising under the Constitution, does not necessarily imply the right to determine in the last resort what that Constitution is. If the Federal courts should, in the very teeth of the eleventh amendment, take jurisdiction of cases "commenced or prosecuted against one of the States by citizens of another State," the decisions of those courts, that they had jurisdiction, would certainly not settle the Constitution in that particular. The State would be under no obligation to submit to such a decision, and it would resist it by virtue of its sovereign right to decide for itself, whether it had agreed to the exercise of such a jurisdiction or not.

Considering the nature of our system of government, the States ought to be, and I presume always will be, extremely careful not to interpose their sovereign power against the decisions of the Supreme Court in any case where that court clearly has jurisdiction. Of this character are the cases already cited at the commencement of this inquiry; such, for example, as those between two States, those affecting foreign ministers, those of admiralty and maritime jurisdiction, &c. As to all these subjects the jurisdiction is clear, and no State can have any interest to dispute it. The decisions of the Supreme Court, therefore, ought to be considered as final and conclusive, and it would be a breach of the contract on the part of any State to refuse submission to them. There are, however, many cases involving questions of the powers of government, State and federal, which cannot assume a proper form for judicial investigation. Most questions of mere political power are of this sort; and such are all questions between a State and the United States. As to these, the Constitution confers no jurisdiction on the federal courts, and, of course, it provides no common umpire to whose decision they can be referred. In such cases, therefore, the State must of necessity decide for itself. But there are also cases between citizen and citizen, arising under the laws of the United States, and between the United States and the citizen, arising in the same way. So far as the federal tribunals have cognizance of such cases, their decisions are final. If the constitutionality of the law under which the case arises, should come into question, the court has authority to decide it, and there is no relief for the parties, in any other judicial proceeding. If the decision, in a controversy between the United States and a citizen, should be against the United States, it is, of course, final and conclusive. If the decision should be against the citizen, his only relief is by an appeal to his own State. He is under no obligation to submit to federal decisions at all, except so far only as his own State has commanded him to do so; and he has, therefore, a perfect right to ask his State whether her commands extend to the particular case or not. He does not ask whether the federal court has interpreted the law correctly or not, but whether or not she ever consented that Congress should pass the law. If Congress had such power, he has no relief, for the decision of the highest federal court is final; if Congress had not such power, then he is

oppressed by the action of a usurped authority, and has a right to look to his own State for redress. His State may interpose in his favor or not, as she may think proper. If she does not, then there is an end of the matter; if she does, than it is no longer a judicial question. The question is then between new parties, who are not bound by the former decision; between a State and the United States. As between these parties the federal tribunals have no jurisdiction, there is no longer a common umpire to whom the controversy can be referred. The State must of necessity judge for itself, by virtue of that inherent, sovereign power and authority, which, as to this matter, it has never surrendered to any other tribunal. Its decision, whatever it may be, is binding upon itself and upon its own people, and no farther.

A great variety of cases are possible, some of which are not unlikely to arise, involving the true construction of the Federal Constitution, but which could not possibly be presented to the courts, in a form proper for their decision. The following are examples:

By the 4th section of the 4th article it is provided that "Congress shall guaranty to every State in the Union a republican form of government." What is a republican form of government, and how shall the question be decided? In its very nature, it is a political, and not a judicial question, and it is not easy to imagine by what contrivance it could be brought before a court. Suppose a State should adopt a constitution not republican, in the opinion of Congress, what course would be pursued? Congress might, by resolution, determine that the constitution was not republican, and direct the State to form a new one. And suppose that the State should refuse to do so, on the ground that it had already complied with the requisitions of the Federal Constitution in that respect? Could Congress direct an issue to try the question at the bar of the Supreme Court? This would, indeed, be an odd way of settling the rights of nations, and determining the extent of their powers! Besides, who would be parties to the issue? At whose suit should the State be summoned to appear and answer? Not at that of the United States, because a State cannot be sued by the United States, in a federal court; not at that of any other State, nor of any individual citizen, because they are not concerned in the question. It is obvious that the case does not present proper subject matter for judicial investigation; and even if it did, that no parties could be found authorized to present the issue.

Again, Congress has authority "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." Suppose that Congress should usurp the right to appoint the militia officers, or the State should insist on training the militia in their own way, and not "according to the discipline prescribed by Congress." How could this matter be brought before the Supreme Court? And even if properly brought there, how could its sentence be executed?

Again, suppose that Congress should enact that all the slaves of the country should immediately be free. This is certainly not impossible, and I fear not even improbable, though it would be the grossest and most palpable violation of the rights of the slaveholder. This would certainly produce the most direct conflict between the State and Federal Governments. It would involve a mere question of political power – the question whether the act of Congress forbidding slavery, or the laws and Constitution of the State allowing it, should prevail. And yet it is manifest that it presents no subject matter proper for judicial decision, and that the parties to it could not be convened before the Supreme Court.

These examples are sufficient to show that there is a large class of "constitutional controversies," which could not possibly be brought under the cognizance of any judicial tribunal, and still less under that of the federal courts. As to these cases, therefore, each State must, of necessity, for the reasons already stated, be its own "final judge or interpreter." They involve the mere question of political power, as between the State and Federal Governments; and the fact that they are clearly withheld from the jurisdiction of the Supreme Court, goes far to prove that the States in framing the Constitution did not design to submit to that court any question of the like kind, in whatever form or between whatever parties it might arise, except so far only as the parties themselves were concerned.

Judge Story himself does not contend that the Supreme Court is the "final judge or interpreter" in all cases whatsoever; he, of course, admits that no court can decide any question which is not susceptible of a proper form for judicial enquiry. But he contends that, in all cases of which the Supreme Court can take cognizance, its decisions are final, and absolutely binding and conclusive in all respects, to all purposes, and against the States and their people. It is this sweeping conclusion which it has been my object to disprove. I can see in the federal courts nothing more than the ordinary functions of the judiciary in every country. It is their proper province to interpret the laws; but their decisions are not binding, except between the parties litigant and their privies. So far as they may claim the force of authority, they are not conclusive, even upon those who pronounce them, and certainly are not so beyond the sphere of their own government. Although the Judiciary may, and frequently do, enlarge or contract the powers of their own governments, as generally understood, yet they can never enlarge or contract those of other governments, for the simple reason that other governments are not bound by their decisions; and so in our own systems. There is no case in which a judicial question can arise, before a federal court, between a State and the Federal Government. Upon what principle, then, are the States bound by the decisions of the federal judiciary? Upon no principle, certainly, except that, as to certain subjects, they have agreed to be so bound. But this agreement they made in their character of Sovereign States, not with the Federal Government, but with one another. As sovereign States, they alone are to determine the nature and extent of that agreement, and, of course, they are to determine whether or not they have given the federal courts authority to bind them in any given case. This principle has frequently been asserted by the States, and always successfully.<sup>24</sup>

But these mere technical rules, upon which we have hitherto considered the subject, are altogether unworthy of its importance, and far beneath its dignity. Sovereign nations do not ask their judges what are their rights, nor do they limit their powers by judicial precedents. Still less do they entrust these important subjects to judicial tribunals not their own, and least of all, to the tribunals of that power against which their own power is asserted. It would have been a gross inconsistency in the States of our Union to do this, since they have shown in every part of their compact with one another, the most jealous care of their separate sovereignty and independence. It is true they have agreed to be bound by the decisions of federal tribunals in certain specified cases, and it is not to be doubted that, so long as they desire the continuance of their present union, they will feel themselves bound, in every case which comes plainly within their agreement. There is no necessity to call in the aid of the Supreme Court to ascertain to what subjects, and how far that agreement extends. So far as it is plain, it will be strictly observed, as national faith and honor require; there is no other guarantee. So far as it is not plain, or

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24 Hunter and Martin, *Cohen v. State of Virginia and other cases*.

so far as it may be the will and pleasure of any State to deny or to resist it, the utter impotency of courts of justice to settle the difficulty will be manifested beyond all doubt. They will be admonished of their responsibility to the power which created them. The States created them. They are but an emanation of the sovereign power of the States, and can neither limit nor control that power.

Ordinarily, the judiciary are the proper interpreters of the powers of government, but they interpret in subordination to the power which created them. In governments established by an aggregate people, such as are those of the States, a proper corrective is always found in the people themselves. If the judicial interpretation confer too much or too little power on the government, a ready remedy is found in an amendment of the Constitution. But in our federal system the evil is without remedy, if the federal courts be allowed to fix the limits of federal power with reference to those of the States. It would place every thing in the State governments, except their mere existence, at the mercy of a single department of the Federal Government. The maxim, *stare decisis*, is not always adhered to by our courts; their own decisions are not held to be absolutely binding upon themselves. They may establish a right today and unsettle it tomorrow. A decision of the Supreme Court might arrest a State in the full exercise of an important and necessary power, which a previous decision of the same court had ascertained that she possessed. Thus the powers of the State governments, as to many important objects, might be kept indeterminate and constantly liable to change, so that they would lose their efficiency, and forfeit all title to confidence and respect. It is true, that in this case, too, there is a possible corrective in the power to amend the Constitution. But that power is not with the aggrieved State alone; it could be exerted only in connection with other States, whose aid she might not be able to command. And even if she could command it, the process would be too slow to afford effectual relief. It is impossible to imagine that any free and sovereign State ever designed to surrender her power of self protection in a case like this, or ever meant to authorize any other power to reduce her to a situation so helpless and contemptible.<sup>25</sup>

Yielding, therefore, to the Supreme Court all the jurisdiction and authority which properly belongs to it, we cannot safely or wisely repose in it the vast trust of ascertaining, defining or limiting the sovereign powers of the States.

Let us now follow the author in the enquiry, by what rules shall the Constitution be interpreted? Many of those which he has given are merely such as we apply to every instrument, and they do not, therefore, require any particular examination. The principal

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25 This want of uniformity and fixedness, in the decisions of courts, renders the Supreme Court the most unfit umpire that could be selected between the Federal Government and the States, on questions involving their respective rights and powers. Suppose that the United States should resolve to cut a canal through the territory of Virginia, and being resisted, the Supreme Court should decide that they had a right to do so. Suppose that, when the work was completed, a similar attempt should be made in Massachusetts, and being resisted, the same court should decide that they had no right to do so. The effect would be that the United States would possess a right in one State which they did not possess in another. Suppose that Virginia should impose a tax on the arsenals, dock-yards, &c., of the United States within her territory, and that, in a suit to determine the right, the Supreme Court should decide in favor of it. Suppose that a like attempt should be made by Massachusetts, and, upon a similar appeal to that court, it should decide against it; Virginia would enjoy a right in reference to the United States, which would be denied to Massachusetts. Other cases may be supposed, involving like consequences, and showing the absurdity of submitting to courts of justice the decision of controversies between governments, involving the extent and nature of their powers. I know that the decisions of the Supreme Court on constitutional questions, have been very consistent and uniform; but that affords no proof that they will be so through all time to come. It is enough for the purposes of the present argument, that they MAY be otherwise.

one, and that from which he deduces many others as consequences, is this: "It is to be construed as a frame or fundamental law of government, established by the people of the United States, according to their own free pleasure and sovereign will. In this respect, it is in no wise distinguishable from the constitutions of the State governments." That our Constitution is "a frame of government" will scarcely be denied by any one, and this, whether it be in its nature federal or consolidated. It is, also, as in every other constitution of government, "a fundamental law." It is the acknowledged basis of all federal power and authority, the sole chart by which federal officers are to direct their course. But all this leaves the enquiry still open, what is this fundamental law, what is the course indicated by the chart of federal power, and how is it to be ascertained? Judge Story seems to suppose that a full answer to this question may be found in the fact, that this frame or fundamental law of government was established by "the people of the United States, according to their free pleasure and sovereign will." If the fact were really so, it would undoubtedly exert an important influence, and would go far to justify his construction of the Constitution. We here discern the usefulness and necessity of that historical enquiry, which has just been finished. From that enquiry, we learn, distinctly and without doubt, that the Constitution was not established by "the people of the United States," and, consequently, that it does not resemble, in that respect, the constitutions of the States. There is no such analogy between them, as will presently be shown, as to require that they should be construed by the same rules. The Constitution of the United States is to be considered as a compact or confederation between free, independent and sovereign States, and is to be construed as such, in all cases where its language is doubtful. This is the leading and fundamental rule, from which the following may be deduced as consequences.

It is to be construed strictly. Judge Story supposes that the Constitution of the United States ought to receive as favorable a construction as those of the States; that it is to be liberally construed; that doubtful words are to be taken most strongly in favor of the powers of the Federal Government; and that there is "no solid objection to implied powers." All these are but inferences from the great rule which he first laid down, to wit, that the Constitution is to be considered as a frame of government, established by the people of the United States. As that rule cannot apply, because the fact on which it was founded is not true, it would seem to follow, as a necessary consequence, that the inferences deduced from it cannot be allowed. Nevertheless, they shall receive a more particular consideration under the present enquiry.

According to the principles of all our institutions, sovereignty does not reside in any government whatever, neither State nor federal. Government is regarded merely as the agent of those who create it, and subject in all respects to their will. In the States the sovereign power is in the people of the States respectively; and the sovereign power of the United States would, for the same reason, be in "the people of the United States," if there were any such people, known as a single nation, and the framers of the Federal Government. We have already seen, however, that there are no such people, in a strict political sense, and that no such people had any agency in the formation of our Constitution, but that it was formed by the States, emphatically as such. It would be absurd, according to all principles received and acknowledged among us, to say that the sovereign power is in one party, and the power which is in the government is in another. The true sovereignty of the United States, therefore, is in the States, and not in the people of the United States, nor in the Federal Government. That government is but the agent through whom a portion of this sovereign power is exerted; possessing no sovereignty itself, and exerting no power, except such only as its constituents have conferred on it. In ascertaining what these powers are, it is obviously proper that we

should look only to the grant from which they are derived. The agent can claim nothing for itself, and on its own account The Constitution is a compact, and the parties to it are each State, with each and every other State. The Federal Government is not a party, but is the mere creature of the agreement between the States as parties. Each State is both grantor and grantee, receiving from each and all the other States precisely what, in its turn, it concedes to each and all of them. The rule, therefore, that the words are to be taken most strongly in favor of the grantee, cannot apply, because, as each State is both grantor and grantee, it would give exactly as much as it would take away. The only mode, therefore, by which we may be certain to do no injustice to the intentions of the parties, is by taking their words as the true exponents of their meaning.

Judge Story thinks, however, that a more liberal rule ought to be adopted, in construing the Constitution of the United States, because "the grant inures solely and exclusively for the benefit of the grantor himself"; and therefore he supposes that "no one would deny the propriety of giving to the words of the grant a benign and liberal interpretation." Admit that it is so, and it would seem to follow that "the benefit of the grantor" requires that we should take from him as little as possible, and that an "interpretation of the words of the grant" would not be "benign and liberal" as to him, if it deprived him of any more of his rights and powers, than his own words prove that he intended to relinquish. It is evident that this remark of the author proceeds upon the leading idea, that the people of the United States are the only party to the contract; an idea which, we have already seen, can by no means be justified or allowed. The States are parties; each agreeing with each, and all the rest, that it will exercise, through a common agent, precisely so much of its sovereign rights and powers, as will, in its own opinion, be beneficial to itself when so exercised. The grant "inures to the sole and exclusive benefit of the grantor"; and who but the grantor himself shall determine what benefit he had in view, and how far the grant shall extend, in order to secure it? This he has done, in the case before us, by the very terms of the grant. If you hold him bound by anything beyond those terms, you enable others to decide this matter for him, and may thus virtually abrogate his contract, and substitute another in its place.

I certainly do not mean to say, that in construing the Constitution, we should at all times confine ourselves to its strict letter. This would, indeed, be sticking in the bark, to the worst possible purpose. Many powers are granted by that instrument, which are not included within its express terms, literally taken, but which are, nevertheless, within their obvious meaning. The strict construction for which I contend, applies to the intention of the framers of the Constitution; and this may or may not require a strict construction of their words. There is no fair analogy as to this matter between the Federal Constitution and those of the States, although the author broadly asserts that they are not "distinguishable in this respect"; and this will sufficiently appear from the following considerations:

1. The entire sovereignty of each State is in the people thereof. When they form for themselves a constitution of government, they part with no portion of their sovereignty, but merely determine what portion thereof shall lie dormant, what portion they will exercise, and in what modes and by what agencies they will exercise it. There is but one party to such a government, to wit, the people of the State. Whatever power their government may possess, it is still the power of the people; and their sovereignty remains the same. So far, therefore, there is "no solid objection to implied powers" in a State constitution; because, by employing power in the government, you take no power from those who made the government.

2. As government is the agent and representative of the sovereign power of the people, the presumption is, that they intend to make it the agent and representative of all their power. In every frame of limited government, the people deny to themselves the exercise of some portion of their rights and powers, but the larger portion never lies thus dormant. In this case, therefore, (viz.: of a government established by an aggregate people), the question naturally is, not what powers are granted, but what are denied; and the rule of strict construction, if applied at all, should be applied only to the powers denied. This would have the effect of enlarging the powers of government, by limiting the restraints imposed on it.

3. As it is fair to presume that a people absolutely sovereign, and having an unlimited right to govern themselves as they please, would not deny to themselves the exercise of any power necessary to their prosperity and happiness, we should admit all fair and reasonable implications in favor of the government, because, otherwise, some power necessary to the public weal, might be dormant and useless.

In these respects, there is no just analogy between the State constitutions and that of the United States.

In the first place, the Constitution of the United States is not a frame of government to which there is but one party. The States are parties, each stipulating and agreeing with each and all the rest. Their agreement is, that a certain portion of that power which each is authorized to exercise within its own limits shall be exercised by their common agent, within the limits of all of them. This is not the separate power of each, but the joint power of all. In proportion, therefore, as you increase the powers of the Federal Government, you necessarily detract from the separate powers of the States. We are not to presume that a sovereign people mean to surrender any of their powers; still less should we presume that they mean to surrender them, to be exerted over themselves by a different sovereignty. In this respect, then, every reasonable implication is against the Federal Government.

In the second place, the Constitution of the United States is not the primary social relation of those who formed it. The State governments were already organized, and were adequate to all the purposes of their municipal concerns. The Federal Government was established only for such purposes as the State government could not answer, to wit: the common purposes of all the States. Whether, therefore, the powers of that government be greater or less, the whole power of the States, (or so much thereof as they design to exercise at all), is represented, either in the Federal Government or in their own. In this respect, therefore, there is no necessity to imply power in the Federal Government.

In the third place, whatever power the States have not delegated to the Federal Government, they have reserved to themselves. Every useful faculty of government is found either in the one or the other. Whatever the Federal Government cannot do for all the States, each State can do for itself, subject only to the restraints of its own constitution. No power, therefore, is dormant and useless, except so far only as the States voluntarily decline to exert it. In this respect, also, there is no necessity to imply power in the Federal Government.

In all these particulars, the Federal Constitution is clearly "distinguishable from the constitutions of the State governments." The views just presented support this obvious distinction, that in the State constitutions every power is granted which is not denied; in

the Federal Constitution, every power is denied which is not granted. There are yet other views of the subject, which lead us to the same conclusion.

The objects for which the Federal Government was, established, are by no means equal in importance to those of the State constitutions. It is difficult to imagine any necessity for a Federal Government at all, except what springs from the relation of the States to foreign nations. A union among them is undoubtedly valuable for many purposes. It renders them stronger and more able to resist their enemies; it attracts to them the respect of other countries, and gives them advantages in the formation of foreign connections; it facilitates all the operations of war, of commerce and of foreign diplomacy. But these objects, although highly important, are not so important as those great rights which are secured to us by the State constitutions. The States might singly protect themselves; singly form their foreign connections, and singly regulate their commerce, not so effectually, it is true, but effectually enough to afford reasonable security to their independence and general prosperity. In addition to all this, we rely exclusively on the State governments for the security of the great rights of life, liberty and property. All the valuable and interesting relations of the social state spring from them. They give validity to the marriage tie; they prescribe the limits of parental authority; they enforce filial duty and obedience; they limit the power of the master, and exact the proper duties of the servant. Their power pervades all ranks of society, restraining the strong, protecting the weak, succoring the poor, and lifting up the fallen and helpless. They secure to all persons an impartial administration of public justice. In all the daily business of life, we set under the protection and guidance of the State governments. They regulate and secure our rights of property; they enforce our contracts and preside over the peace and safety of our firesides. There is nothing dear to our feelings or valuable in our social condition, for which we are not indebted to their protecting and benignant action. Take away the Federal Government altogether, and still we are free, our rights are still protected, our business is still regulated, and we still enjoy all the other advantages and blessings of established and well-organized government. But if you take away the State governments, what have you left? A Federal Government, which can neither regulate your industry, secure your property, nor protect your person! Surely there can be no just reason for stealing, by liberal constructions and implications, from these beneficent State governments, any portion of their power, in order to confer it on another government, which, from its very organization, cannot possibly exert it for equally useful purposes. A strict construction of the Constitution will give to the Federal Government all the power which it can beneficially exert, all that is necessary for her to possess, and all that its framers ever designed to confer on it.

To these views of the subject we may add, that there is a natural and necessary tendency in the Federal Government to encroach on the rights and powers of the States. As the representative of all the States, it affords, in its organization, an opportunity for these combinations, by which a majority of the States may oppress the minority, against the spirit or even the letter of the Constitution. There is no danger that the Federal Government will ever be too weak. Its means of aggrandizing itself are so numerous, and its temptations to do so are so strong, that there is not the least necessity to imply any new power in its favor. The States, on the contrary, have no motive to encroach on the Federal Government, and no power to do so, even if they desired it. In order, therefore, to preserve the just balance between them, we should incline, in every doubtful case, in favor of the States; confident that the Federal Government has always the inclination, and always the means, to maintain itself in all its just powers.

The Constitution itself suggests that it should be strictly and not liberally construed. The tenth amendment provides, that "the powers not delegated to the United States, nor prohibited, to the States, by the Constitution, are reserved to the States and the people." There was a corresponding provision in the Articles of Confederation, which doubtless suggested this amendment. It was considered necessary, in order to prevent that latitude of construction which was contended for by one of the great political parties of the country, and much dreaded and strenuously opposed by the other. In the Articles of Confederation all "rights, jurisdiction and powers" are reserved, except only such as are expressly delegated: but in the Constitution the word "expressly" is omitted. Judge Story believes, from this fact, that it was the intention of the framers of the tenth amendment to leave "the question, whether the particular power which is the subject of contest, has been delegated to one government or prohibited to the other, to depend upon a fair construction of the whole instrument"; doubtless intending by the word "fair," a construction as liberal as would be, applied to any other frame of government. This argument is much relied on, and is certainly not without plausibility, but it loses all its force, if the omission can be otherwise satisfactorily accounted for. The Constitution provides that Congress shall have power to pass all laws which shall be necessary and proper for carrying into effect the various powers which it grants. If this clause confers no additional faculty of any sort, it is wholly useless and out of place; the fact that it is found in the Constitution is sufficient proof that some effect was intended to be given to it. It was contemplated that, in executing the powers expressly granted, it might be necessary to exert some power not enumerated, and as to which some doubt might, for that reason, be entertained. For example, the power to provide a navy is not, in itself, the power to build a dry dock; but, as dry docks are necessary and proper means for providing a navy, Congress shall have power to authorize the construction of them. But if the word "expressly" had been used in the tenth amendment, it would have created a very rational and strong doubt of this. There would have been, at least, an apparent repugnance between the two provisions of the Constitution; not a real one, I admit, but still sufficiently probable to give rise to embarrassing doubts and disputes. Hence the necessity of omitting the word "expressly," in the tenth amendment. It left free from doubt and unaffected the power of Congress to provide the necessary and proper means of executing the granted powers, while it denied to the Federal Government every power which was not granted. The same result was doubtless expected from this amendment of the Constitution, which was expected from the corresponding provision in the Articles of Confederation; and the difference in the terms employed is but the necessary consequence of the difference in other provisions of the two systems.

Strictly speaking, then, the Constitution allows no implication in favor of the Federal Government, in any case whatever. Every power which it can properly exert is a granted power. All these are enumerated in the Constitution, and nothing can be constitutionally done, beyond that enumeration, unless it be done as a means of executing some one of the enumerated powers. These means are granted, not implied; they are given as the necessary incidents of the power itself, or, more properly speaking, as component parts of it, because the power would be imperfect, nugatory and useless, without them. It is true, that in regard to these incidental powers, some discretion must, of necessity, be left with the government. But there is at the same time, a peculiar necessity that a strict construction should be applied to them; because that is the precise point at which the government is most apt to encroach. Without some strict, definite and fixed rules upon the subject, it would be left under no restraint, except what is imposed by its own wisdom, integrity and good faith. In proportion as a power is liable to be abused, should

we increase and strengthen the checks upon it. And this brings us to the enquiry, what are these incidental powers, and by what rules are they to be ascertained and defined?

The only source from which these incidental powers, are derived is that clause of the Constitution which confers on Congress the power "to make all laws which are 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." The true character of this clause cannot be better given than in the words of Judge Story himself: "It neither enlarges any power specially granted, nor is it a grant of any new power to Congress. But it is merely a declaration, for the removal of all uncertainty, that the means of carrying into execution, those otherwise granted, are included in the grant." His general reasoning upon the subject is very lucid, and, to a certain extent, correct and convincing. He contends that the word "necessary" is not to be taken in its restricted sense, as importing absolute and indispensable necessity, but is to be understood in the sense of "convenience," "useful," "requisite"; as being such that, without them, "the grant would be nugatory." The dangerous latitude implied by this construction, he thinks sufficiently restrained by the additional word "proper," which implies, that the means shall be "constitutional and bona fide appropriate, to the end." In all this he is undoubtedly correct; but the conclusion which he draws from it cannot be so readily admitted. "If," says he, "there be any general principle which is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, it is that every power vested in the government is, in its nature, sovereign, and includes, by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the end of such power, unless they are excepted in the Constitution, or are immoral, or are contrary to the essential objects of political society." This is by no means a legitimate conclusion from his own fair and forcible reasoning. The doctrine here is, in effect, that the Federal Government is absolutely unrestricted in the selection and use of the means of executing its own powers, except only so far as those means are excepted in the Constitution. Whether or not they are "requisite," "fairly applicable to the attainment of the end of such power," "immoral or contrary to the essential objects of political society," all these are questions which the government alone can decide, and, of course, as their own judgment and discretion are their only rule, they are under no sort of limitation or control in these respects. The standards of political morality, of public convenience and necessity, and of conformity to the essential objects of society, are quite too fluctuating and indeterminate to be relied on, by a free people, as checks upon the powers of their rulers. The only real restriction, then, which the author proposes in the above passage, is that which may be found in the fact, that the proposed means are "excepted" in the Constitution; and this is directly contrary to the letter and spirit of that instrument. The Federal Government possesses no power which is not "delegated"; "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved by the States respectively, or to the people." Judge Story's idea is, that every thing is granted which is not excepted; whereas, the language of the tenth amendment is express, that every thing is excepted which is not granted. If the word "excepted" is to be understood in this sense, the author's idea is correct; but this does not accord with the general scope of his opinions, and reasoning. He approaches much nearer to the true rule in the following passage. Let the end be legitimate; let it be within scope of the Constitution; and all means which are appropriate, which are plainly adapted to the end, and which are not prohibited, but ARE CONSISTENT WITH THE LETTER AND SPIRIT OF THE INSTRUMENT, are constitutional."

Judge Story's error is equally great, and far more dangerous, in supposing that the means of executing its powers are conferred on the government. The general proposition is true, as he has stated it; but it is not true in the application which he has made of it to our government. He regards the tenth amendment as altogether unnecessary, and tells us, in express terms, that the powers of the government would be exactly the same with or without it. This is a great and obvious mistake. The tenth amendment was wisely incorporated into the Constitution for the express purpose of denying to the government that unbounded discretion in the selection and use of its means, for which it contends. The power to make all laws necessary and proper for carrying into effect the granted powers is conferred on Congress alone; it is exclusively a legislative power. So far, therefore, as the government is concerned, it derives no power from this clause; and the same is true of its several departments. They have no discretion in the selection of any incidental means of executing their several trusts. If they need the use of such means, they must apply to Congress to furnish them; and it is discretionary with that body whether to furnish them or not. All this is perfectly clear from the very language of the Constitution, and the propriety of such a provision must be apparent to every one. If power could be implied in favor of such a government as ours, it would, if nothing were added to the contrary, be implied in favor of every department and officer thereof, to the execution of whose duties it might seem to be necessary. This would be a wide extent of discretion, indeed; so wide, that it would render all the limitations of the Constitution nugatory and useless. It is precisely this result which was intended to be prevented by the clause in question. The States were unwilling to entrust such a discretion either to the government, or to the several departments or officers thereof. They were willing to confer it on Congress alone; on the legislative department, the more immediate representatives of the States and their people, who would be most apt to discharge the trust properly, because they had the least temptation to abuse it. It is not true, then, as our author supposes, or, at least, it is not true of our system, that "every power in the government is, in its nature, sovereign, and includes, by force of the term, a right to employ all the means requisite, and fairly applicable to the attainment of the ends of such power, unless they are excepted in the Constitution, or forbidden by some consideration of public morals, or by their unsuitableness to the proper objects of government." In our government, the means are at the disposal of one department only, which may either grant or withhold them at its pleasure. What, then, are the proper limitations of the power of Congress in this respect? This has always been a subject of great difficulty, and of marked difference of opinion, among politicians. I cannot hope that I shall be able perfectly to disembarass it; but I think, nevertheless, that there are a few plain rules, the propriety of which all will admit, and which may materially aid us in the formation of a sound opinion upon the subject.

In the first place, then, it is to be observed that Congress has no power under this clause of the Constitution, except to provide the means of executing the granted powers. It is not enough that the means adopted are sufficient to that and they must be adopted bona fide, with a view to accomplish it. Congress has no right to use for the accomplishment of one purpose, means ostensibly provided for another to do so would be a positive fraud, and a manifest usurpation; for, if the purpose be lawful, it may be accomplished by its own appropriate means, and if it be unlawful, it should not be accomplished at all. It is quite obvious that, without this check, Congress may, by indirection, accomplish almost any forbidden object; for among the great variety of means adapted to carry out the granted powers, some may be found equally calculated to effect, either by their direct or indirect action, purposes of a wholly different character and tendency. It is, therefore, of

the utmost importance to the preservation of the true principles of the Constitution, that strict faith should be kept upon this point.

In the second place, the means provided must not only be "necessary," but they must also be "proper." If the word "necessary" stood alone, it would be susceptible of a very extended meaning, and would probably be considered as embracing powers which it never was in the contemplation of the framers of the Constitution to grant. It was necessary, then, to limit and restrain it by some other word, and the word "proper" was very happily selected. This word requires that the means selected shall be strictly constitutional. In ascertaining this, we must have regard not only to the express provisions of the Constitution, but also to the general nature and character of our institutions. Ours is a free government, which implies that it is also an equal government; it therefore authorizes the employment of no means for the execution of its powers, except such as are consistent with the spirit of liberty and equality. Ours is a confederated government; it therefore authorizes no means which are inconsistent with the distinct sovereignty of the States, the confederating powers. Ours is a government of "delegated" powers, limited and specifically enumerated; it therefore authorizes no means which involve, in the use of them, any distinct substantive power, not granted. This single rule, if fairly and honestly observed, will go far to remove many serious difficulties upon this point, and will deprive the Federal Government of many important powers which it has hitherto exercised, and which are still claimed for it, by Judge Story, and the whole political world to which he belongs. The propriety and, indeed, the absolute necessity of the rule, appear to me to be obvious. If powers not granted might be used as means of executing the granted powers, it is manifest that no power whatever could be considered as denied. It is not enough that there is no apparent unconstitutionality in the use of such means, in the particular case. If they involve a principle which will authorize the use of ungranted powers in any other case, they are forbidden by the Constitution. To illustrate this idea by an example: Congress has power to regulate commerce among the several States. This is supposed by some to give them power to open channels of commerce, by making roads, cutting canals etc., through the territories of the States. But this is a substantive power in itself, not granted to the United States, but reserved to the States respectively, and therefore is not allowed as a means of regulating commerce among the States. Let us suppose, however, that the opening of roads and cutting of canals are the very best means of facilitating and regulating commerce among the States, and that there is nothing in the language of the Constitution to forbid it; we are still to inquire what farther powers would be necessarily implied, as incidents of this. We find that the power to open a road through a State, implies the power to keep it in repair: to impose fines and penalties on those who injure it, and, consequently, to enforce those fines and penalties by the exercise of a jurisdiction over it. We find, also, that the power to make such a road, implies the power to locate it; and, as there is nothing to control the discretion of Congress in this respect, there is nothing to forbid them to locate their road, upon the bed of a State canal, or along the whole course of a State turnpike. The effect of this would be to transfer to the United States, against the consent of the State, and without compensation, improvements made by the State within her own territory and at her own expense. Nay, the supremacy claimed for the powers of Congress in this respect would, upon the same principle, authorize them to run a road through the centre of a State capital, or to cover half her territory with roads and canals, over which the State could exert neither jurisdiction nor control. The improvements of individuals, too, and of corporate bodies made under the authority of State laws, would thus be held at the mercy of the United States. When we see, then, that the means of regulating commerce among the States

would necessarily imply these vast and forbidden powers, we should unhesitatingly reject them as unconstitutional. This single instance, given by way of example and illustration, presents a rule which, if strictly adhered to in all analogous cases, would go far to remove the difficulties, and to prevent the contests, which so often arise on this part of the Constitution.

These few simple rules are, in their nature, technical, and may at all times be easily applied, if Congress will observe good faith in the exercise of its powers. There is another of a more enlarged and liberal character, which the word "proper" suggests, and which, if applied with sound judgment, perfect integrity and impartial justice, will render all others comparatively unnecessary. It exacts of Congress an extended and fair view of the relations of all the States, and a strictly impartial regard to their respective rights and interests. Although the direct action of a granted power, by the means also granted in the Constitution, may be both unequal and unjust, those means would, nevertheless, be perfectly constitutional. Such injustice and inequality would be but the necessary consequence of that imperfection, which characterizes every human institution, and to which those who undertake to proscribe specific rules to themselves are bound to submit. But when, Congress are called on to prescribe new means of executing a granted power, none are "proper," and therefore none are constitutional which operate unequally and unjustly among the States or the people. It is true that perfect and exact equality in this respect is not to be expected; but a near approach to it will always be made by a wise and fair legislation. Great and obvious injustice and inequality may at all times be avoided. No "means" which involve these consequences can possibly be considered "proper"; either in a moral or in a constitutional sense. It requires no high intellectual faculty to apply this rule; simple integrity is all that is required.

I have not thought it necessary to follow the author through his extended examination of what he terms the incidental powers of Congress, arising under the clause of the Constitution we are examining. It would be indeed an endless task to do so; for I am unable to perceive that he proposes any limit to them at all. Indeed, he tells us in so many words, that "upon the whole, the result of the most careful examination of this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or impair the right of the legislature to use its best judgment in the selection of measures to carry into execution the constitutional powers of the national government." This is, indeed, a sweep of authority, boundless and unrestricted. The "best judgment" of Congress is the only limit proposed to its powers, whilst there is nothing to control that judgment, nor to correct its errors. Government is abandoned emphatically to its own discretion; for even if a corrective be supposed to exist with the people, that corrective can never be applied in behalf of an oppressed minority. Are the rules which I have proposed indeed nothing? Is no effect whatever to be given to this word "proper," in this clause of the Constitution? Can Judge Story possibly be right in supposing that the Constitution would be the same without it as with it; and that the only object of inserting it was "the desire to remove all possible doubt respecting the right to legislate on the vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid pageant, or a delusive phantom of sovereignty?" It was, indeed, the object of the framers of the Constitution "to remove all possible doubt" from this subject. They desired neither a splendid pageant nor a splendid government. They knew that without this restriction ours would be both; and as powerful as splendid. They did not design that any power with which they thought proper to clothe it should be inoperative for want of means to carry it into execution; but they never designed to give it the boundless field of its own mere will, for the selection of those means. Having specifically enumerated its powers, as far as was practicable, they never designed to involve

themselves in the absurdity of removing, by a single clause, every restriction which they had previously imposed. They meant to assure their agent that, while none of the powers with which they had thought proper to clothe it should be nugatory, none of them should be executed by any means which were not both "necessary" and "proper."

The lovers of a strong consolidated government have labored strenuously, and I fear with too much success, to remove every available restriction upon the powers of Congress. The tendency of their principles is to establish that legislative omnipotence which is the fundamental principle of the British Constitution, and which renders every form of written constitution idle and useless. They suffer themselves to be too much attracted by the splendors of a great central power. Dazzled by these splendors, they lose sight of the more useful, yet less ostentatious purposes of the State governments, and seem to be unconscious that, in building up this huge temple of federal power, they necessarily destroy those less pretending structures from which alone they derive shelter, protection and safety. This is the ignis fatuus which has so often deceived nations, and betrayed them into the slough of despotism. On all such, the impressive warning of Patrick Henry, drawn from the lessons of all experience, would be utterly lost: "Those nations who have gone in search of grandeur, power and splendor, have always fallen a sacrifice and been the victims of their own folly. While they acquired those visionary blessings, they lost their freedom." The consolidationists forget these wholesome truths, in their eagerness to invest the federal government with every power which is necessary to realize their visions in a great and splendid nation. Hence they do not discriminate between the several classes of federal powers, but contend for all of them, with the same blind and devoted zeal. It is remarkable that, in the exercise of all those functions of the Federal Government which concern our foreign relations, scarcely a case can be supposed, requiring the aid of any implied or incidental power, as to which any serious doubt can arise. The powers of that government, as to all such matters, are so distinctly and plainly pointed out in the very letter of the Constitution, and they are so ample for all the purposes contemplated, that it is only necessary to understand them according to their plain meaning and to exercise them according to their acknowledged extent. No auxiliaries are required; the government has only to go on in the execution of its trusts, with powers at once ample and unquestioned. It is only in matters which concern our domestic policy, that any serious struggle for federal power has ever arisen, or is likely to arise. Here, that love of splendor and display, which deludes so large a portion of mankind, unites with that self-interest by which all mankind are swayed, in aggrandizing the Federal Government, and adding to its powers. He who thinks it better to belong to a splendid and showy government, than to a free and happy one, naturally seeks to surround all our institutions with a gaudy pageantry, which belongs only to aristocratic or monarchical systems. But the great struggle is for those various and extended powers, from the exercise of which avarice may expect its gratifications. Hence the desire for a profuse expenditure of the public money, and hence the thousand schemes under the name of internal improvements, by means of which hungry contractors may plunder the public treasury, and wily speculators prey upon the less skillful and cunning. And hence, too, another sort of legislation, the most vicious of the whole, which, professing a fair and legitimate object of public good, looks, really, only to the promotion of private interests. It is thus that classes are united in supporting the powers of government, and an interest is created strong enough to carry all measures and sustain all abuses.

Let it be borne in mind that, as to all these subjects of domestic concern, there is no absolute necessity that the Federal Government should possess any power at all. They are all such as the State governments are perfectly competent to manage; and the most

competent, because each State is the best judge of what is useful or necessary to itself. There is, then, no room to complain of any want of power to do whatever the interests of the people require to be done. This is the topic upon which Judge Story has lavishly expended his strength. Looking upon government as a machine contrived only for the public good, he thinks it strange that it should not be supposed to possess all the faculties calculated to answer the purposes of its creation. And surely it would be strange if it were, indeed, so defectively constructed. But the author seems to forget that in our system the Federal Government stands not alone. That is but a part of the machine; complete in itself, certainly, and perfectly competent, without borrowing aid from any other source, to work out its own part of the general result. But it is not competent to work out the whole result. The State governments have also their part to perform, and the two together make the perfect work, then, are all the powers which it is necessary that government should possess; not lodged in one place, but distributed; not the power of the State governments, nor of the Federal Government, but the aggregate of their several and respective powers. In the exercise of those functions which the State governments are forbidden to exercise, the Federal Government need not look beyond the letter of its charter for any needful power; and in the exercise of any other function, there is still less necessity that it should do so; because, whatever power that government does not plainly possess, is plainly possessed by, the State governments. I speak, of course, of such powers only as may be exercised either by the one or the other, and not of such as are denied to both. I mean only to say, that so far as the States and the people have entrusted power to government at all, they have done so in language plain and fall enough to render all implication unnecessary. Let the Federal Government exercise only such power as plainly belongs to it, rejecting all such as is even doubtful, and it will be found that our system will work out all the useful ends of government, harmoniously and without contest, and without dispute, and without usurpation.<sup>26</sup>

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26 In this extended examination of the rates by which the Constitution of the United States is to be interpreted, Judge Upshur has, we think, completely demolished the doctrines of Judge Story on that subject; but there is an important principle to be applied in the interpretation of all compacts and legal instruments which has not been made sufficiently plain. It is the rule laid down by Blackstone, that the intention of the parties to a compact to the key to its meaning. The terms and language must be referred to the time of its enactment, and must be taken as understood by those who so employed them, and not according to any subsequent definition. (1 Blackstone, 69, 60.) Thus the Constitution of the United States must be explained as those who made and framed it intended. Their INTENTION is the LAW. We sometimes hear such phrases as "New views of the Constitution," and "Progressive ideas of the Constitution." But we are to seek for the meaning of that instrument; not in "new views," or in "progressive ideas" of its import, but in the old views of those who made it. We are to take into consideration the condition of the country at the time the Constitution was framed and adopted, and the settled judicial and professional opinion immediately following its adoption. This rule has been often affirmed by the Supreme Court. (6 Wheaton, 410; 2 Peters, 714; 5 Cranch. 83; 8 Dallas. 898.) Any subsequent construction of a law or instrument not in agreement with the settled intent of those who framed it is to be disregarded. (1 Peters, 281, 1.) The intention of the framers of the Constitution was that it should continue as they framed it; it was not designed as a temporary agreement, but as an everlasting law. (1 Wheaton, 326.) Its language is to be taken in its natural and obvious sense, and not in any novel and new construction. (4 Wheaton, 415.) "Its spirit is to be respected not less than its letter, yet the spirit is to be collected chiefly by the words." (a Wheaton, 262. "it was not intended to use language which would convey to the eye one idea, and after deep reflection impress on the mind another." (4 Wheaton, 418.) Such were the rules by which the Constitution was interpreted by the Supreme Court undeviatingly from the foundation of the government to 1863. Since this last date a change has come over the spirit of the judiciary which is in violation of all the past rules of interpretation, and indeed of judicial proceedings among all enlightened nations. The doctrine has been boldly proclaimed, by leading

## CHAPTER X - STRUCTURE AND FUNCTIONS OF THE HOUSE OF REPRESENTATIVES

I have thus finished the examination of the political part of these commentaries, and this is the only object with which this review was commenced. There are, however, a few topics yet remaining, of great public concern, and which ought not to be omitted. Some of these, it seems to me, have been presented by the author in false and deceptive lights, and others of them, from their intrinsic importance, cannot be too often pressed upon public attention. I do not propose to examine them minutely, but simply to present them in a few of their strongest lights.

In his examination of the structure and functions of the House of Representatives, Judge Story has given his views of that clause of the Constitution which allows representation to three-fifths of the slaves. He considers the compromise upon this subject as unjust in principle, and decidedly injurious to the people of the non-slaveholding States. He admits that an equivalent for this supposed concession to the South was intended to be secured by another provision, which directs that "Representatives and direct taxes shall be apportioned among the several States, according to their respective numbers"; but he considers this provision "more specious than solid; for while in the levy of taxes it apportions them on three-fifths of persons not free, it on the other hand, really exempts the other two-fifths from being taxed at all as property. Whereas, if direct taxes had been apportioned, as upon principle they ought to be, according to the real value of property within the State, the whole of the slaves would have been taxed as property. But a far more striking inequality has been disclosed by the practical operations of the government. The principle of representation is constant and uniform; the levy of direct taxes is occasional and rare. In the course of forty years, no more than three direct taxes have been levied, and those only under very extraordinary and pressing circumstances. The ordinary expenditures of the government are, and always have been, derived from other sources. Imposts upon foreign importations, have supplied, and will generally supply, all the common wants; and if these should not furnish an adequate revenue, excises are next resorted to, as the surest and most convenient mode of taxation. Direct taxes constitute the last resort; and, as might have been foreseen, would never be laid until other resources had failed."

This is a very imperfect, and, as it seems to me, not a very candid view of a grave and important subject. It would have been well to avoid it altogether, if it had been permitted; for the public mind needs no encouragement to dwell, with unpleasant reflections, upon the topics it suggests. In an examination of the Constitution of the United States, however, some notice of this peculiar feature of it was unavoidable; but we should not have expected the author to dismiss it with such criticism only as tends to show that it is unjust to his own peculiar part of the country. It is manifest to everyone that the arrangement rests upon no particular principle, but as a mere compromise between conflicting interests and opinions. It is much to be regretted that it is not on all hands acquiesced in and approved, upon that ground; for no public necessity requires that it should be discussed; and it cannot now be changed without serious danger to the whole fabric. The people of the slaveholding States themselves have never shown a

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journals, that laws and compacts are to be construed so as to be in harmony with the "will of the people," and judges have, in too many instances, succumbed to this monstrous delusion. It amounts to the abrogation of all organic law, by substituting the passions and fancies of the people to its place. It has made the whims and the passions of a political party superior to the Constitution of our country. It, indeed, amounts to the overthrow of all fixed and regular governments, and leaves the passions and fancies of an hour the only guarantees of liberty. -- [C. C. B.]

disposition to agitate the question at all, but, on the contrary, have generally sought to avoid it. It has, however, always "been complained of as a grievance," by the non-slaveholding States, and that too in language which leaves little doubt that a wish is very generally entertained to change it. A grave author, like Judge Story, who tells the people, as it were ex cathedra, that the thing is unjust in itself, will scarcely repress the dissatisfaction which such an announcement, falling in with preconceived opinions, will create, by a simple recommendation to acquiesce in it as a compromise, tending upon the whole to good results. His remarks may render the public mind more unquiet than it now is they can scarcely tranquilize or reconcile it. For myself, I am very far from wishing to bring the subject into serious discussion, with any view to change; but I cannot agree that an arrangement, obviously injurious to the South, should be held up as giving her advantages of which the North has reason to complain.

I will not pause to inquire whether the rule apportioning representatives according to numbers, which, after much, contest, was finally adopted by the convention, be the correct one or not. Supposing that it is so, the rule which apportions taxation in the same way, follows as a matter of course. The difficulties under which the convention seem to have labored, in regard to this subject, may well excite our surprise, at the present day. If the North really supposed that they conceded anything to the South, by allowing representation to three-fifths of their slaves, they were certainly but poorly compensated for the concession, by that provision of the Constitution which apportions taxation according to representation. This principle was universally acknowledged throughout the United States, and is, in fact, only, a modification of the great principle upon which the revolution itself was based. That taxation should be apportioned to representation, results from the federative character of the government; and the fact that this rule was adopted, sustains the views which have been presented upon this point. It would have been indeed strange if some one State, having only half the representatives of its neighbor State, might yet have been subjected to twice the amount of taxation; Delaware, for instance, with her one representative, to twice the taxes of Pennsylvania, with her twenty-eight. A different rule from that which prevails might subject the weaker States to intolerable oppression. A combination among a few of the strongest States might, by a little management, throw the whole burthen of taxation upon the others, by selecting only such subjects of taxation as they themselves did not possess, or which they possessed only to a comparatively small extent. It never would have answered to entrust the power of taxation to Congress, without some check against these and similar abuses, and no check could have been devised more effective or more appropriate than the provision now under consideration. All the States were interested in it, and the South much more deeply than the North. The slaves of the South afford the readiest of all possible subjects for this sort of practice, and it would be going too far to say that they would not, at some day or other, be selected for it, if this provision of the Constitution did not stand in the way. The southern States would certainly never have adopted the Constitution without some such guarantee as this against those oppressions to which their peculiar institutions exposed them; and the weaker States, whether north or south, would never have adopted it, because it might lead to their utter annihilation in the confederacy. This provision of the Constitution, therefore, can scarcely be considered as an equivalent for anything conceded by some of the States to others. It resulted necessarily from the very nature of their union; it is an appropriate and necessary feature in every confederacy between sovereign States. We ought, then, to regard that provision of the Constitution which allows representation to only three-fifths of the slaves, as a concession made by the South; and one for which they received no equivalent, except in the harmony it served to produce.

Reverting to the rule that representation shall be apportioned to population, and supposing that all parties acquiesce in the propriety of it, upon what principle is the rule itself founded? We have already seen that the whole country had adopted the principle that taxation, should be apportioned to representation, and, of course, in fixing the principle of representation, the question of taxation was necessarily involved. There is no perfectly just rule of taxation but property; every man should contribute to the support of the government, according to his ability, that is, according to the value of that property to which government extends its protection. But this rule never can be applied in practice; because it is impossible to discover what is the amount of the property, either of individuals or nations. In regard to States, population is the best measure of this value which can be found, and is, in most cases, a sufficiently accurate one. Although the wealth of a State cannot be ascertained, its people can be easily counted, and hence the number of its people gives the best rule for its representation, and consequently for its taxation.

The population of a State is received as the best measure of the value of its property, because it is in general true, that the greater the number of people, the greater is the amount of productive industry. But of what consequence is it, by what sort of people this amount of production is afforded? It was required that each State of our Union should contribute its due proportion to the common treasury; a proposition ascertained by the number of its people. Of what consequence is it whether this contribution be made by the labor of slaves, or by that of freemen? All that the States had a right to require of one another was, that each should contribute its allotted proportion; but no State had a right to enquire from what particular sources that contribution arose. Each State having a perfect right to frame its own municipal regulations for itself, the other States had no right to subject her to any disabilities or disadvantages on account of them. If Massachusetts had a right to object to the representation of the slaves of Virginia, Virginia had the same right to object to the representation of the apprentices, the domestic servants, or even the mechanics of Massachusetts. The peculiar private condition and relations of the people of a State to one another could not properly be enquired into by any other State. That is a subject which each State regulates for itself; and it cannot enter into the question of the influence which such State ought to possess, in the common government of all the States. It is enough that the State brings into the common stock a certain amount of wealth, resulting from the industry of her people. Whether those people be men or women, bond or free, or bound to service for a limited time only, is the exclusive concern of the State itself, and is a matter with which the other States cannot intermeddle, without impertinence, injustice and oppression. So far, then, from limiting representation to three-fifths of the slaves, they ought all to be represented, for all contribute to the aggregate of the productive industry of the country. And, even then, the rule would operate injuriously upon the slave-holding States; for, if the labor of a slave be as productive as that of a free man, (and in agriculture it is so), the cost of supporting him is much less. Therefore, of the same amount of food and clothing, raised by the two classes, a greater surplus will remain of that of the slave, and of course a greater amount subject to the demands of the public necessities.

The remarks of John Adams, delivered in convention,<sup>27</sup> are very forcible upon this point. According to Mr. Jefferson's report of them, he observed, "that the numbers of people are taken as an index of the wealth of the State, and not as subjects of taxation; that, as to this matter it was of no consequence by what name you called your people, whether

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27 Mr. Adams was not a member of the convention. This speech was made in Congress in deliberating on the Articles of Confederation. -- [Ed.]

by that of freemen or of slaves; that in some countries the laboring poor are called freemen, in others they are called slaves; but that the difference, as to the state, was imaginary only. What matters it whether a landlord, employing ten laborers on his farm, gives them annually as much money as will buy them the necessaries of life, or gives them those necessaries at short hand? The ten laborers add as much wealth to the State, increase its exports as much, in the one case as in the other. Certainly five hundred freemen produce no more profits, no greater surplus for the payment of taxes, than five hundred slaves. Therefore the State in which are the laborers called freemen should be taxed no more than that in which are the laborers called slaves. Suppose by an extraordinary operation of nature or of law, one-half the laborers of a State could, in the course of one night, be transformed into slaves, would the State be made poorer, or less able to pay taxes? That the condition of the laboring poor in most countries, that of the fishermen particularly of the northern States, is as abject as that of slaves. It is the number of laborers which produces the surplus for taxation, and numbers therefore, indiscriminately, are the fair index to wealth."

It is obvious that these remarks were made for very different purpose from that which I have in view. The subject then before the convention was the proper rule of taxation, and it was Mr. Adams's purpose to show that, as to that matter, slaves should be considered only as people, and, consequently, as an index of the amount of taxable wealth. The convention had not then determined that representatives and direct taxes should be regulated by the same ratio. When they did determine this, the remarks of Mr. Adams seem to me conclusive, to show that representation of all the slaves ought to have been allowed; nor do I see how those who held his opinions could possibly have voted otherwise. If slaves are people, as forming the measure of national wealth, and consequently of taxation, and if taxation and representation be placed upon the same principle, and regulated by the same ratio, then that slaves are people, in fixing the ratio of representation, is a logical sequitur which no one can possibly deny.

But it is objected that slaves are property, and for that reason, are not more entitled to representation than any other species of property. But they are also people, and, upon analogous principles, are entitled to representation as people. It is in this character alone that the non-slaveholding States have a right to consider them, as has already been shown, and in this character alone is it just to consider them. We ought to presume that every slave occupies a place which, but for his presence, would be occupied by a free white man; and, if this were so, every one, and not three-fifths only, would be represented. But the States who hold no slaves have no right to complain that this is not the case in other States, so long as the labor of the slave contributes as much to the common stock of productive industry, as the labor of the white man. It is enough that a State possesses a certain number of people, of living, rational beings. We are not to enquire whether they be black or white, nor tawny, nor what are their peculiar relations among one another. If the slave of the South be property, of what nature is that property, and what kind of interest has the owner in it? He has a right to the profits of the slave's labor. And so, the master of an indented apprentice has a right to the profits of his labor. It is true, one holds the right for the life of the slave, and the other only for a time limited in the apprentice's indentures; but this is a difference only in the extent, and not in the nature of the interest. It is also true, that the owner of a slave has, in most States, a right to sell him; but this is only because the laws of the State authorize him to do so. And, in like manner, the indentures of an apprentice may be transferred if the laws of the State will allow it. In all these respects, therefore, the slave and the indentured apprentice stand upon precisely the same principle. To a certain extent, they are both property, and neither of them can be regarded as a free man; and if the one be not entitled to

representation, the other also should be denied that right. Whatever be the difference of their relations to the separate members of the community, in the eye of that community they are both people. Here, again, Mr. Adams shall speak for me; and our country has produced few men who could speak more wisely: "A slave may, indeed, from the custom of speech, be more properly called the wealth of his master, than the free laborer might be called the wealth of his employer; but as to the State, both are equally its wealth, and should therefore equally add to the quota of its tax." Yea; and, consequently, they should equally add to the quota of its representation.

Judge Story supposes that it is a great advantage to the slave-holding States that, while three-fifths of the slaves are entitled to representation, two-fifths are exempted from taxation. Why confine it to three-fifths? Suppose that none of them were entitled to representation, the only consequence would be, that the State would have fewer representatives, and for that reason, would have a less amount of taxes to pay. In this case, all the slaves would be exempted from taxation; and, according to our author, the slaveholding States would have great reason to be content with so distinguishing an advantage. And, for the same reason, every other State would have cause to rejoice at the diminution of the number of people, for although its representation would thereby be decreased, its taxes would be decreased in the same proportion. This is the true mode of testing the author's position. It will be found that every State values the right of representation at a price infinitely beyond the amount of direct taxes to which that right may subject it; and, of course, the southern States have little reason to be thankful that two-fifths of their slaves are exempted from taxation, since they lose, in consequence of it, the right of representation to the same extent. The author, however, seems to have forgotten this connection between representation and taxation; he looks only at the sources whence the Union may draw wealth from the South, without enquiring into the principles upon which her representation may be enlarged. He thinks that direct taxes ought to be apportioned, "according to the real value of property within the State; in which case "the whole of the slaves would have been taxable as property." I have already remarked that this is, indeed, the true rule but it is wholly impracticable. It would be alike impossible to fix a satisfactory standard of valuation, and to discover the taxable subjects. No approximation to the truth could be hoped for, without a host of officers, whose compensation would consume a large proportion of the tax, while, from the very nature of their duties, they would be forced into minute examinations, inconsistent with the freedom of our institutions, harassing and vexatious in their details, and leading inevitably to popular resistance and tumult. And this process must be gone through at every new tax; for the relative wealth of the States would be continually changing. Hence, population has been selected as the proper measure of the wealth of the States. But, upon our author's principle, the South would be, indeed, little better off than the lamb in the embrace of the wolf. The slaves are easily found; they can neither be buried under ground, nor hid in the secret drawers of a bureau. They are peculiar, too, to a particular region; and other regions, having none of them, would yet have a voice in fixing their value as subjects of taxation. That they would bear something more than their due share of this burthen, is just as certain as that man, under all circumstances, will act according to his nature. In the mean time, not being considered as people, they would have no right to be heard in their own defense, through their representatives in the federal councils. On the other hand, the non-slave-holding States would be represented in proportion to the whole numbers of their people, and would be taxed only according to that part of their wealth which they might choose to disclose, or which they could not conceal. And in the estimate of this wealth, their people would not be counted as taxable subjects, although they hold to their respective States precisely the same relation, as

laborers and contributors to the common treasury, as is held by the slaves of the South to their respective States. The rule, which considers slaves only as property to be taxed, and not as people to be represented, is little else than a rule imposing on the southern States almost the entire burthens of the government, and allowing to them only the shadow of influence in the measures of that government.

The truth is, the slave-holding States have always contributed more than their just proportion to the wealth and strength of the country, and not less than their just proportion to its intelligence and public virtue. This is the only perfectly just measure of political influence; but it is a measure which cannot be applied in practice. We receive population as the best practicable substitute for it; and as all people, whatever be their private and peculiar conditions and relations, are presumed to contribute their share to the stock of general wealth, intelligence and virtue, they are all entitled to their respective shares of influence in the measures of government. The slave-holding States, therefore, had a right to demand that all their slaves should be represented; they yielded too much in agreeing that only three-fifths of them should possess that right. I cannot doubt that this would have been conceded by the convention, had the principle, that representatives and direct taxes should be apportioned according to the same ratio, been then adopted into the Constitution. It would have been perceived that, while the representation of the southern States would thus have been increased, their share of the public taxes would have been increased in the same proportion; and thus they would have stood, in all respects, upon the same footing with the other States. The northern States would have said to them, "Count your people; it is of no consequence to us what is their condition at home; they are laborers, and therefore they contribute the mine, amount of taxable subjects, whether black or white, bond or free. We therefore recognize them as people, and give them representation as such. All that we require is, that when we come to lay direct taxes, they shall be regarded as people still, and you shall contribute for them precisely as we contribute for our people." This is the plain justice of the case; and this alone would be consistent with the great principles which ought to regulate the subject. It is a result which is no longer attainable, and the South will, as they ought to do, acquiesce in the arrangement as it now stands. But they have reason to complain that great authors, in elaborate works designed to form the opinions of rising generations, should so treat the subject as to create an impression that the southern States are enjoying advantages under our Constitution to which they are not fairly entitled, and which they owe only to the liberality of the other States; for the South feels that these supposed advantages are, in fact, sacrifices, which she has made only to a spirit of conciliation and harmony, and which neither justice nor sound principle would have exacted of her.

Regarding this work of Judge Story, as a whole, it is impossible not to be struck with the laborious industry which he has displayed in the collection and preparation of his materials. He does not often indulge himself in speculations upon the general principles of government, but confines himself, with great strictness, to the particular form before him. Considering him as a mere lawyer, his work does honor to his learning and research, and will form a very useful addition to our law libraries. But it is not in this light only that we are to view it. The author is a politician, as well as a lawyer, and has taken unusual pains to justify and recommend his own peculiar opinions. This he has done, often at the expense of candor and fairness, and, almost invariably, at the expense of historical truth. We may well doubt, therefore, whether his book will produce more evil than good, to the country; since the false views which it presents, of the nature and character of our government, are calculated to exert an influence over the public mind, too seriously mischievous to be compensated by any new lights which it sheds upon

other parts of our Constitution. Indeed, it is little less than a labored panegyric upon that instrument. Having made it, by forced constructions, and strange misapprehensions of history, to conform to his own beau ideal of a perfect government, he can discern, in it nothing that is deficient, nothing that is superfluous. And it is his particular pleasure to arm it with strong powers, and surround it with imposing splendors. In his examination of the legislative department, he has displayed an extraordinary liberality of concession in this respect. There is not a single important power ever exercised or claimed for Congress which he does not vindicate and maintain. The long-contested powers to protect manufactures, to construct roads, with an endless list of similar objects to which the public money may be applied, present no serious difficulty to his mind. An examination of these several subjects, in detail, would swell this review beyond its proper limits, and is rendered unnecessary by the great principles which it has been my object to establish. I allude to them here, only as illustrating the general character of this book, and as showing the dangerous tendency of its political principles. It is, indeed, a strong argument in favor of federal power; and when we have said this, we have given it the character which the author will most proudly recognize. And it is not for the legislature alone, that these unbounded powers are claimed; the other departments come in for a full share of his favor. Even when he is forced to condemn, he does it with a censure so faint, and so softened and palliated, as to amount to positive praise.

The principle that ours is a consolidated government of all the people of the United States, and not a confederation of sovereign States, must necessarily render it little less than omnipotent. That principle, carried out to its legitimate results, will assuredly render the federal government the strongest in the world. The powers of such a government are supposed to reside in a majority of the people; and, as its responsibility is only to the people, that majority may make it whatever they please. To whom is that majority itself responsible? Upon the theory that it possesses all the powers of the government, there is nothing to check, nothing to control it. In a population strictly homogeneous in interests, character and pursuits, there is no danger in this principle. We adopt it in all our State governments, and in them it is the true principle; because the majority can pass no law which will not affect themselves, in mode and degree, precisely as it affects others. But in a country so extensive as the United States, with great differences of character, interests and pursuits, and with these differences, too, marked by geographical lines, a fair opportunity is afforded for the exercise of an oppressive tyranny, by the majority over the minority. Large masses of mankind are not apt to be swayed, except interest alone; and wherever that interest is distinct and clear, it presents a motive of action too strong to be controlled. Let it be supposed that a certain number of States, containing a majority of the people of all the States, should find it to their interest to pass laws oppressive to the minority, and violating their rights as secured by the Constitution. What redress is there, upon the principles of Judge Story? Is it to be found in the federal tribunals? They are themselves a part of the oppressing government, and are, therefore, not impartial judges of the powers of that government. Is it to be found in the virtue and intelligence of the people? This is the author's great reliance. He acknowledges that the system, as he understands it, is liable to great abuses; but he supposes that the virtue and intelligence of the people will, under all circumstances, prove a sufficient corrective. Of what people? Of that very majority who have committed the injustice complained of, and who, according to the author's theory, are the sole judges whether they have power to do it or not, and whether it be injustice or not. Under such a system as this, it is a cruel mockery to talk about the rights of the minority. If they possess rights, they have no means to vindicate them. The majority alone possess the government; they alone measure its powers, and wield them without control or

responsibility. This is despotism of the worst sort, in a system like ours. More tolerable, by far, is the despotism of one man, than that of a party, ruling without control, consulting its own interests, and justifying its excesses under the name of republican liberty. Free government, so far as its protecting power is concerned, is made for minorities alone.

But the system of our author, while it invites the majority to tyrannize over the minority, and gives the minority no redress, is not safe even, for that majority itself. It is a system unbalanced, unchecked, without any definite rules to prevent it from running into abuse, and becoming a victim to its own excesses. The separation and complete independence of the several departments of the government is usually supposed to afford a sufficient security against an undue enlargement of the powers of any one of them. This is said to be the only real discovery in politics, which can be claimed in modern times; and it is generally considered a very great discovery, and, perhaps, the only contrivance by which public liberty can be preserved. The idea is wholly illusory. It is true, that public liberty could scarcely exist without such separation, and, for that reason, it was wisely adopted in our systems. But we should not rely on it with too implicit a confidence, as affording in itself any adequate barrier against the encroachment of power, or any adequate security for the rights and liberties of the people. I have little faith in these balances of government; because there is neither knowledge nor wisdom enough in man to render them accurate and permanent. In spite of every precaution against it, some one department will acquire an undue preponderance over the rest. The first excesses are apt to be committed by the legislature; and, in a consolidated government, such as the author supposes ours to be, there is a peculiar proneness to this. In all free governments, the democratic principle is continually extending itself. The people being possessed of all power, and feeling that they are subject to no authority except their own, learn, in the end, to consider the very restraints which they have voluntarily imposed upon themselves, in their constitution of government, as the mere creatures of their own will, which their own will may at any time destroy. Hence the legislature, the immediate representatives of the popular will, naturally assume upon themselves every power which is necessary to carry that will into effect. This is not liberty. True political liberty demands many and severe restraints; it requires protection against itself, and is no longer safe, when it refuses to submit to its own self-imposed discipline.

And let us not sleep in the delusion that we shall derive all needful security from our own "intelligence and virtue." The people may, indeed, preserve their liberties forever, if they will take care to be always virtuous, always wise, and always vigilant. And they will be equally secure, if they can assure themselves that the rulers they may select will never abuse their trust, but will always understand and always pursue the true interests of the people. But, unhappily, there are no such people and no such rulers. A government must be imperfect, indeed, if it require such a degree of virtue in the people as renders all government unnecessary. Government is founded, not in the virtues, but in the vices of mankind; not in their knowledge and wisdom, but in their ignorance and folly. Its object is to protect the weak, to restrain the violent, to punish the vicious, and to compel all to the performance of the duty which man owes to man in a social state. It is not a self-acting machine, which will go on and perform its work without human agency; it cannot be separated from the human beings who fill its places, set in motion, and regulate and direct its operations. So long as these are liable to err in judgment, or to fail in virtue, so long will government be liable to run into abuses. Until all men shall become so perfect as not to require to be ruled, all governments professing to be free will require to be watched, guarded, checked and controlled. To do this effectually requires more than we generally find of public virtue and public intelligence. A great majority of mankind are much more sensible to their interests than to their rights. Whenever the people can be

persuaded that it is their greatest interest to maintain their rights, then, and then only, will free government be safe from abuses.

Looking at our own Federal Government, apart from the States, and regarding it, as Judge Story would have us, as a consolidated government of all the people of the United States, we shall not find in it this salutary countervailing interest. In an enlarged sense, it is, indeed, the greatest interest of all to support that government in its purity; for, although it is undoubtedly defective in many important respects, it is much the best that has yet been devised. Unhappily, however, the greatest interest of the whole is not felt to be, although in truth it is, the greatest interest of all the parts. This results from the fact, that our character is not homogeneous, and our pursuits are wholly different. Rightly understood, these facts should tend to bind us the more closely together, by showing us our dependence upon each other; and it should teach us the necessity of watching, with the greater jealousy, every departure from the strict principles of our union. It is a truth, however, no less melancholy than incontestable, that if this ever was the view of the people, it has ceased to be so. And it could not be otherwise. Whatever be the theory of our Constitution, its practice, of late years, has made it a consolidated government; the government of an irresponsible majority. If that majority can find, either in the pursuits of their own peculiar industry, or in the offices and emoluments which flow from the patronage of the government, an interest distinct from that of the minority, they will pursue that interest, and nothing will be left to the minority but the poor privilege of complaining. Thus the government becomes tyrannous and oppressive, precisely in proportion as its democratic principle is extended; and instead of the enlarged and general interest which should check and restrain it, a peculiar interest is enlisted, to extend its powers and sustain its abuses. Public virtue and intelligence avail little, in such a condition of things as this. That virtue falls before the temptation's of interest which you present to it, and that intelligence, thus deprived of its encouraging hopes, serves only to point out new objects of unlawful pursuit, and suggest new and baser methods of attaining them.

This result could scarcely be brought about, if the Federal Government were allowed to rest on the principles upon which I have endeavored to place it. The checking and controlling influences which afford safety to public liberty, are not to be found in the government itself. The people cannot always protect themselves against their rulers; if they could, no free government, in past times, would have been overthrown. Power and patronage cannot easily be so limited and defined, as to rob them of their corrupting influences over the public mind. It is truly and wisely remarked by the Federalist, that "a power over a man's subsistence is a power over his will." As little as possible of this power should be entrusted to the Federal Government, and even that little should be watched by a power authorized and competent to arrest its abuses. That power can be found only in the States. In this consists the great superiority of the federative system over every other. In that system, the Federal Government is responsible, not directly to the people en masse, but to the people in their character of distinct political corporations. However easy it may be to steal power from the people, governments do not so readily yield to one another. The confederated States confer on their common government only such power as they themselves cannot separately exercise, or such as can be better exercised by that government. They have, therefore, an equal interest, to give it power enough, and to prevent it from assuming too much. In their hands, the power of interposition is attended with no danger; it may be safely lodged where there is no interest to abuse it.

Under a federative system, the people are not liable to be acted on (at least, not to the same extent), by those influences which are so apt to betray and enslave them, under a consolidated government. Popular masses, acting under the excitements of the moment, are easily led into fatal errors. History is full of examples of the good and great sacrificed to the hasty judgments of infuriated multitudes, and of the most fatal public measures adopted under the excitements of the moment. How easy it is for the adroit and cunning to avail themselves of such occasions, and how impossible it is, for a people so acted on, to watch their rulers wisely, and guard themselves against the encroachments of power? In a federative system, this danger is avoided, so far as their common government is concerned. The right of interposition belongs, not to the people in the aggregate, but to the people in separate and comparatively small subdivisions. And even in these subdivisions, they can act only through the forms of their own separate governments. These are necessarily slow and deliberate, affording time for excitement to subside, and for passion to cool. Having to pass through their own governments, before they reach that of the United States, they are forbidden to act until they have had time for reflection, and for the exercise of a cool and temperate judgment. Besides, they are taught to look, not to one government only, for the protection and security of their rights, and not to feel that they owe obedience only to that. Conscious that they can find, in their own State governments, protection against the wrongs of the Federal Government, their feeling of dependence is less oppressive, and their judgments more free. And while their efforts to throw off oppression are not repressed by a feeling that there is no power to which they can appeal, these efforts are kept under due restraints, by a consciousness that they cannot be unwisely exerted, except to the injury of the people themselves. It is difficult to perceive how a Federal Government, established on correct principles, can ever be overthrown, except by external violence, so long as the federative principle is duly respected and maintained. All the requisite checks and balances will be found, in the right of the States to keep their common government within their common sphere; and a sufficient security for the due exercise of that right is afforded by the fact, that it is the interest of the States to exercise it discreetly. So far as our own government is concerned, I venture to predict that it will become absolute and irresponsible, precisely in proportion as the rights of the States shall cease to be respected, and their authority to interpose for the correction of federal abuses shall be denied and overthrown.

It should be the object of every patriot in the United States to encourage a high respect for the State governments. The people should be taught to regard them as their greatest interest, and as the first objects of their duty and affection. Maintained in their just rights and powers, they form the true balance-wheel, the only effectual check on federal encroachments. And it possesses as a check these distinguishing advantages over every other, that it can never be applied without great deliberation and caution, that it is certain in its effects, and that it is but little liable to abuse. It is true that a State may use its power for improper purposes, or on improper occasions; but the Federal Government is, to say the least of it, equally liable to dangerous errors and violations of trust. Shall we then leave that government free from all restraint, merely because the proper countervailing power is liable to abuse? Upon the same principle we should abandon all the guards and securities which we have so carefully provided in the Federal Constitution itself. The truth is, all checks upon government are more or less imperfect; for if it were not so, government itself would be perfect. But this is no reason why we should abandon it to its own will. We have only to apply to this subject our best discretion and caution, to confer no more power than is absolutely necessary, and to guard that power as carefully as we can. Perfection is not to be hoped for; but an

approximation to it, sufficiently near to afford a reasonable security to our rights and liberties, is not unattainable. In the formation of the Federal Government we have been careful to limit its powers and define its duties. Our object was to render it such that the people should feel an interest in sustaining it in its purity, for otherwise it could not long subsist. Upon the same principle, we should enlist the same interest in the wise and proper application of those checks, which its unavoidable imperfections render necessary. That interest is found in the States. Having created the Federal Government at their own free will, and for their own uses, why should they seek to destroy it? Having clothed it with a certain portion of their own powers, for their own benefit alone, why should they desire to render those powers inoperative and nugatory? The danger is, not that the States will interpose too often, but that they will rather submit to federal usurpations, than incur the risk of embarrassing that government, by any attempts to check and control it. Flagrant abuses alone, and such as public liberty cannot endure, will ever call into action this salutary and conservative power of the States.

But whether this check be the best or the worst in its nature, it is at least one which our system allows. It is not found within the Constitution, but exists independent of it. As that Constitution was formed by sovereign States, they alone are authorized, whenever the question arises between them and their common government, to determine, in the last resort, what powers they intended to confer on it.<sup>28</sup> This is an inseparable incident of sovereignty; a right which belongs to the States, simply because they have never surrendered it to any other power. But to render this right available for any good purpose, it is indispensably necessary to maintain the States in their proper position. If their people suffer them to sink into the insignificance of mere municipal corporations, it will be in vain to invoke their protection against the gigantic power of the Federal Government. This is the point to which the vigilance of the people should be chiefly directed. Their highest interest is at home; their palladium is their own State governments. They ought to know that they can look nowhere else with perfect assurance of safety and protection. Let them then maintain those governments, not only in their rights, but in their dignity and influence. Make it the interest of their people to serve them; an interest strong enough to resist all the temptations of federal office and patronage. Then alone will their voice be heard with respect at Washington; then alone will their interposition avail to protect their own people against the usurpations of the great central power. It is vain to hope that the federative principle of our government can be preserved, or that anything can prevent it from running into the absolutism of consolidation, if we suffer the rights of the States to be filched away, and their dignity and influence to be lost, through our carelessness or neglect.

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28 Elsewhere we have shown that such was the understanding of those who framed the Constitution of the Imitates when they adopted it. -- [C. C. B]