THE

FEDERALIST

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THE FEDERALIST:

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OF

ESSAYS,

WRITTEN IN FAVOUR OF THE

NEW CONSTITUTION,

AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787.

IN TWO VOLUMES.

VOL. II.

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THE

THE

FEDERALIST:

ADDRESSED TO THE

PEOPLE OF THE STATE OF NEW-YORK.

NUMBER XXXVII.

Concerning the Difficulties which the Convention must have experienced in the Formation of a proper Plan.

IN reviewing the defects of the existing confederation, and shewing that they cannot be supplied by a government of less energy than that before the public, several of the most important principles of the latter fell of course under consideration. But as the ultimate object of these papers is to determine clearly and fully the merits of this constitution, and the expediency of adopting it, our plan cannot be compleated without taking a more critical and thorough survey of the work of the convention; without examining it on all its sides; comparing it in all its parts, and calculating its probable effects. That this remaining task may be executed under impressions conducive to a just and fair result, some reflections must in this place be indulged, which candour previously suggests. It is a misfortune, inseparable from human affairs, that public measures

are rarely inveſtigated with that ſpirit of moderation which is eſſential to a juſt eſtimate of their real tendency to advance or obſtruct the public good; and that this ſpirit is more apt to be diminiſhed than promoted, by thoſe occaſions which require an unuſual exerciſe of it. To thoſe who have been led by experience to attend to this conſideration, it could not appear ſurpriſing, that the act of the convention which recommends ſo many important changes and innovations, which may be viewed in ſo many lights and relations, and which touches the ſprings of ſo many paſſions and intereſts, ſhould find or excite diſpoſitions unfriendly both on one ſide, and on the other, to a fair diſcuſſion and accurate judgment of its merits. In ſome, it has been too evident from their own publications, that they have ſcanned the propoſed conſtitution, not only with a prediſpoſition to cenſure; but with a predetermination to condemn: As the language held by others betrays an oppoſite predetermination or bias, which muſt render their opinions alſo of little moment in the queſtion. In placing however, theſe different characters on a level, with reſpect to the weight of their opinions, I wiſh not to inſinuate that there may not be a material difference in the purity of their intentions. It is but juſt to remark in favor of the latter deſcription, that as our ſituation is univerſally admitted to be peculiarly critical, and to require indiſpenſibly, that ſomething ſhould be done for our relief, the predetermined patron of what has been actually done, may have taken his bias from the weight of theſe conſiderations, as well as from conſiderations of a ſiniſter nature. The predetermined adverſary on the other hand, can have been governed by no venial motive whatever. The intentions of the firſt may be upright, as they may on the contrary be culpable. The views of the laſt cannot be upright, and muſt be culpable. But the truth is, that theſe papers are not addreſſed to perſons falling under either of theſe

characters.

characters. They ſolicit the attention of thoſe only, who add to a ſincere zeal for the happineſs of their country, a temper favorable to a juſt eſtimate of the means of promoting it.

Perſons of this character will proceed to an examination of the plan ſubmitted by the convention, not only without a diſpoſition to find or to magnify faults; but will ſee the propriety of reflecting that a faultleſs plan was not to be expected. Nor will they barely make allowances for the errors which may be chargeable on the fallibility to which the convention, as a body of men, were liable; but will keep in mind that they themſelves alſo are but men, and ought not to aſſume an infallibility in rejudging the fallible opinions of others.

With equal readineſs will it be perceived, that beſides theſe inducements to candour, many allowances ought to be made for the difficulties inherent in the very nature of the undertaking referred to the convention.

The novelty of the undertaking immediately ſtrikes us. It has been ſhewn in the courſe of theſe papers, that the exiſting confederation is founded on principles which are fallacious; that we muſt conſequently change this firſt foundation, and with it, the ſuperſtructure reſting upon it. It has been ſhewn, that the other confederacies which could be conſulted as precedents, have been viciated by the ſame erroneous principles, and can therefore furniſh no other light than that of beacons, which give warning of the courſe to be ſhunned, without pointing out that which ought to be purſued. The moſt that the convention could do in ſuch a ſituation, was to avoid the errors ſuggeſted by the paſt experience of other countries, as well as of our own; and to provide a convenient mode of rectifying their own errors, as future experience may unfold them.

Among the difficulties encountered by the convention, a very important one muſt have lain, in com-

bining the requiſite ſtability and energy in government with the inviolable attention due to liberty, and to the republican form. Without ſubſtantially accompliſhing this part of their undertaking, they would have very imperfectly fulfilled the object of their appointment, or the expectation of the public. Yet, that it could not be eaſily accompliſhed, will be denied by no one, who is unwilling to betray his ignorance of the ſubject. Energy in government is eſſential to that ſecurity againſt external and internal danger, and to that prompt and ſalutary execution of the laws, which enter into the very definition of good government. Stability in government, is eſſential to national character, and to the advantages annexed to it, as well as to that repoſe and confidence in the minds of the people, which are among the chief bleſſings of civil ſociety. An irregular and mutable legiſlation is not more an evil in itſelf, than it is odious to the people; and it may be pronounced with aſſurance, that the people of this country, enlightened as they are, with regard to the nature, and intereſted, as the great body of them are, in the effects of good government will never be ſatisfied, till ſome remedy be applied to the viciſſitudes and uncertainties, which characterize the ſtate adminiſtrations. On comparing, however theſe valuable ingredients with the vital principles of liberty, we muſt perceive at once, the difficulty of mingling them together in their due proportions. The genius of republican liberty, ſeems to demand on one ſide, not only, that all power ſhould be derived from the people; but, that thoſe entruſted with it ſhould be kept in dependence on the people, by a ſhort duration of their appointments; and, that, even during this ſhort period, the truſt ſhould be placed not in a few, but in a number of hands. Stability, on the contrary, requires, that the hands, in which power is lodged, ſhould continue for a length of time the ſame. A frequent change of men will reſult from a

frequent

frequent return of electors, and a frequent change of measures, from a frequent change of men; whilst energy in government requires not only a certain duration of power, but the execution of it by a single hand. How far the convention may have succeeded in this part of their work, will better appear on a more accurate view of it. From the cursory view, here taken, it must clearly appear to have been an arduous part.

Not less arduous most have been the task of marking the proper line of partition, between the authority of the general, and that of the state governments. Every man will be sensible of this difficulty, in proportion as he has been accustomed to contemplate and discriminate objects, extensive and complicated in their nature. The faculties of the mind itself have never yet been distinguished and defined, with satisfactory precision, by all the efforts of the most acute and metaphysical philosophers. Sense, perception, judgment, desire, volition, memory, imagination, are found to be separated, by such delicate shades and minute gradations, that their boundaries have eluded the most subtle investigations, and remain a pregnant source of ingenious disquisition and controversy. The boundaries between the great kingdoms of nature, and still more, between the various provinces, and lesser portions, into which they are subdivided, afford another illustration of the same important truth. The most sagacious and laborious naturalists have never yet succeeded, in tracing with certainty, the line which separates the district of vegetable life from the neighbouring region of unorganized matter, or which marks the termination of the former and the commencement of the animal empire. A still greater obscurity lies in the distinctive characters, by which the objects in each of these great departments of nature have been arranged and assorted. When we pass from the works of nature, in which all the delineations are perfectly

accurate, and appear to be otherwiſe only from the imperfection of the eye which ſurveys them, to the inſtitutions of man, in which the obſcurity ariſes as well from the object itſelf, as from the organ by which it is contemplated; we muſt perceive the neceſſity of moderating ſtill farther our expectations and hopes from the efforts of human ſagacity. Experience has inſtructed us that no ſkill in the ſcience of government has yet been able to diſcriminate and deſine, with ſufficient certainty, its three great provinces, the legiſlative, executive and judiciary; or even the privileges and powers of the different legiſlative branches. Queſtions daily occur in the courſe of practice, which prove the obſcurity which reigns in theſe ſubjects, and which puzzles the greateſt adepts in political ſcience. The experience of ages, with the continued and combined labors of the moſt enlightened legiſlators and juriſts, have been equally unſucceſsful in delineating the ſeveral objects and limits of different codes of laws and different tribunals of juſtice. The preciſe extent of the common law, the ſtatute law, the maritime law, the eccleſiaſtical law, the law of corporations and other local laws and cuſtoms, remain ſtill to be clearly and finally eſtabliſhed in Great Britain, where accuracy in ſuch ſubjects has been more induſtriouſly purſued than in any other part of the world. The juriſdiction of her ſeveral courts, general and local, of law, of equity, of admiralty, &c. is not leſs a ſource of frequent and intricate diſcuſſions, ſufficiently denoting the indeterminate limits by which they are reſpectively circumſcribed. All new laws, though penned with the greateſt technical ſkill, and paſſed on the fulleſt and moſt mature deliberation, are conſidered as more or leſs obſcure and equivocal, until their meaning be liquidated and aſcertained by a ſeries of particular diſcuſſions and adjudications. Beſides the obſcurity ariſing from the complexity of objects, and the imperfection of the human faculties, the medium

through

through which the conceptions of men are conveyed to each other, adds a freſh embarraſment. The uſe of words is to expreſs ideas. Perſpicuity therefore requires not only that the ideas ſhould be diſtinctly formed, but that they ſhould be expreſſed by words diſtinctly and excluſively appropriated to them. But no language is ſo copious as to ſupply words and phraſes for every complex idea, or ſo correct as not to include many equivocally denoting different ideas. Hence it muſt happen, that however accurately objects may be diſcriminated in themſelves, and however accurately the diſcrimination may be conſidered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy muſt be greater or leſs, according to the complexity and novelty of the objects defined. When the Almighty himſelf condeſcends to addreſs mankind in their own language, his meaning luminous as it muſt be, is rendered dim and doubtful, by the cloudy medium through which it is communicated. Here then are three ſources of vague and incorrect definitions; indiſtinctneſs of the object, imperfection of the organ of conception, inadequateneſs of the vehicle of ideas. Any one of theſe muſt produce a certain degree of obſcurity. The convention, in delineating the boundary between the federal and ſtate juriſdictions, muſt have experienced the full effect of them all.

To the difficulties already mentioned, may be added the interfering pretenſions of the larger and ſmaller ſtates. We cannot err in ſuppoſing that the former would contend for a participation in the government, fully proportioned to their ſuperior wealth and importance; and that the latter would not be leſs tenacious of the equality at preſent enjoyed by them. We may well ſuppoſe that neither ſide would entirely yield to the other, and conſequently that the ſtruggle could be terminated only by compromiſe. It is extremely probable alſo, that after the

the ratio of repreſentation had been adjuſted, this very compromiſe muſt have produced a freſh ſtruggle between the ſame parties, to give ſuch a turn to the organization of the government, and to the diſtribution of its powers, as would increaſe the importance of the branches, in forming which they had reſpectively obtained the greateſt ſhare of influence. There are features in the conſtitution which warrant each of theſe ſuppoſitions; and as far as either of them is well founded, it ſhews that the convention muſt have been compelled to ſacrifice theoretical propriety to the force of extraneous conſiderations.

Nor could it have been the large and ſmall ſtates only which would marſhal themſelves in oppoſition to each other on various points. Other combinations, reſulting from a difference of local poſition and policy, muſt have created additional difficulties. As every ſtate may be divided into different diſtricts, and its citizens into different claſſes, which give birth to contending intereſts and local jealouſies; ſo the different parts of the United States are diſtinguiſhed from each other, by a variety of circumſtances, which produce a like effect on a larger ſcale. And although this variety of intereſts, for reaſons ſufficiently explained in a former paper, may have a ſalutary influence on the adminiſtration of the government when formed; yet every one muſt be ſenſible of the contrary influence which muſt have been experienced in the taſk of forming it.

Would it be wonderful if under the preſſure of all theſe difficulties, the convention ſhould have been forced into ſome deviations from that artificial ſtructure and regular ſymmetry, which an abſtract view of the ſubject might lead an ingenious theoriſt to beſtow on a conſtitution planned in his cloſet or in his imagination? The real wonder is, that ſo many difficulties ſhould have been ſurmounted; and ſurmounted with an unanimity almoſt as unprecedented as it muſt have been unexpected. It is impoſſible for

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any man of candor to reflect on this circumstance, without partaking of the astonishment. It is impossible for the man of pious reflection not to perceive in it, a finger of that Almighty Hand which has been so frequently and signally extended to our relief in the critical stages of the revolution. We had occasion in a former paper, to take notice of the repeated trials which have been unsuccessfully made in the United Netherlands, for reforming the baneful and notorious vices of their constitution. The history of almost all the great councils and consultations, held among mankind for reconciling their discordant opinions, assuaging their mutual jealousies, and adjusting their respective interests, is a history of factions, contentions and disappointments; and may be classed among the most dark and degrading pictures which display the infirmities and depravities of the human character. If, in a few scattered instances, a brighter aspect is presented, they serve only as exceptions to admonish us of the general truth; and by their lustre to darken the gloom of the adverse prospect to which they are contrasted. In revolving the causes from which these exceptions result, and applying them to the particular instance before us, we are necessarily led to two important conclusions. The first is, that the convention must have enjoyed in a very singular degree, an exemption from the pestilential influence of party animosities; the diseases most incident to deliberative bodies, and most apt to contaminate their proceedings. The second conclusion is, that all the deputations composing the convention, were either satisfactorily accommodated by the final act; or were induced to accede to it, by a deep conviction of the necessity of sacrificing private opinions and partial interests, to the public good, and by a despair of seeing this necessity diminished by delays or by new experiments.

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NUMBER XXXVIII.

The Subject continued, and the incoherence of the Objections to the Plan exposed.

IT is not a little remarkable that in every case reported by antient history, in which government has been established with deliberation and consent, the task of framing it has not been committed to an assembly of men; but has been performed by some individual citizen of pre-eminent wisdom and approved integrity. Minos, we learn, was the primitive founder of the government of Crete; as Zaleucus was of that of the Locrians. Theseus first, and after him Draco and Solon, instituted the government of Athens. Lycurgus was the lawgiver of Sparta. The foundation of the original government of Rome was laid by Romulus; and the work compleated by two of his elective successors, Numa, and Tullus Hostilius. On the abolition of royalty, the consular administration was substituted by Brutus, who stepped forward with a project for such a reform, which he alledged had been prepared by Servius Tullius, and to which his address obtained the assent and ratification of the senate and people. This remark is applicable to confederate governments also. Amphyction, we are told, was the author of that which bore his name. The Achæan league received its first birth from Achæus, and its second from Aratus. What degree of agency these reputed lawgivers might have in their respective establishments, or how far they might be cloathed with the legitimate authority of the people, cannot in every instance be ascertained. In some, however, the proceeding was strictly regular. Draco appears to have been entrusted by the people of Athens, with indefinite powers to reform its government and laws.

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And Solon, according to Plutarch, was in a manner compelled by the univerſal ſuffrage of his fellow citizens, to take upon him the ſole and abſolute power of new modelling the conſtitution. The proceedings under Lycurgus were leſs regular; but as far as the advocates for a regular reform could prevail, they all turned their eyes towards the ſingle efforts of that celebrated patriot and ſage, inſtead of ſeeking to bring about a revolution, by the intervention of a deliberative body of citizens. Whence could it have proceeded that a people, jealous as the Greeks were of their liberty, ſhould ſo far abandon the rules of caution, as to place their deſtiny in the hands of a ſingle citizen? Whence could it have proceeded that the Athenians, a people who would not ſuffer an army to be commanded by fewer than ten generals, and who required no other proof of danger to their liberties than the illuſtrious merit of a fellow citizen, ſhould conſider one illuſtrious citizen as a more eligible depoſitary of the fortunes of themſelves and their poſterity, than a ſelect body of citizens, from whoſe common deliberations more wiſdom, as well as more ſafety, might have been expected? Theſe queſtions cannot be fully anſwered without ſuppoſing that the fears of diſcord and diſunion among a number of counſellors, exceeded the apprehenſion of treachery or incapacity in a ſingle individual. Hiſtory informs us likewiſe of the difficulties with which theſe celebrated reformers had to contend; as well as of the expedients which they were obliged to employ, in order to carry their reforms into effect. Solon, who ſeems to have indulged a more temporiſing policy, confeſſed that he had not given to his countrymen the government beſt ſuited to their happineſs, but moſt tolerable to their prejudices. And Lycurgus, more true to his object, was under the neceſſity of mixing a portion of violence with the authority of ſuperſtition; and of ſecuring his final ſucceſs, by a voluntary renunciation, firſt of his country, and then

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of his life. If these lessons teach us, on one hand, to admire the improvement made by America on the ancient mode of preparing and establishing regular plans of government; they serve not less on the other, to admonish us of the hazards and difficulties incident to such experiments, and of the great imprudence of unnecessarily multiplying them.

Is it an unreasonable conjecture that the errors which may be contained in the plan of the convention are such as have resulted rather from the defect of antecedent experience on this complicated and difficult subject, than from a want of accuracy or care in the investigation of it; and consequently such as will not be ascertained until an actual trial shall have pointed them out? This conjecture is rendered probable not only by many considerations of a general nature, but by the particular case of the articles of confederation. It is observable that among the numerous objections and amendments suggested by the several states, when these articles were submitted for their ratification, not one is found which alludes to the great and radical error, which on actual trial has discovered itself. And if we except the observations which New-Jersey was led to make rather by her local situation than by her peculiar foresight, it may be questioned whether a single suggestion was of sufficient moment to justify a revision of the system. There is abundant reason nevertheless to suppose that immaterial as these objections were, they would have been adhered to with a very dangerous inflexibility in some states, had not a zeal for their opinions and supposed interests, been stifled by the more powerful sentiment of self-preservation. One state, we may remember, persisted for several years in refusing her concurrence, although the enemy remained the whole period at our gates, or rather in the very bowels of our country. Nor was her pliancy in the end effected by a less motive than the fear of being chargeable with protracting the public calamities, and endan-

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gering the event of the conteſt. Every candid reader will make the proper reflections on theſe important facts.

A patient who finds his diſorder daily growing worſe; and that an efficacious remedy can no longer be delayed without extreme danger; after coolly revolving his ſituation, and the characters of different phyſicians, ſelects and calls in ſuch of them as he judges moſt capable of adminiſtering relief, and beſt entitled to his confidence. The phyſicians attend: The caſe of the patient is carefully examined: a conſultation is held. They are unanimouſly agreed that the ſymptoms are critical, but that the caſe, with proper and timely relief, is ſo far from being deſperate, that it may be made to iſſue in an improvement of his conſtitution. They are equally equanimous in preſcribing the remedy by which this happy effect is to be produced. The preſcription is no ſooner made known however, than a number of perſons interpoſe, and without denying the reality or danger of the diſorder, aſſure the patient that the preſcription will be poiſon to his conſtitution, and forbid him under pain of certain death to make uſe of it. Might not the patient reaſonably demand before he ventured to follow this advice, that the authors of it ſhould at leaſt agree among themſelves, on ſome other remedy to be ſubſtituted? And if he found them differing as much from one another, as from his firſt counſellors, would he not act prudently, in trying the experiment unanimouſly recommended by the latter, rather than in hearkening to thoſe who could neither deny the neceſſity of a ſpeedy remedy, nor agree in propoſing one?

Such a patient, and in ſuch a ſituation is America at this moment. She has been ſenſible of her malady. She has obtained a regular and unanimous advice from men of her own deliberate choice. And ſhe is warned by others againſt following this advice, under pain of the moſt fatal conſequences. Do the monitors deny the reality of her danger? No. Do they deny the

neceſſity of ſome ſpeedy and powerful remedy? No. Are they agreed, are any two of them agreed in their objections to the remedy propoſed, or in the proper one to be ſubſtituted? Let them ſpeak for themſelves. This one tells us that the propoſed conſtitution ought to be rejected, becauſe it is not a confederation of the ſtates, but a government over individuals. Another admits that it ought to be a government over individuals, to a certain extent, but by no means to the extent propoſed. A third does not object to the government over individuals or to the extent propoſed, but to the want of a bill of rights. A fourth concurs in the abſolute neceſſity of a bill of rights, but contends that it ought to be declaratory not of the perſonal rights of individuals, but of the rights reſerved to the ſtates in their political capacity. A fifth is of opinion that a bill of rights of any ſort would be ſuperfluous and miſplaced, and that the plan would be unexceptionable, but for the fatal power of regulating the times and places of election. An objector in a large ſtate exclaims loudly againſt the unreaſonable equality of repreſentation in the ſenate. An objector in a ſmall ſtate is equally loud againſt the dangerous inequality in the houſe of repreſentatives. From this quarter we are alarmed with the amazing expence from the number of perſons who are to adminiſter the new government. From another quarter, and ſometimes from the ſame quarter, on another occaſion, the cry is, that the congreſs will be but the ſhadow of a repreſentation, and that the government would be far leſs objectionable, if the number and the expence were doubled. A patriot in a ſtate that does not import or export, diſcerns inſuperable objections againſt the power of direct taxation. The patriotic adverſary in a ſtate of great exports and imports, is not leſs diſſatisfied that the whole burthen of taxes may be thrown on conſumption. This politician diſcovers in the conſtitution a direct and irreſiſtible tendency to monarchy. That is equally ſure, it will

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end in ariſtocracy. Another is puzzled to ſay which of theſe ſhapes it will ultimately aſſume, but ſees clearly it muſt be one or other of them. Whilſt a fourth is not wanting, who with no leſs confidence affirms that the conſtitution is ſo far from having a bias towards either of theſe dangers, that the weight on that ſide will not be ſufficient to keep it upright and firm againſt its oppoſite propenſities. With another claſs of adverſaries to the conſtitution, the language is that the legiſlative, executive and judiciary departments are intermixed in ſuch a manner as to contradict all the ideas of regular government, and all the requiſite precautions in favour of liberty. Whilſt this objection circulates in vague and general expreſſions, there are not a few who lend their ſanction to it. Let each one come forward with his particular explanation and ſcarce any two are exactly agreed on the ſubject. In the eyes of one the junction of the ſenate with the preſident in the reſponſible function of appointing to offices, inſtead of veſting this executive power in the executive, alone, is the vicious part of the organiſation. To another, the excluſion of the houſe of repreſentatives, whoſe numbers alone could be a due ſecurity againſt corruption and partiality in the exerciſe of ſuch a power, is equally obnoxious. With another, the admiſſion of the preſident into any ſhare of a power which muſt ever be a dangerous engine in the hands of the executive magiſtrate, is an unpardonable violation of the maxims of republican jealouſy. No part of the arrangement according to ſome is more admiſſible than the trial of impeachments by the ſenate, which is alternately a member both of the legiſlative and executive departments, when this power ſo evidently belonged to the judiciary department. We concur fully, reply others, in the objection to this part of the plan, but we can never agree that a reference of impeachments to the judiciary authority would be an amendment of the error. Our principal diſlike to the organiſation ariſes from the extenſive

powers already lodged in that department. Even among the zealous patrons of a council of ſtate, the moſt irreconcilable variance is diſcovered concerning the mode in which it ought to be conſtituted. The demand of one gentleman is that the council ſhould conſiſt of a ſmall number, to be appointed by the moſt numerous branch of the legiſlature. Another would prefer a larger number, and conſiders it as a fundamental condition that the appointment ſhould be made by the preſident himſelf.

As it can give no umbrage to the writers againſt the plan of the federal conſtitution, let us ſuppoſe that as they are the moſt zealous, ſo they are alſo the moſt ſagacious of thoſe who think the late convention were unequal to the taſk aſſigned them, and that a wiſer and better plan might and ought to be ſubſtituted. Let us further ſuppoſe that their country ſhould concur both in this favourable opinion of their merits, and in their unfavourable opinion of the convention; and ſhould accordingly proceed to form them into a ſecond convention, with full powers and for the expreſs purpoſe of reviſing and remoulding the work of the firſt. Were the experiment to be ſeriouſly made, though it requires ſome effort to view it ſeriouſly even in fiction, I leave it to be decided by the ſample of opinions juſt exhibited, whether with all their enmity to their predeceſſors, they would in any one point depart ſo widely from their example, as in the diſcord and ferment that would mark their own deliberations; and whether the conſtitution, now before the public, would not ſtand as fair a chance for immortality, as Lycurgus gave to that of Sparta, by making its change to depend on his own return from exile and death, if it were to be immediately adopted, and were to continue in force, not until A BETTER, but until ANOTHER ſhould be agreed upon by this new aſſembly of law-givers.

It is a matter both of wonder and regret, that thoſe who raiſe ſo many objections againſt the new conſtitution,

conſtitution, ſhould never call to mind the defects of that which is to be exchanged for it. It is not neceſſary that the former ſhould be perfect; it is ſufficient that the latter is more imperfect. No man would refuſe to give braſs for ſilver or gold, becauſe the latter had ſome alloy in it. No man would refuſe to quit a ſhattered and tottering habitation, for a firm and commodious building, becauſe the latter had not a porch to it; or becauſe ſome of the rooms might be a little larger or ſmaller, or the cieling a little higher or lower than his fancy would have planned them. But waving illuſtrations of this ſort, is it not manifeſt that moſt of the capital objections urged againſt the new ſyſtem, lie with tenfold weight againſt the exiſting confederation? Is an indefinite power to raiſe money dangerous in the hands of a federal government? The preſent congreſs can make requiſitions to any amount they pleaſe; and the ſtates are conſtitutionally bound to furniſh them; they can emit bills of credit as long as they will pay for the paper; they can borrow both abroad and at home, as long as a ſhilling will be lent. Is an indefinite power to raiſe troops dangerous? The confederation gives to congreſs that power alſo; and they have already begun to make uſe of it. Is it improper and unſafe to intermix the different powers of government in the ſame body of men? Congreſs, a ſingle body of men, are the ſole depoſitory of all the federal powers. Is it particularly dangerous to give the keys of the treaſury, and the command of the army, into the ſame hands? The confederation places them both in the hands of congreſs. Is a bill of rights eſſential to liberty? The confederation has no bill of rights. Is it an objection againſt the new conſtitution, that it empowers the ſenate with the concurrence of the executive to make treaties which are to be the laws of the land? The exiſting congreſs, without any ſuch controul, can make treaties which they themſelves have declared, and moſt of the ſtates have

recognized, to be the ſupreme law of the land. Is the importation of ſlaves permitted by the new conſtitution for twenty years? By the old, it is permitted for ever.

I ſhall be told that however dangerous this mixture of powers may be in theory, it is rendered harmleſs by the dependence of congreſs on the ſtates for the means of carrying them into practice: That however large the maſs of powers may be, it is in fact a lifeleſs maſs. Then ſay I in the firſt place, that the confederation is chargeable with the ſtill greater folly of declaring certain powers in the federal government to be abſolutely neceſſary, and at the ſame time rendering them abſolutely nugatory; And in the next place, that if the union is to continue, and no better government be ſubſtituted, effective powers muſt either be granted to or aſſumed by the exiſting congreſs, in either of which events the contraſt juſt ſtated will hold good. But this is not all. Out of this lifeleſs maſs has already grown an excreſcent power, which tends to realize all the dangers that can be apprehended from a defective conſtruction of the ſupreme government of the union. It is now no longer a point of ſpeculation and hope that the weſtern territory is a mine of vaſt wealth to the United States; and although it is not of ſuch a nature as to extricate them from their preſent diſtreſſes, or for ſome time to come, to yield any regular ſupplies for the public expences, yet muſt it hereafter be able under proper management both to effect a gradual diſcharge of the domeſtic debt, and to furniſh for a certain period, liberal tributes to the federal treaſury. A very large proportion of this fund has been already ſurrendered by individual ſtates; and it may with reaſon be expected, that the remaining ſtates will not perſiſt in witholding ſimilar proofs of their equity and generoſity. We may calculate therefore that a rich and fertile country, of an area equal to the inhabited extent of the United States, will ſoon become a national ſtock. Congreſs have

have assumed the administration of this stock. They have began to render it productive. Congress have undertaken to do more, they have proceeded to form new states; to erect temporary governments; to appoint officers for them; and to prescribe the conditions on which such states shall be admitted into the confederacy. All this has been done; and done without the least colour of constitutional authority. Yet no blame has been whispered; no alarm has been sounded. A GREAT and INDEPENDENT fund of revenue is passing into the hands of a SINGLE BODY of men, who can RAISE TROOPS to an INDEFINITE NUMBER, and appropriate money to their support for an INDEFINITE PERIOD OF TIME. And yet there are men who have not only been silent spectators of this prospect; but who are advocates for the system which exhibits it; and at the same time urge against the new system the objections which we have heard. Would they not act with more consistency in urging the establishment of the latter, as no less necessary to guard the union against the future powers and resources of a body constructed like the existing congress, than to save it from the dangers threatened by the present impotency of that assembly?

I mean not by any thing here said to throw censure on the measures which have been pursued by congress. I am sensible they could not have done otherwise. The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects? A dissolution or usurpation is the dreadful dilemma to which it is continually exposed.

PUBLIUS.

NUMBER

NUMBER XXXIX.

The Conformity of the Plan to Republican Principles: An Objection in Respect to the Powers of the Convention, examined.

THE last paper having concluded the observations which were meant to introduce a candid survey of the plan of government reported by the convention, we now proceed to the execution of that part of our undertaking. The first question that offers itself is, whether the general form and aspect of the government be strictly republican? It is evident that no other form would be reconcileable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention therefore be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What then are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitutions of different states, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people, is exercised in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch

branch only, combined with a hereditary ariſtocracy and monarchy, has with equal impropriety been frequently placed on the liſt of republics. Theſe examples, which are nearly as diſſimilar to each other as to a genuine republic, ſhew the extreme inaccuracy with which the term has been uſed in political diſquiſitions.

If we reſort for a criterion, to the different principles on which different forms of government are eſtabliſhed, we may define a republic to be, or at leaſt may beſtow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is adminiſtered by perſons holding their offices during pleaſure, for a limited period, or during good behaviour. It is *eſſential* to ſuch a government, that it be derived from the great body of the ſociety, not from an inconſiderable proportion, or a favored claſs of it; otherwiſe a handful of tyrannical nobles, exerciſing their oppreſſions by a delegation of their powers, might aſpire to the rank of republicans, and claim for their government the honorable title of republic. It is *ſufficient* for ſuch a government, that the perſons adminiſtering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures juſt ſpecified; otherwiſe every government in the United States, as well as every other popular government that has been or can be well organiſed or well executed, would be degraded from the republican character. According to the conſtitution of every ſtate in the union, ſome or other of the officers of government are appointed indirectly only by the people. According to moſt of them the chief magiſtrate himſelf is ſo appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legiſlature. According to all the conſtitutions alſo, the tenure of the higheſt offices is extended to a definite period, and in many inſtances, both within the legiſlative and executive departments, to a period

of

of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behaviour.

On comparing the constitution planned by the convention, with the standard here fixed, we perceive at once that it is in the most rigid sense conformable to it. The house of representatives, like that of one branch at least of all the state legislatures, is elected immediately by the great body of the people. The senate, like the present congress, and the senate of maryland. derives its appointment indirectly from the people. The president is indirectly derived from the choice of the people, according to the example in most of the states. Even the judges, with all other officers of the union, will, as in the several states, be the choice, though a remote choice, of the people themselves. The duration of the appointments is equally conformable to the republican standard, and to the model of the state constitutions. The house of representatives is periodically elective as in all the states; and for the period of two years as in the state of south carolina. The senate is elective for the period of six years; which is but one year more than the period of the senate of Maryland; and but two more than that of the senates of New-York and Virginia. The president is to continue in office for the period of four years; as in New-York and Delaware, the chief magistrate is elected for three years, and in South Carolina for two years. In the other states the election is annual. In several of the states however, no explicit provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia, he is not impeachable till out of office. The president of the United States is impeachable at any time during his continuance in office. The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behaviour. The tenure of the

ministerial

miniſterial offices generally will be a ſubject of legal regulation, conformably to the reaſon of the caſe, and the example of the ſtate conſtitutions.

Could any further proof be required of the republican complexion of this ſyſtem, the moſt deciſive one might be found in its abſolute prohibition of titles of nobility, both under the federal and the ſtate governments; and in its expreſs guaratee of the republican form to each of the latter.

But it was not ſufficient, ſay the adverſaries of the propoſed conſtitution, for the convention to adhere to the republican form. They ought with equal care, to have preſerved the *federal* form, which regards the union as a *confederacy* of ſovereign ſtates; inſtead of which, they have framed a *national* government, which regards the union as a *conſolidation* of the ſtates. And it is aſked by what authority this bold and radical innovation was undertaken. The handle which has been made of this objection requires, that it ſhould be examined with ſome preciſion.

Without enquiring into the accuracy of the diſtinction on which the objection is founded, it will be neceſſary to a juſt eſtimate of its force, firſt to aſcertain the real character of the government in queſtion; ſecondly, to enquire how far the convention were authoriſed to propoſe ſuch a government; and thirdly, how far the duty they owed to their country, could ſupply any defect of regular authority.

Firſt. In order to aſcertain the real character of the government it may be conſidered in relation to the foundation on which it is to be eſtabliſhed; to the ſources from which its ordinary powers are to be drawn to the operation of thoſe powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the firſt relation, it appears on one hand that the conſtitution is to be founded on the aſſent and ratification of the people of America, given by deputies elected for the ſpecial purpoſe; but on the other

other that this aſſent and ratification is to be given by the people, not as individuals compoſing one entire nation; but as compoſing the diſtinct and independent ſtates to which they reſpectively belong. It is to be the aſſent and ratification of the ſeveral ſtates derived from the ſupreme authority in each ſtate, the authority of the people themſelves. The act therefore eſtabliſhing the conſtitution, will not be a *national* but a *federal* act.

That it will be a federal and not a national act, as theſe terms are underſtood by the objectors, the act of the people as forming ſo many independent ſtates, not as forming one aggregate nation is obvious from this ſingle conſideration, that it is to reſult neither from the deciſion of a *majority* of the people of the union, nor from that of a *majority* of the ſtates. It muſt reſult from the *unanimous* aſſent of the ſeveral ſtates that are parties to it, differing no other wiſe from their ordinary aſſent than in its being expreſſed, not by the legiſlative authority, but by that of the people themſelves. Were the people regarded in this tranſaction as forming one nation, the will of the majority of the whole people of the United States, would bind the minority; in the ſame manner as the majority in each ſtate muſt bind the minority; and the will of the majority muſt be determined either by a compariſon of the individual votes; or by conſidering the will of the majority of the ſtates, as evidence of the will of a majority of the people of the United States. Neither of theſe rules has been adopted. Each ſtate in ratifying the conſtitution, is conſidered as a ſovereign body independent of all others, and only to be bound by its own voluntary act. In this relation then the new conſtitution will, if eſtabliſhed, be a *federal* and not a *national* conſtitution.

The next relation is to the ſources from which the ordinary powers of government are to be derived. The houſe of repreſentatives will derive its powers

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

The difference between a federal and national government, as it relates to the *operation of the government*, is, by the adversaries of the plan of the convention, supposed to consist in this, that in the former, the powers operate on the political bodies composing the confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the constitution by this criterion, it falls under the *national*, not the *federal* character; though perhaps not so compleatly as has been understood. In several cases, and particularly in the trial of controversies to which states may be parties, they must be viewed and proceeded against in their collective and political capacities only. But the operation of the govern-

ment on the people in their individual capacities, in its ordinary and most essential proceedings, will on the whole, in the sense of its opponents, designate it in this relation, a *national* government.

But if the government be national with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is compleatly vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controuled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere. In this relation then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the

general,

general, rather than under the local governments; or to ſpeak more properly, that it could be ſafely eſtabliſhed under the firſt alone, is a poſition not likely to be combated.

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

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

PUBLIUS.

NUMBER XL.

The same Objection further examined.

THE *second* point to be examined is, whether the convention were authorised to frame and propose this mixed constitution.

The powers of the convention ought in strictness to be determined by an inspection of the commissions given to the members by their respective constituents. As all of these however, had reference, either to the recommendation from the meeting at Annapolis in September, 1786, or to that from congress in February, 1787, it will be sufficient to recur to these particular acts.

The act from Annapolis recommends the "appointment of commissioners to take into consideration the situation of the United States, to devise *such further provisions* as shall appear to them necessary to render the constitution of the federal government *adequate to the exigencies of the union*; and to report such an act for that purpose, to the United States in congress assembled, as, when agreed to by them, and afterwards confirmed by the legislature of every state, will effectually provide for the same."

The recommendatory act of congress is in the words following: "Whereas there is provision in the articles of confederation and perpetual union, for making alterations therein, by the assent of a congress of the United States, and of the legislatures of the several states: And whereas experience hath evinced, that there are defects in the present confederation, as a mean to remedy which several of the states, and *particularly the state of New-York*, by express instructions to their delegates in congress, have suggested a convention for

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" the purpoſes expreſſed in the following reſolution ; " and ſuch convention appearing to be the moſt pro- " bable mean of eſtabliſhing in theſe ſtates, *a firm* " *national government*."

" Reſolved, That in the opinion of congreſs, it is " expedient, that on the 2d Monday in May next, " a convention of delegates, who ſhall have been " appointed by the ſeveral ſtates, be held at Phila- " delphia, for the ſole and expreſs purpoſe *of reviſ-* " *ing the articles of confederation*, and reporting to " congreſs and the ſeveral legiſlatures, ſuch *alter-* " *ations and proviſions therein*, as ſhall, when agreed " to in congreſs, and confirmed by the ſtates, ren- " der the federal conſtitution *adequate to the exigencies* " *of government and the preſervation of the union*."

From theſe two acts it appears, 1ſt. that the object of the convention was to eſtabliſh in theſe ſtates, *a firm national government* ; 2d. that this government was to be ſuch as would be *adequate to the exigencies of government* and *the preſervation of the union* ; 3d. that theſe purpoſes were to be effected by *alterations and proviſions in the articles of confederation*, as it is expreſſed in the act of congreſs, or by *ſuch further proviſions as ſhould appear neceſſary*, as it ſtands in the recommendatory act from Annapolis ; 4th. that the alterations and proviſions were to be reported to congreſs, and to the ſtates, in order to be agreed to by the former, and confirmed by the latter.

From a compariſon and fair conſtruction of theſe ſeveral modes of expreſſion, is to be deduced the authority under which the convention acted. They were to frame a *national government*, adequate to the *exigencies of government* and *of the union*, and to reduce the articles of confederation into ſuch form as to accompliſh theſe purpoſes.

There are two rules of conſtruction dictated by plain reaſon, as well as founded on legal axioms. The one is, that every part of the expreſſion ought, if poſſible, to be allowed ſome meaning, and be made to

conſpire to ſome common end. The other is, that where the ſeveral parts cannot be made to coincide, the leſs important ſhould give way to the more important part; the means ſhould be ſacrificed to the end, rather than the end to the means.

Suppoſe then that the expreſſions defining the authority of the convention, were irreconcileably at variance with each other; that a *national* and *adequate government* could not poſſibly, in the judgment of the convention, be effected by *alterations* and *proviſions* in the *articles of confeaeration*, which part of the definition ought to have been embraced, and which rejected? Which was the more important, which the leſs important part? Which the end, which the means? Let the moſt ſcrupulous expoſitors of delegated powers; let the moſt inveterate objectors againſt thoſe exerciſed by the convention, anſwer theſe queſtions. Let them declare, whether it was of moſt importance to the happineſs of the people of America, that the articles of confederation ſhould be diſregarded, and an adequate government be provided, and the union preſerved; or that an adequate government ſhould be omitted, and the articles of confederation preſerved. Let them declare, whether the preſervation of theſe articles was the end for ſecuring which a reform of the government was to be introduced as the means; or whether the eſtabliſhment of a government, adequate to the national happineſs, was the end at which theſe articles themſelves originally aimed, and to which they ought, as inſufficient means, to have been ſacrificed.

But is it neceſſary to ſuppoſe that theſe expreſſions are abſolutely irreconciliable to each other; that no *alterations* or *proviſions* in the *articles of the confederation*, could poſſibly mould them into a national and adequate government; into ſuch a government as has been propoſed by the convention?

No ſtreſs it is preſumed will in this caſe be laid on the *title*, a change of that could never be deemed an

exerciſe

exercise of ungranted power. *Alterations* in the body of the instrument, are expressly authorised. *New provisions* therein are also expressly authorised. Here then is a power to change the title; to insert new articles; to alter old ones. Must it of necessity be admitted that this power is infringed, so long as a part of the old articles remain? Those who maintain the affirmative, ought at least to mark the boundary between authorised and usurped innovations, between that degree of change which lies within the compass of *alterations and further provisions*; and that which amounts to a *transmutation* of the government. Will it be said that the alterations ought not to have touched the substance of the confederation? The states would never have appointed a convention with so much solemnity, nor described its objects with so much latitude, if some *substantial* reform had not been in contemplation. Will it be said that the *fundamental principles* of the confederation were not within the purview of the convention, and ought not to have been varied? I ask what are these principles? Do they require that in the establishment of the constitution, the states should be regarded as distinct and independent sovereigns? They are so regarded by the constitution proposed. Do they require that the members of the government should derive their appointment from the legislatures, not from the people of the states? One branch of the new government is to be appointed by these legislatures; and under the confederation the delegates to congress *may all* be appointed immediately by the people, and in two states* are actually so appointed. Do they require that the powers of the government should act on the states, and not immediately on individuals? In some instances, as has been shewn, the powers of the new government will act on the states in their collective characters. In some instances also those of the existing government act immediately on individuals: In cases

* Connecticut and Rhode-Island.

cases of capture, of piracy, of the post-office, of coins weights and measures, of trade with the Indians, of claims under grants of land by different states, and above all, in the case of trials by courts-martial in the army and navy, by which death may be inflicted without the intervention of a jury, or even of a civil magistrate; in all these cases the powers of the confederation operate immediately on the persons and interests of individual citizens. Do these fundamental principles require particularly that no tax should be levied without the intermediate agency of the states? The confederation itself authorises a direct tax to a certain extent on the post-office. The power of coinage has been so construed by congress, as to levy a tribute immediately from that source also. But pretermitting these instances, was it not an acknowledged object of the convention, and the universal expectation of the people, that the regulation of trade should be submitted to the general government in such a form as would render it an immediate source of general revenue? Had not congress repeatedly recommended this measure as not inconsistent with the fundamental principles of the confederation? Had not every state but one, had not New-York herself, so far complied with the plan of congress, as to recognize the *principle* of the innovation? Do these principles in fine require that the powers of the general government should be limited, and that beyond this limit, the states should be left in possession of their sovereignty and independence? We have seen that in the new government as in the old, the general powers are limited, and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.

The truth is, that the great principles of the constitution proposed by the convention, may be considered less as absolutely new, than as the expansion of principles which are found in the articles of confederation. The misfortune under the latter system

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has been, that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it; and to require a degree of enlargement which gives to the new system, the aspect of an entire transformation of the old.

In one particular it is admitted that the convention have departed from the tenor of their commission. Instead of reporting a plan requiring the confirmation *of all the states*, they have reported a plan which is to be confirmed and may be carried into effect by *nine states only*. It is worthy of remark, that this objection, though the most plausible, has been the least urged in the publications which have swarmed against the convention. The forbearance can only have proceeded from an irresistible conviction of the absurdity of subjecting the fate of twelve states, to the perverseness or corruption of a thirteenth; from the example of inflexible opposition given by a *majority* of one sixtieth of the people of America, to a measure approved and called for by the voice of twelve states comprising fifty-nine sixtieths of the people; an example still fresh in the memory and indignation of every citizen who has felt for the wounded honor and prosperity of his country. As this objection therefore, has been in a manner waved by those who have criticised the powers of the convention, I dismiss it without further observation.

The *third* point to be enquired into is, how far considerations of duty arising out of the case itself, could have supplied any defect of regular authority.

In the preceding enquiries, the powers of the convention have been analised and tried with the same rigour, and by the same rules, as if they had been real and final powers, for the establishment of a constitution for the United States. We have seen, in what manner they have borne the trial, even on that supposition. It is time now to recollect, that the powers were merely advisory and recommendatory; that they were so meant by the states, and so understood

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ſtood by the convention; and that the latter have accordingly planned and propoſed a conſtitution, which is to be of no more conſequence than the paper on which it is written, unleſs it be ſtamped with the approbation of thoſe to whom it is addreſſed. This reflection places the ſubject in a point of view altogether different, and will enable us to judge with propriety of the courſe taken by the convention.

Let us view the ground on which the convention ſtood. It may be collected from their proceedings, that they were deeply and unanimouſly impreſſed with the criſis which had led their country almoſt with one voice to make ſo ſingular and ſolemn an experiment, for correcting the errors of a ſyſtem by which this criſis had been produced; that they were no le's deeply and unanimouſly convinced, that ſuch a reform as they have propoſed, was abſolutely neceſſary to effect the purpoſes of their appointment. It could not be unknown to them, that the hopes and expectations of the great body of citizens, throughout this great empire, were turned with the keeneſt anxiety, to the event of their deliberations. They had every reaſon to believe that the contrary ſentiments agitated the minds and boſoms of every external and internal foe to the liberty and proſperity of the United States. They had ſeen in the origin and progreſs of the experiment, the alacrity with which the *propoſition*, made by a ſingle ſtate (Virginia) towards a partial amendment of the confederation, had been attended to and promoted. They had ſeen the *liberty aſſumed* by a *very few* deputies, from a *very few* ſtates, convened at Annapolis, of recommending a great and critical object, wholly foreign to their commiſſion, not only juſtified by the public opinion, but actually carried into effect, by twelve out of the Thirteen States. They had ſeen in a variety of inſtances, aſſumptions by congreſs not only of recommendatory, but of operative powers, warranted

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in the public eſtimation, by occaſions and objects infinitely leſs urgent than thoſe by which their conduct was to be governed. They muſt have reflected, that in all great changes of eſtabliſhed governments, forms ought to give way to ſubſtance; that a rigid adherence in ſuch caſes to the former, would render nominal and nugatory, the tranſcendent and precious right of the people to "aboliſh or alter their governments as to "them ſhall ſeem moſt likely to effect their ſafety "and happineſs*;" ſince it is impoſſible for the people ſpontaneouſly and univerſally, to move in concert towards their object; and it is therefore eſſential, that ſuch changes be inſtituted by ſome *informal and unauthoriſed propoſitions*, made by ſome patriotic and reſpectable citizen or number of citizens. They muſt have recollected that it was by this irregular and aſſumed privilege of propoſing to the people plans for their ſafety and happineſs, that the ſtates were firſt united againſt the danger with which they were threatened by their antient government; that committees and congreſſes were formed for concentrating their efforts, and defending their rights; and that *conventions* were *elected* in *the ſeveral ſtates*, for eſtabliſhing the conſtitutions under which they are now governed; nor could it have been forgotten that no little ill-timed ſcruples, no zeal for adhering to ordinary forms were any where ſeen, except in thoſe who wiſhed to indulge under theſe maſks, their ſecret enmity to the ſubſtance contended for. They muſt have borne in mind, that as the plan to be framed and propoſed, was to be ſubmitted to *the people themſelves*, the diſapprobation of this ſupreme authority would deſtroy it for ever; its approbation blot out all antecedent errors and irregularities. It might even have occurred to them, that where a diſpoſition to cavil prevailed, their neglect to execute the degree of power veſted in them, and ſtill more their recommendation of any meaſure whatever not warranted

* Declaration of Independence.

warranted by their commiſſion, would not leſs excite animadverſion, than a recommendation at once of a meaſure fully commenſurate to the national exigencies.

Had the convention under all theſe impreſſions, and in the midſt of all theſe conſiderations, inſtead of exerciſing a manly confidence in their country, by whoſe confidence they had been ſo peculiarly diſtinguiſhed, and of pointing out a ſyſtem capable in their judgment of ſecuring its happineſs, taken the cold and ſullen reſolution of diſappointing its ardent hopes of ſacrificing ſubſtance to forms, of committing the deareſt intereſts of their country to the uncertainties of delay, and the hazard of events; let me aſk the man, who can raiſe his mind to one elevated conception; who can awaken in his boſom, one patriotic emotion, what judgment ought to have been pronounced by the impartial world, by the friends of mankind, by every virtuous citizen, on the conduct and character of this aſſembly, or if there be a man whoſe propenſity to condemn, is ſuſceptible of no controul, let me then aſk what ſentence he has in reſerve for the twelve ſtates who *uſurped the power of* ſending deputies to the convention, a body utterly unknown to their conſtitutions; for congreſs, who recommended the appointment of this body, equally unknown to the confederation; and for the ſtate of New-York in particular, who firſt urged, and then complied with this unauthoriſed interpoſition.

But that the objectors may be diſarmed of every pretext, it ſhall be granted for a moment, that the convention were neither authoriſed by their commiſſion, nor juſtified by circumſtances, in propoſing a conſtitution for their country: Does it follow that the conſtitution ought for that reaſon alone to be rejected? If according to the noble precept, it be lawful to accept good advice even from an enemy, ſhall we ſet the ignoble example of refuſing ſuch advice even when it is offered by our friends? The prudent

enquiry

enquiry in all caſes, ought ſurely to be not ſo much *from whom* the advice comes, as whether the advice be *good*.

The ſum of what has been here advanced and proved, is that the charge againſt the convention of exceeding their powers, except in one inſtance little urged by the objectors, has no foundation to ſupport it; that if they had exceeded their powers, they were not only warranted but required, as the confidential ſervants of their country, by the circumſtances in which they were placed, to exerciſe the liberty which they aſſumed, and that finally, if they had violated both their powers, and their obligations in propoſing a conſtitution, this ought nevertheleſs to be embraced, if it be calculated to accompliſh the views and happineſs of the people of America. How far this character is due to the conſtitution, is the ſubject under inveſtigation.

PUBLIUS.

NUMBER XLI.

General View of the Powers propoſed to be veſted in the Union.

THE conſtitution propoſed by the convention may be conſidered under two general points of view. The FIRST relates to the ſum or quantity of power which it veſts in the government, including the reſtraints impoſed on the ſtates. The SECOND, to the particular ſtructure of the government, and the diſtribution of this power, among its ſeveral branches.

Under the firſt view of the ſubject two important queſtions ariſe; 1. Whether any part of the powers transferred to the general government be unneceſſary or improper? 2. Whether the entire maſs of them be dangerous to the portion of juriſdiction left in the ſeveral ſtates?

Is the aggregate power of the general government greater than ought to have been vested in it? This is the first question.

It cannot have escaped those who have attended with candour to the arguments employed against the extensive powers of the government, that the authors of them have very little considered how far these powers were necessary means of attaining a necessary end. They have chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages; and on the possible abuses which must be incident to every power or trust of which a beneficial use can be made. This method of handling the subject cannot impose on the good sense of the people of America. It may display the subtlety of the writer; it may open a boundless field for rhetoric and declamation; it may inflame the passions of the unthinking, and may confirm the prejudices of the misthinking. But cool and candid people will at once reflect, that the purest of human blessings must have a portion of alloy in them; that the choice must always be made, if not of the lesser evil, at least of the GREATER, not the PERFECT good; and that in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused. They will see therefore that in all cases, where power is to be conferred, the point first to be decided is whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment.

That we may form a correct judgment on this subject, it will be proper to review the several powers conferred on the government of the union; and that this may be the more conveniently done, they may be reduced into different classes as they relate to the following different objects; 1. Security against foreign danger; 2. Regulation of the intercourse with

foreign

foreign nations; 3. Maintenance of harmony and proper intercourſe among the ſtates; 4. Certain miſcellaneous objects of general utility; 5. Reſtraint of the ſtates from certain injurious acts; 6. Proviſions for giving due efficacy to all theſe powers.

The powers falling within the firſt claſs, are thoſe of declaring war, and granting letters of marque; of providing armies and fleets; of regulating and calling forth the militia; of levying and borrowing money.

Security againſt foreign danger is one of the primitive objects of civil ſociety. It is an avowed and eſſential object of the American union. The powers requiſite for attaining it, muſt be effectually confided to the federal councils.

Is the power of declaring war neceſſary? No man will anſwer this queſtion in the negative. It would be ſuperfluous therefore to enter into a proof of the affirmative. The exiſting confederation eſtabliſhes this power in the moſt ample form.

Is the power of raiſing armies, and equipping fleets neceſſary? This is involved in the foregoing power. It is involved in the power of ſelf-defence.

But was it neceſſary to give an INDEFINITE POWER of raiſing TROOPS, as well as providing fleets; and of maintaining both in PEACE, as well as in WAR?

The anſwer to theſe queſtions has been too far anticipated, in another place, to admit an extenſive diſcuſſion of them in this place. The anſwer indeed ſeems to be ſo obvious and concluſive as ſcarcely to juſtify ſuch a diſcuſſion in any place. With what colour of propriety could the force neceſſary for defence, be limited by thoſe who cannot limit the force of offence? If a federal conſtitution could chain the ambition, or ſet bounds to the exertions of all other nations, then indeed might it prudently chain the diſcretion of its own government, and ſet bounds to the exertions for its own ſafety.

How could a readineſs for war in time of peace be ſafely prohibited, unleſs we could prohibit in like manner the preparations and eſtabliſhments of every hoſtile nation? The means of ſecurity can only be regulated by the means and the danger of attack. They will in fact be ever determined by theſe rules, and by no others. It is in vain to oppoſe conſtitutional barriers to the impulſe of ſelf preſervation. It is worſe than in vain; becauſe it plants in the conſtitution itſelf neceſſary uſurpations of power, every precedent of which is a germe of unneceſſary and multiplied repetitions. If one nation maintains conſtantly a diſciplined army ready for the ſervice of ambition or revenge, it obliges the moſt pacific nations, who may be within the reach of its enterprizes, to take correſponding precautions. The fifteenth century was the unhappy epoch of military eſtabliſhments in time of peace. They were introduced by Charles VII. of France. All Europe has followed, or been forced into the example. Had the example not been followed by other nations, all Europe muſt long ago have worn the chains of a univerſal monarch Were every nation except France now to diſband its peace eſtabliſhment, the ſame event might follow. The veteran legions of Rome were an overmatch for the undiſciplined valour of all other nations, and rendered her miſtreſs of the world.

Not leſs true is it, that the liberties of Rome proved the final victim to her military triumphs, and that the liberties of Europe, as far as they ever exiſted, have with few exceptions been the price of her military eſtabliſhments. A ſtanding force therefore is a dangerous, at the ſame time that it may be a neceſſary proviſion. On the ſmalleſt ſcale it has its inconveniences. On an extenſive ſcale, its conſequences may be fatal. On any ſcale, it is an object of laudable circumſpection and precaution. A wiſe nation will combine all theſe conſiderations;

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and whilſt it does not raſhly preclude itſelf from any reſource which may become eſſential to its ſafety, will exert all its prudence in diminiſhing both the neceſſity and the danger of reſorting to one which may be inauſpicious to its liberties.

The clearest marks of this prudence are ſtamped on the propoſed conſtitution. The union itſelf which it cements and ſecures, deſtroys every pretext for a military eſtabliſhment which could be dangerous. America, united with a handful of troops, or without a ſingle ſoldier, exhibits a more forbidding poſture to foreign ambition, than America diſunited, with an hundred thouſand veterans ready for combat. It was remarked on a former occaſion, that the want of this pretext had ſaved the liberties of one nation in Europe. Being rendered by her inſular ſituation and her maritime reſources, impregnable to the armies of her neighbours, the rulers of Great-Britain have never been able, by real or artificial dangers, to cheat the public into an extenſive peace eſtabliſhment. The diſtance of the United States from the powerful nations of the world, gives them the ſame happy ſecurity. A dangerous eſtabliſhment can never be neceſſary or plauſible, ſo long as they continue a united people. But let it never for a moment be forgotten, that they are indebted for this advantage to their union alone. The moment of its diſſolution will be the date of a new order of things. The fears of the weaker or the ambition of the ſtronger ſtates or confederacies, will ſet the ſame example in the new, as Charles VII. did in the old world. The example will be followed here from the ſame motives which produced univerſal imitation there. Inſtead of deriving from our ſituation the precious advantage which Great-Britain has derived from hers, the face of America will be but a copy of that of the continent of Europe. It will preſent liberty every where cruſhed between ſtanding armies and perpetual taxes. The fortunes of diſunited

America will be even more diſaſtrous than thoſe of Europe. The ſources of evil in the latter are confined to her own limits. No ſuperior powers of another quarter of the globe intrigue among her rival nations, inflame their mutual animoſities, and render them the inſtruments of foreign ambition, jealouſy and revenge. In America, the miſeries ſpringing from her internal jealouſies, contentions and wars, would form a part only of her lot. A plentiful addition of evils would have their ſource in that relation in which Europe ſtands to this quarter of the earth, and which no other quarter of the earth bears to Europe. This picture of the conſequences of diſunion cannot be too highly coloured, or too often exhibited. Every man who loves peace, every man who loves his country, every man who loves liberty, ought to have it ever before his eyes, that he may cheriſh in his heart a due attachment to the union of America, and be able to ſet a due value on the means of preſerving it.

Next to the effectual eſtabliſhment of the union, the beſt poſſible precaution againſt danger from ſtanding armies, is a limitation of the term for which revenue may be appropriated to their ſupport. This precaution the conſtitution has prudently added. I will not repeat here the obſervations, which I flatter myſelf have placed this ſubject in a juſt and ſatisfactory light. But it may not be improper to take notice of an argument againſt this part of the conſtitution, which has been drawn from the policy and practice of Great-Britain. It is ſaid that the continuance of an army in that kingdom, requires an annual vote of the legiſlature; whereas the American conſtitution has lengthened this critical period to two years. This is the form in which the compariſon is uſually ſtated to the public: But is it a juſt form? Is it a fair compariſon? Does the Britiſh conſtitution reſtrain the parliamentary diſcretion to one year? Does the American impoſe on the congreſs appro-

priations

priations for two years? On the contrary, it cannot be unknown to the authors of the fallacy themſelves, that the Britiſh conſtitution fixes no limit whatever to the diſcretion of the legiſlature, and that the American ties down the legiſlature to two years, as the longeſt admiſſible term.

Had the argument from the Britiſh example been truly ſtated, it would have ſtood thus: The term for which ſupplies may be appropriated to the army eſtabliſhment, though unlimited by the Britiſh conſtitution, has nevertheleſs in practice been limited by parliamentary diſcretion, to a ſingle year. Now if in Great-Britain, where the houſe of commons is elected for ſeven years; where ſo great a proportion of the members are elected by ſo ſmall a proportion of the people; where the electors are ſo corrupted by the repreſentatives, and the repreſentatives ſo corrupted by the crown, the repreſentative body can poſſeſs a power to make appropriations to the army for an indefinite term, without deſiring, or without daring, to extend the term beyond a ſingle year; ought not ſuſpicion herſelf to bluſh in pretending that the repreſentatives of the United States, elected FREELY, by the WHOLE BODY of the people, every SECOND YEAR, cannot be ſafely entruſted with a diſcretion over ſuch appropriations, expreſsly limited to the ſhort period of TWO YEARS.

A bad cauſe ſeldom fails to betray itſelf. Of this truth, the management of the oppoſition to the federal government is an unvaried exemplification. But among all the blunders which have been committed, none is more ſtriking than the attempt to enliſt on that ſide, the prudent jealouſy entertained by the people, of ſtanding armies. The attempt has awakened fully the public attention to that important ſubject; and has led to inveſtigations which muſt terminate in a thorough and univerſal conviction, not only that the conſtitution has provided the moſt effectual guards againſt danger from that quarter, but

that

that nothing ſhort of a conſtitution fully adequate to the national defence, and the preſervation of the union, can ſave America from as many ſtanding armies as it may be ſplit into ſtates or confederacies; and from ſuch a progreſſive augmentation of theſe eſtabliſhments in each, as will render them as burdenſome to the properties and ominous to the liberties of the people; as any eſtabliſhment that can become neceſſary, under a united and efficient government, muſt be tolerable to the former, and ſafe to the latter.

The palpable neceſſity of the power to provide and maintain a navy has protected that part of the conſtitution againſt a ſpirit of cenſure, which has ſpared few other parts. It muſt indeed be numbered among the greateſt bleſſings of America, that as her union will be the only ſource of her maritime ſtrength, ſo this will be a principal ſource of her ſecurity againſt danger from abroad. In this reſpect our ſituation bears another likeneſs to the inſular advantage of Great-Britain. The batteries moſt capable of repelling foreign enterprizes on our ſafety, are happily ſuch as can never be turned by a perfidious government againſt our liberties.

The inhabitants of the Atlantic frontier are all of them deeply intereſted in this proviſion for naval protection, and if they have hitherto been ſuffered to ſleep quietly in their beds; if their property has remained ſafe againſt the predatory ſpirit of licentious adventurers; if their maritime towns have not yet been compelled to ranſom themſelves from the terrors of a conflagration, by yielding to the exactions of daring and ſudden invaders, theſe inſtances of good fortune are not to be aſcribed to the capacity of the exiſting government for the protection of those from whom it claims allegiance, but to cauſes that are fugitive and fallacious. If we except perhaps Virginia and Maryland, which are peculiarly vulnerable on their eaſtern frontiers, no part of the union ought to feel more anxiety on this ſubject than

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New-York. Her ſea coaſt is extenſive. The very important diſtrict of the ſtate is an iſland. The ſtate itſelf is penetrated by a large navigable river for more than fifty leagues. The great emporium of its commerce, the great reſervoir of its wealth, lies every moment at the mercy of events, and may almoſt be regarded as a hoſtage, for ignominious compliances with the dictates of a foreign enemy, or even with the rapacious demands of pirates and barbarians. Should a war be the reſult of the precarious ſituation of European affairs, and all the unruly paſſions attending it, be let looſe on the ocean our eſcape from inſults and depredations, not only on that element but every part of the other bordering on it, will be truly miraculous. In the preſent condition of America, the ſtates more immediately expoſed to theſe calamities, have nothing to hope from the phantom of a general government which now exiſts; and if their ſingle reſources were equal to the taſk of fortifying themſelves againſt the danger, the object to be protected would be almoſt conſumed by the means of protecting them.

The power of regulating and calling forth the militia has been already ſufficiently vindicated and explained.

The power of levying and borrowing money, being the ſinew of that which is to be exerted in the national defence, is properly thrown into the ſame claſs with it. This power alſo has been examined already with much attention, and has I truſt been clearly ſhewn to be neceſſary both in the extent and form given to it by the conſtitution. I will addreſs one additional reflection only to thoſe who contend that the power ought to have been reſtrained to external taxation, by which they mean taxes on articles imported from other countries. It cannot be doubted that this will always be a valuable ſource of revenue, that for a conſiderable time, it muſt be a principal ſource, that at this moment it is an eſſential one.

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But we may form very mistaken ideas on this subject, if we do not call to mind in our calculations, that the extent of revenue drawn from foreign commerce, must vary with the variations both in the extent and the kind of imports, and that these variations do not correspond with the progress of population, which must be the general measure of the public wants. As long as agriculture continues the sole field of labour, the importation of manufactures must increase as the consumers multiply. As soon as domestic manufactures are begun by the hands not called for by agriculture, the imported manufactures will decrease as the numbers of people increase. In a more remote stage, the imports may consist in considerable part of raw materials which will be wrought into articles for exportation, and will therefore require rather the encouragement of bounties, than to be loaded with discouraging duties. A system of government, meant for duration ought to contemplate these revolutions, and be able to accommodate itself to them.

Some who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the constitution on the language in which it is defined. It has been urged and echoed, that the power "to lay and collect taxes, duties, imposts and "excises, to pay the debts, and provide for the com-"mon defence and general welfare of the United "States," amounts to an unlimited commission to exercise every power which may be alledged to be necessary for the common defence or general welfare. No stronger proof could be given of the distress under which these writers labour for objections, than their stooping to such a misconstruction.

Had no other enumeration or definition of the powers of the congress been found in the constitution, than the general expressions just cited, the authors of the objection might have had some colour for it; though it would have been difficult to find a reason for so aukward a form of describing an authority to legislate

legiſlate in all poſſible caſes. A power to deſtroy the freedom of the preſs, the trial by jury or even to regulate the courſe of deſcents, or the forms of conveyances, muſt be very ſingularly expreſſed by the terms " to raiſe money for the general welfare."

But what colour can the objection have, when a ſpecification of the objects alluded to by theſe general terms, immediately follows; and is not even ſeparated by a longer pauſe than a ſemicolon. If the different parts of the ſame inſtrument ought to be ſo expounded as to give meaning to every part which will bear it; ſhall one part of the ſame ſentence be excluded altogether from a ſhare in the meaning; and ſhall the more doubtful and indefinite terms be retained in their full extent and the clear and preciſe expreſſions, be denied any ſignification whatſoever? For what purpoſe could the enumeration of particular powers be inſerted, if theſe and all others were meant to be included in the preceding general power? Nothing is more natural or common than firſt to uſe a general phraſe, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars, which neither explain nor qualify the general meaning, and can have no other effect than to confound and miſlead, is an abſurdity which as we are reduced to the dilemma of charging either on the authors of the objection, or on the authors of the conſtitution, we muſt take the liberty of ſuppoſing, had not its origin with the latter.

The objection here is the more extraordinary, as it appears, that the language uſed by the convention is a copy from the articles of confederation. The objects of the union among the ſtates as deſcribed in article 3d. are, " their common defence, ſecurity of " their liberties, and mutual and general welfare." The terms of article 8th, are ſtill more identical. " All charges of war, and all other expences, that " ſhall be incurred for the common defence or general " welfare, and allowed by the United States in con-

" greſs

"greſs ſhall be defrayed out of a common treaſury, "&c." A ſimilar language again occurs in article 9. Conſtrue either of theſe articles by the rules which would juſtify the conſtruction put on the new conſtitution, and they veſt in the exiſting Congreſs a power to legiſlate in all caſes whatſoever. But what would have been thought of that aſſembly, if attaching themſelves to theſe general expreſſions, and diſregarding the ſpecifications, which aſcertain and limit their import, they had exerciſed an unlimited power of providing for the common defence and general welfare? I appeal to the objectors themſelves, whether they would in that caſe have employed the ſame reaſoning in juſtification of congreſs, as they now make uſe of againſt the convention. How difficult it is for error to eſcape its own condemnation.

PUBLIUS.

NUMBER XLII.

The ſame View continued.

THE *ſecond* claſs of powers lodged in the general government, conſiſts of thoſe which regulate the intercourſe with foreign nations, to wit, to make treaties; to ſend and receive ambaſſadors, other public miniſters and conſuls; to define and puniſh piracies and felonies committed on the high ſeas, and offences againſt the law of nations; to regulate foreign commerce, including a power to prohibit after the year 1808, the importation of ſlaves, and to lay an intermediate duty of ten dollars per head, as a diſcouragement to ſuch importations.

This claſs of powers forms an obvious and eſſential branch of the federal adminiſtration. If we are to be one nation in any reſpect, it clearly ought to be in reſpect to other nations.

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The powers to make treaties and to ſend and receive ambaſſadors, ſpeak their own propriety.—Both of them are compriſed in the articles of confederation; with this difference only, that the former is diſembarraſſed by the plan of the convention of an exception, under which treaties might be ſubſtantially fruſtrated by regulations of the ſtates; and that a power of appointing and receiving "other public "miniſters and conſuls," is expreſſly and very properly added to the former proviſion concerning ambaſſadors. The term ambaſſador, if taken ſtrictly, as ſeems to be required by the ſecond of the articles of confederation, comprehends the higheſt grade only of public miniſters; and excludes the grades which the United States will be moſt likely to prefer where foreign embaſſies may be neceſſary. And under no latitude of conſtruction will the term comprehend conſuls. Yet it has been found expedient, and has been the practice of congreſs to employ the inferior grades of public miniſters; and to ſend and receive conſuls. It is true that where treaties of commerce ſtipulate for the mutual appointment of conſuls, whoſe functions are connected with commerce, the admiſſion of foreign conſuls may fall within the power of making commercial treaties; and that where no ſuch treaties exiſt, the miſſion of American conſuls into foreign countries, may *perhaps* be covered under the authority given by the 9th article of the confederation, to appoint all ſuch civil officers as may be neceſſary for managing the general affairs of the United States. But the admiſſion of conſuls into the United States, where no previous treaty has ſtipulated it, ſeems to have been no where provided for. A ſupply of the omiſſion is one of the leſſer inſtances in which the convention have improved on the model before them. But the moſt minute proviſions become important when they tend to obviate the neceſſity or the pretext for gradual and unobſerved uſurpations of power. A liſt of the caſes in which

congreſs have been betrayed, or forced by the defects of the confederation into violations of their chartered authorities, would not a little ſurpriſe thoſe who have paid no attention to the ſubject; and would be no inconſiderable argument in favor of the new conſtitution, which ſeems to have provided no leſs ſtudiouſly for the leſſer, than the more obvious and ſtriking defects of the old.

The power to define and puniſh piracies and felonies committed on the high ſeas, and offences againſt the law of nations, belongs with equal propriety to the general government; and is a ſtill greater improvement on the articles of confederation.

Theſe articles contain no proviſion for the caſe of offences againſt the law of nations; and conſequently leave it in the power of any indiſcreet member to embroil the confederacy with foreign nations.

The proviſion of the federal articles on the ſubject of piracies and felonies, extends no farther than to the eſtabliſhment of courts for the trial of theſe offences. The definition of piracies might perhaps, without inconveniency, be left to the law of nations; though a legiſlative definition of them is found in moſt municipal codes. A definition of felonies on the high ſeas is evidently requiſite. Felony is a term of looſe ſignification even in the common law of England; and of various import in the ſtatute law of that kingdom. But neither the common, nor the ſtatute law of that or of any other nation, ought to be a ſtandard for the proceedings of this, unleſs previouſly made its own by legiſlative adoption. The meaning of the term as defined in the codes of the ſeveral ſtates, would be as impracticable as the former would be a diſhonorable and illegitimate guide. It is not preciſely the ſame in any two of the ſtates; and varies in each with every reviſion of its criminal laws. For the ſake of certainty and uniformity therefore, the power of defining felonies in this caſe, was in every reſpect neceſſary and proper.

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The regulation of foreign commerce, having fallen within several views which have been taken of this subject, has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration.

It were doubtless to be wished that the power of prohibiting the importation of slaves, had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate for ever within these states, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period it will receive a considerable discouragement from the federal government, and may be totally abolished by a concurrence of the few states which continue the unnatural traffic, in the prohibitory example which has been given by so great a majority of the union. Happy would it be for the unfortunate Africans, if an equal prospect lay before them, of being redeemed from the oppressions of their European brethren!

Attempts have been made to pervert this clause into an objection against the constitution, by representing it on one side as a criminal toleration of an illicit practice, and on another, as calculated to prevent voluntary and beneficial emigrations from Europe to America. I mention these misconstructions, not with a view to give them an answer, for they deserve none; but as specimens of the manner and spirit in which some have thought fit to conduct their opposition to the proposed government.

The powers included in the *third* class, are those which provide for the harmony and proper intercourse among the states.

Under this head might be included the particular restraints imposed on the authority of the states, and certain powers of the judicial department; but the former are reserved for a distinct class, and the latter will be particularly examined when we arrive at the structure and organization of the government. I shall confine myself to a cursory review of the remaining powers comprehended under this third description, to wit, to regulate commerce among the several states and the Indian tribes; to coin money, regulate the value thereof and of foreign coin; to provide for the punishment of counterfeiting the current coin and securities of the United States; to fix the standard of weights and measures; to establish an uniform rule of naturalization, and uniform laws of bankruptcy; to prescribe the manner in which the public acts, records and judicial proceedings of each state shall be proved, and the effect they shall have in other states, and to establish post-offices and post-roads.

The defect of power in the existing confederacy, to regulate the commerce between its several members, is in the number of those which have been clearly pointed out by experience. To the proofs and remarks which former papers have brought into view on this subject, it may be added, that without this supplemental provision, the great and essential power of regulating foreign commerce, would have been incomplete, and ineffectual. A very material object of this power was the relief of the states which import and export through other states, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between state and state, it must be foreseen that ways would be found out, to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former: We may be assured by past experience, that such a practice would be introduced

introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility. To those who do not view the question through the medium of passion or of interest, the desire of the commercial states to collect in any form, an indirect revenue from their uncommercial neighbours, must appear not less impolitic than it is unfair; since it would stimulate the injured party, by resentment as well as interest, to resort to less convenient channels for their foreign trade. But the mild voice of reason, pleading the cause of an enlarged and permanent interest, is but too often drowned before public bodies as well as individuals, by the clamours of an impatient avidity for immediate and immoderate gain.

The necessity of a superintending authority over the reciprocal trade of confederated states has been illustrated by other examples as well as our own. In Switzerland, where the union is so very slight, each canton is obliged to allow to merchandizes, a passage through its jurisdiction into other cantons, without an augmentation of the tolls. In Germany, it is a law of the empire, that the princes and states shall not lay tolls or customs on bridges, rivers, or passages, without the consent of the emperor and diet; though it appears from a quotation in an antecedent paper, that the practice in this as in many other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been foreseen here. Among the restraints imposed by the union of the Netherlands, on its members, one is, that they shall not establish imposts disadvantageous to their neighbours, without the general permission.

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision

obſcure and contradictory. The power is there restrained to Indians, not members of any of the ſtates, and is not to violate or infringe the legiſlative right of any ſtate within its own limits. What deſcription of Indians are to be deemed members of a ſtate, is not yet ſettled; and has been a queſtion of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a ſtate, yet reſiding within its legiſlative juriſdiction, can be regulated by an external authority, without ſo far intruding on the internal rights of legiſlation, is abſolutely incomprehenſible. This is not the only caſe in which the articles of confederation have inconſiderately endeavoured to accompliſh impoſſibilities; to reconcile a partial ſovereignty in the union, with complete ſovereignty in the ſtates; to ſubvert a mathematical axiom, by taking away a part, and letting the whole remain.

All that need be remarked on the power to coin money, regulate the value thereof, and of foreign coin, is that by providing for this laſt caſe, the conſtitution has ſupplied a material omiſſion in the articles of confederation. The authority of the exiſting congreſs is reſtrained to the regulation of coin *ſtruck* by their own authority, or that of the reſpective ſtates. It muſt be ſeen at once, that the propoſed uniformity in the *value* of the current coin might be deſtroyed by ſubjecting that of foreign coin to the different regulations of the different ſtates.

The puniſhment of counterfeiting the public ſecurities as well as of the current coin, is ſubmitted of courſe to that authority, which is to ſecure the value of both.

The regulation of weights and meaſures is transferred from the articles of confederation, and is founded on like conſiderations with the preceding power of regulating coin.

The diſſimilarity in the rules of naturalization, has long been remarked as a fault in our ſyſtem, and as

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laying a foundation for intricate and delicate queſtions. In the 4th article of the confederation, it is declared "that the *free inhabitants* of each of theſe ſtates, "paupers, vagabonds, and fugitives from juſtice "excepted, ſhall be entitled to all privileges and "immunities of *free citizens*, in the ſeveral ſtates, "and *the people* of each ſtate, ſhall in every other, "enjoy all the privileges of trade and commerce, &c." There is a confuſion of language here, which is remarkable. Why the terms *free inhabitants*, are uſed in one part of the article; *free citizens* in another, and *people* in another, or what was meant by ſupperadding "to all privileges and immunities of "free citizens,"—"all the privileges of trade and "commerce," cannot eaſily be determined. It ſeems to be a conſtruction ſcarcely avoidable, however that thoſe who come under the denomination of *free inhabitants* of a ſtate, although not citizens of ſuch ſtate, are entitled in every other ſtate to all the privileges of *free citizens* of the latter; that is, to greater privileges than they may be entitled to in their own ſtate; ſo that it may be in the power of a particular ſtate, or rather every ſtate is laid under a neceſſity, not only to confer the rights of citizenſhip in other ſtates upon any whom it may admit to ſuch rights within itſelf; but upon any whom it may allow to become inhabitants within its juriſdiction. But were an expoſition of the term "inhabitants" to be admitted, which would confine the ſtipulated privileges to citizens alone, the difficulty is diminiſhed only, not removed. The very improper power would ſtill be retained by each ſtate, of naturalizing aliens in every other ſtate. In one ſtate reſidence for a ſhort term confers all the rights of citizenſhip. In another qualifications of greater importance are required. An alien therefore legally incapacitated for certain rights in the latter, may by previous reſidence only in the former elude his incapacity; and thus the law of one ſtate, be prepoſterouſly rendered paramount to the

the law of another within the jurisdiction of the other. We owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped. By the laws of several states, certain descriptions of aliens who had rendered themselves obnoxious, were laid under interdicts inconsistent, not only with the rights of citizenship, but with the privileges of residence. What would have been the consequence, if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another state, and then asserted their rights as such, both to residence and citizenship within the state proscribing them? Whatever the legal consequences might have been, other consequences would probably have resulted of too serious a nature, not to be provided against. The new constitution has accordingly with great propriety made provision against them, and all others proceeding from the defect of the confederation, on this head by authorising the general government to establish an uniform rule of naturalization throughout the United States.

The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states, that the expediency of it seems not likely to be drawn into question.

The power of prescribing by general laws the manner in which the public acts, records and judicial proceedings of each state shall be proved, and the effect they shall have in other states, is an evident and valuable improvement on the clause relating to this subject in the articles of confederation. The meaning of the latter is extremely indeterminate; and can be of little importance under any interpretation which it will bear. The power here established, may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous states, where the effects liable to justice, may

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be ſuddenly and ſecretly tranſlated in any ſtage of the proceſs, within a foreign juriſdiction.

The power of eſtabliſhing poſt-roads, muſt in every view be a harmleſs power; and may perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourſe between the ſtates, can be deemed unworthy of the public care.

PUBLIUS.

NUMBER XLIII.

The ſame View continued.

THE *fourth* claſs compriſes the following miſcellaneous powers:

1. A power to "promote the progreſs of ſcience "and uſeful arts, by ſecuring for a limited time, to "authors and inventors, the excluſive right to their "reſpective writings and diſcoveries."

The utility of this power will ſcarcely be queſtioned. The copy right of authors has been ſolemnly adjudged in Great Britain, to be a right at common law. The right to uſeful inventions, ſeems with equal reaſon to belong to the inventors. The public good fully coincides in both caſes, with the claims of individuals. The ſtates cannot ſeparately make effectual proviſion for either of the caſes, and moſt of them have anticipated the deciſion of this point, by laws paſſed at the inſtance of Congreſs.

2. "To exerciſe excluſive legiſlation in all caſes "whatſoever, over ſuch diſtrict (not exceeding ten "miles ſquare) as may by ceſſion of particular ſtates, "and the acceptance of congreſs, become the ſeat "of the government of the United States; and to "exerciſe like authority over all places purchaſed by "the conſent of the legiſlature of the ſtates, in "which the ſame ſhall be, for the erection of

"forts,

"forts, magazines, arſenals, dock yards, and other "needſul buildings."

The indiſpenſible neceſſity of compleat authority at the ſeat of government, carries its own evidence with it. It is a power exerciſed by every legiſlature of the union, I might ſay of the world, by virtue of its general ſupremacy. Without it, not only the public authority might be inſulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general government on the ſtate, comprehending the ſeat of the government for protection in the exerciſe of their duty, might bring on the national councils an imputation of awe or influence, equally diſhonorable to the government, and diſſatisfactory to the other members of the confederacy. This conſideration has the more weight as the gradual accumulation of public improvements at the ſtationary reſidence of the government, would be both too great a public pledge to be left in the hands of a ſingle ſtate; and would create ſo many obſtacles to a removal of the government, as ſtill further to abridge its neceſſary independence. The extent of this federal diſtrict is ſufficiently circumſcribed to ſatisfy every jealouſy of an oppoſite nature. And as it is to be appropriated to this uſe with the conſent of the ſtate ceding it; as the ſtate will no doubt provide in the compact for the rights, and the conſent of the citizens inhabiting it; as the inhabitants will find ſufficient inducements of intereſt to become willing parties to the ceſſion; as they will have had their voice in the election of the government which is to exerciſe authority over them; as a municipal legiſlature for local purpoſes, derived from their own ſuffrages, will of courſe be allowed them; and as the authority of the legiſlature of the ſtate, and of the inhabitants of the ceded part of it, to concur in the ceſſion, will be derived from the whole people of the ſtate, in their adoption of the conſtitution, every imaginable objection ſeems to be obviated.

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The neceſſity of a like authority over forts, magazines, &c. eſtabliſhed by the general government is not leſs evident. The public money expended on ſuch places, and the public property depoſited in them, require that they ſhould be exempt from the authority of the particular ſtate. Nor would it be proper for the places on which the ſecurity of the entire union may depend, to be in any degree dependent on a particular member of it. All objections and ſcruples are here alſo obviated by requiring the concurrence of the ſtates concerned, in every ſuch eſtabliſhment.

3. "To declare the puniſhment of treaſon, but "no attainder of treaſon ſhall work corruption of "blood, or forfeiture, except during the life of "the perſon attainted."

As treaſon may be committed againſt the United States, the authority of the United States ought to be enabled to puniſh it; but as new fangled and artificial treaſons, have been the great engines, by which violent factions, the natural offſpring of free governments, have uſually wreaked their alternate malignity on each other, the convention have with great judgment oppoſed a barrier to this peculiar danger, by inſerting a conſtitutional definition of the crime, fixing the proof neceſſary for conviction of it, and reſtraining the congreſs, even in puniſhing it, from extending the conſequences of guilt beyond the perſon of its author.

4. "To admit new ſtates into the union; but no "new ſtate ſhall be formed or erected within the juriſ-"diction of any other ſtate; nor any ſtate be formed "by the junction of two or more ſtates, or parts of "ſtates, without the conſent of the legiſlatures of "the ſtates concerned, as well as of the congreſs."

In the articles of confederation no proviſion is found on this important ſubject. Canada was to be admitted of right on her joining in the meaſures of the United States; and the other *colonies*, by which

were

were evidently meant, the other Britiſh colonies, at the diſcretion of nine ſtates. The eventual eſtabliſhment of *new ſtates*, ſeems to have been overlooked by the compilers of that inſtrument. We have ſeen the inconvenience of this omiſſion, and the aſſumption of power into which congreſs have been led by it. With great propriety therefore has the new ſyſtem ſupplied the defect. The general precaution that no new ſtates ſhall be formed without the concurrence of the federal authority and that of the ſtates concerned, is conſonant to the principles which ought to govern ſuch tranſactions. The particular precaution againſt the erection of new ſtates, by the partition of a ſtate without its conſent, quiets the jealouſy of the larger ſtates; as that of the ſmaller is quieted by a like precaution againſt a junction of ſtates without their conſent.

5. "To diſpoſe of and make all needful rules and "regulations reſpecting the territory or other pro-"perty belonging to the United States, with a pro-"viſo that nothing in the conſtitution ſhall be ſo "conſtrued as to prejudice any claims of the United "States, as of any particular ſtate."

This is a power of very great importance, and required by conſiderations ſimilar to thoſe which ſhew the propriety of the former. The proviſo annexed is proper in itſelf, and was probably rendered abſolutely neceſſary, by jealouſies and queſtions concerning the weſtern territory, ſufficiently known to the public.

6. "To guarantee to every ſtate in the union a "republican form of government; to protect each "of them againſt invaſion; and on application of "the legiſlature, or of the executive (when the "legiſlature cannot be convened) againſt domeſtic "violence."

In a confederacy founded on republican principles, and compoſed of republican members, the ſuperintending government ought clearly to poſſeſs authority

without recuring more or leſs to the doctrine of *conſtruction* or *implication*. As the powers delegated under the new ſyſtem are more extenſive, the government which is to adminiſter it would find itſelf ſtill more diſtreſſed with the alternative of betraying the public intereſt by doing nothing; or of violating the conſtitution by exerciſing powers indiſpenſably neceſſary and proper; but at the ſame time, not *expreſsly* granted.

Had the convention attempted a poſitive enumeration of the powers neceſſary and proper for carrying their other powers into effect; the attempt would have involved a compleat digeſt of laws on every ſubject to which the conſtitution relates; accomodated too not only to the exiſting ſtate of things, but to all the poſſible changes which futurity may produce: For in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, muſt always neceſſarily vary with that object; and be often properly varied whilſt the object remains the ſame.

Had they attempted to enumerate the particular powers or means, not neceſſary or proper for carrying the general powers into execution, the taſk would have been no leſs chimerical; and would have been liable to this further objection; that every defect in the enumeration, would have been equivalent to a poſitive grant of authority. If to avoid this conſequence they had attempted a partial enumeration of the exceptions and deſcribed the reſidue by the general terms, *not neceſſary or proper:* It muſt have happened that the enumeration would comprehend a few of the excepted powers only; that theſe would be ſuch as would be leaſt likely to be aſſumed or tolerated becauſe the enumeration would of courſe ſelect ſuch as would be leaſt neceſſary or proper, and that the unneceſſary and improper powers included in the reſiduum, would be leſs forcibly excepted, than if no partial enumeration had been made.

Had the conſtitution been ſilent on this head, there can be no doubt that all the particular powers, requiſite as means of executing the general powers, would have reſulted to the government, by unavoidable implication. No axiom is more clearly eſtabliſhed in law, or in reaſon, than that wherever the end is required, the means are authoriſed; wherever a general power to do a thing is given, every particular power neceſſary for doing it, is included. Had this laſt method therefore been purſued by the convention, every objection now urged againſt their plan, would remain in all its plauſibility; and the real inconveniency would be incurred, of not removing a pretext which may be ſeized on critical occaſions for drawing into queſtion the eſſential powers of the union.

If it be aſked, what is to be the conſequence, in caſe the congreſs ſhall miſconſtrue this part of the conſtitution, and exerciſe powers not warranted by its true meaning? I anſwer the ſame as if they ſhould miſconſtrue or enlarge any other power veſted in them, as if the general power had been reduced to particulars, and any one of theſe were to be violated; the ſame in ſhort, as if the ſtate legiſlatures ſhould violate their reſpective conſtitutional authorities. In the firſt inſtance, the ſucceſs of the uſurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legiſlative acts; and in the laſt reſort, a remedy muſt be obtained from the people, who can by the election of more faithful repreſentatives, annul the acts of the uſurpers. The truth is, that this ultimate redreſs may be more confided in againſt unconſtitutional acts of the federal than of the ſtate legiſlatures, for this plain reaſon, that as every ſuch act of the former, will be an invaſion of the rights of the latter, theſe will be ever ready to mark the innovation, to ſound the alarm to the people, and to exert their local influence in effecting a change of federal repreſentatives. There being no

ſuch intermediate body between the ſtate legiſlatures and the people, intereſted in watching the conduct of the former, violations of the ſtate conſtitution are more likely to remain unnoticed and unredreſſed.

2. "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, un-"der the authority of the United States, ſhall be "the ſupreme law of the land, and the judges in "every ſtate ſhall be bound thereby, any thing in "the conſtitution or laws of any ſtate to the contrary "notwithſtanding."

The indiſcreet zeal of the adverſaries to the conſtitution, has betrayed them into an attack on this part of it alſo, without which it would have been evidently and radically defective. To be fully ſenſible of this we need only ſuppoſe for a moment, that the ſupremacy of the ſtate conſtitutions had been left compleat by a ſaving clauſe in their favor.

In the firſt place, as theſe conſtitutions inveſt the ſtate legiſlatures with abſolute ſovereignty, in all caſes not excepted by the exiſting articles of confederation, all the authorities contained in the propoſed conſtitution, ſo far as they exceed thoſe enumerated in the confederation, would have been annulled, and the new congreſs would have been reduced to the ſame impotent condition with their predeceſſors.

In the next place, as the conſtitutions of ſome of the ſtates do not even expreſsly and fully recognize the exiſting powers of the confederacy, an expreſs ſaving of the ſupremacy of the former, would in ſuch ſtates have brought into queſtion, every power contained in the propoſed conſtitution.

In the third place, as the conſtitutions of the ſtates differ much from each other, it might happen that a treaty or national law of great and equal importance to the ſtates, would interfere with ſome and not with other conſtitutions, and would conſequently be valid in ſome of the ſtates at the ſame time that it would have no effect in others.

In fine, the world would have ſeen for the firſt time, a ſyſtem of government founded on an inverſion of the fundamental principles of all government; it would have ſeen the authority of the whole ſociety every where ſubordinate to the authority of the parts; it would have ſeen a monſter in which the head was under the direction of the members.

3. "The ſenators and repreſentatives, and the "members of the ſeveral ſtate legiſlatures; and all "executive and judicial officers, both of the United "States, and the ſeveral ſtates ſhall be bound by "oath or affirmation, to ſupport this conſtitution."

It has been aſked, why it was thought neceſſary, that the ſtate magiſtracy ſhould be bound to ſupport the federal conſtitution, and unneceſſary that a like oath ſhould be impoſed on the officers of the United States in favour of the ſtate conſtitutions?

Several reaſons might be aſſigned for the diſtinctions. I content myſelf with one which is obvious and concluſive. The members of the federal government will have no agency in carrying the ſtate conſtitutions into effect. The members and officers of the ſtate governments, on the contrary, will have an eſſential agency in giving effect to the federal conſtitution. The election of the preſident and ſenate, will depend in all caſes, on the legiſlatures of the ſeveral ſtates. And the election of the houſe of repreſentatives, will equally depend on the ſame authority in the firſt inſtance; and will probably, for ever be conducted by the officers and according to the laws of the ſtates.

4. Among the proviſions for giving efficacy to the federal powers, might be added, thoſe which belong to the executive and judiciary departments. But as theſe are reſerved for particular examination in another place, I paſs them over in this.

We have now reviewed in detail all the articles compoſing the ſum or quantity of power delegated by the propoſed conſtitution to the federal government; and

and are brought to this undeniable conclusion, that no part of the power is unnecessary or improper for accomplishing the necessary objects of the union. The question therefore, whether this amount of power shall be granted or not, resolves itself into another question, whether or not a government commensurate to the exigencies of the union, shall be established; or in other words, whether the union itself shall be preserved.

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NUMBER XLV.

A further Discussion of the supposed Danger from the Powers of the Union, to the State Governments.

HAVING shewn that no one of the powers transfered to the federal government is unnecessary or improper, the next question to be considered is whether the whole mass of them will be dangerous to the portion of authority left in the several states.

The adversaries to the plan of the convention instead of considering in the first place what degree of power was absolutely necessary for the purposes of the federal government, have exhausted themselves in a secondary enquiry into the possible consequences of the proposed degree of power, to the governments of the particular states. But if the union, as has been shewn, be essential, to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different states; if it be essential to guard them against those violent and oppressive factions which imbitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain; if, in a word the union be essential

to the happineſs of the people of America, is it not prepoſterous, to urge as an objection to a government without which the objects of the union cannot be attained, that ſuch a government may derogate from the importance of the governments of the individual ſtates? Was then the American revolution effected, was the American confederacy formed, was the precious blood of thouſands ſpilt, and the hard earned ſubſtance of millions laviſhed, not that the people of America ſhould enjoy peace, liberty, and ſafety; but that the governments of the individual ſtates, that particular municipal eſtabliſhments might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of ſovereignty? We have heard of the impious doctrine in the old world that the people were made for kings, not kings for the people. Is the ſame doctrine to be revived in the new, in another ſhape, that the ſolid happineſs of the people is to be ſacrificed to the views of political inſtitutions of a different form? It is too early for politicians to preſume on our forgetting that the public good, the real welfare of the great body of the people is the ſupreme object to be purſued; and that no form of government whatever, has any other value, than as it may be fitted for the attainment of this object. Were the plan of the convention adverſe to the public happineſs, my voice would be, reject the plan. Were the union itſelf inconſiſtent with the public happineſs, it would be, aboliſh the union. In like manner as far as the ſovereignty of the ſtates cannot be reconciled to the happineſs of the people; the voice of every good citizen muſt be, let the former be ſacrificed to the latter. How far the ſacrifice is neceſſary, has been ſhewn. How far the unſacrificed reſidue will be endangered, is the queſtion before us.

Several important conſiderations have been touched in the courſe of theſe papers, which diſcountenance the ſuppoſition that the operation of the federal government

government will by degrees prove fatal to the ſtate governments. The more I revolve the ſubject the more fully I am perſuaded that the balance is much more likely to be diſturbed by the preponderancy of the laſt than of the firſt ſcale.

We have ſeen in all the examples of antient and modern confederacies, the ſtrongeſt tendency continually betraying itſelf in the members to deſpoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itſelf againſt the encroachments. Although in moſt of theſe examples, the ſyſtem has been ſo diſſimilar from that under conſideration, as greatly to weaken any inference concerning the latter from the fate of the former; yet as the ſtates will retain under the propoſed conſtitution a very extenſive portion of active ſovereignty, the inference ought not to be wholly diſregarded. In the Achæan league, it is probable that the federal head had a degree and ſpecies of power, which gave it a conſiderable likeneſs to the government framed by the convention. The Lycian confederacy, as far as its principles and form are tranſmitted, muſt have borne a ſtill greater analogy to it. Yet hiſtory does not inform us that either of them ever degenerated or tended to degenerate into one conſolidated government. On the contrary, we know that the ruin of one of them proceeded from the incapacity of the federal authority to prevent the diſſentions, and finally the diſunion of the ſubordinate authorities. Theſe caſes are the more worthy of our attention, as the external cauſes by which the component parts were preſſed together, were much more numerous and powerful than in our caſe; and conſequently, leſs powerful ligaments within, would be ſufficient to bind the members to the head, and to each other.

In the feudal ſyſtem we have ſeen a ſimilar propenſity exemplified. Notwithſtanding the want of proper ſympathy in every inſtance between the local

ſovereigns

ſovereigns and the people, and the ſympathy in ſome inſtances between the general ſovereign and the latter; it uſually happened that the local ſovereigns prevailed in the rivalſhip for encroachments. Had no external dangers enforced internal harmony and ſubordination; and particularly had the local ſovereigns poſſeſſed the affections of the people, the great kingdoms in Europe, would at this time conſiſt of as many independent princes as there were formerly feudatory barons.

The ſtate governments will have the advantage of the federal government, whether we compare them in reſpect to the immediate dependence of the one on the other; to the weight of perſonal influence which each ſide will poſſeſs; to the powers reſpectively veſted in them; to the predilection and probable ſupport of the people; to the diſpoſition and faculty of reſiſting and fruſtrating the meaſures of each other.

The ſtate governments may be regarded as conſtituent and eſſential parts of the federal government; whilſt the latter is no wiſe eſſential to the operation or organiſation of the former. Without the intervention of the ſtate legiſlatures, the preſident of the United States cannot be elected at all. They muſt in all caſes have a great ſhare in his appointment, and will perhaps in moſt caſes of themſelves determine it. The ſenate will be elected abſolutely and excluſively by the ſtate legiſlatures. Even the houſe of repreſentatives, though drawn immediately from the people, will be choſen very much under the influence of that claſs of men, whoſe influence over the people obtains for themſelves an election into the ſtate legiſlatures. Thus each of the principal branches of the federal government will owe its exiſtence more or leſs to the favor of the ſtate governments, and muſt conſequently feel a dependence, which is much more likely to beget a diſpoſition too obſequious, than too overbearing towards them. On the other

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ſide, the component parts of the ſtate governments will in no inſtance be indebted for their appointment to the direct agency of the federal government, and very little if at all, to the local influence of its members.

The number of individuals employed under the conſtitution of the United States, will be much ſmaller, than the number employed under the particular ſtates. There will conſequently be leſs of perſonal influence on the ſide of the former, than of the latter. The members of the legiſlative, executive and judiciary departments of thirteen and more ſtates; the juſtices of peace, officers of militia, miniſterial officers of juſtice, with all the county corporation and town officers, for three millions and more of people, intermixed and having particular acquaintance with every claſs and circle of people, muſt exceed beyond all proportion, both in number and influence, thoſe of every deſcription who will be employed in the adminiſtration of the federal ſyſtem. Compare the members of the three great departments, of the Thirteen Sates, excluding from the judiciary department the juſtices of peace, with the members of the correſponding departments of the ſingle government of the union; compare the militia officers of three millions of people, with the military and marine officers of any eſtabliſhment which is within the compaſs of probability, or I may add, of poſſibility, and in this view alone, we may pronounce the advantage of the ſtates to be deciſive. If the federal government is to have collectors of revenue, the ſtate governments will have theirs alſo. And as thoſe of the former will be principally on the ſea-coaſt, and not very numerous; whilſt thoſe of the latter will be ſpread over the face of the country, and will be very numerous, the advantage in this view alſo lies on the ſame ſide. It is true that the confederacy is to poſſeſs, and may exerciſe, the power of collecting internal as well as external taxes throughout the ſtates;

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But it is probable that this power will not be resorted to, except for supplemental purposes of revenue; that an option will then be given to the states to supply their quotas by previous collections of their own; and that the eventual collection under the immediate authority of the union, will generally be made by the officers, and according to the rules, appointed by the several states. Indeed it is extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the states will be cloathed with the correspondent authority of the union. Should it happen however that separate collectors of internal revenue should be appointed under the federal government, the influence of the whole number would not be a comparison with that of the multitude of state-officers in the opposite scale. Within every district, to which a federal collector would be allotted, there would not be less than thirty or forty or even more officers of different descriptions and many of them persons of character and weight, whose influence would lie on the side of the state.

The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the state.

The operations of the federal government will be most extensive and important in times of war and danger; those of the state governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the state governments will here enjoy another advantage over the

the federal government. The more adequate indeed the federal powers may be rendered to the national defence, the less frequent will be those scenes of danger which might favour their ascendancy over the governments of the particular states.

If the new constitution be examined with accuracy and candour, it will be found that the change which it proposes, consists much less in the addition of NEW POWERS to the union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing congress by the articles of confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. The change relating to taxation, may be regarded as the most important: and yet the present congress have as compleat authority to REQUIRE of the states indefinite supplies of money for the common defence and general welfare, as the future congress will have to require them of individual citizens; and the latter will be no more bound than the states themselves have been, to pay the quotas respectively taxed on them. Had the states complied punctually with the articles of confederation, or could their compliance have been enforced by as peaceable means as may be used with success towards single persons, our past experience is very far from countenancing an opinion that the state governments would have lost their constitutional powers, and have gradually undergone an entire consolidation. To maintain that such an event would have ensued, would be to say at once, that the existence of the state governments is incompatible with any system whatever that accomplishes the essential purposes of the union.

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The Subject of the last Paper resumed; with an Examination of the comparative Means of Influence of the Federal and State Governments.

RESUMING the subject of the last paper I proceed to enquire whether the federal government or the state governments will have the advantage with regard to the predilection and support of the people. Notwithstanding the different modes in which they are appointed, we must consider both of them, as substantially dependent on the great body of the citizens of the United States. I assume this position here as it respects the first, reserving the proofs for another place. The federal and state of governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes. The adversaries of the constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrouled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone; and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expence of the other. Truth no less than decency requires, that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.

Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt, that the

the firſt and moſt natural attachment of the people will be to the governments of their reſpective ſtates. Into the adminiſtration of theſe, a greater number of individuals will expect to riſe. From the gift of theſe, a greater number of offices and emoluments will flow. By the ſuperintending care of theſe, all the more domeſtic and perſonal intereſts of the people will be regulated and provided for. With the affairs of theſe, the people will be more familiarly and minutely converſant. And with the members of theſe, will a greater proportion of the people have the ties of perſonal acquaintance and friendſhip, and of family and party attachments; on the ſide of theſe, therefore, the popular bias may well be expected moſt ſtrongly to incline.

Experience ſpeaks the ſame language in this caſe. The federal adminiſtration, though hitherto very defective, in compariſon with what may be hoped under a better ſyſtem, had during the war, and particularly, whilſt the independent fund of paper emiſſions was in credit, an activity and importance as great as it can well have, in any future circumſtances whatever. It was engaged too in a courſe of meaſures, which had for their object, the protection of every thing that was dear, and the acquiſition of every thing that could be deſirable to the people at large. It was nevertheleſs, invariably found, after the tranſient enthuſiaſm for the early congreſſes was over, that the attention and attachment of the people were turned anew to their own particular governments; that the federal council was at no time the idol of popular favor; and that oppoſition to propoſed enlargements of its powers and importance, was the ſide uſually taken by the men who wiſhed to build their political conſequence on the prepoſſeſſions of their fellow citizens.

If therefore, as has been elſewhere remarked, the people ſhould in future become more partial to the federal than to the ſtate governments, the change can

only result from ſuch manifeſt and irreſiſtible proofs of a better adminiſtration, as will overcome all their antecedent propenſities. And in that caſe, the people ought not ſurely to be precluded from giving moſt of their confidence where they may diſcover it to be moſt due: But even in that caſe, the ſtate governments could have little to apprehend, becauſe it is only within a certain ſphere, that the federal power can, in the nature of things, be advantageouſly adminiſtered.

The remaining points on which I propoſed to compare the federal and ſtate governments, are the diſpoſition, and the faculty they may reſpectively poſſeſs, to reſiſt and fruſtrate the meaſures of each other.

It has been already proved, that the members of the federal will be more dependent on the members of the ſtate governments, than the latter will be on the former. It has appeared alſo, that the prepoſſeſſions of the people on whom both will depend, will be more on the ſide of the ſtate governments, than of the federal government. So far as the diſpoſition of each, towards the other, may be influenced by theſe cauſes, the ſtate governments muſt clearly have the advantage. But in a diſtinct and very important point of view, the advantage will lie on the ſame ſide. The prepoſſeſſions which the members themſelves will carry into the federal government, will generally be favorable to the ſtates; whilſt it will rarely happen, that the members of the ſtate governments will carry into the public councils, a bias in favor of the general government. A local ſpirit will infallibly prevail much more in the members of the congreſs, than a national ſpirit will prevail in the legiſlatures of the particular ſtates. Every one knows that a great proportion of the errors committed by the ſtate legiſlatures proceeds from the diſpoſition of the members to ſacrifice the comprehenſive and permanent intereſts of the ſtate, to the particular and

ſeparate

ſeparate views of the counties or diſtricts in which they reſide. And if they do not ſufficiently enlarge their policy to embrace the collective welfare of their particular ſtate, how can it be imagined, that they will make the aggregate proſperity of the union, and the dignity and reſpectability of its government, the objects of their affections and conſultations? For the ſame reaſon, that the members of the ſtate legiſlatures will be unlikely to attach themſelves ſufficiently to national objects, the members of the federal legiſlature will be likely to attach themſelves too much to local objects. The ſtates will be to the latter, what counties and towns are to the former. Meaſures will too often be decided according to their probable effect, not on the national proſperity and happineſs, but on the prejudices, intereſts and purſuits of the governments and people of the individual ſtates. What is the ſpirit that has in general characterized the proceedings of congreſs? A peruſal of their journals as well as the candid acknowledgments of ſuch as have had a ſeat in that aſſembly, will inform us, that the members have but too frequently diſplayed the character, rather of partizans of their reſpective ſtates, than of impartial guardians of a common intereſt; that where, on one occaſion, improper ſacrifices have been made of local conſiderations to the aggrandizement of the federal government; the great intereſts of the nation have ſuffered on an hundred, from an undue atttention to the local prejudices, intereſts and views of the particular ſtates. I mean not by theſe reflections to inſinuate, that the new federal government will not embrace a more enlarged plan of policy than the exiſting government may have purſued, much leſs that its views will be as confined as thoſe of the ſtate legiſlatures; but only that it will partake ſufficiently of the ſpirit of both, to be diſinclined to invade the rights of the individual ſtates, or the prerogatives of their governments. The motives on the part of the

ſtate governments, to augment their prerogatives by defalcations from the federal government, will be over-ruled by no reciprocal predipoſitions in the members.

Were it admitted however that the federal government may feel an equal diſpoſition with the ſtate governments to extend its power beyond the due limits, the latter would ſtill have the advantage in the means of defeating ſuch encroachments. If an act of a particular ſtate, though unfriendly to the national government, be generally popular in that ſtate, and ſhould not too groſsly violate the oaths of the ſtate officers, it is executed immediately, and of courſe, by means on the ſpot, and depending on the ſtate alone. The oppoſition of the federal government, or the interpoſition of federal officers, would but inflame the zeal of all parties on the ſide of the ſtate, and the evil could not be prevented or repaired, if at all, without the employment of means which muſt always be reſorted to with reluctance and difficulty. On the other hand, ſhould an unwarrantable meaſure of the federal government be unpopular in particular ſtates, which would ſeldom fail to be the caſe, or even a warrantable meaſure be ſo, which may ſometimes be the caſe, the means of oppoſition to it are powerful and at hand. The diſquietude of the people, their repugnance and perhaps refuſal to co-operate with the officers of the union, the frowns of the executive magiſtracy of the ſtate, the embarraſſments created by legiſlative devices, which would often be added on ſuch occaſions, would oppoſe in any ſtate difficulties not to be deſpiſed; would form in a large ſtate very ſerious impediments, and where the ſentiments of ſeveral adjoining ſtates happened to be in uniſon, would preſent obſtructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government, on the authority of the ſtate governments, would

not

not excite the oppoſition of a ſingle ſtate or of a few ſtates only. They would be ſignals of general alarm. Every government would eſpouſe the common cauſe. A correſpondence would be opened. Plans of reſiſtance would be concerted. One ſpirit would animate and conduct the whole. The ſame combination in ſhort would reſult from an apprehenſion of the federal, as was produced by the dread of a foreign yoke; and unleſs the projected innovations ſhould be voluntarily renounced, the ſame appeal to a trial of force would be made in the one caſe, as was made in the other. But what degree of madneſs could ever drive the federal government to ſuch an extremity? In the conteſt with Great-Britain, one part of the empire was employed againſt the other. The more numerous part invaded the rights of the leſs numerous part. The attempt was unjuſt and unwiſe; but it was not in ſpeculation abſolutely chimerical. But what would be the conteſt in the caſe we are ſuppoſing? Who would be the parties? A few repreſentatives of the people would be oppoſed to the people themſelves; or rather one ſet of repreſentatives would be contending againſt thirteen ſets of repreſentatives, with the whole body of their common conſtituents on the ſide of the latter.

The only refuge left for thoſe who prophecy the downfal of the ſtate governments; is the viſionary ſuppoſition that the federal government may previouſly accumulate a military force for the projects of ambition. The reaſonings contained in theſe papers muſt have been employed to little purpoſe indeed, if it could be neceſſary now to diſprove the reality of this danger. That the people and the ſtates ſhould for a ſufficient period of time elect an uninterrupted ſucceſſion of men ready to betray both; that the traitors ſhould throughout this period, uniformly and ſyſtematically purſue ſome fixed plan for the extenſion of the military eſtabliſhment; that the governments and the people of the ſtates ſhould ſilently and patiently behold

the gathering ſtorm, and continue to ſupply the materials, until it ſhould be prepared to burſt on their own heads, muſt appear to every one more like the incoherent dreams of a delirious jealouſy, or the miſjudged exaggerations of a counterfeit zeal, than like the ſober apprehenſions of genuine patriotiſm. Extravagant as the ſuppoſition is, let it however be made. Let a regular army, fully equal to the reſources of the country be formed; and let it be entirely at the devotion of the federal government; ſtill it would not be going too far to ſay, that the ſtate governments with the people on their ſide would be able to repel the danger. The higheſt number to which, according to the beſt computation, a ſtanding army can be carried in any country, does not exceed one hundredth part of the whole number of ſouls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield in the United States an army of more than twenty-five or thirty thouſand men. To theſe would be oppoſed a militia amounting to near half a million of citizens with arms in their hands, officered by men choſen from among themſelves, fighting for their common liberties, and united and conducted by governments poſſeſſing their affections and confidence. It may well be doubted whether a militia thus circumſtanced could ever be conquered by ſuch a proportion of regular troops. Thoſe who are beſt acquainted with the late ſucceſsful reſiſtance of this country againſt the Britiſh arms will be moſt inclined to deny the poſſibility of it. Beſides the advantage of being armed, which the Americans poſſeſs over the people of almoſt every other nation, the exiſtence of ſubordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier againſt the enterprizes of ambition, more inſurmountable than any which a ſimple government of any form can admit of. Notwithſtanding the military eſtabliſhments in the ſeveral kingdoms of Europe, which are

carried

carried as far as the public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone, they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force, and officers appointed out of the militia, by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance that the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it. Let us not insult the free and gallant citizens of America with the suspicion that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors. Let us rather no longer insult them with the supposition, that they can ever reduce themselves to the necessity of making the experiment, by a blind and tame submission to the long train of insidious measures, which must precede and produce it.

The argument under the present head may be put into a very concise form, which appears altogether conclusive. Either the mode in which the federal government is to be constructed will render it sufficiently dependant on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the state governments; who will be supported by the people.

On summing up the considerations stated in this and the last paper, they seem to amount to the most convincing evidence, that the powers proposed to be lodged in the federal government, are as little formidable to those reserved to the individual states, as they

are

are indispensibly necessary to accomplish the purposes of the union; and that all those alarms which have been sounded, of a meditated and consequential annihilation of the state governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them.

PUBLIUS.

NUMBER XLVII.

The Meaning of the Maxim, which requires a Separation of the Departments of Power, examined and ascertained.

HAVING reviewed the general form of the proposed government, and the general mass of power allotted to it; I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive and judiciary departments ought to be seperate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner, as at once to destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all

powers

powers legiſlative, executive and judiciary in the ſame hands, whether of one, a few or many, and whether hereditary, ſelf appointed, or elective, may juſtly be pronounced the very definition of tyranny. Were the federal conſtitution therefore, really chargeable with this accumulation of power or with a mixture of powers, having a dangerous tendency to ſuch an accumulation, no further arguments would be neceſſary to inſpire a univerſal reprobation of the ſyſtem. I perſuade myſelf however, that it will be made apparent to every one, that the charge cannot be ſupported, and that the maxim on which it relies, has been totally miſconceived and miſapplied. In order to form correct ideas on this important ſubject, it will be proper to inveſtigate the ſenſe, in which the preſervation of liberty requires, that the three great departments of power ſhould be ſeparate and diſtinct.

The oracle who is always conſulted and cited on this ſubject, is the celebrated Monteſquieu. If he be not the author of this invaluable precept in the ſcience of politics, he has the merit at leaſt of diſplaying and recommending it moſt effectually to the attention of mankind. Let us endeavour in the firſt place to aſcertain his meaning on this point.

The Britiſh conſtitution was to Monteſqueiu, what Homer has been to the didactic writers on epic poetry. As the latter have conſidered the work of the immortal bard, as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all ſimilar works were to be judged; ſo this great political critic appears to have viewed the conſtitution of England as the ſtandard, or to uſe his own expreſſion, as the mirror of political liberty; and to have delivered in the form of elementary truths, the ſeveral characteriſtic principles of that particular ſyſtem. That we may be ſure then not to miſtake his meaning in this caſe,

let

let us recur to the ſource from which the maxim was drawn.

On the ſlighteſt view of the Britiſh conſtitution we muſt perceive, that the legiſlative, executive, and judiciary departments are by no means totally ſeparate and diſtinct from each other. The executive magiſtrate forms an integral part of the legiſlative authority. He alone has the prerogative of making treaties with foreign ſovereigns, which when made, have, under certain limitations, the force of legiſlative acts. All the members of the judiciary department are appointed by him; can be removed by him on the addreſs of the two houſes of parliament, and form, when he pleaſes to conſult them, one of his conſtitutional councils. One branch of the legiſlative department forms alſo, a great conſtitutional council to the executive chief; as on another hand, it is the ſole depoſitary of judicial power in caſes of impeachment, and is inveſted with the ſupreme appellate juriſdiction, in all other caſes. The judges again are ſo far connected with the legiſlative department, as often to attend and participate in its deliberations, though not admitted to a legiſlative vote.

From theſe facts by which Monteſquieu was guided it may clearly be inferred, that in ſaying, "there "can be no liberty where the legiſlative and execu- "tive powers are united in the ſame perſon, or "body of magiſtrates," or, "if the power of "judging be not ſeparated from the legiſlative and "executive powers," he did not mean that theſe departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import, and ſtill more concluſively as illuſtrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exerciſed by the ſame hands which poſſeſs the *whole* power of another department, the fundamental principles of a free conſtitution, are ſubverted.

ſubverted. This would not have been the caſe in the conſtitution examined by him, if the king who is the ſole executive magiſtrate, had poſſeſſed alſo the complete legiſlative power, or the ſupreme adminiſtration of juſtice; or if the entire legiſlative body, had poſſeſſed the ſupreme judiciary, or the ſupreme executive authority. This however is not among the vices of that conſtitution. The magiſtrate in whom the whole executive power reſides cannot of himſelf make a law, though he can put a negative on every law, nor adminiſter juſtice in perſon, though he has the appointment of thoſe who do adminiſter it. The judges can exerciſe no executive prerogative, though they are ſhoots from the executive ſtock, nor any legiſlative function, though they may be adviſed with by the legiſlative councils. The entire legiſlature, can perform no judiciary act; though by the joint act of two of its branches, the judges may be removed from their offices; and though one of its branches is poſſeſſed of the judicial power in the laſt reſort. The entire legiſlature again can exerciſe no executive prerogative, though one of its branches* conſtitutes the ſupreme executive magiſtracy; and another, on the impeachment of a third, can try and condemn all the ſubordinate officers in the executive department.

The reaſons on which Monteſquieu grounds his maxim are a further demonſtration of his meaning. "When the legiſlative and executive powers are "united in the ſame perſon or body," ſays he, "there "can be no liberty, becauſe apprehenſions may ariſe "leſt *the ſame* monarch or ſenate ſhould *enact* tyran-"nical laws, to *execute* them in a tyrannical manner." Again "Were the power of judging joined with the "legiſlative, the life and liberty of the ſubject would "be expoſed to arbitrary control, for *the judge* would "then be *the legiſlator*. Were it joined to the exe-"cutive power, *the judge* might behave with all the "violence of *an oppreſſor*." Some of theſe reaſons are

* The King.

are more fully explained in other paſſages; but briefly ſtated as they are here, they ſufficiently eſtabliſh the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the conſtitutions of the ſeveral ſtates, we find that notwithſtanding the emphatical, and in ſome inſtances, the unqualified terms in which this axiom has been laid down, there is not a ſingle inſtance in which the ſeveral departments of power have been kept abſolutely ſeparate and diſtinct. New Hampſhire, whoſe conſtitution was the laſt formed, ſeems to have been fully aware of the impoſſibility and inexpediency of avoiding any mixture whatever of theſe departments; and has qualified the doctrine by declaring "that the legiſlative, executive and judiciary powers ought to be kept as "ſeparate from, and independent of each other *as "the nature of a free government will admit; or as is "conſiſtent with that chain of connection, that binds "the whole fabric of the conſtitution in one indiſſoluble "bond of unity and amity.*" Her conſtitution accordingly mixes theſe departments in ſeveral reſpects. The ſenate, which is a branch of the legiſlative department, is alſo a judicial tribunal for the trial of impeachments. The preſident who is the head of the executive department, is the preſiding member alſo of the ſenate; and beſides an equal vote in all caſes, has a caſting vote in caſe of a tie. The executive head is himſelf eventually elective every year by the legiſlative department; and his council is every year choſen by and from the members of the ſame department. Several of the officers of ſtate are alſo appointed by the legiſlature. And the members of the judiciary department are appointed by the executive department.

The conſtitution of Maſſachuſetts has obſerved a ſufficient though leſs pointed caution in expreſſing this fundamental article of liberty. It declares, "that "the legiſlative department ſhall never exerciſe the

"executive

"executive and judicial powers, or either of them: "The executive ſhall never exerciſe the legiſlative "and judicial powers, or either of them: The "judicial ſhall never exerciſe the legiſlative and "executive powers, or either of them." This declaration correſponds preciſely with the doctrine of Monteſquieu, as it has been explained, and is not in a ſingle point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exerciſing the powers of another department. In the very conſtitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magiſtrate has a qualified negative on the legiſlative body; and the ſenate, which is a part of the legiſlature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department again are appointable by the executive department, and removeable by the ſame authority, on the addreſs of the two legiſlative branches. Laſtly, a number of the officers of government are annually appointed by the legiſlative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the conſtitution have in this laſt point at leaſt, violated the rule eſtabliſhed by themſelves.

I paſs over the conſtitution of Rhode-Iſland and Connecticut, becauſe they were formed prior to the revolution; and even before the principle under examination had become an object of political attention.

The conſtitution of New-York contains no declaration on this ſubject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives nevertheleſs to the executive magiſtrate a partial controul over the legiſlative department; and what is more, gives a like controul to the judiciary department, and even blends the executive and

judiciary departments in the exercise of this controul. In its council of appointment, members of the legislative are associated with the executive authority in the appointment of officers both executive and judiciary. And its court for the trial of impeachments and correction of errors, is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New-Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary or surrogate of the state; is a member of the supreme court of appeals, and president with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the court of appeals. The members of the judiciary department are appointed by the legislative department, and removeable by one branch of it, on the impeachment of the other.

According to the constitution of Pennsylvania, the president, who is head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department, and forms a court of impeachments for trial of all officers, judiciary as well as executive. The judges of the supreme court, and justices of the peace, seem also to be removeable by the legislature; and the executive power of pardoning in certain cases to be referred to the same department. The members of the executive council are made EX OFFICIO justices of peace throughout the state.

In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The

executive

executive chief, with ſix others, appointed three by each of the legiſlative branches, conſtitute the ſupreme court of appeals: He is joined with the legiſlative department in the appointment of the other judges. Throughout the ſtates it appears that the members of the legiſlature may at the ſame time be juſtices of the peace. In this ſtate, the members of one branch of it are EX OFFICIO juſtices of the peace; as are alſo the members of the executive council. The principal officers of the executive department are appointed by the legiſlative; and one branch of the latter forms a court of impeachments. All officers may be removed on addreſs of the legiſlature.

Maryland has adopted the maxim in the moſt unqualified terms; declaring that the legiſlative, executive and judicial powers of government, ought to be forever ſeparate and diſtinct from each other. Her conſtitution, notwithſtanding makes the executive magiſtrate appointable by the legiſlative department; and the members of the judiciary, by the executive department.

The language of Virginia is ſtill more pointed on this ſubject. Her conſtitution declares, "that the "legiſlative, executive and judiciary departments, "ſhall be ſeparate and diſtinct; ſo that neither "exerciſe the powers properly belonging to the "other; nor ſhall any perſon exerciſe the powers "of more than one of them at the ſame time; ex-"cept that the juſtices of county courts ſhall be "eligible to either houſe of aſſembly." Yet we find not only this expreſs exception, with reſpect to the members of the inferior courts; but that the chief magiſtrate with his executive council are appointable by the legiſlature; that two members of the latter are triennially diſplaced at the pleaſure of the legiſlature; and that all the principal officers, both executive and judiciary, are filled by the ſame department. The executive prerogative of pardoning,

alſo is in one caſe veſted in the legiſlative department.

The conſtitution of North-Carolina, which declares, "that the legiſlative, executive and ſupreme "judicial powers of government, ought to be for-"ever ſeparate and diſtinct from each other," refers at the ſame time to the legiſlative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.

In South-Carolina, the conſtitution makes the executive magiſtracy eligible by the legiſlative department. It gives to the latter alſo the appointment of the members of the judiciary department, including even juſtices of the peace and ſheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the ſtate.

In the conſtitution of Georgia, where it is declared, "that the legiſlative, executive and judici-"ary departments ſhall be ſeparate and diſtinct, ſo "that neither exerciſe the powers properly belong-"ing to the other." We find that the executive department is to be filled by appointments of the legiſlature; and the executive prerogative of pardoning, to be finally exerciſed by the ſame authority. Even juſtices of the peace are to be appointed by the legiſlature.

In citing theſe caſes in which the legiſlative, executive and judiciary departments have not been kept totally ſeparate and diſtinct, I wiſh not to be regarded as an advocate for the particular organizations of the ſeveral ſtate governments. I am fully aware that among the many excellent principles which they exemplify, they carry ſtrong marks of the haſte, and ſtill ſtronger of the inexperience, under which they were framed. It is but too obvious that in ſome inſtances, the fundamental principle under conſideration has been violated by too great a mixture, and even an actual conſolidation of the

different

different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is, that the charge brought against the proposed constitution, of violating a sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author; nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

PUBLIUS.

XLVIII

NUMBER LXVIII.

The same Subject continued, with a View to the Means of giving Efficacy in Practice to that Maxim.

IT was shewn in the last paper, that the political apothegm there examined, does not require that the legislative, executive and judiciary departments should be wholly unconnected with each other. I shall undertake in the next place, to shew that unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an over-ruling influence over the others in the administration of their respective powers. It will not be denied that power is of an incroaching nature, and that it ought to be effectually restrained from passing the

limits, assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark with precision the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defence is indispensibly necessary for the more feeble, against the more powerful members of the government. The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth however obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In a government, where numerous and extensive prerogatives are placed in the hands of a hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with

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all the jealouſy which a zeal for liberty ought to inſpire. In a democracy, where a multitude of people exerciſe in perſon the legiſlative functions, and are continually expoſed by their incapacity for regular deliberation and concerted meaſures, to the ambitious intrigues of their executive magiſtrates, tyranny may well be apprehended on ſome favourable emergency, to ſtart up in the ſame quarter. But in a repreſentative republic, where the executive magiſtracy is carefully limited both in the extent and the duration of its power; and where the legiſlative power is exerciſed by an aſſembly, which is inſpired by a ſuppoſed influence over the people with an intrepid confidence in its own ſtrength; which is ſufficiently numerous to feel all the paſſions which actuate a multitude; yet not ſo numerous as to be incapable of purſuing the objects of its paſſions, by means which reaſon preſcribes; it is againſt the enterpriſing ambition of this department, that the people ought to indulge all their jealouſy and exhauſt all their precautions.

The legiſlative department derives a ſuperiority in our governments from other circumſtances. Its conſtitutional powers being at once more extenſive and leſs ſuſceptible of preciſe limits, it can with the greater facility, maſk under complicated and indirect meaſures, the encroachments which it makes, on the co-ordinate departments. It is not unfrequently a queſtion of real nicety in legiſlative bodies, whether the operation of a particular meaſure, will, or will not extend beyond the legiſlative ſphere. On the other ſide, the executive power being reſtrained within a narrower compaſs, and being more ſimple in its nature; and the judiciary being deſcribed by land marks, ſtill leſs uncertain, projects of uſurpation by either of theſe departments, would immediately betray and defeat themſelves. Nor is this all: As the legiſlative department alone has acceſs to the pockets of the people, and has in ſome conſtitutions full diſcretion, and in all, a prevailing influence

over

over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might collect vouchers in abundance from the records and archives of every state in the union. But as a more concise and at the same time, equally satisfactory evidence I will refer to the example of two states, attested by two unexceptionable authorities.

The first example is that of Virginia, a state which, as we have seen, has expresly declared in its constitution, that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting "Notes on "the state of Virginia." (p. 195) "All the powers "of government, legislative, executive and judi-"ciary, result to the legislative body. The concen-"trating these in the same hands is precisely the "definition of despotic government. It will be no "alleviation that these powers will be exercised by "a plurality of hands, and not by a single one. One "hundred and seventy-three despots would surely "be as oppressive as one. Let those who doubt it "turn their eyes on the republic of Venice. As "little will it avail us that they are chosen by "ourselves. An *elective despotism* was not the go-"vernment we fought for; but one which should "not only be founded on free principles, but in "which the powers of government should be so "divided and balanced among several bodies of "magistracy, as that no one could transcend their

"legal

"legal limits, without being effectually checked "and restrained by the others. For this reason, "that convention which passed the ordinance of go- "vernment laid its foundation on this basis, that "the legislative, executive and judiciary depart- "ments, should be separate and distinct, so that no "person should exercise the powers of more than one "of them at the same time. *But no barrier was "provided between these several powers.* The judi- "ciary and executive members were left dependent "on the legislative for their subsistence in office, "and some of them for their continuance in it. If "therefore the legislature assumes executive and ju- "diciary powers, no opposition is likely to be made; "nor if made can be effectual; because in that case, "they may put their proceeding into the form of an "act of assembly, which will render them obliga- "tory on the other branches. They have accord- "ingly *in many* instances *decided rights* which should "have been left to *judiciary controversy*; and *the "direction of the executive, during the whole time of "their session, is becoming habitual and familiar.*"

The other state which I shall have for an example, is Pennsylvania; and the other authority the council of censors which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the constitution, was "to enquire whether the consti- "tution had been preserved inviolate in every part; "and whether the legislative and executive branches "of government had performed their duty as guar- "dians of the people, or assumed to themselves, or "exercised other or greater powers than they are "entitled to by the constitution." In the execution of this trust, the council were necessarily led to a comparison, of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which, both sides in the coun- cil subscribed, it appears that the constitution had

been

been flagrantly violated by the legiſlature in a variety of important inſtances.

A great number of laws had been paſſed violating without any apparent neceſſity, the rule requiring that all bills of a publick nature ſhall be previouſly printed for the conſideration of the people; although this is one of the precautions chiefly relied on by the conſtitution, againſt improper acts of the legiſlature.

The conſtitutional trial by jury had been violated; and powers aſſumed, which had not been delegated by the conſtitution.

Executive powers had been uſurped.

The ſalaries of the judges, which the conſtitution expreſsly requires to be fixed, had been occaſionally varied; and caſes belonging to the judiciary department, frequently drawn within legiſlative cognizance and determination.

Thoſe who wiſh to ſee the ſeveral particulars falling under each of theſe heads, may conſult the journals of the council which are in print. Some of them, it will be found may be imputable to peculiar circumſtances connected with the war: But the greater part of them may be conſidered as the ſpontaneous ſhoots of an ill conſtituted government.

It appears alſo, that the executive department had not been innocent of frequent breaches of the conſtitution. There are three obſervations however, which ought to be made on this head. *Firſt*, A great proportion of the inſtances, were either immediately produced by the neceſſities of the war, or recommended by Congreſs or the commander in chief. *Second*. In moſt of the other inſtances, they conformed either to the declared or the known ſentiments of the legiſlative department. *Third*. The executive department of Pennſylvania is diſtinguiſhed from that of the other ſtates, by the number of members compoſing it. In this reſpect it has as much affinity to a legiſlative aſſembly, as to an executive council. And being at once exempt from the reſtraint of an individual

individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence; unauthorised measures would of course be more freely hazarded, than where the executive department is administered by a single hand or by a few hands.

The conclusion which I am warranted in drawing from these observations is, that a mere demarkation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

PUBLIUS.

XLIX

NUMBER LXIX.

The same Subject continued with the same View.

THE author of the "Notes on the state of Virgi-
"nia," quoted in the last paper has subjoined to that valuable work, the draught of a constitution which had been prepared in order to be laid before a convention expected to be called in 1783, by the legislature, for the establishment of a constitution for that commonwealth. The plan, like every thing from the same pen, marks a turn of thinking original, comprehensive and accurate; and is the more worthy of attention, as it equally displays a fervent attachment to republican government, and an enlightened view of the dangerous propensities against which it ought to be guarded. One of the precautions which he proposes, and on which he appears ultimately to rely as a palladium to the weaker departments of power, against the invasions of the stronger, is perhaps altogether his own, and as it immediately relates to the subject of our present enquiry, ought not to be overlooked.

His

His propoſition is, "that whenever any two of the "three branches of government ſhall concur in "opinion, each by the voices of two thirds of their "whole number, that a convention is neceſſary for "altering the conſtitution or *correcting breaches of it*, "a convention ſhall be called for the purpoſe."

As the people are the only legitimate fountain of power, and it is from them that the conſtitutional charter, under which the ſeveral branches of government hold their power, is derived; it ſeems ſtrictly conſonant to the republican theory, to recur to the ſame original authority, not only whenever it may be neceſſary to enlarge, diminiſh, or new-model the powers of government; but alſo whenever any one of the departments may commit encroachments on the chartered authorities of the others. The ſeveral departments being perfectly co-ordinate by the terms of their common commiſſion, neither of them, it is evident, can pretend to an excluſive or ſuperior right of ſettling the boundaries between their reſpective powers; and how are the encroachments of the ſtronger to be prevented, or the wrongs of the weaker to be redreſſed, without an appeal to the people themſelves; who, as the grantors of the commiſſion, can alone declare its true meaning and enforce its obſervance?

There is certainly great force in this reaſoning, and it muſt be allowed to prove, that a conſtitutional road to the deciſion of the people, ought to be marked out, and kept open, for certain great and extraordinary occaſions. But there appear to be inſuperable objections againſt the propoſed recurrence to the people, as a proviſion in all caſes for keeping the ſeveral departments of power within their conſtitutional limits.

In the firſt place, the proviſion does not reach the caſe of a combination of two of the departments againſt a third. If the legiſlative authority, which poſſeſſes ſo many means of operating on the motives

of

of the other departments, ſhould be able to gain to its intereſt either of the others, or even one third of its members, the remaining department could derive no advantage from this remedial proviſion. I do not dwell however, on this objection, becauſe it may be thought to lie rather againſt the modification of the principle, than againſt the principle itſelf.

In the next place, it may be conſidered as an objection inherent in the principle, that as every appeal to the people would carry an implication of ſome defect in the government, frequent appeals would in great meaſure deprive the government of that veneration which time beſtows on every thing, and without which perhaps the wiſeſt and freeſt governments would not poſſeſs the requiſite ſtability. If it be true that all governments reſt on opinion, it is no leſs true that the ſtrength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he ſuppoſes to have entertained the ſame opinion. The reaſon of man, like man himſelf, is timid and cautious, when leſt alone; and acquires firmneſs and confidence, in proportion to the namber with which it is aſſociated. When the examples, which fortify opinion, are *antient* as well as *numerous*, they are known to have a double effect. In a nation of philoſophers, this conſideration ought to be diſregarded. A reverence for the laws, would be ſufficiently inculcated by the voice of an enlightened reaſon. But a nation of philoſophers is as little to be expected as the philoſophical race of kings wiſhed for by Plato. And in every other nation, the moſt rational government will not find it a ſuperfluous advantage to have the prejudices of the community on its ſide.

The danger of diſturbing the public tranquility by intereſting too ſtrongly the public paſſions, is a ſtill more ſerious objection againſt a frequent reference of conſtitutional queſtions, to the deciſion of the whole ſociety. Notwithſtanding the ſucceſs which

has attended the revisions of our established forms of government, and which does so much honor to the virtue and intelligence of the people of America, it must be confessed, that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the antient government; and whilst no spirit of party, connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended.

But the greatest objection of all is that the decisions which would probably result from such appeals, would not answer the purpose of maintaining the constitutional equilibrium of the government. We have seen that the tendency of republican governments is to an aggrandizement of the legislative, at the expence of the other departments. The appeals to the people therefore, would usually be made by the executive and judiciary departments. But whether made by one side or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments, are few in number, and can be personally known to a small part only of the people. The latter by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally the objects of jealousy: and their administration is always

liable

liable to be discoloured and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship and of acquaintance, embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages, it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.

But the legislative party would not only be able to plead their cause most successfully with the people: They would probably be constituted themselves the judges. The same influence which had gained them an election into the legislature, would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters, on whom every thing depends in such bodies. The convention in short would be composed chiefly of men, who had been, who actually were, or who expected to be, members of the department whose conduct was arraigned. They would consequently be parties to the very question to be decided by them.

It might however sometimes happen, that appeals would be made under circumstances less adverse to the executive and judiciary departments. The usurpations of the legislature might be so flagrant and so sudden, as to admit of no specious colouring A strong party among themselves might take side with the other branches. The executive power might be in the hands of a peculiar favorite of the people. In such a posture of things, the public decision might be less swayed by prepossessions in favor of the legislative party. But still it could never be expected to turn on the true merits of the question. It would

inevitably be connected with the spirit of pre-existing parties, or of parties springing out of the question itself. It would be connected with persons of distinguished character and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of the measures, to which the decision would relate. The *passions* therefore not the *reason*, of the public, would sit in judgment. But it is the reason of the public alone that ought to controul and regulate the government. The passions ought to be controuled and regulated by the government.

We found in the last paper that mere declarations in the written constitution, are not sufficient to restrain the several departments within their legal limits. It appears in this that occasional appeals to the people would be neither a proper nor an effectual provision, for that purpose. How far the provisions of a different nature contained in the plan above quoted, might be adequate, I do not examine. Some of them are unquestionably founded on sound political principles, and all of them are framed with singular ingenuity and precision.

PUBLIUS.

NUMBER L.

The same Subject continued with the same View.

IT may be contended perhaps, that instead of *occasional* appeals to the people, which are liable to the objections urged against them, *periodical* appeals are the proper and adequate means of *preventing and correcting infractions of the constitution.*

It will be attended to, that in the examination of these expedients, I confine myself to their aptitude

for

for *enforcing* the conſtitution by keeping the ſeveral departments of power within their due bounds, without particularly conſidering them, as proviſions for *altering* the conſtitution itſelf. In the firſt view, appeals to the people at fixed periods, appear to be nearly as ineligible, as appeals on particular occaſions as they emerge. If the periods be ſeparated by ſhort intervals, the meaſures to be reviewed and rectified, will have been of recent date, and will be connected with all the circumſtances which tend to viciate and pervert the reſult of occaſional reviſions. If the periods be diſtant from each other, the ſame remark will be applicable to all recent meaſures, and in proportion as the remoteneſs of the others may favor a diſpaſſionate review of them, this advantage is inſeparable from inconveniences which ſeem to counterbalance it. In the firſt place, a diſtant proſpect of public cenſure would be a very feeble reſtraint on power from thoſe exceſſes, to which it might be urged by the force of preſent motives. Is it to be imagined, that a legiſlative aſſembly, conſiſting of a hundred or two hundred members, eagerly bent on ſome favorite object, and breaking through the reſtraints of the conſtitution in purſuit of it, would be arreſted in their career, by conſiderations drawn from a cenſorial reviſion of their conduct at the future diſtance of ten, fifteen or twenty years? In the next place, the abuſes would often have completed their miſchievous effects, before the remedial proviſion would be applied. And in the laſt place, where this might not be the caſe, they would be of long ſtanding would have taken deep root, and would not eaſily be extirpated.

The ſcheme of reviſing the conſtitution in order to correct recent breaches of it, as well as for other purpoſes, has been actually tried in one of the ſtates. One of the objects of the council of cenſors, which met in Pennſylvania, in 1783 and 1784, was, as we have ſeen, to enquire "whether the conſtitution had

"been violated, and whether the legiſlative and exe-
"cutive departments had encroached on each other."
This important and novel experiment in politics, merits in ſeveral points of view, very particular attention. In ſome of them it may perhaps as a ſingle experiment, made under circumſtances ſomewhat peculiar, be thought to be not abſolutely concluſive. But as applied to the caſe under conſideration, it involves ſome facts which I venture to remark, as a complete and ſatisfactory illuſtration of the reaſoning which I have employed.

Firſt. It appears from the names of the gentlemen who compoſed the council, that ſome at leaſt of its moſt active and leading members, had alſo been active and leading characters in the parties which pre-exiſted in the ſtate.

Second. It appears that the ſame active and leading members of the council, had been active and influential members of the legiſlative and executive branches, within the period to be reviewed; and even patrons or opponents of the very meaſures to be thus brought to the teſt of the conſtitution. Two of the members had been vice-preſidents of the ſtate, and ſeveral others, members of the executive council within the ſeven preceding years. One of them had been ſpeaker, and a number of others diſtinguiſhed members of the legiſlative aſſembly, within the ſame period.

Third. Every page of their proceedings witneſſes the effect of all theſe circumſtances on the temper of of their deliberations. Throughout the continuance of the council, it was ſplit into two fixed and violent parties. The fact is acknowledged and lamented by themſelves. Had this not been the caſe, the face of their proceedings exhibit a proof equally ſatisfactory. In all queſtions, however unimportant in themſelves, or unconnected with each other, the ſame names ſtand invariably contraſted on the oppoſite columns. Every unbiaſſed obſerver, may infer without danger

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of mistake, and at the same time, without meaning to reflect on either party, or any individuals of either party, that unfortunately *passion*, not *reason*, must have presided over their decisions. When men exercise their reason coolly and freely, on a variety of distinct questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same.

Fourth. It is at least problematical, whether the decisions of this body do not, in several instances, misconstrue the limits prescribed for the legislative and executive departments, instead of reducing and limiting them within their constitutional places.

Fifth. I have never understood that the decisions of the council on constitutional questions, whether rightly or erroneously formed, have had any effect in varying the practice founded on legislative constructions. It even appears, if I mistake not, that in one instance, the cotemporary legislature denied the constructions of the council, and actually prevailed in the contest.

This censorial body, therefore, proves at the same time, by its researches, the existence of the disease; and by its example, the inefficacy of the remedy.

This conclusion cannot be invalidated by alledging that the state in which the experiment was made, was at that crisis, and had been for a long time before, violently heated and distracted by the rage of party. Is it to be presumed, that at any future septennial epoch, the same state will be free from parties? Is it to be presumed that any other state, at the same or any other given period, will be exempt from them? Such an event ought to be neither presumed nor desired; because an extinction of parties necessarily implies either a universal alarm for the public safety, or an absolute extinction of liberty.

Were the precaution taken of excluding from the assemblies elected by the people to revise the preceding

ceding adminiſtration of the government, all perſons who ſhould have been concerned in the government within the given period, the difficulties would not be obviated. The important taſk would probably devolve on men, who with inferior capacities, would in other reſpects be little better qualified. Although they might not have been perſonally concerned in the adminiſtration, and therefore not immediately agents in the meaſures to be examined; they would probably have been involved in the parties connected with theſe meaſures, and have been elected under their auſpices.

PUBLIUS.

NUMBER LI.

The ſame Subject continued with the ſame View, and concluded.

TO what expedient then ſhall we finally reſort for maintaining in practice the neceſſary partition of power among the ſeveral departments, as laid down in the conſtitution? The only anſwer that can be given is, that as all theſe exterior proviſions are found to be inadequate, the defect muſt be ſupplied, by ſo contriving the interior ſtructure of the government, as that its ſeveral conſtituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without preſuming to undertake a full developement of this important idea, I will hazard a few general obſervations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and ſtructure of the government planned by the convention.

In order to lay a due foundation for that ſeparate and diſtinct exerciſe of the different powers of government, which to a certain extent, is admitted on all hands.

hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels, having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties however, and some additional expence, would attend the execution of it. Some deviations therefore from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle; first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice, which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other, would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all

other

other caſes, be made commenſurate to the danger of attack. Ambition muſt be made to counteract ambition. The intereſt of the man muſt be connected with the conſtitutional rights of the place. It may be a reflection on human nature, that ſuch devices ſhould be neceſſary to control the abuſes of government. But what is government itſelf but the greateſt of all reflections on human nature? If men were angels, no government would be neceſſary. If angels were to govern men, neither external nor internal controls on government would be neceſſary. In framing a government which is to be adminiſtered by men over men, the great difficulty lies in this: You muſt firſt enable the government to control the governed; and in the next place, oblige it to control itſelf. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the neceſſity of auxiliary precautions.

This policy of ſupplying by oppoſite and rival intereſts, the defect of better motives, might be traced through the whole ſyſtem of human affairs, private as well as public. We ſee it particularly diſplayed in all the ſubordinate diſtributions of power; where the conſtant aim is to divide and arrange the ſeveral offices in ſuch a manner as that each may be a check on the other; that the private intereſt of every individual, may be a centinel over the public rights. Theſe inventions of prudence cannot be leſs requiſite in the diſtribution of the ſupreme powers of the ſtate.

But it is not poſſible to give to each department an equal power of ſelf-defence. In republican government the legiſlative authority neceſſarily predominates. The remedy for this inconveniency is, to divide the legiſlature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common

functions,

ſunctions, and their common dependence on the ſociety, will admit. It may even be neceſſary to guard againſt dangerous encroachments by ſtill further precautions. As the weight of the legiſlative authority requires that it ſhould be thus divided, the weakneſs of the executive may require, on the other hand, that it ſhould be fortified. An abſolute negative, on the legiſlature, appears at firſt view to be the natural defence with which the executive magiſtrate ſhould be armed. But perhaps it would be neither altogether ſafe, nor alone ſufficient. On ordinary occaſions, it might not be exerted with the requiſite firmneſs; and on extraordinary occaſions, it might be perfidiouſly abuſed. May not this defect of an abſolute negative be ſupplied by ſome qualified connection between this weaker department, and the weaker branch of the ſtronger department, by which the latter may be led to ſupport the conſtitutional rights of the former, without being too much detached from the rights of its own department?

If the principles on which theſe obſervations are founded be juſt, as I perſuade myſelf they are, and they be applied as a criterion to the ſeveral ſtate conſtitutions, and to the federal conſtitution, it will be found, that if the latter does not perfectly correſpond with them, the former are infinitely leſs able to bear ſuch a teſt.

There are moreover two conſiderations particularly applicable to the federal ſyſtem of America, which place that ſyſtem in a very intereſting point of view.

Firſt. In a ſingle republic, all the power ſurrendered by the people, is ſubmitted to the adminiſtration of a ſingle government; and the uſurpations are guarded againſt by a diviſion of the government into diſtinct and ſeparate departments. In the compound republic of America, the power ſurrendered by the people, is firſt divided between two diſtinct governments, and then the portion allotted to each, ſubdivided

ſubdivided among diſtinct and ſeparate departments. Hence a double ſecurity ariſes to the rights of the people. The different governments will control each other; at the ſame time that each will be controled by itſelf.

Second. It is of great importance in a republic, not only to guard the ſociety againſt the oppreſſion of its rulers; but to guard one part of the ſociety againſt the injuſtice of the other part. Different intereſts neceſſarily exiſt in different claſſes of citizens. If a majority be united by a common intereſt, the rights of the minority will be inſecure. There are but two methods of providing againſt this evil: The one by creating a will in the community independent of the majority, that is, of the ſociety itſelf; the other by comprehending in the ſociety ſo many ſeparate deſcriptions of citizens, as will render an unjuſt combination of a majority of the whole very improbable, if not impracticable. The firſt method prevails in all governments poſſeſſing an hereditary or ſelf appointed authority. This at beſt is but a precarious ſecurity; becauſe a power independent of the ſociety may as well eſpouſe the unjuſt views of the major, as the rightful intereſts of the minor party, and may poſſibly be turned againſt both parties. The ſecond method will be exemplified in the federal republic of the United States. Whilſt all authority in it will be derived from, and dependent on the ſociety, the ſociety itſelf will be broken into ſo many parts, intereſts and claſſes of citizens, that the rights of individuals or of the minority, will be in little danger from intereſted combinations of the majority. In a free government, the ſecurity for civil rights muſt be the ſame as that for religious rights. It conſiſts in the one caſe in the multiplicity of intereſts, and in the other, in the multiplicity of ſects. The degree of ſecurity in both caſes will depend on the number of intereſts and ſects; and this may be preſumed to depend on the extent of country and number of people

comprehended

comprehended under the ſame government. This view of the ſubject muſt particularly recommend a proper federal ſyſtem to all the ſincere and conſiderate friends of republican government: Since it ſhews that in exact proportion as the territory of the union may be formed into more circumſcribed confederacies or ſtates, oppreſſive combinations of a majority will be facilitated, the beſt ſecurity under the republican form, for the rights of every claſs of citizens, will be diminiſhed; and conſequently, the ſtability and independence of ſome member of the government, the only other ſecurity muſt be proportionally increaſed. Juſtice is the end of government. It is the end of civil ſociety. It ever has been, and ever will be purſued, until it be obtained, or until liberty be loſt in the purſuit. In a ſociety under the forms of which the ſtronger faction can readily unite and oppreſs the weaker, anarchy may as truly be ſaid to reign, as in a ſtate of nature where the weaker individual is not ſecured againſt the violence of the ſtronger: And as in the latter ſtate even the ſtronger individuals are prompted by the uncertainty of their condition, to ſubmit to a government which may protect the weak as well as themſelves: So in the former ſtate, will the more powerful factions or parties be gradually induced by a like motive, to wiſh for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted, that if the ſtate of Rhode-Iſland was ſeparated from the confederacy, and left to itſelf, the inſecurity of rights under the popular form of government within ſuch narrow limits, would be diſplayed by ſuch reiterated oppreſſions of factious majorities, that ſome power altogether independent of the people would ſoon be called for by the voice of the very factions whoſe miſrule had proved the neceſſity of it. In the extended republic of the United States, and among the great variety of intereſts, parties and ſects which it embraces, a coalition of a majority of the whole

ſociety could ſeldom take place upon any other principles than thoſe of juſtice and the general good: Whilſt there being thus leſs danger to a minor from the will of the major party, there muſt be leſs pretext alſo, to provide for the ſecurity of the former, by introducing into the government a will not dependent on the latter; or in other words, a will independent of the ſociety itſelf. It is no leſs certain than it is important, notwithſtanding the contrary opinions which have been entertained, that the larger the ſociety, provided it lie within a practicable ſphere, the more duly capable it will be of ſelf government. And happily for the *republican cauſe*, the practicable ſphere may be carried to a very great extent, by a judicious modification and mixture of the *federal principle*.

PUBLIUS.

NUMBER LII.

Concerning the Houſe of Repreſentatives, with a View to the Qualifications of the Electors and elected, and the Time of Service of the Members.

FROM the more general enquiries purſued in the four laſt papers, I paſs on to a more particular examination of the ſeveral parts of the government. I ſhall begin with the houſe of repreſentatives.

The firſt view to be taken of this part of the government, relates to the qualifications of the electors and the elected. Thoſe of the former are to be the ſame with thoſe of the electors of the moſt numerous branch of the ſtate legiſlatures. The definition of the right of ſuffrage is very juſtly regarded as a fundamental article of republican government. It

It was incumbent on the convention, therefore, to define and eſtabliſh this right in the conſtitution. To have left it open for the occaſional regulation of the congreſs, would have been improper for the reaſon juſt mentioned. To have ſubmitted it to the legiſlative diſcretion of the ſtates, would have been improper for the ſame reaſon; and for the additional reaſon, that it would have rendered too dependent on the ſtate governments, that branch of the federal government, which ought to be dependent on the people alone. To have reduced the different qualifications in the different ſtates to one uniform rule, would probably have been as diſſatisfactory to ſome of the ſtates, as it would have been difficult to the convention. The proviſion made by the convention appears therefore, to be the beſt that lay within their option. It muſt be ſatisfactory to every ſtate; becauſe it is conformable to the ſtandard already eſtabliſhed, or which may be eſtabliſhed by the ſtate itſelf. It will be ſafe to the United States; becauſe, being fixed by the ſtate conſtitutions, it is not alterable by the ſtate governments, and it cannot be feared that the people of the ſtates will alter this part of their conſtitutions, in ſuch a manner as to abridge the rights ſecured to them by the federal conſtitution.

The qualifications of the elected being leſs carefully and properly defined by the ſtate conſtitutions, and being at the ſame time more ſuſceptible of uniformity, have been very properly conſidered and regulated by the convention. A repreſentative of the United States muſt be of the age of twenty-five years; muſt have been ſeven years a citizen of the United States; muſt at the time of his election, be an inhabitant of the ſtate he is to repreſent, and during the time of his ſervice muſt be in no office under the United States. Under theſe reaſonable limitations, the door of this part of the federal government is open to merit of every deſcription,

whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.

The term for which the representatives are to be elected, falls under a second view which may be taken of this branch. In order to decide on the propriety of this article, two questions must be considered; first, whether biennial elections will, in this case, be safe; secondly, whether they be necessary or useful.

First. As it is essential to liberty, that the government in general should have a common interest with the people; so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured. But what particular degree of frequency may be absolutely necessary for the purpose, does not appear to be susceptible of any precise calculation: And must depend on a variety of circumstances with which it may be connected. Let us consult experience, the guide that ought always to be followed, whenever it can be found.

The scheme of representation, as a substitute for a meeting of the citizens in person, being at most but very imperfectly known to antient polity; it is in more modern times only, that we are to expect instructive examples. And even here, in order to avoid a research too vague and diffusive, it will be proper to confine ourselves to the few examples which are best known, and which bear the greatest analogy to our particular case. The first to which this character ought to be applied, is the house of commons in Great-Britain. The history of this branch of the English constitution, anterior to the date of Magna Charta, is too obscure to yield instruction. The very existence of it has been made a question among political antiquaries. The earliest records of subsequent

date

date prove, that parliaments were to *sit* only, every year; not that they were to be *elected* every year. And even these annual sessions were left so much at the discretion of the monarch, that under various pretexts, very long and dangerous intermissions were often contrived by royal ambition. To remedy this grievance, it was provided by a statute in the reign of Charles IId. that the intermissions, should not be protracted beyond a period of three years. On the accession of William IIId, when a revolution took place in the government, the subject was still more seriously resumed, and it was declared to be among the fundamental rights of the people, that parliaments ought to be held *frequently*. By another statute which passed a few years later in the same reign, the term "frequently" which had alluded to the triennial period settled in the time of Charles IId. is reduced to a precise meaning, it being expresly enacted that a new parliament shall be called within three years after the determination of the former. The last change from three to seven years is well known to have been introduced pretty early in the present century, under an alarm for the Hanoverian succession. From these facts it appears, that the greatest frequency of elections which has been deemed necessary in that kingdom, for binding the representatives to their constituents, does not exceed a triennial return of them. And if we may argue from the degree of liberty retained even under septennial elections, and all the other vicious ingredients in the parliamentary constitution, we cannot doubt that a reduction of the period from seven to three years, with the other necessary reforms, would so far extend the influence of the people over their representatives as to satisfy us, that biennial elections under the federal system, cannot possibly be dangerous to the requisite dependence of the house of representatives on their constituents.

Elections in Ireland, till of late, were regulated entirely by the discretion of the crown, and were seldom repeated except on the accession of a new prince, or some other contingent event. The parliament which commenced with George IId. was continued throughout his whole reign, a period of about thirty-five years. The only dependence of the representatives on the people, consisted in the right of the latter to supply occasional vacancies, by the election of new members, and in the chance of some event which might produce a general new election. The ability also of the Irish parliament to maintain the rights of their constituents, so far as the disposition might exist, was extremely shackled by the control of the crown over the subjects of their deliberation. Of late these shackles, if I mistake not, have been broken; and octennial parliaments have besides been established. What effect may be produced by this partial reform, must be left to further experience. The example of Ireland, from this view of it, can throw but little light on the subject. As far as we can draw any conclusion from it, it must be, that if the people of that country have been able, under all these disadvantages, to retain any liberty whatever, the advantage of biennial elections would secure to them every degree of liberty which might depend on a due connection between their representatives and themselves.

Let us bring our enquiries nearer home. The example of these states when British colonies, claims particular attention; at the same time that it is so well known, as to require little to be said on it. The principle of representation, in one branch of the legislature at least, was established in all of them. But the periods of election were different. They varied from one to seven years. Have we any reason to infer from the spirit and conduct of the representatives of the people, prior to the revolution, that biennial elections would have been dangerous to the

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public liberties? The ſpirit which every where diſplayed itſelf at the commencement of the ſtruggle; and which vanquiſhed the obſtacles to independence, is the beſt of proofs that a ſufficient portion of liberty had been every where enjoyed to inſpire both a ſenſe of its worth, and a zeal for its proper enlargement. This remark holds good as well with regard to the then colonies, whoſe elections were leaſt frequent, as to thoſe whoſe elections were moſt frequent. Virginia was the colony which ſtood firſt in reſiſting the parliamentary uſurpations of Great-Britain; it was the firſt alſo in eſpouſing by public act, the reſolution of independence. In Virginia, nevertheleſs, if I have not been miſinformed, elections under the former government were ſeptennial. This particular example is brought into view, not as a proof of any peculiar merit, for the priority in thoſe inſtances, was probably accidental; and ſtill leſs of any advantage in *ſeptennial* elections, for when compared with a greater frequency they are inadmiſſible; but merely as a proof, and I conceive it to be a very ſubſtantial proof, that the liberties of the people can be in no danger from *biennial* elections.

The concluſion reſulting from theſe examples will be not a little ſtrengthened by recollecting three circumſtances. The firſt is, that the federal legiſlature will poſſeſs a part only of that ſupreme legiſlative authority which is veſted completely in the Britiſh parliament, and which, with a few exceptions, was exerciſed by the colonial aſſemblies and the Iriſh legiſlature. It is a received and well founded maxim, that, where no other circumſtances affect the caſe, the greater the power is, the ſhorter ought to be its duration; and converſely, the ſmaller the power, the more ſafely may its duration be protracted. In the ſecond place, it has, on another occaſion, been ſhewn that the federal legiſlature will not only be reſtrained by its dependence on the people, as other legiſlative bodies are; but that it

will

will be moreover watched and controled by the ſeveral collateral legiſlatures, which other legiſlative bodies are not. And in the third place, no comparison can be made between the means that will be poſſeſſed by the more permanent branches of the federal government for ſeducing, if they ſhould be diſpoſed to ſeduce, the houſe of repreſentatives from their duty to the people; and the means of influence over the popular branch, poſſeſſed by the other branches of the governments above cited. With leſs power therefore to abuſe, the federal repreſentatives can be leſs tempted on one ſide, and will be doubly watched on the other.

PUBLIUS.

NUMBER LIII.

The ſame Subject continued, with a View of the Term of Service of the Members.

I SHALL here perhaps be reminded of a current obſervation, "that where annual elections end, "tyranny begins." If it be true, as has often been remarked, that ſayings which become proverbial, are generally founded in reaſon, it is not leſs true that when once eſtabliſhed, they are often applied to caſes to which the reaſon of them does not extend. I need not look for a proof beyond the caſe before us. What is the reaſon on which this proverbial obſervation is founded? No man will ſubject himſelf to the ridicule of pretending that any natural connection ſubſiſts between the ſun or the ſeaſons, and the period within which human virtue can bear the temptations of power. Happily for mankind, liberty is not in this reſpect confined to any ſingle point of time; but lies within extremes, which afford ſufficient latitude for all the variations which may be required by the various

various ſituations and circumſtances of civil ſociety. The election of magiſtrates might be, if it were found expedient, as in ſome inſtances it actually has been, daily, weekly, or monthly, as well as annual; and if circumſtances may require a deviation from the rule on one ſide, why not alſo on the other ſide. Turning our attention to the periods eſtabliſhed among ourſelves, for the election of the moſt numerous branches of the ſtate legiſlatures, we find them by no means coinciding any more in this inſtance, than in the elections of other civil magiſtrates. In Connecticut and Rhode-Iſland, the periods are half-yearly. In the other ſtates, South-Carolina excepted, they are annual. In South-Carolina, they are biennial; as is propoſed in the federal government. Here is a difference, as four to one, between the longeſt and the ſhorteſt periods; and yet it would be not eaſy to ſhew that Connecticut or Rhode-Iſland is better governed, or enjoys a greater ſhare of rational liberty than South-Carolina; or that either the one or the other of theſe ſtates are diſtinguiſhed in theſe reſpects, and by theſe cauſes, from the ſtates whoſe elections are different from both.

In ſearching for the grounds of this doctrine, I can diſcover but one, and that is wholly inapplicable to our caſe. The important diſtinction ſo well underſtood in America between a conſtitution eſtabliſhed by the people, and unalterable by the government; and a law eſtabliſhed by the government, and alterable by the government, ſeems to have been little underſtood and leſs obſerved in any other country. Whe ever the ſupreme power of legiſlation has reſided, has been ſuppoſed to reſide alſo, a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been moſt diſcuſſed, and where we hear moſt of the rights of the conſtitution, it is maintained that the authority of the parliament is tranſcendent and uncontrolable, as well with regard to the conſtitution, as the ordinary objects

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of legiſlative proviſion. They have accordingly, in ſeveral inſtances, actually changed, by legiſlative acts, ſome of the moſt fundamental articles of the government. They have in particular, on ſeveral occaſions, changed the period of election; and on the laſt occaſion, not only introduced ſeptennial, in place of triennial elections; but by the ſame act continued themſelves in place four years beyond the term for which they were elected by the people. An attention to theſe dangerous practices has produced a very natural alarm in the votaries of free government, of which frequency of elections is the corner ſtone; and has led them to ſeek for ſome ſecurity to liberty againſt the danger to which it is expoſed. Where no conſtitution paramount to the government, either exiſted or could be obtained, no conſtitutional ſecurity ſimilar to that eſtabliſhed in the United States, was to be attempted. Some other ſecurity therefore was to be ſought for; and what better ſecurity would the caſe admit, than that of ſelecting and appealing to ſome ſimple and familiar portion of time, as a ſtandard for meaſuring the danger of innovations, for fixing the national ſentiment, and for uniting the patriotic exertions. The moſt ſimple and familiar portion of time, applicable to the ſubject, was that of a year; and hence the doctrine has been inculcated by a laudable zeal to erect ſome barrier againſt the gradual innovations of an unlimited government, that the advance towards tyranny was to be calculated by the diſtance of departure from the fixed point of annual elections. But what neceſſity can there be of applying this expedient to a government, limited as the federal government will be, by the authority of a paramount conſtitution? Or who will pretend that the liberties of the people of America will not be more ſecure under biennial elections, unalterably fixed by ſuch a conſtitution, than thoſe of any other nation would be, where elections were annual or even more

frequent,

frequent, but ſubject to alterations by the ordinary power of the government?

The ſecond queſtion ſtated is, whether biennial elections be neceſſary or uſeful? The propriety of anſwering this queſtion in the affirmative will appear from ſeveral very obvious conſiderations.

No man can be a competent legiſlator who does not add to an upright intention and a ſound judgment, a certain degree of knowledge of the ſubjects on which he is to legiſlate. A part of this knowledge may be acquired by means of information which lie within the compaſs of men in private as well as public ſtations. Another part can only be attained, or at leaſt thoroughly attained, by actual experience in the ſtation which requires the uſe of it. The period of ſervice ought therefore in all ſuch caſes to bear ſome proportion to the extent of practical knowledge, requiſite to the due performance of the ſervice. The period of legiſlative ſervice eſtabliſhed in moſt of the ſtates for the more numerous branch is, as we have ſeen, one year. The queſtion then may be put into this ſimple form; does the period of two years bear no greater proportion to the knowledge requiſite for federal legiſlation, than one year does to the knowledge requiſite for ſtate legiſlation? The very ſtatement of the queſtion in this form, ſuggeſts the anſwer that ought to be given to it.

In a ſingle ſtate, the requiſite knowledge relates to the exiſting laws which are uniform throughout the ſtate, and with which all the citizens are more or leſs converſant; and to the general affairs of the ſtate, which lie within a ſmall compaſs, are not very diverſified and occupy much of the attention and converſation of every claſs of people. The great theatre of the United States preſents a very different ſcene. The laws are ſo far from being uniform, that they vary in every ſtate; whilſt the public affairs of the union are ſpread throughout a very extenſive region, and are extremely diverſified by the local affairs

affairs connected with them, and can with difficulty be correctly learnt in any other place, than in the central councils, to which a knowledge of them will be brought by the representatives of every part of the empire. Yet some knowledge of the affairs, and even of the laws of all the states, ought to be possessed by the members from each of the states. How can foreign trade be properly regulated by uniform laws, without some acquaintance with the commerce; the ports, the usages, and the regulations of the different states? How can the trade between the different states be duly regulated without some knowledge of their relative situations in these and other points? How can taxes be judiciously imposed, and effectually collected, if they be not accommodated to the different laws and local circumstances relating to these objects in the different states? How can uniform regulations for the militia be duly provided without a similar knowledge of some internal circumstances by which the states are distinguished from each other? These are the principal objects of federal legislation, and suggest most forceably, the extensive information which the representatives ought to acquire. The other inferior objects will require a proportional degree of information with regard to them.

It is true that all these difficulties will by degrees be very much diminished. The most laborious task will be the proper inauguration of the government, and the primeval formation of a federal code. Improvements on the first draught will every year become both easier and fewer. Past transactions of the government will be a ready and accurate source of information to new members. The affairs of the union will become more and more objects of curiosity and conversation among the citizens at large. And the increased intercourse among those of different states will contribute not a little to diffuse a mutual knowledge of their affairs, as this again will contribute to a general assimilation of their manners and laws.

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But with all these abatements the business of federal legislation must continue so far to exceed both in novelty and difficulty the legislative business of a single state, as to justify the longer period of service assigned to those who are to transact it.

A branch of knowledge which belongs to the acquirements of a federal representative, and which has not been mentioned, is that of foreign affairs. In regulating our own commerce, he ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. He ought not be altogether ignorant of the law of nations, for that as far it is a proper object of municipal legislation is submitted to the federal government. And although the house of representatives is not immediately to participate in foreign negociations and arrangements, yet from the necessary connection between the several branches of public affairs, those particular branches will frequently deserve attention in the ordinary course of legislation, and will sometimes demand particular legislative sanction and co-operation. Some portion of this knowledge may no doubt be acquired in a man's closet; but some of it also can only be derived from the public sources of information; and all of it will be acquired to best effect by a practical attention to the subject during the period of actual service in the legislature.

There are other considerations of less importance perhaps, but which are not unworthy of notice. The distance which many of the representatives will be obliged to travel, and the arrangements rendered necessary by that circumstance, might be much more serious objections with fit men to this service if limited to a single year, than if extended to two years. No argument can be drawn on this subject from the case of the delegates to the existing congress. They are elected annually it is true; but their re-election is

considered by the legislative assemblies almost as a matter of course. The election of the representatives by the people would not be governed by the same principle.

A few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members, and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them. This remark is no less applicable to the relation which will subsist between the house of representatives and the senate.

It is an inconvenience mingled with the advantages of our frequent elections, even in single states, where they are large and hold but one legislative session in the year, that spurious elections cannot be investigated and annulled in time for the decision to have its due effect. If a return can be obtained, no matter by what unlawful means, the irregular member, who takes his seat of course, is sure of holding it a sufficient time to answer his purposes. Hence a very pernicious encouragement is given to the use of unlawful means for obtaining irregular returns. Were elections for the federal legislature to be annual, this practice might become a very serious abuse, particularly in the more distant states. Each house is, as it necessarily must be, the judge of the elections, qualifications and returns of its members, and whatever improvements may be suggested by experience for simplifying and accelerating the process in disputed cases, so great a portion of a year would unavoidably elapse, before an illegitimate member could be dispossessed of his seat, that the prospect of such an event would be little check to unfair and illicit means of obtaining a seat.

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All these considerations taken together warrant us in affirming that biennial elections will be as useful to the affairs of the public, as we have seen that they will be safe to the liberties of the people.

PUBLIUS.

NUMBER LIV.

The same Subject continued with a View to the Ratio of Representation.

THE next view which I shall take of the house of representatives, relates to the apportionment of its members to the several states, which is to be determined by the same rule with that of direct taxes.

It is not contended that the number of people in each state ought not to be the standard for regulating the proportion of those who are to represent the people of each state. The establishment of the same rule for the apportionment of taxes, will probably be as little contested; though the rule itself in this case, is by no means founded on the same principle. In the former case, the rule is understood to refer to the personal rights of the people, with which it has a natural and universal connection. In the latter, it has reference to the proportion of wealth, of which it is in no case a precise measure, and in ordinary cases, a very unfit one. But notwithstanding the imperfection of the rule as applied to the relative wealth and contributions of the states, it is evidently the least exceptionable among the practicable rules; and had too recently obtained the general sanction of America, not to have found a ready preference with the convention.

All this is admitted, it will perhaps be said: But does it follow from an admission of numbers for the measure of representation, or of slaves combined with

free citizens, as a ratio of taxation, that ſlaves ought to be included in the numerical rule of repreſentation? Slaves are conſidered as property, not as perſons. They ought therefore to be comprehended in eſtimates of taxation which are founded on property, and to be excluded from repreſentation which is regulated by a cenſus of perſons. This is the objection, as I underſtand it, ſtated in its full force. I ſhall be equally candid in ſtating the reaſoning which may be offered on the oppoſite ſide.

We ſubſcribe to the doctrine, might one of our ſouthern brethren obſerve, that repreſentation relates more immediately to perſons, and taxation more immediately to property, and we join in the application of this diſtinction to the caſe of our ſlaves. But we muſt deny the fact that ſlaves are conſidered merely as property, and in no reſpect whatever as perſons. The true ſtate of the caſe is, that they partake of both theſe qualities; being conſidered by our laws, in ſome reſpects, as perſons, and in other reſpects, as property. In being compelled to labor not for himſelf, but for a maſter; in being vendible by one maſter to another maſter; and in being ſubject at all times to be reſtrained in his liberty, and chaſtiſed in his body, by the capricious will of another, the ſlave may appear to be degraded from the human rank, and claſſed with thoſe irrational animals, which fall under the legal denomination of property. In being protected on the other hand in his life and in his limbs, againſt the violence of all others, even the maſter of his labour and his liberty; and in being puniſhable himſelf for all violence committed againſt others; the ſlave is no leſs evidently regarded by the law as a member of the ſociety; not as a part of the irrational creation; as a moral perſon, not as a mere article of property. The federal conſtitution therefore, decides with great propriety on the caſe of our ſlaves, when it views them in the mixt character of perſons and of property. This is in fact their true character. It is

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the character bestowed on them by the laws under which they live; and it will not be denied that these are the proper criterion; because it is only under the pretext that the laws have transformed the negroes into subjects of property, that a place is disputed them in the computation of numbers; and it is admitted that if the laws were to restore the rights which have been taken away, the negroes could no longer be refused an equal share of representation with the other inhabitants.

This question may be placed in another light. It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of represention. Would the Convention have been impartial or consistent, if they had rejected the slaves from the list of inhabitants when the shares of representation were to be calculated; and inserted them on the lists when the tariff of contributions was to be adjusted? Could it be reasonably expected that the southern states would concur in a system which considered their slaves in some degree as men, when burdens were to be imposed, but refused to consider them in the same light when advantages were to be conferred? Might not some surprize also be expressed that those who reproach the southern states with the barbarous policy of considering as property, a part of their human brethren, should themselves contend that the government to which all the states are to be parties, ought to consider this unfortunate race more compleatly in the unnatural light of property, than the very laws of which they complain!

It may be replied perhaps that slaves are not included in the estimate of representatives in any of the states possessing them. They neither vote themselves, nor increase the votes of their masters. Upon what principle then ought they to be taken into the federal estimate of representation? In rejecting them altogether, the constitution would in this respect,

have followed the very laws which have been appealed to, as the proper guide.

This objection is repelled by a single obſervation. It is a fundamental principle of the propoſed conſtitution, that as the aggregate number of repreſentatives allotted to the ſeveral ſtates is to be determined by a federal rule founded on the aggregate number of inhabitants, ſo the right of chooſing this allotted number in each ſtate is to be exerciſed by ſuch part of the inhabitants, as the ſtate itſelf may deſignate. The qualifications on which the right of ſuffrage depend, are not perhaps the ſame in any two ſtates. In ſome of the ſtates the difference is very material. In every ſtate a certain proportion of inhabitants are deprived of this right by the conſtitution of the ſtate, who will be included in the cenſus by which the federal conſtitution apportions the repreſentatives. In this point of view, the ſouthern ſtates might retort the complaint, by inſiſting, that the principle laid down by the convention required that no regard ſhould be had to the policy of particular ſtates towards their own inhabitants; and conſequently, that the ſlaves as inhabitants ſhould have been admitted into the cenſus according to their full number, in like manner with other inhabitants, who by the policy of other ſtates, are not admitted to all the rights of citizens. A rigorous adherence however, to this principle, is waved by thoſe who would be gainers by it. All that they aſk is, that equal moderation be ſhewn on the other ſide. Let the caſe of the ſlaves be conſidered, as it is in truth a peculiar one. Let the compromiſing expedient of the conſtitution be mutually adopted, which regards them as inhabitants, but as debaſed by ſervitude below the equal level of free inhabitants, which regards the *ſlave* as diveſted of two fifths of the *man*.

After all, may not another ground be taken on which this article of the conſtitution will admit of a ſtill more ready defence? We have hitherto proceeded

ceeded on the idea that representation related to persons only, and not at all to property. But is it a just idea? Government is instituted no less for protection of the property, than of the persons of individuals. The one as well as the other, therefore, may be considered as represented by those who are charged with the government. Upon this principle it is, that in several of the states, and particularly in the state of New-York, one branch of the government is intended more especially to be the guardian of property, and is accordingly elected by that part of the society which is most interested in this object of government. In the federal constitution this policy does not prevail. The rights of property are committed into the same hands with the personal rights. Some attention ought therefore to be paid to property in the choice of those hands.

For another reason the votes allowed in the federal legislature to the people of each state, ought to bear some proportion to the comparitive wealth of the states. States have not, like individuals, an influence over each other arising from superior advantages of fortune. If the law allows an opulent citizen but a single vote in the choice of his representative, the respect and consequence which he derives from his fortunate situation, very frequently guide the votes of others to the objects of his choice; and through this imperceptible channel the rights of property are conveyed into the public representation. A state possesses no such influence over other states. It is not probable that the richest state in the confederacy will ever influence the choice of a single representative in any other state. Nor will the representatives of the larger and richer states, possess any other advantage in the federal legislature over the representatives of other states, than what may result from their superior number alone; as far therefore as their superior wealth and weight may justly entitle them to any advantage, it ought

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to be ſecured to them by a ſuperior ſhare of repreſentation. The new conſtitution is in this reſpect materially different from the exiſting confederation, as well as from that of the United Netherlands, and other ſimilar confederacies. In each of the latter, the efficacy of the federal reſolutions depends on the ſubſequent and voluntary reſolutions of the ſtates compoſing the union. Hence the ſtates, though poſſeſſing an equal vote in the public councils, have an unequal influence, correſponding with the unequal importance of theſe ſubſequent and voluntary reſolutions. Under the propoſed conſtitution, the federal acts will take effect without the neceſſary intervention of the individual ſtates. They will depend merely on the majority of votes in the federal legiſlature, and conſequently each vote, whether proceeding from a larger or ſmaller ſtate, or a ſtate more or leſs wealthy or powerful, will have an equal weight and efficacy; in the ſame manner as the votes individually given in a ſtate legiſlature, by the repreſentatives of unequal counties or other diſtricts, have each a preciſe equality of value and effect; or if there be any difference in the caſe, it proceeds from the difference in the perſonal character of the individual repreſentative, rather than from any regard to the extent of the diſtrict from which he comes.

Such is the reaſoning which an advocate for the ſouthern intereſts might employ on this ſubject: And although it may appear to be a little ſtrained in ſome points, yet on the whole, I muſt confeſs, that it fully reconciles me to the ſcale of repreſentation, which the convention have eſtabliſhed.

In one reſpect the eſtabliſhment of a common meaſure for repreſentation and taxation will have a very ſalutary effect. As the accuracy of the cenſus to be obtained by the congreſs, will neceſſarily depend in a conſiderable degree on the diſpoſition, if not the co-operation of the ſtates, it is of great importance

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that the ſtates ſhould feel as little bias as poſſible to ſwell or to reduce the amount of their numbers. Were their ſhare of repreſentation alone to be governed by this rule, they would have an intereſt in exaggerating their inhabitants. Were the rule to decide their ſhare of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the ſtates will have oppoſite intereſts, which will control and ballance each other; and produce the requiſite impartiality.

PUBLIUS.

NUMBER LV.

The ſame Subject continued in Relation to the total Number of the Body.

THE number of which the houſe of repreſentatives is to conſiſt, forms another, and a very intereſting point of view under which this branch of the federal legiſlature may be contemplated. Scarce any article indeed in the whole conſtitution ſeems to be rendered more worthy of attention, by the weight of character and the apparent force of argument, with which it has been aſſailed. The charges exhibited againſt it are, firſt, that ſo ſmall a number of repreſentatives will be an unſafe depoſitary of the public intereſts; ſecondly, that they will not poſſeſs a proper knowledge of the local circumſtances of their numerous conſtituents; thirdly, that they will be taken from that claſs of citizens which will ſympathiſe leaſt with the feelings of the maſs of the people, and be moſt likely to aim at a permanent elevation of the few on the depreſſion of the many; fourthly, that defective as the number will be in the firſt inſtance, it will be more and more diſproportionate, by the increaſe of the people, and the

the obſtacles which will prevent a correſpondent increaſe of the repreſentatives.

In general it may be remarked on this ſubject, that no polical problem is leſs ſuſceptible of a preciſe ſolution, than that which relates to the number moſt convenient for a repreſentative legiſlature; nor is there any point on which the policy of the ſeveral ſtates is more at variance; whether we compare their legiſlative aſſemblies directly with each other, or conſider the proportions which they reſpectively bear to the number of their conſtituents. Paſſing over the difference between the ſmalleſt and largeſt ſtates, as Delaware, whoſe moſt numerous branch conſiſts of twenty-one repreſentatives, and Maſſachuſetts, where it amounts to between three and four hundred; a very conſiderable difference is obſervable among ſtates nearly equal in population. The number of repreſentatives in Pennſylvania is not more than one fifth of that in the ſtate laſt mentioned. New-York, whoſe population is to that of South-Carolina as ſix to five, has little more than one third of the number of repreſentatives. As great a diſparity prevails between the ſtates of Georgia and Delaware, or Rhode-Iſland. In Pennſylvania the repreſentatives do not bear a greater proportion to their conſtituents than of one for every four or five thouſand. In Rhode-Iſland, they bear a proportion of at leaſt one for every thouſand. And according to the conſtitution of Georgia, the proportion may be carried to one for every ten electors; and muſt unavoidably far exceed the proportion in any of the other ſtates.

Another general remark to be made is, that the ratio between the repreſentatives and the people, ought not to be the ſame where the latter are very numerous, as where they are very few. Were the repreſentatives in Virginia to be regulated by the ſtandard in Rhode-Iſland, they would at this time amount to between four and five hundred; and twenty or thirty years hence, to a thouſand. On the other hand,

hand, the ratio of Pennſylvania, if applied to the ſtate of Delaware, would reduce the repreſentative aſſembly of the latter to ſeven or eight members. Nothing can be more fallacious than to found our political calculations on arithmetical principles. Sixty or ſeventy men, may be more properly truſted with a given degree of power than ſix or ſeven. But it does not follow, that ſix or ſeven hundred would be proportionally a better depoſitary. And if we carry on the ſuppoſition to ſix or ſeven thouſand, the whole reaſoning ought to be reverſed. The truth is, that in all caſes a certain number at leaſt ſeems to be neceſſary to ſecure the benefits of free conſultation and diſcuſſion, and to guard againſt too eaſy a combination for improper purpoſes: As on the other hand, the number ought at moſt to be kept within a certain limit, in order to avoid the confuſion and intemperance of a multitude. In all very numerous aſſemblies, of whatever characters compoſed, paſſion never fails to wreſt the ſceptre from reaſon. Had every Athenian citizen been a Socrates; every Athenian aſſembly would ſtill have been a mob.

It is neceſſary alſo to recollect here the obſervations which were applied to the caſe of biennial elections. For the ſame reaſon that the limited powers of the congreſs and the control of the ſtate legiſlatures, juſtify leſs frequent elections than the public ſafety might otherwiſe require; the members of the congreſs need be leſs numerous than if they poſſeſſed the whole power of legiſlation, and were under no other than the ordinary reſtraints of other legiſlative bodies.

With theſe general ideas in our minds, let us weigh the objections which have been ſtated againſt the number of members propoſed for the houſe of repreſentatives. It is ſaid in the firſt place, that ſo ſmall a number cannot be ſafely truſted with ſo much power.

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The number of which this branch of the legiſlature is to conſiſt at the outſet of the government, will be ſixty-five. Within three years a cenſus is to be taken, when the number may be augmented to one for every thirty thouſand inhabitants; and within every ſucceſſive period of ten years, the cenſus is to be renewed, and augmentations may continue to be made under the above limitation. It will not be thought an extravagant conjecture, that the firſt cenſus will, at the rate of one for every thirty thouſand, raiſe the number of repreſentatives to at leaſt one hundred. Eſtimating the negroes in the proportion of three-fifths, it can ſcarcely be doubted that the population of the United States will by that time, if it does not already, amount to three millions. At the expiration of twenty-five years, according to the computed rate of increaſe, the number of repreſentatives will amount to two hundred; and of fifty years to four hundred. This is a number which I preſume will put an end to all fears ariſing from the ſmallneſs of the body. I take for granted here what I ſhall in anſwering the fourth objection hereafter ſhew, that the number of repreſentatives will be augmented from time to time in the manner provided by the conſtitution. On a contrary ſuppoſition, I ſhould admit the objection to have very great weight indeed.

The true queſtion to be decided then is, whether the ſmallneſs of the number as a temporary regulation, be dangerous to the public liberty: Whether ſixty-five members for a few years, and a hundred or two hundred for a few more, be a ſafe depoſitary for a limited and well guarded power of legiſlating for the United States? I muſt own that I could not give a negative anſwer to this queſtion, without firſt obliterating every impreſſion which I have received with regard to the preſent genius of the people of America, the ſpirit which actuates the ſtate legiſlatures, and the principles which are incorporated with

with the political character of every claſs of citizens. I am unable to conceive that the people of America in their preſent temper, or under any circumſtances which can ſpeedily happen, will chuſe, and every ſecond year repeat the choice of ſixty-five or an hundred men, who would be diſpoſed to form and purſue a ſcheme of tyranny or treachery. I am unable to conceive that the ſtate legiſlatures which muſt feel ſo many motives to watch, and which poſſeſs ſo many means of counteracting the federal legiſlature, would fail either to detect or to defeat a conſpiracy of the latter againſt the liberties of their common conſtituents. I am equally unable to conceive that there are at this time, or can be in any ſhort time, in the United States, any ſixty-five or an hundred men capable of recommending themſelves to the choice of the people at large, who would either deſire or dare within the ſhort ſpace of two years, to betray the ſolemn truſt committed to them. What change of circumſtances time and a fuller population of our country may produce, requires a prophetic ſpirit to declare, which makes no part of my pretenſions. But judging from the circumſtances now before us, and from the probable ſtate of them within a moderate period of time, I muſt pronounce that the liberties of America cannot be unſafe in the number of hands propoſed by the federal conſtitution.

From what quarter can the danger proceed? Are we afraid of foreign gold? If foreign gold could ſo eaſily corrupt our federal rulers, and enable them to enſnare and betray their conſtituents, how has it happened that we are at this time a free and independent nation? The congreſs which conducted us through the revolution were a leſs numerous body than their ſucceſſors will be; they were not choſen by nor reſponſible to their fellow citizens at large; though appointed from year to year, and recallable at pleaſure, they were generally continued for three

years; and prior to the ratification of the federal articles, for a ſtill longer term; they held their conſultations always under the veil of ſecreſy; they had the ſole tranſaction of our affairs with foreign nations; through the whole courſe of the war, they had the fate of their country more in their hands, than it is to be hoped will ever be the caſe with our future repreſentatives; and from the greatneſs of the prize at ſtake and the eagerneſs of the party which loſt it, it may well be ſuppoſed, that the uſe of other means than force would not have been ſcrupled: Yet we know by happy experience that the public truſt was not betrayed; nor has the purity of our public councils in this particular ever ſuffered even from the whiſpers of calumny.

Is the danger apprehended from the other branches of the federal government? But where are the means to be found by the preſident or the ſenate, or both? Their emoluments of office it is to be preſumed will not, and without a previous corruption of the houſe of repreſentatives cannot, more than ſuffice for very different purpoſes: Their private fortunes, as they muſt all be American citizens, cannot poſſibly be ſources of danger. The only means then which they can poſſeſs, will be in the diſpenſation of appointments. Is it here that ſuſpicion reſts her charge? Sometimes we are told that this fund of corruption is to be exhauſted by the preſident in ſubduing the virtue of the ſenate. Now the fidelity of the other houſe is to be the victim. The improbability of ſuch a mercenary and perfidious combination of the ſeveral members of government ſtanding on as different foundations as republican principles will well admit, and at the ſame time accountable to the ſociety over which they are placed, ought alone to quiet this apprehenſion. But fortunately the conſtitution has provided a ſtill further ſafeguard. The members of the congreſs are rendered ineligible to any civil offices that may be created or of which the emoluments may be

be increaſed, during the term of their election. No offices therefore can be dealt out to the exiſting members, but ſuch as many become vacant by ordinary caſualties; and to ſuppoſe that theſe would be ſufficient to purchaſe the guardians of the people, ſelected by the people themſelves, is to renounce every rule by which events ought to be calculated, and to ſubſtitute an indiſcriminate and unbounded jealouſy, with which all reaſoning muſt be vain. The ſincere friends of liberty who give themſelves up to the extravagancies of this paſſion are not aware of the injury they do their own cauſe. As there is a degree of depravity in mankind which requires a certain degree of circumſpection and diſtruſt: So there are other qualities in human nature, which juſtify a certain portion of eſteem and confidence. Republican government preſuppoſes the exiſtence of theſe qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealouſy of ſome among us, faithful likeneſſes of the human character, the inference would be that there is not ſufficient virtue among men for ſelf government; and that nothing leſs than the chains of deſpotiſm can reſtrain them from deſtroying and devouring one another.

PUBLIUS.

NUMBER LVI.

The ſame Subject continued in Relation to the ſame Point.

THE *ſecond* charge againſt the houſe of repreſentatives is, that it will be too ſmall to poſſeſs a due knowledge of the intereſts of its conſtituents.

As this objection evidently proceeds from a compariſon of the propoſed number of repreſentatives,

with the great extent of the United States, the number of their inhabitants, and the diverſity of their intereſts, without taking into view at the ſame time the circumſtances which will diſtinguiſh the congreſs from other legiſlative bodies, the beſt anſwer that can be given to it, will be a brief explanation of theſe peculiarities.

It is a ſound and important principle, that the repreſentative ought to be acquainted with the intereſts and circumſtances of his conſtituents. But this principle can extend no farther than to thoſe circumſtances and intereſts to which the authority and care of the repreſentative relate. An ignorance of a variety of minute and particular objects, which do not lie within the compaſs of legiſlation, is conſiſtent with every attribute neceſſary to a due performance of the legiſlative truſt. In determining the extent of information required in the exerciſe of a particular authority, recourſe then muſt be had to the objects within the purview of that authority.

What are to be the objects of federal legiſlation? Thoſe which are of moſt importance, and which ſeem moſt to require local knowledge, are commerce, taxation and the militia.

A proper regulation of commerce requires much information, as has been elſewhere remarked; but as far as this information relates to the laws and local ſituation of each individual ſtate, a very few repreſentatives would be very ſufficient vehicles of it to the federal councils.

Taxation will conſiſt in great meaſure, of duties which will be involved in the regulation of commerce. So far the preceding remark is applicable to this object. As far as it may conſiſt of internal collections, a more diffuſive knowledge of the circumſtances of the ſtate may be neceſſary. But will not this alſo be poſſeſſed in ſufficient degree by a very few intelligent men, diffuſively elected within the ſtate. Divide the largeſt ſtate into ten or twelve diſtricts,

diſtricts, and it will be found that there will be no peculiar local intereſt in either, which will not be within the knowledge of the repreſentative of the diſtrict. Beſides this ſource of information, the laws of the ſtate framed by repreſentatives from every part of it, will be almoſt of themſelves a ſufficient guide. In every ſtate there have been made, and muſt continue to be made, regulations on this ſubject, which will in many caſes leave little more to be done by the federal legiſlature, than to review the different laws, and reduce them into one general act. A ſkilful individual in his cloſet, with all the local codes before him, might compile a law on ſome ſubjects of taxation for the whole union, without any aid from oral information; and it may be expected, that whenever internal taxes may be neceſſary, and particularly in caſes requiring uniformity throughout the ſtates, the more ſimple objects will be preferred. To be fully ſenſible of the facility which will be given to this branch of federal legiſlation, by the aſſiſtance of the ſtate codes, we need only ſuppoſe for a moment, that this or any other ſtate were divided into a number of parts, each having and exerciſing within itſelf a power of local legiſlation. Is it not evident that a degree of local information and preparatory labour would be found in the ſeveral volumes of their proceedings, which would very much ſhorten the labours of the general legiſlature, and render a much ſmaller number of members ſufficient for it? The federal councils will derive great advantage from another circumſtance. The repreſentatives of each ſtate will not only bring with them a conſiderable knowledge of its laws, and a local knowlege of their reſpective diſtricts; but will probably in all caſes have been members, and may even at the very time be members of the ſtate legiſlature, where all the local information and intereſts of the ſtate are aſſembled, and from whence they may eaſily be

conveyed by a very few hands into the legiſlature of the United States.

With regard to the regulation of the militia, there are ſcarcely any circumſtances in reference to which local knowledge can be ſaid to be neceſſary. The general face of the country, whether mountainous or level, moſt fit for the operations of infantry or cavalry, is almoſt the only conſideration of this nature that can occur. The art of war teaches general principles of organization, movement and diſcipline, which apply univerſally.

The attentive reader will diſcern that the reaſoning here uſed to prove the ſufficiency of a moderate number of repreſentatives, does not in any reſpect contradict what was urged on another occaſion with regard to the extenſive information which the repreſentatives ought to poſſeſs, and the time that might be neceſſary for acquiring it. This information, ſo far as it may relate to local objects, is rendered neceſſary and difficult, not by a difference of laws and local circumſtances within a ſingle ſtate, but of thoſe among different ſtates. Taking each ſtate by itſelf, its laws are the ſame, and its intereſts but little diverſified. A few men therefore will poſſeſs all the knowledge requiſite for a proper repreſentation of them. Were the intereſts and affairs of each individual ſtate, perfectly ſimple and uniform, a knowledge of them in one part would involve a knowledge of them in every other, and the whole ſtate might be competently repreſented, by a ſingle member taken from any part of it. On a compariſon of the different ſtates together, we find a great diſſimilarity in their laws, and in many other circumſtances connected with the objects of federal legiſlation, with all of which the federal repreſentatives ought to have ſome acquaintance. Whilſt a few repreſentatives therefore from each ſtate may bring with them a due knowledge of their own ſtate, every repreſentative will have much information to acquire concerning

cerning all the other ſtates. The changes of time, as was formerly remarked, on the comparative ſituation of the different ſtates, will have an aſſimilating effect. The effect of time on the internal affairs of the ſtates taken ſingly, will be juſt the contrary. At preſent ſome of the ſtates are little more than a ſociety of huſhandmen. Few of them have made much progreſs in thoſe branches of induſtry, which give a variety and complexity to the affairs of a nation. Theſe however will in all of them be the fruits of a more advanced population; and will require on the part of each ſtate a fuller repreſentation. The foreſight of the convention has accordingly taken care that the progreſs of population may be accompanied with a proper increaſe of the repreſentative branch of the government.

The experience of Great Britain which preſents to mankind ſo many political leſſons, both of the monitory and exemplary kind, and which has been frequently conſulted in the courſe of theſe enquiries, corroborates the reſult of the reflections which we have juſt made. The number of inhabitants in the two kingdoms of England and Scotland, cannot be ſtated at leſs than eight millions. The repreſentatives of theſe eight millions in the houſe of commons, amount to five hundred fifty eight. Of this number one ninth are elected by three hundred and ſixty four perſons, and one half by five thouſand ſeven hundred and twenty three perſons*. It cannot be ſuppoſed that the half thus elected, and who do not even reſide among the people at large, can add any thing either to the ſecurity of the people againſt the government, or to the knowledge of their circumſtances and intereſts, in the legiſlative councils. On the contrary it is notorious that they are more frequently the repreſentatives and inſtruments of the executive magiſtrate, than the guardians und advocates of the popular rights. They might therefore with great propriety

* Burgh's Political Diſquiſitions.

propriety be considered as something more than a mere deduction from the real representatives of the nation. We will however consider them, in this light alone, and will not extend the deduction, to a considerable number of others, who do not reside among their constituents, are very faintly connected with them, and have very little particular knowledge of their affairs. With all these concessions two hundred and seventy nine persons only will be the depositary of the safety, interest and happiness of eight millions; that is to say; there will be one representative only to maintain the rights and explain the situation *of twenty eight thousand six hundred and seventy* constituents, in an assembly exposed to the whole force of executive influence, and extending its authority to every object of legislation within a nation whose affairs are in the highest degree diversified and complicated. Yet it is very certain not only that a valuable portion of freedom has been preserved under all these circumstances, but that the defects in the British code are chargeable in a very small proportion, on the ignorance of the legislature concerning the circumstances of the people. Allowing to this case the weight which is due to it; and comparing it with that of the house of representatives as above explained, it seems to give the fullest assurance that a representative for every *thirty thousand inhabitants* will render the latter both a safe and competent guardian of the interests which will be confided to it.

PUBLIUS.

NUMBER

NUMBER LVII.

The ſame Subject continued in Relation to the ſuppoſed tendency of the Plan of the Convention to elevate the few above the many.

THE *third* charge againſt the houſe of repreſentatives is, that it will be taken from that claſs of citizens which will have leaſt ſympathy with the maſs of the people, and be moſt likely to aim at an ambitious ſacrifice of the many to the aggrandizement of the few.

Of all the objections which have been framed againſt the federal conſtitution, this is perhaps the moſt extraordinary. Whilſt the objection itſelf is levelled againſt a pretended oligarchy, the principle of it ſtrikes at the very root of republican government.

The aim of every political conſtitution is, or ought to be, firſt, to obtain for rulers men who poſſeſs moſt wiſdom to diſcern, and moſt virtue to purſue the common good of the ſociety; and in the next place, to take the moſt effectual precautions for keeping them virtuous, whilſt they continue to hold their public truſt. The elective mode of obtaining rulers is the characteriſtic policy of republican government. The means relied on in this form of government for preventing their degeneracy, are numerous and various. The moſt effectual one is ſuch a limitation of the term of appointments, as will maintain a proper reſponſibility to the people.

Let me now aſk what circumſtance there is in the conſtitution of the houſe of repreſentatives, that violates the principles of republican government; or favors the elevation of the few on the ruins of the many? Let me aſk whether every circumſtance is not, on the contrary, ſtrictly conformable to theſe principles;

principles; and ſcrupulouſly impartial to the rights and pretenſions of every claſs and deſcription of citizens?

Who are to be the electors of the federal repreſentatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of diſtinguiſhed names, more than the humble ſons of obſcure and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the ſame who exerciſe the right in every ſtate of electing the correſpondent branch of the legiſlature of the ſtate.

Who are to be the objects of popular choice? Every citizen whoſe merit may recommend him to the eſteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profeſſion, is permitted to fetter the judgment or diſappoint the inclination of the people.

If we conſider the ſituation of the men on whom the free ſuffrages of their fellow citizens may confer the repreſentative truſt, we ſhall find it involving every ſecurity which can be deviſed or deſired for their fidelity to their conſtituents.

In the firſt place, as they will have been diſtinguiſhed by the preference of their fellow citizens, we are to preſume, that in general, they will be ſomewhat diſtinguiſhed alſo, by thoſe qualities which entitle them to it, and which promiſe a ſincere and ſcrupulous regard to the nature of their engagements.

In the ſecond place, they will enter into the public ſervice under circumſtances which cannot fail to produce a temporary affection at leaſt to their conſtituents. There is in every breaſt a ſenſibility to marks of honour, of favour, of eſteem, and of confidence, which, apart from all conſiderations of intereſts, is ſome pledge for grateful and benevolent returns. Ingratitude is a common topic of declamation againſt human nature; and it muſt be confeſſed,

ſeſſed, that inſtances of it are but too frequent and flagrant both in public and in private life. But the univerſal and extreme indignation which it inſpires, is itſelf a proof of the energy and prevalence of the contrary ſentiment.

In the third place, thoſe ties which bind the repreſentative to his conſtituents are ſtrengthened by motives of a more ſelfiſh nature. His pride and vanity attach him to a form of government which favors his pretenſions, and gives him a ſhare in its honors and diſtinctions. Whatever hopes or projects might be entertained by a few aſpiring characters, it muſt generally happen that a great proportion of the men deriving their advancement from their influence with the people, would have more to hope from a preſervation of the favor, than from innovations in the government ſubverſive of the authority of the people.

All theſe ſecurities however would be found very inſufficient without the reſtraint of frequent elections. Hence, in the fourth place, the houſe of repreſentatives is ſo conſtituted as to ſupport in the members an habitual recollection of their dependence on the people. Before the ſentiments impreſſed on their minds by the mode of their elevation, can be effaced by the exerciſe of power, they will be compelled to anticipate the moment when their power is to ceaſe, when their exerciſe of it is to be reviewed, and when they muſt deſcend to the level from which they were raiſed; there for ever to remain, unleſs a faithful diſcharge of their truſt ſhall have eſtabliſhed their title to a renewal of it.

I will add as a fifth circumſtance in the ſituation of the houſe of repreſentatives, reſtraining them from oppreſſive meaſures, that they can make no law which will not have its full operation on themſelves and their friends, as well as on the great maſs of the ſociety. This has always been deemed one of the ſtrongeſt bonds by which human policy can

connect

connect the rulers and the people together. It creates between them that communion of interest and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny. If it be asked what is to restrain the house of representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer, the genius of the whole system, the nature of just and constitutional laws, and above all the vigilant and manly spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature as well as on the people, the people will be prepared to tolerate any thing but liberty.

Such will be the relation between the house of representatives and their constituents. Duty, gratitude, interest, ambition itself, are the cords by which they will be bound to fidelity and sympathy with the great mass of the people. It is possible that these may all be insufficient to control the caprice and wickedness of men. But are they not all that government will admit, and that human prudence can devise? Are they not the genuine and the characteristic means by which republican government provides for the liberty and happiness of the people? Are they not the indentical means on which every state government in the union, relies for the attainment of these important ends? What then are we to understand by the objection which this paper has combated? What are we to say to the men who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it; who pretend to be champions for the right and the capacity of the people to chuse their own rulers, yet maintain that they will prefer those only

who

who will immediately and infallibly betray the truſt committed to them?

Were the objection to be read by one who had not ſeen the mode preſcribed by the conſtitution for the choice of repreſentatives, he could ſuppoſe nothing leſs than that ſome unreaſonable qualification of property was annexed to the right of ſuffrage; or that the right of eligibility was limited to perſons of particular families or fortunes; or at leaſt that the mode preſcribed by the ſtate conſtitutions was in ſome reſpect or other very groſsly departed from. We have ſeen how far ſuch a ſuppoſition would err as to the two firſt points. Nor would it in fact be leſs erroneous as to the laſt. The only difference diſcoverable between the two caſes is, that each repreſentative of the United States will be elected by five or ſix thouſand citizens; whilſt in the individual ſtates the election of a repreſentative is left to about as many hundred. Will it be pretended that this difference is ſufficient to juſtify an attachment to the ſtate governments and an abhorrence to the federal government? If this be the point on which the objection turns, it deſerves to be examined.

Is it ſupported by *reaſon?* This cannot be ſaid, without maintaining that five or ſix thouſand citizens are leſs capable of chuſing a fit repreſentative, or more liable to be corrupted by an unfit one, than five or ſix hundred. Reaſon, on the contrary aſſures us, that as in ſo great a number, a fit repreſentative would be moſt likely to be found, ſo the choice would be leſs likely to be diverted from him, by the intrigues of the ambitious, or the bribes of the rich.

Is the *conſequence* from this doctrine admiſſible? If we ſay that five or ſix hundred citizens are as many as can jointly exerciſe their right of ſuffrage, muſt we not deprive the people of the immediate choice of their public ſervants in every inſtance where the adminiſtration of the government does not require as many

of them as will amount to one for that number of citizens?

Is the doctrine warranted by *facts?* It was shewn in the last paper, that the real representation in the British house of commons very little exceeds the proportion of one for every thirty thousand inhabitants. Besides a variety of powerful causes, not existing here and which favor in that country, the pretensions of rank and wealth, no person is eligible as a representative of a county, unless he possess real estate of the clear value of six hundred pounds sterling per year; nor of a city or borough, unless he possess a like estate of half that annual value. To this qualification on the part of the county representatives, is added another on the part of the county electors, which restrains the right of suffrage to persons having a freehold estate of the annual value of more than twenty pounds sterling, according to the present rate of money. Notwithstanding these unfavourable circumstances, and notwithstanding some very unequal laws in the British code, it cannot be said that the representatives of the nation have elevated the few on the ruins of the many.

But we need not resort to foreign experience on this subject. Our own is explicit and decisive. The districts in New-Hampshire in which the senators are chosen immediately by the people, are nearly as large as will be necessary for her representatives in the congress. Those of Massachusetts are larger than will be necessary for that purpose. And those of New-York still more so. In the last state the members of assembly, for the cities and counties of New York and Albany, are elected by very nearly as many voters as will be entitled to a representative in the congress, calculating on the number of sixty-five representatives only. It makes no difference that in these senatorial districts and counties, a number of representatives are voted for by each elector at the same time. If the same electors, at the same time, are capable of choosing

choosing four or five representatives, they cannot be incapable of choosing one. Pennsylvania is an additional example. Some of her counties which elect her state representatives, are almost as large as her districts will be by which her federal representatives will be elected. The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of federal representatives. It forms however but one county, in which every elector votes for each of its representatives in the state legislature. And what may appear to be still more directly to our purpose, the whole city actually elects a *single member* for the executive council. This is the case in all the other counties of the state.

Are not these facts the most satisfactory proofs of the fallacy which has been employed against the branch of the federal government under consideration? Has it appeared on trial that the senators of New-Hampshire, Massachusetts and New-York; or the executive council of Pennsylvania; or the members of the assembly in the two last states, have betrayed any peculiar disposition to sacrifice the many to the few; or are in any respect less worthy of their places than the representatives and magistrates appointed in other states, by very small divisions of the people?

But there are cases of a stronger complexion than any which I have yet quoted. One branch of the legislature of Connecticut is so constituted that each member of it is elected by the whole state. So is the governor of that state, of Massachusetts, and of this state, and the president of New Hampshire. I leave every man to decide whether the result of any one of these experiments can be said to countenance a suspicion that a diffusive mode of chusing representatives of the people tends to elevate traitors, and to undermine the public liberty.

PUBLIUS.

NUMBER LVIII.

The ſame Subject continued in Relation to the future augmentation of the Members.

THE remaining charge againſt the houſe of repreſentatives which I am to examine, is grounded on a ſuppoſition that the number of members will not be augmented from time to time, as the progreſs of population may demand.

It has been admitted that this objection, if well ſupported, would have great weight. The following obſervations will ſhew that like moſt other objections againſt the conſtitution, it can only proceed from a partial view of the ſubject; or from a jealouſy which diſcolours and diſfigures every object which is beheld.

1. Thoſe who urge the objection ſeem not to have recollected that the federal conſtitution will not ſuffer by a compariſon with the ſtate conſtitutions, in the ſecurity provided for a gradual augmentation of the number of repreſentatives. The number which is to prevail in the firſt inſtance is declared to be temporary. Its duration is limited to the ſhort term of three years.

Within every ſucceſſive term of ten years, a cenſus of inhabitants is to be repeated. The unequivocal objects of theſe regulations are, firſt, to re-adjuſt from time to time the apportionment of repreſentatives to the number of inhabitants; under the ſingle exception that each ſtate ſhall have one repreſentative at leaſt: Secondly, to augment the number of repreſentatives at the ſame periods; under the ſole limitation, that the whole number ſhall not exceed one for every thirty thouſand inhabitants. If we review the conſtitutions of the ſeveral ſtates, we ſhall find that ſome of them contain no determinate regulations on this ſubject; that others correſpond pretty much on this

point

point with the federal conſtitution; and that the moſt effectual ſecurity in any of them is reſolvable into a mere directory proviſion.

2. As far as experience has taken place on this ſubject, a gradual increaſe of repreſentatives under the ſtate conſtitutions, has at leaſt kept pace with that of the conſtituents; and it appears that the former have been as ready to concur in ſuch meaſures, as the latter have been to call for them.

3. There is a peculiarity in the federal conſtitution which enſures a watchful attention in a majority both of the people and of their repreſentatives, to a conſtitutional augmentation of the latter. The peculiarity lies in this, that one branch of the legiſlature is a repreſentation of citizens; the other of the ſtates: In the former, conſequently the larger ſtates will have moſt weight; in the latter, the advantage will be in favor of the ſmaller ſtates. From this circumſtance it may with certainty be inferred, that the larger ſtates will be ſtrenuous advocates for increaſing the number and weight of that part of the legiſlature in which their influence predominates. And it ſo happens that four only of the largeſt, will have a majority of the whole votes in the houſe of repreſentatives. Should the repreſentatives or people therefore of the ſmaller ſtates oppoſe at any time a reaſonable addition of members, a coalition of a very few ſtates will be ſufficient to overrule the oppoſition; a coalition, which notwithſtanding the rivalſhip and local prejudices which might prevent it on ordinary occaſions, would not fail to take place, when not merely prompted by common intereſt but juſtified by equity and the principles of the conſtitution.

It may be alledged, perhaps, that the ſenate would be prompted by like motives to an adverſe coalition; and as their concurrence would be indiſpenſable, the juſt and conſtitutional views of the other branch might be defeated. This is the difficulty which has probably created the moſt ſerious

apprehenſions in the jealous friends of a numerous repreſentation. Fortunately it is among the difficulties which, exiſting only in appearance, vaniſh on a cloſe and accurate inſpection. The following reflections will, if I miſtake not, be admitted to be concluſive and ſatisfactory on this point.

Notwithſtanding the equal authority which will ſubſiſt between the two houſes on all legiſlative ſubjects, except the originating of money bills, it cannot be doubted that the houſe compoſed of the greater number of members, when ſupported by the more powerful ſtates, and ſpeaking the known and determined ſenſe of a majority of the people, will have no ſmall advantage in a queſtion depending on the comparative firmneſs of the two houſes.

This advantage muſt be increaſed by the conſciouſneſs felt by the ſame ſide, of being ſupported in its demands, by right, by reaſon, and by the conſtitution; and the conſciouſneſs on the oppoſite ſide, of contending againſt the force of all theſe ſolemn conſiderations.

It is farther to be conſidered that in the gradation between the ſmalleſt and largeſt ſtates, there are ſeveral which, though moſt likely in general to arrange themſelves among the former, are too little removed in extent and population from the latter, to ſecond an oppoſition to their juſt and legitimate pretenſions. Hence it is by no means certain that a majority of votes, even in the ſenate; would be unfriendly to proper augmentations in the number of repreſentatives.

It will not be looking too far to add, that the ſenators from all the new ſtates may be gained over to the juſt views of the houſe of repreſentatives, by an expedient too obvious to be overlooked. As theſe ſtates will for a great length of time advance in population with peculiar rapidity, they will be intereſted in frequent re-apportionments of the repreſentatives to the number of inhabitants. The large ſtates therefore,

therefore, who will prevail in the houſe of repreſentatives, will have nothing to do, but to make reapportionments and augmentations mutually conditions of each other; and the ſenators from all the moſt growing ſtates will be bound to contend for the latter, by the intereſt which their ſtates will feel in the former.

Theſe conſiderations ſeem to afford ample ſecurity on this ſubject; and ought alone to ſatisfy all the doubts and fears which have been indulged with regard to it. Admitting however, that they ſhould all be inſufficient to ſubdue the unjuſt policy of the ſmaller ſtates, or their predominant influence in the councils of the ſenate; a conſtitutional and infallible reſource ſtill remains with the larger ſtates, by which they will be able at all times to accompliſh their juſt purpoſes. The houſe of repreſentatives can not only refuſe, but they alone can propoſe the ſupplies requiſite for the ſupport of government. They in a word hold the purſe; that powerful inſtrument by which we behold in the hiſtory of the Britiſh conſtitution, an infant and humble repreſentation of the people, gradually enlarging the ſphere of its activity and importance, and finally reducing, as far as it ſeems to have wiſhed, all the overgrown prerogatives of the other branches of the government. This power over the purſe, may in fact be regarded as the moſt compleat and effectual weapon with which any conſtitution can arm the immediate repreſentatives of the people, for obtaining a redreſs of every grievance, and for carrying into effect every juſt and ſalutary meaſure.

But will not the houſe of repreſentatives be as much intereſted as the ſenate in maintaining the government in its proper functions, and will they not therefore be unwilling to ſtake its exiſtence for its reputation on the pliancy of the ſenate? Or if ſuch a trial of firmneſs between the two branches were hazarded, would not the one be as likely firſt

to

to yield as the other? These questions will create no difficulty with those who reflect, that in all cases the smaller the number and the more permanent and conspicuous the station of men in power, the stronger must be the interest which they will individually feel in whatever concerns the government. Those who represent the dignity of their country in the eyes of other nations, will be particularly sensible to every prospect of public danger or of a dishonorable stagnation in public affairs. To those causes we are to ascribe the continual triumph of the British house of commons over the other branches of the government, whenever the engine of a money bill has been employed. An absolute inflexibility on the side of the latter, although it could not have failed to involve every department of the state in the general confusion, has neither been apprehended nor experienced. The utmost degree of firmness that can be displayed by the federal senate or president will not be more than equal to a resistance in which they will be supported by constitutional and patriotic principles.

In this review of the constitution of the house of representatives, I have passed over the circumstance of economy, which in the present state of affairs might have had some effect in lessening the temporary number of representatives; and a disregard of which would probably have been as rich a theme of declamation against the constitution as has been furnished by the smallness of the number proposed. I omit also any remarks on the difficulty which might be found, under present circumstances, in engaging in the federal service, a large number of such characters as the people will probably elect. One observation however, I must be permitted to add on this subject, as claiming in my judgment a very serious attention. It is, that in all legislative assemblies, the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings. In the first place, the more

more numerous any aſſembly may be, of whatever characters compoſed, the greater is known to be the aſcendancy of paſſion over reaſon. In the next place, the larger the number, the greater will be the proportion of members of limited information and of weak capacities. Now it is preciſely on characters of this deſcription that the eloquence and addreſs of the few are known to act with all their force. In the antient republics, where the whole body of the people aſſembled in perſon, a ſingle orator, or an artful ſtateſman, was generally ſeen to rule with as compleat a ſway, as if a ſceptre had been placed in his ſingle hands. On the ſame principle the more multitudinous a repreſentative aſſembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning; and paſſion the ſlave of ſophiſtry and declamation. The people can never err more than in ſuppoſing that by multiplying their repreſentatives beyond a certain limit, they ſtrengthen the barrier againſt the government of a few. Experience will forever admoniſh them that on the contrary, *after ſecuring a ſufficient number for the purpoſes of ſafety, of local information, and of diffuſive ſympathy with the whole ſociety*, they will counteract their own views by every addition to their repreſentatives. The countenance of the government may become more democratic; but the ſoul that animates it will be more oligarchic. The machine will be enlarged, but the fewer, and often the more ſecret, will be the ſprings by which its motions are directed.

As connected with the objection againſt the number of repreſentatives, may properly be here noticed, that which has been ſuggeſted againſt the number made competent for legiſlative buſineſs. It has been ſaid that more than a majority ought to have been required for a quorum, and in particular caſes, if not in all, more than a majority of a quorum for a deciſion.

That

That ſome advantages might have reſulted from ſuch a precaution, cannot be denied. It might have been an additional ſhield to ſome particular intereſts, and another obſtacle generally to haſty and partial meaſures. But theſe conſiderations are outweighed by the inconveniencies in the oppoſite ſcale. In all caſes where juſtice or the general good might require new laws to be paſſed, or active meaſures to be purſued, the fundamental principle of free government would be reverſed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defenſive privilege limited to particular caſes, an intereſted minority might take advantage of it to ſkreen themſelves from equitable ſacrifices to the general weal, or in particular emergencies to extort unreaſonable indulgences. Laſtly, it would facilitate and foſter the baneful practice of ſeceſſions; a practice which has ſhewn itſelf even in ſtates where a majority only is required; a practice ſubverſive of all the principles of order and regular government; a practice which leads more directly to public convulſions, and the ruin of popular governments, than any other which has yet been diſplayed among us.

PUBLIUS.

NUMBER LIX.

Concerning the Regulation of Elections.

THE natural order of the ſubject leads us to conſider in this place, that proviſion of the conſtitution which authoriſes the national legiſlature to regulate in the laſt reſort the election of its own members. It is in theſe words—"The *times, places* "and *manner* of holding elections for ſenators and "repreſentatives, ſhall be preſcribed in each ſtate "by

"by the legiſlature thereof; but the congreſs may "at any time by law, make or alter *ſuch regulations* "except as to *places* of chooſing ſenators*." This proviſion has not only been declaimed againſt by thoſe who condemn the conſtitution in the groſs; but it has been cenſured by thoſe, who have objected with leſs latitude and greater moderation; and in one inſtance, it has been thought exceptionable by a gentleman who has declared himſelf the advocate of every other part of the ſyſtem.

I am greatly miſtaken, notwithſtanding, if there be any article in the whole plan more completely defenſible than this. Its propriety reſts upon the evidence of this plain propoſition, that *every government ought to contain in itſelf the means of its own preſervation*. Every juſt reaſoner will at firſt ſight approve an adherence to this rule in the work of the convention; and will diſapprove every deviation from it, which may not appear to have been dictated by the neceſſity of incorporating into the work ſome particular ingredient, with which a rigid conformity to the rule was incompatible. Even in this caſe, though he may acquieſce in the neceſſity, yet he will not ceaſe to regard a departure from ſo fundamental a principle, as a portion of imperfection in the ſyſtem which may prove the ſeed of future weakneſs and perhaps anarchy.

It will not be alledged than an election law could have been framed and inſerted into the conſtitution, which would have been applicable to every probable change in the ſituation of the country; and it will therefore not be denied that a diſcretionary power over elections ought to exiſt ſomewhere. It will, I preſume, be as readily conceded, that there were only three ways, in which this power could have been reaſonably modified and diſpoſed, that it muſt either have been lodged wholly in the national legiſlature, or wholly in the ſtate legiſlatures, or primarily in the

* 1ſt Clauſe, 4th Section of the 1ſt Article.

the latter, and ultimately in the former. The last mode has with reason been preferred by the convention. They have submitted the regulation of elections for the federal government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the state legislatures, would leave the existence of the union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say that a neglect or omission of this kind, would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk, is an unanswerable objection. Nor has any satisfactory reason been yet assigned for incurring that risk. The extravagant surmises of a distempered jealousy can never be dignified with that character. If we are in a humour to presume abuses of power, it is as fair to presume them on the part of the state governments, as on the part of the general government. And as it is more consonant to the rules of a just theory to intrust the union with the care of its own existence, than to transfer that care to any other hands; if abuses of power are to be hazarded on the one side or on the other, it is more rational to hazard them where the power would naturally be placed, than where it would unnaturally be placed.

Suppose an article had been introduced into the constitution, empowering the United States to regulate the elections for the particular states, would any man have hesitated to condemn it, both as an unwarrantable

warrantable transposition of power, and as a premeditated engine for the destruction of the state governments? The violation of principle in this case would have required no comment; and to an unbiassed observer, it will not be less apparent in the project of subjecting the existence of the national government, in a similar respect to the pleasure of the state governments. An impartial view of the matter cannot fail to result in a conviction, that each, as far as possible ought to depend on itself for its own preservation.

As an objection to this position, it may be remarked that the constitution of the national senate, would involve in its full extent the danger which it is suggested might flow from an exclusive power in the state legislatures to regulate the federal elections. It may be alledged, that by declining the appointment of senators, they might at any time give a fatal blow to the union; and from this it may be infered, that as its existence would be thus rendered dependent upon them in so essential a point, there can be no objection to entrusting them with it, in the particular case under consideration. The interest of each state, it may be added, to maintain its representation in the national councils, would be a complete security against an abuse of the trust.

This argument, though specious, will not upon examination be found solid. It is certainly true, that the state legislatures, by forbearing the appointment of senators, may destroy the national government. But it will not follow, that because they have the power to do this in one instance, they ought to have it in every other. There are cases in which the pernicious tendency of such a power may be far more decisive, without any motive, equally cogent with that which must have regulated the conduct of the convention, in respect to the construction of the senate, to recommend their admission into the system. So far as that construction may expose the union to the

possibility of injury from the state legislatures, it is an evil; but it is an evil, which could not have been avoided without excluding the states, in their political capacities, wholly from a place in the organization of the national government. If this had been done, it would doubtless have been interpreted into an entire dereliction of the federal principle; and would certainly have deprived the state governments of that absolute safe-guard, which they will enjoy under this provision. But however wise it may have been, to have submitted in this instance to an inconvenience, for the attainment of a necessary advantage or a greater good, no inference can be drawn from thence to favor an accumulation of the evil, where no necessity urges, nor any greater good invites.

It may easily be discerned also, that the national government would run a much greater risk from a power in the state legislatures over the elections of its house of representatives, than from their power of appointing the members of its senate. The senators are to be chosen for the period of six years; there is to be a rotation, by which the seats of a third part of them are to be vacated, and replenished every two years; and no state is to be entitled to more than two senators: A quorum of the body is to consist of sixteen members. The joint result of these circumstances would be, that a temporary combination of a few states, to intermit the appointment of senators, could neither annul the existence nor impair the activity of the body: And it is not from a general and permanent combination of the states, that we can have any thing to fear. The first might proceed from sinister designs in the leading members of a few of the state legislatures; the last would suppose a fixed and rooted disaffection in the great body of the people; which will either never exist at all, or will in all probability proceed from an experience of the inaptitude of the general government to the advance-

ment

ment of their happineſs; in which event no good citizen could deſire its continuance.

But with regard to the federal houſe of repreſentatives, there is intended to be a general election of members once in two years. If the ſtate legiſlatures were to be inveſted with an excluſive power of regulating theſe elections, every period of making them would be a delicate criſis in the national ſituation; which might iſſue in a diſſolution of the union, if the leaders of a few of the moſt important ſtates ſhould have entered into a previous conſpiracy to prevent an election.

I ſhall not deny that there is a degree of weight in the obſervation, that the intereſt of each ſtate to be repreſented in the federal councils will be a ſecurity againſt the abuſe of a power over its elections in the hands of the ſtate legiſlatures. But the ſecurity will not be conſidered as complete, by thoſe who attend to the force of an obvious diſtinction between the intereſts of the people in the public felicity, and the intereſt of their local rulers in the power and conſequence of their offices. The people of America may be warmly attached to the government of the union at times, when the particular rulers of particular ſtates, ſtimulated by the natural rivalſhip of power, and by the hopes of perſonal aggrandiſement, and ſupported by a ſtrong faction in each of thoſe ſtates, may be in a very oppoſite temper. This diverſity of ſentiment, between a majority of the people, and the individuals who have the greateſt credit, in their councils, is exemplified in ſome of the ſtates, at the preſent moment, on the preſent queſtion. The ſcheme of ſeparate confederacies, which will always multiply the chances of ambition, will be a never failing bait to all ſuch influential characters in the ſtate adminiſtrations as are capable of preferring their own emolument and advancement to the public weal. With ſo effectual a weapon in their hands as the excluſive power of regulating elections for the national

government, a combination of a few such men, in a few of the most considerable states, where the temptation will always be the strongest, might accomplish the destruction of the union; by seizing the opportunity of some casual dissatisfaction among the people, (and which perhaps they may themselves have excited) to discontinue the choice of members for the federal house of representatives. It ought never to be forgotten, that a firm union of this country, under an efficient government, will probably be an encreasing object of jealousy to more than one nation of Europe; and that enterprises to subvert it will sometimes originate in the intrigues of foreign powers, and will seldom fail to be patronised and abbetted by some of them. Its preservation therefore ought in no case, that can be avoided, to be committed to the guardianship of any but those, whose situation will uniformly beget an immediate interest in the faithful and vigilant performance of the trust.

PUBLIUS.

NUMBER LX.

The same Subject continued.

WE have seen that an incontrolable power over the elections for the federal government could not, without hazard be committed to the state legislatures. Let us now see what would be the dangers on the other side; that is, from confiding the ultimate right of regulating its own elections to the union itself. It is not pretended, that this right would ever be used for the exclusion of any state from its share in the representation. The interest of all would in this respect at least be the security of all. But it is alledged that it might be employed in such a manner as to promote the election of some favourite class of men in

exclusion

exclusion of others; by confining the places of election to particular districts, and rendering it impracticable to the citizens at large to partake in the choice. Of all chimerical suppositions, this seems to be the most chimerical. On the one hand no rational calculation of probabilities would lead us to imagine, that the disposition, which a conduct so violent and extraordinary would imply, could ever find its way into the national councils; and on the other, it may be concluded with certainty, that if so improper a spirit should ever gain admittance into them, it would display itself in a form altogether different and far more decisive.

The improbability of the attempt may be satisfactorily inferred from this single reflection, that it could never be made without causing an immediate revolt of the great body of the people, headed and directed by the state governments. It is not difficult to conceive that this characteristic right of freedom may, in certain turbulent and factious seasons, be violated in respect to a particular class of citizens by a victorious majority; but that so fundamental a privilege, in a country situated and enlightened as this is, should be invaded to the prejudice of the great mass of the people, by the deliberate policy of the government, without occasioning a popular revolution, is altogether inconceivable and incredible.

In addition to this general reflection, there are considerations of a more precise nature, which forbid all apprehension on the subject. The dissimilarity in the ingredients, which will compose the national government, and still more in the manner in which they will be brought into action in its various branches, must form a powerful obstacle to a concert of views, in any partial scheme of elections. There is sufficient diversity in the state of property, in the genius, manners, and habits of the people of the different parts of the union, to occasion a material diversity of disposition in their representatives towards the different

ranks and conditions in ſociety. And though an intimate intercourſe under the ſame government will promote a gradual aſſimilation of temper and ſentiments, yet there are cauſes as well phyſical as moral, which may in a greater or leſs degree permanently nouriſh different propenſities and inclinations in this particular. But the circumſtance which will be likely to have the greateſt influence in the matter, will be the diſſimilar modes of conſtituting the ſeveral component parts of the government. The houſe of repreſentatives being to be elected immediately by the people; the ſenate by the ſtate legiſlatures; the preſident by electors choſen for that purpoſe by the people; there would be little probability of a common intereſt to cement theſe different branches in a predilection for any particular claſs of electors.

As to the ſenate it is impoſſible that any regulation of "time and manner," which is all that is propoſed to be ſubmitted to the national government in reſpect to that body, can affect the ſpirit which will direct the choice of its members. The collective ſenſe of the ſtate legiſlatures can never be influenced by extraneous circumſtances of that ſort: A conſideration which alone ought to ſatisfy us that the diſcrimination apprehended would never be attempted. For what inducement could the ſenate have to concur in a preference in which itſelf would not be included? Or to what purpoſe would it be eſtabliſhed in reference to one branch of the legiſlature, if it could not be extended to the other? The compoſition of the one would in this caſe counteract that of the other. And we can never ſuppoſe that it would embrace the appointments to the ſenate, unleſs we can at the ſame time ſuppoſe the voluntary co-operation of the ſtate legiſlatures. If we make the latter ſuppoſition, it then becomes immaterial where the power in queſtion is placed; whether in their hands or in thoſe of the union.

But

But what is to be the object of this capricious partiality in the national councils? Is it to be exercised in a discrimination between the different departments of industry, or between the different kinds of property, or between the different degrees of property? Will it lean in favor of the landed interest, or the monied interest, or the mercantile interest, or the manufacturing interest? Or, to speak in the fashionable language of the adversaries of the constitution, will it court the elevation of the "wealthy and the "well born" to the exclusion and debasement of all the rest of the society?

If this partiality is to be exerted in favour of those who are concerned in any particular description of industry or property, I presume it will readily be admitted that the competition for it will lie between landed men and merchants. And I scruple not to affirm, that it is infinitely less likely that either of them should gain an ascendant in the national councils, than that the one or the other of them should predominate in all the local councils. The inference will be, that a conduct tending to give an undue preference to either, is much less to be dreaded from the former than from the latter.

The several states are in various degrees addicted to agriculture and commerce. In most, if not all of them, agriculture is predominant. In a few of them, however, commerce nearly divides its empire, and in most of them has a considerable share of influence. In proportion as either prevails, it will be conveyed into the national representation; and for the very reason that this will be an emanation from a greater variety of interests, and in much more various proportions, than are to be found in any single state, it will be much less apt to espouse either of them, with a decided partiality, than the representation of any single state.

In a country consisting chiefly of the cultivators of land where the rules of an equal representation obtain

obtain the landed intereſt muſt upon the whole preponderate in the government. As long as this intereſt prevails in moſt of the ſtate legiſlatures, ſo long it muſt maintain a correſpondent ſuperiority in the national ſenate, which will generally be a faithful copy of the majorities of thoſe aſſemblies. It cannot therefore be preſumed that a ſacrifice of the landed to the mercantile claſs will ever be a favorite object of this branch of the federal legiſlature. In applying thus particularly to the ſenate a general obſervation ſuggeſted by the ſituation of the country, I am governed by the conſideration, that the credulous votaries of ſtate power, cannot upon their own principles ſuſpect that the ſtate legiſlatures would be warped from their duty by any external influence. But as in reality the ſame ſituation muſt have the ſame effect in the primitive compoſition at leaſt of the federal houſe of repreſentatives; an improper byaſs towards the mercantile claſs is as little to be expected from this quarter or from the other.

In order perhaps to give countenance to the objection at any rate, it may be aſked, is there not danger of an oppoſite byaſs in the national government, which may diſpoſe it to endeavour to ſecure a monopoly of the federal adminiſtration to the landed claſs? As there is little likelihood that the ſuppoſition of ſuch a byaſs will have any terrors for thoſe who would be immediately injured by it, a laboured anſwer to this queſtion will be diſpenſed with. It will be ſufficient to remark, firſt, that for the reaſons elſewhere aſſigned, it is leſs likely that any decided partiality ſhould prevail in the councils of the union than in thoſe of any of its members. Secondly that there would be no temptation to violate the conſtitution in favor of the landed claſs, becauſe that claſs would in the natural courſe of things enjoy as great a preponderancy as itſelf could deſire. And thirdly that men accuſtomed to inveſtigate the ſources of public proſperity, upon a large ſcale, muſt be too well

convinced

convinced of the utility of commerce, to be inclined to inflict upon it so deep a wound as would be occasioned by the entire exclusion of those who would best understand its interests from a share in the management of them. The importance of commerce in the view of revenue alone must effectually guard it against the enmity of a body which would be continually importuned in its favor by the urgent calls of public necessity.

I the rather consult brevity in discussing the probability of a preference founded upon a discrimination between the different kinds of industry and property, because, as far as I understand the meaning of the objectors, they contemplate a discrimination of another kind. They appear to have in view, as the objects of the preference with which they endeavour to alarm us, those whom they designate by the description of the "wealthy and the well born." These, it seems, are to be exalted to an odious pre-eminence over the rest of their fellow citizens. At one time however their elevation is to be a necessary consequence of the smallness of the representative body; at another time it is to be effected by depriving the people at large of the opportunity of exercising their right of suffrage in the choice of that body.

But upon what principle is the discrimination of the places of election to be made in order to answer the purpose of the meditated preference? Are the wealthy and the well born, as they are called, confined to particular spots in the several states? Have they by some miraculous instinct or foresight set apart in each of them a common place of residence? Are they only to be met with in the towns and the cities? Or are they, on the contrary scattered over the face of the country as avarice or chance may have happened to cast their own lot, or that of their predecessors? If the latter is the case, (as every intelligent man knows it to be*) is it not evident that the policy

* particularly in the Southern States and in this State.

policy of confining the places of elections to particular diſtricts would be as ſubverſive of its own aim as it would be exceptionable on every other account? The truth is that there is no method of ſecuring to the rich the preference apprehended, but by preſcribing qualifications of property either for thoſe who may elect, or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expreſsly reſtricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the perſons who may chooſe or be choſen, as has been remarked upon another occaſion, are defined and fixed in the conſtitution; and are unalterable by the legiſlature.

Let it however be admitted, for argument ſake, that the expedient ſuggeſted might be ſucceſsful; and let it at the ſame time be equally taken for granted that all the ſcruples which a ſenſe of duty or an apprehenſion of the danger of the experiment might inſpire, were overcome in the breaſts of the national rulers; ſtill, I imagine, it will hardly be pretended, that they could ever hope to carry ſuch an enterpriſe into execution, without the aid of a military force ſufficient to ſubdue the reſiſtance of the great body of the people. The improbability of the exiſtence of a force equal to that object, has been diſcuſſed and demonſtrated in different parts of theſe papers; but that the futility of the objection under conſideration may appear in the ſtrongeſt light, it ſhall be conceded for a moment that ſuch a force might exiſt; and the national government ſhall be ſuppoſed to be in the actual poſſeſſion of it. What will be the concluſion? With a diſpoſition to invade the eſſential rights of the community, and with the means of gratifying that diſpoſition, is it preſumable that the perſons who were actuated by it would amuſe themſelves in the ridiculous taſk of fabricating election laws for ſecuring a preference to a favourite claſs of men? Would they

not

not be likely to prefer a conduct better adapted to their own immediate aggrandizement? Would they not rather boldly resolve to perpetuate themselves in office by one decisive act of usurpation, than to trust to precarious expedients, which in spite of all the precautions that might accompany them, might terminate in the dismission, disgrace and ruin of their authors? Would they not fear that citizens not less tenacious than conscious of their rights would flock from the remotest extremes of their respective states to the places of election, to overthrow their tyrants, and to substitute men who would be disposed to avenge the violated majesty of the people?

PUBLIUS.

NUMBER LXI.

The same Subject continued and concluded.

THE more candid opposers of the provision respecting elections contained in the plan of the convention, when pressed in argument, will sometimes concede the propriety of that provision; with this qualification however that it ought to have been accompanied with a declaration that all elections should be had in the counties where the electors resided. This say they, was a necessary precaution against an abuse of the power. A declaration of this nature, would certainly have been harmless: So far as it would have had the effect of quieting apprehensions, it might not have been undesirable. But it would in fact have afforded little or no additional security against the danger apprehended; and the want of it will never be considered by an impartial and judicious examiner as a serious, still less, as an insuperable objection to the plan. The different views taken of the subject in the two preceding

papers must be sufficient to satisfy all dispassionate and discerning men, that if the public liberty should ever be the victim of the ambition of the national rulers, the power under examination at least will be guiltless of the sacrifice.

If those who are inclined to consult their jealousy only would exercise it in a careful inspection of the several state constitutions, they would find little less room for disquietude and alarm from the latitude which most of them allow in respect to elections, than from the latitude which is proposed to be allowed to the national government in the same respect. A review of their situation, in this particular, would tend greatly to remove any ill impressions which may remain in regard to this matter. But as that review would lead into lengthy and tedious details, I shall content myself with the single example of the state in which I write. The constitution of New-York makes no other provision for *locality* of elections, than that the members of the assembly shall be elected in the *counties*, those of the senate in the great districts into which the state is or may be divided; these at present are four in number, and comprehend each from two to six counties. It may readily be perceived, that it would not be more difficult to the legislature of New-York to defeat the suffrages of the citizens of New-York, by confining elections to particular places, than to the legislature of the United States to defeat the suffrages of the citizens of the union, by the like expedient. Suppose, for instance, the city of Albany was to be appointed the sole place of election for the county and district of which it is a part, would not the inhabitants of that city speedily become the only electors of the members both of the senate and assembly, for that county and district? Can we imagine that the electors who reside in the remote subdivisions of the county of Albany, Saratoga, Cambridge, &c. or in any part of the county of Montgomery, would take the trouble to come to the city

of

of Albany to give their votes for members of the assembly or senate, sooner than they would repair to the city of New-York, to participate in the choice of the members of the federal house of representatives? The alarming indifference discoverable in the exercise of so invaluable a privilege under the existing laws, which afford every facility to it, furnishes a ready answer to this question. And, abstracted from any experience on the subject, we can be at no loss to determine that when the place of election is at an *inconvenient distance* from the elector, the effect upon his conduct will be the same whether that distance be twenty miles or twenty thousand miles. Hence it must appear that objections to the particular modification of the federal power of regulating elections will in substance apply with equal force to the modification of the like power in the constitution of this state; and for this reason it will be impossible to acquit the one and to condemn the other. A similar comparison would lead to the same conclusion in respect to the constitutions of most of the other states.

If it should be said that defects in the state constitutions furnish no apology for those which are to be found in the plan proposed; I answer, that as the former have never been thought chargeable with inattention to the security of liberty, where the imputations thrown on the latter can be shewn to be applicable to them also, the presumption is that they are rather the cavilling refinements of a predetermined opposition, than the well founded inferences of a candid research after truth. To those who are disposed to consider, as innocent omissions in the state constitutions, what they regard as unpardonable blemishes in the plan of the convention, nothing can be said; or at most they can only be asked to assign some substantial reason why the representatives of the people in a single state should be more impregnable to the lust of power or other sinister motives, than the

representatives of the people of the United States? If they cannot do this, they ought at least to prove to us, that it is easier to subvert the liberties of three millions of people, with the advantage of local governments to head their opposition, than of two hundred thousand people, who are destitute of that advantage. And in relation to the point immediately under consideration, they ought to convince us that it is less probable a predominant faction in a single state, should in order to maintain its superiority, incline to a preference of a particular class of electors, than that a similar spirit should take possession of the representatives of thirteen states spread over a vast region, and in several respects distinguishable from each other by a diversity of local circumstances, prejudices and interests.

Hitherto my observations have only aimed at a vindication of the provision in question, on the ground of theoretic propriety, on that of the danger of placing the power elsewhere, and on that of the safety of placing it in the manner proposed. But there remains to be mentioned a positive advantage which will accrue from this disposition, and which could not as well have been obtained from any other: I allude to the circumstance of uniformity in the time of elections for the federal house of representatives. It is more than possible, that this uniformity may be found by experience to be of great importance to the public welfare; both as a security against the perpetuation of the same spirit in the body, and as a cure for the diseases of faction. If each state may choose its own time of election, it is possible there may be at least as many different periods as there are months in the year. The times of election in the several states as they are now established for local purposes, vary between extremes as wide as March and November. The consequence of this diversity would be, that there could never happen a total dissolution or renovation of the body at one time. If an improper spirit of any

any kind ſhould happen to prevail in it, that ſpirit would be apt to infuſe itſelf into the new members as they came forward in ſucceſſion. The maſs would be likely to remain nearly the ſame; aſſimilating conſtantly to itſelf its gradual accretions. There is a contagion in example which few men have ſufficient force of mind to reſiſt. I am inclined to think that treble the duration in office, with the condition of a total diſſolution of the body at the ſame time, might be leſs formidable to liberty, than one third of that duration ſubject to gradual and ſucceſſive alterations.

Uniformity in the time of elections ſeems not leſs requiſite for executing the idea of a regular rotation in the ſenate; and for conveniently aſſembling the legiſlature at a ſtated period in each year.

It may be aſked, why then could not a time have been fixed in the conſtitution? As the moſt zealous adverſaries of the plan of the convention in this ſtate, are in general not leſs zealous admirers of the conſtitution of the ſtate, the queſtion may be retorted, and it may be aſked, why was not a time for the like purpoſe fixed in the conſtitution of this ſtate? No better anſwer can be given, than that it was a matter which might ſafely be entruſted to legiſlative diſcretion, and that if a time had been appointed, it might upon experiment have been found leſs convenient than ſome other time. The ſame anſwer may be given to the queſtion put on the other ſide. And it may be added, that the ſuppoſed danger of a gradual change being merely ſpeculative; it would have been hardly adviſable upon that ſpeculation to eſtabliſh, as a fundamental point, what would deprive ſeveral ſtates of the convenience of having the elections for their own governments, and for the national government, at the ſame epoch.

PUBLIUS.

NUMBER LXII.

Concerning the Conſtitution of the Senate, with regard to the Qualifications of the Members, the Manner of appointing them, the Equality of Repreſentation, the Number of the Senators and the Duration of their Appointments.

HAVING examined the conſtitution of the houſe of repreſentatives, and anſwered ſuch of the objections againſt it as ſeemed to merit notice, I enter next on the examination of the ſenate. The heads into which this member of the government may be conſidered, are—I. the qualifications of ſenators—II. the appointment of them by the ſtate legiſlatures—III. the equality of repreſentation in the ſenate—IV. the number of ſenators, and the term for which they are to be elected—V. the powers veſted in the ſenate.

I. The qualifications propoſed for ſenators, as diſtinguiſhed from thoſe of repreſentatives, conſiſt in a more advanced age, and a longer period of citizenſhip. A ſenator muſt be thirty years of age at leaſt; as a repreſentative, muſt be twenty-five. And the former muſt have been a citizen nine years; as ſeven years are required for the latter. The propriety of theſe diſtinctions is explained by the nature of the ſenatorial truſt; which requiring greater extent of information and ſtability of character, requires at the ſame time that the ſenator ſhould have reached a period of life moſt likely to ſupply theſe advantages; and which participating immediately in tranſactions with foreign nations, ought to be exerciſed by none who are not thoroughly weaned from the prepoſſeſſions and habits incident to foreign birth and education. The term of nine years appears to be a prudent mediocrity

mediocrity between a total exclusion of adopted citizens, whose merit and talents may claim a share in the public confidence; and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the national councils.

II. It is equally unnecessary to dilate on the appointment of senators by the state legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed by the convention is probably the most congenial with the public opinion. It is recommended by the double advantage of favoring a select appointment, and of giving to the state governments such an agency in the formation of the federal government, as must secure the authority of the former, and may form a convenient link between the two systems.

III. The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion. If indeed it be right that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government; and that among independent and sovereign states bound together by a simple league, the parties however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try by the standard of theory, a part of the constitution which is allowed on all hands to be the result not of theory, but "of a "spirit of amity, and that mutual deference and con-"cession which the peculiarity of our political situa-"tion rendered indispensable." A common government, with powers equal to its objects, is called for

by the voice, and ſtill more loudly by the political ſituation of America. A government founded on principles more conſonant to the wiſhes of the larger ſtates, is not likely to be obtained from the ſmaller ſtates. The only option then for the former lies between the propoſed government and a government ſtill more objectionable. Under this alternative the advice of prudence muſt be, to embrace the leſſer evil; and inſtead of indulging a fruitleſs anticipation of the poſſible miſchiefs which may enſue, to contemplate rather the advantageous conſequences which may qualify the ſacrifice.

In this ſpirit it may be remarked, that the equal vote allowed to each ſtate, is at once a conſtitutional recognition of the portion of ſovereignty remaining in the individual ſtates, and an inſtrument for preſerving that reſiduary ſovereignty. So far the equality ought to be no leſs acceptable to the large than to the ſmall ſtates; ſince they are not leſs ſolicitous to guard by every poſſible expedient againſt an improper conſolidation of the ſtates into one ſimple republic.

Another advantage accruing from this ingredient in the conſtitution of the ſenate, is the additional impediment it muſt prove againſt improper acts of legiſlation. No law or reſolution can now be paſſed without the concurrence firſt of a majority of the people, and then of a majority of the ſtates. It muſt be acknowledged that this complicated check on legiſlation may in ſome inſtances be injurious as well as beneficial; and that the peculiar defence which it involves in favor of the ſmaller ſtates would be more rational, if any intereſts common to them, and diſtinct from thoſe of the other ſtates, would otherwiſe be expoſed to peculiar danger. But as the larger ſtates will always be able by their power over the ſupplies, to defeat unreaſonable exertions of this prerogative of the leſſer ſtates; and as the facility and exceſs of law making ſeem to be the diſeaſes to which

which our governments are moſt liable, it is not impoſſible that this part of the conſtitution may be more convenient in practice than it appears to many in contemplation.

IV. The number of ſenators and the duration of their appointment come next to be conſidered. In order to form an accurate judgment on both theſe points, it will be proper to enquire into the purpoſes which are to be anſwered by a ſenate; and in order to aſcertain theſe it will be neceſſary to review the inconveniencies which a republic muſt ſuffer from the want of ſuch an inſtitution.

First. It is a misfortune incident to republican government, though in a leſs degree than to other governments, that thoſe who adminiſter it, may forget their obligations to their conſtituents, and prove unfaithful to their important truſt. In this point of view, a ſenate, as a ſecond branch of the legiſlative aſſembly, diſtinct from, and dividing the power with, a firſt, muſt be in all caſes a ſalutary check on the government. It doubles the ſecurity to the people, by requiring the concurrence of two diſtinct bodies in ſchemes of uſurpation or perfidy, where the ambition or corruption of one, would otherwiſe be ſufficient. This is a precaution founded on ſuch clear principles, and now ſo well underſtood in the United States, that it would be more than ſuperfluous to enlarge on it. I will barely remark that as the improbability of ſiniſter combinations will be in proportion to the diſſimilarity in the genius of the two bodies; it muſt be politic to diſtinguiſh them from each other by every circumſtance which will conſiſt with a due harmony in all proper meaſures, and with the genuine principles of republican government.

Second. The neceſſity of a ſenate is not leſs indicated by the propenſity of all ſingle and numerous aſſemblies, to yield to the impulſe of ſudden and violent paſſions, and to be ſeduced by factious

leaders

leaders into intemperate and pernicious resolutions. Examples on this subject might be cited without number; and from proceedings within the United States, as well as from the history of other nations. But a position that will not be contradicted need not be proved. All that need be remarked is that a body which is to correct this infirmity ought itself be free from it, and consequently ought to be less numerous. It ought moreover to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.

Third. Another defect to be supplied by a senate lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be charged on the blunders of our governments; and that these have proceeded from the heads rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient wisdom; so many impeachments exhibited by each succeeding, against each preceding session; so many admonitions to the people of the value of those aids which may be expected from a well constituted senate?

A good government implies two things; first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities:

lities. Most governments are deficient in the first. I scruple not to assert that in the American governments, too little attention has been paid to the last. The federal constitution avoids this error; and what merits particular notice, it provides for the last in a mode which increases the security for the first.

Fourth. The mutability in the public councils, arising from a rapid succession of new members, however qualified they may be, points out in the strongest manner, the necessity of some stable institution in the government. Every new election in the states, is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence, and every prospect of success. The remark is verified in private life, and becomes more just as well as more important, in national transactions.

To trace the mischievous effects of a mutable government would fill a volume. I will hint a few only, each of which will be perceived to be a source of innumerable others.

In the first place it forfeits the respect and confidence of other nations, and all the advantages connected with national character. An individual who is observed to be inconstant to his plans, or perhaps to carry on his affairs without any plan at all, is marked at once by all prudent people, as a speedy victim to his own unsteadiness and folly. His more friendly neighbours may pity him; but all will decline to connect their fortunes with his; and not a few will seize the opportunity of making their fortunes out of his. One nation is to another what one individual is to another; with this melancholy distinction perhaps, that the former, with fewer of the benevolent emotions than the latter, are under fewer restraints also from taking undue advantage of

the

the indiſcretions of each other. Every nation conſequently, whoſe affairs betray a want of wiſdom and ſtability, may calculate on every loſs which can be ſuſtained from the more ſyſtematic policy of its wiſer neighbours. But the beſt inſtruction on this ſubject is unhappily conveyed to America by the example of her own ſituation. She finds that ſhe is held in no reſpect by her friends; that ſhe is the deriſion of her enemies; and that ſhe is a prey to every nation which has an intereſt in ſpeculating on her fluctuating councils and embarraſſed affairs.

The internal effects of a mutable policy are ſtill more calamitous. It poiſons the bleſſings of liberty itſelf. It will be of little avail to the people that the laws are made by men of their own choice, if the laws be ſo voluminous that they cannot be read, or ſo incoherent that they cannot be underſtood; if they be repealed or reviſed before they are promulged, or undergo ſuch inceſſant changes that no man who knows what the law is to day can gueſs what it will be to morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known and leſs fixed?

Another effect of public inſtability is the unreaſonable advantage it gives to the ſagacious, the enterpriſing and the moneyed few, over the induſtrious and uninformed maſs of the people. Every new regulation concerning commerce or revenue; or in any manner affecting the value of the different ſpecies of property, preſents a new harveſt to thoſe who watch the change and can trace its conſequences; a harveſt reared not by themſelves but by the toils and cares of the great body of their fellow citizens. This is a ſtate of things in which it may be ſaid with ſome truth that laws are made for the *few* not for the *many*.

In another point of view great injury reſults from an unſtable government. The want of confidence in the public councils damps every uſeful undertaking; the

the ſucceſs and profit of which may depend on a continuance of exiſting arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce, when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himſelf out for the encouragement given to any particular cultivation or eſtabliſhment, when he can have no aſſurance that his preparatory labours and advances will not render him a victim to an inconſtant government? In a word, no great improvement or laudable enterpriſe can go forward, which requires the auſpices of a ſteady ſyſtem of national policy.

But the moſt deplorable effect of all is that diminution of attachment and reverence which ſteals into the hearts of the people, towards a political ſyſtem which betrays ſo many marks of infirmity, and diſappoints ſo many of their flattering hopes. No government any more than an individual will long be reſpected, without being truly reſpectable, nor be truly reſpectable without poſſeſſing a certain portion of order and ſtability.

PUBLIUS.

NUMBER LXIII.

A further View of the Conſtitution of the Senate, in regard to the Duration of the Appointment of its Members.

A FIFTH deſideratum illuſtrating the utility of a ſenate, is the want of a due ſenſe of national character. Without a ſelect and ſtable member of the government, the eſteem of foreign powers will not only by forfeited by an unenlightened and variable policy, proceeding from the cauſes already mentioned; but

but the national councils will not poſſeſs that ſenſibility to the opinion of the world, which is perhaps not leſs neceſſary in order to merit, than it is to obtain, its reſpect and confidence.

An attention to the judgment of other nations is important to every government for two reaſons: The one is, that independently of the merits of any particular plan or meaſure, it is deſirable on various accounts, that it ſhould appear to other nations as the offſpring of a wiſe and honorable policy: The ſecond is, that in doubtful caſes, particularly where the national councils may be warped by ſome ſtrong paſſion, or momentary intereſt, the preſumed or known opinion of the impartial world, may be the beſt guide that can be followed. What has not America loſt by her want of character with foreign nations? And how many errors and follies would ſhe not have avoided, if the juſtice and propriety of her meaſures had in every inſtance been previouſly tried by the light in which they would probably appear to the unbiaſſed part of mankind.

Yet however requiſite a ſenſe of national character may be, it is evident that it can never be ſufficiently poſſeſſed by a numerous and changeable body. It can only be found in a number ſo ſmall, that a ſenſible degree of the praiſe and blame of public meaſures may be the portion of each individual; or in an aſſembly ſo durably inveſted with public truſt, that the pride and conſequence of its members may be ſenſibly incorporated with the reputation and proſperity of the community. The half-yearly repreſentatives of Rhode-Iſland, would probably have been little affected in their deliberations on the iniquitous meaſures of that ſtate, by arguments drawn from the light in which ſuch meaſures would be viewed by foreign nations, or even by the ſiſter ſtates; whilſt it can ſcarcely be doubted, that if the concurrence of a ſelect and ſtable body had been neceſſary, a regard to national character alone,

would

would have prevented the calamities under which that misguided people is now labouring.

I add as a *sixth* defect, the want in some important cases of a due responsibility in the government to the people, arising from that frequency of elections, which in other cases produces this responsibility. The remark will perhaps appear not only new but paradoxical. It must nevertheless be acknowledged, when explained, to be as undeniable as it is important.

Responsibility in order to be reasonable must be limited to objects within the power of the responsible party; and in order to be effectual, most relate to operations of that power, of which a ready and proper judgement can be formed by the constituents. The objects of government may be divided into two general classes; the one depending on measures which have singly an immediate and sensible operation; the other depending on a succession of well chosen and well connected measures, which have a gradual and perhaps unobserved operation. The importance of the latter description to the collective and permanent welfare of every country needs no explanation. And yet it is evident, that an assembly elected for so short a term as to be unable to provide more than one or two links in a chain of measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements, which could not be accomplished in less than half a dozen years. Nor is it possible for the people to estimate the *share* of influence which their annual assemblies may respectively have on events resulting from the mixed transactions of several years. It is sufficiently difficult, at any rate, to preserve a personal responsibility in the members of a *numerous* body, for such acts of the body as have an immediate, detached and palpable operation on its constituents.

The proper remedy for this defect must be an additional body in the legislative department, which having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.

Thus far I have considered the circumstances which point out the necessity of a well constructed senate, only as they relate to the representatives of the people. To a people as little blinded by prejudice, or corrupted by flattery, as those whom I address, I shall not scruple to add, that such an institution may be sometimes necessary, as a defence to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought in all governments, and actually will in all free governments ultimately prevail over the views of its rulers; so there are particular moments in public affairs, when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice and truth, can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped, if their government had contained so provident a safeguard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens, the hemlock on one day, and statues on the next.

It may be suggested that a people spread over an extensive region, cannot like the crouded inhabitants of a small district, be subject to the infection of violent passions; or to the danger of combining in the pursuit

purſuit of unjuſt meaſures. I am far from denying that this is a diſtinction of peculiar importance. I have on the contrary endeavoured in a former paper to ſhew that it is one of the principle recomendations of a confederated republic. At the ſame time this advantage ought not to be conſidered as ſuperſeding the uſe of auxiliary precautions. It may even be remarked that the ſame extended ſituation which will exempt the people of America from ſome of the dangers incident to leſſer republics, will expoſe them to the inconveniency of remaining for a longer time, under the influence of those miſrepreſentations which the combined induſtry of intereſted men may ſucceed in diſtributing among them.

It adds no ſmall weight to all theſe conſiderations, to recollect, that hiſtory informs us of no long lived republic which had not a ſenate. Sparta, Rome and Carthage are in fact the only ſtates to whom that character can be applied. In each of the two firſt there was a ſenate for life. The conſtitution of the ſenate in the laſt, is leſs known. Circumſtantial evidence makes it probable that it was not different in this particular from the two others. It is at leaſt certain that it had ſome quality or other which rendered it an anchor againſt popular fluctuations; and that a ſmaller council drawn out of the ſenate was appointed not only for life, but filled up vacancies itſelf. Theſe examples, though as unfit for the imitation as they are repugnant to the genius of America, are notwithſtanding, when compared with the fugitive and turbulent exiſtence of other antient republics, very inſtructive proofs of the neceſſity of ſome inſtitution that will blend ſtability with liberty. I am not unaware of the circumſtances which diſtinguiſh the American from other popular governments, as well antient as modern; and which render extreme circumſpection neceſſary in reaſoning from the one caſe to the other. But after allowing due weight to this conſideration, it may ſtill be maintained that there are

many points of ſimilitude which render theſe examples not unworthy of our attention. Many of the defects as we have ſeen, which can only be ſupplied by a ſenatorial inſtitution, are common to a numerous aſſembly frequently elected by the people, and to the people themſelves. There are others peculiar to the former, which require the controul of ſuch an inſtitution. The people can never wilfully betray their own intereſts: but they may poſſibly be betrayed by the repreſentatives of the people; and the danger will be evidently greater where the whole legiſlative truſt is lodged in the hands of one body of men, than where the concurrence of ſeparate and diſſimilar bodies is required in every public act.

The difference moſt relied on between the American and other republics, conſiſts in the principle of repreſentation, which is the pivot on which the former move, and which is ſuppoſed to have been unknown to the latter, or at leaſt to the antient part of them. The uſe which has been made of this difference, in reaſonings contained in former papers, will have ſhewn that I am diſpoſed neither to deny its exiſtance nor to undervalue its importance. I feel the leſs reſtraint therefore in obſerving that the poſition concerning the ignorance of the antient governments on the ſubject of repreſentation is by no means preciſely true in the latitude commonly given to it. Without entering into a diſquiſition which here would be miſplaced, I will refer to a few known facts in ſupport of what I advance.

In the moſt pure democracies of Greece, many of the executive functions were performed not by the people themſelves, but by officers elected by the people, and *repreſenting* the people in their *executive* capacity.

Prior to the reform of Solon, Athens was governed by nine archons, annually *elected by the people at large*. The degree of power delegated to them ſeems to be left in great obſcurity. Subſequent to that period, we

we find an assembly first of four and afterwards of six hundred members, annually *elected by the people*; and *partially* representing them in their *legislative* capacity, since they were not only associated with the people in the function of making laws; but had the exclusive right of originating legislative propositions to the people. The senate of Carthage also, whatever might be its power or the duration of its appointment, appears to have been elective by the suffrages of the people. Similar instances might be traced in most if not all the popular governments of antiquity.

Lastly in Sparta, we meet with the ephori, and in Rome with the tribunes; two bodies, small indeed in number, but annually *elected by the whole body of the people*, and considered as the *representatives* of the people, almost in their *plenipotentiary* capacity. The cosme of Crete were also annually *elected by the people*: and have been considered by some authors as an institution analogous to those of Sparta and Rome, with this difference only, that in the election of that representative body the right of suffrage was communicated to a part only of the people.

From these facts, to which many others might be added, it is clear that the principle of representation was neither unknown to the ancients, nor wholly overlooked in their political constitutions. The true distinction between these and the American governments lies *in the total exclusion of the people in their collective capacity* from any share in the *latter*, and not in the *total exclusion of the representatives of the people* from the administration of the *former*. The distinction however thus qualified must be admitted to leave a most advantageous superiority in favour of the United States. But to ensure to this advantage its full effect, we must be careful not to separate it from the other advantage, of an extensive territory. For it cannot be believed that any form of representative government, could have succeeded within

the narrow limits occupied by the democracies of Greece.

In anſwer to all theſe arguments, ſuggeſted by reaſon, illuſtrated by examples, and enforced by our our own experience, the jealous adverſary of the conſtitution will probably content himſelf with repeating, that a ſenate appointed not immediately by the people, and for the term of ſix years, muſt gradually acquire a dangerous pre-eminence in the government, and finally transform it into a tyrannical ariſtocracy.

To this general anſwer the general reply ought to be ſufficient; that liberty may be endangered by the abuſes of liberty, as well as by the abuſes of power; that there are numerous inſtances of the former as well as of the latter; and that the former rather than the latter is apparently moſt to be apprehended by the United States. But a more particular reply may be given.

Before ſuch a revolution can be effected, the ſenate, it is to be obſerved, muſt in the firſt place corrupt itſelf; muſt next corrupt the ſtate legiſlatures, muſt then corrupt the houſe of repreſentatives, and muſt finally corrupt the people at large. It is evident that the ſenate muſt be firſt corrupted, before it can attempt an eſtabliſhment of tyranny. Without corrupting the legiſlatures, it cannot proſecute the attempt, becauſe the periodical change of members would otherwiſe regenerate the whole body. Without exerting the means of corruption with equal ſucceſs on the houſe of repreſentatives, the oppoſition of that co-equal branch of the government would inevitably defeat the attempt; and without corrupting the people themſelves, a ſucceſſion of new repreſentatives would ſpeedily reſtore all things to their priſtine order. Is there any man who can ſeriouſly perſuade himſelf that the propoſed ſenate can, by any poſſible means within the compaſs of human addreſs, arrive at the object of a lawleſs ambition, through all theſe obſtructions?

If

If reaſon condemns the ſuſpicion, the ſame ſentence is pronounced by experience. The conſtitution of Maryland furniſhes the moſt appoſite example. The ſenate of that ſtate is elected, as the federal ſenate will be, indirectly by the people; and for a term leſs by one year only, than the federal ſenate. It is diſtinguiſhed alſo by the remarkable prerogative of filling up its own vacancies within the term of its appointment; and at the ſame time, is not under the control of any ſuch rotation, as is provided for the federal ſenate. There are ſome other leſſer diſtinctions, which would expoſe the former to colorable ſubjections that do not lie againſt the latter. If the federal ſenate therefore really contained the danger which has been ſo loudly proclaimed, ſome ſymptoms at leaſt of a like danger ought by this time to have been betrayed by the ſenate of Maryland; but no ſuch ſymptoms have appeared. On the contrary the jealouſies at firſt entertained by men of the ſame deſcription with thoſe who view with terror the correſpondent part of the federal conſtitution, have been gradually extinguiſhed by the progreſs of the experiment; and the Maryland conſtitution is daily deriving from the ſalutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any ſtate in the union.

But if any thing could ſilence the jealouſies on this ſubject, it ought to be the Britiſh example. The ſenate there, inſtead of being elected for a term of ſix years, and of being unconfined to particular families or fortunes, is an hereditary aſſembly of opulent nobles. The houſe of repreſentatives, inſtead of being elected for two years, and by the whole body of the people, is elected for ſeven years; and in very great proportion, by a very ſmall proportion of the people. Here unqueſtionably ought to be ſeen in full diſplay, the ariſtocratic uſurpations and tyranny, which are at ſome future period to be exemplified in

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the United States. Unfortunately however for the antifederal argument, the British history informs us, that this hereditary assembly has not even been able to defend itself against the continual encroachments of the house of representatives; and that it no sooner lost the support of the monarch, than it was actually crushed by the weight of the popular branch.

As far as antiquity can instruct us on this subject, its examples support the reasoning which we have employed. In Sparta the ephori, the annual representatives of the people, were found an overmatch for the senate for life, continually gained on its authority, and finally drew all power into their own hands. The tribunes of Rome, who were the representatives of the people, prevailed, it is well known, in almost every contest with the senate for life, and in the end gained the most complete triumph over it. This fact is the more remarkable, as unanimity was required in every act of the tribunes, even after their number was augmented to ten. It proves the irresistable force possessed by that branch of a free government, which has the people on its side. To these examples might be added that of Carthage, whose senate, according to the testimony of Polybius, instead of drawing all power into its vortex, had at the commencement of the second punic war, lost almost the whole of its original portion.

Besides the conclusive evidence resulting from this assemblage of facts, that the federal senate will never be able to transform itself, by gradual usurpations, into an independent and aristocratic body; we are warranted in believing that if such a revolution should ever happen from causes which the foresight of man cannot guard against, the house of representatives with the people on their side will at all times be able to bring back the constitution to its primitive form and principles. Against the force of the immediate representatives of the people, nothing will be able to maintain even the constitutional authority

of

of the ſenate, but ſuch a diſplay of enlightned policy, and attachment to the public good, as will divide with that branch of the legiſlature, the affections and ſupport of the entire body of the people themſelves.

PUBLIUS.

NUMBER LXIV.

A further View of the Conſtitution of the Senate, in regard to the Power of making Treaties.

IT is a juſt and not a new obſervation, that enemies to particular perſons, and opponents to particular meaſures, ſeldom confine their cenſures to ſuch things only in either, as are worthy of blame. Unleſs on this principle, it is difficult to explain the motives of their conduct, who condemn the propoſed conſtitution in the aggregate, and treat with ſeverity ſome of the moſt unexceptionable articles in it.

The 2d. ſecton gives power to the preſident "*by* "*and with advice and conſent of the ſenate to make* "*treaties* PROVIDED TWO THIRDS OF THE SENA- "TORS PRESENT CONCUR."

The power of making treaties is an important one, eſpecially as it relates to war, peace and commerce; and it ſhould not be delegated but in ſuch a mode, and with ſuch precautions, as will afford the higheſt ſecurity, that it will be exerciſed by men the beſt qualified for the purpoſe, and in the manner moſt conducive to the public good. The convention appear to have been attentive to both theſe points—they have directed the preſident to be choſen by ſelect bodies of electors to be deputed by the people for that expreſs purpoſe; and they have committed the appointment of ſenators to the ſtate legiſlatures. This mode has in ſuch caſes, vaſtly the advantage of elections

elections by the people in their collective capacity, where the activity of party zeal taking advantage of the ſupineſs, the ignorance, and the hopes and fears of the unwary and intereſted, often places men in office by the votes of a ſmall proportion of the electors.

As the ſelect aſſemblies for chooſing the preſident, as well as the ſtate legiſlatures who appoint the ſenators will in general be compoſed of the moſt enlightned and reſpectable citizens, there is reaſon to preſume that their attention and their votes will be directed to thoſe men only who have become the moſt diſtinguiſhed by their abilities and virtue, and in whom the people perceive juſt grounds for confidence. The conſtitution manifeſts very particular attention to this object. By excluding men under thirty fire from the firſt office, and thoſe under thirty from the ſecond, it confines the elections to men of whom the people have had time to form a judgment, and with reſpect to whom they will not be liable to be deceived by thoſe brilliant appearances of genius and patriotiſm, which like tranſient meteors ſometimes miſlead as well as dazzle. If the obſervation be well founded, that wiſe kings will always be ſerved by able miniſters, it is fair to argue that as an aſſembly of ſelect electors poſſeſs in a greater degree than kings, the means of extenſive and accurate information relative to men and characters, ſo will their appointments bear at leaſt equal marks of diſcretion and diſcernment. The inference which naturally reſults from theſe conſiderations is this, that the preſident and ſenators ſo choſen will always be of the number of thoſe who beſt underſtand our national intereſts, whether conſidered in relation to the ſeveral ſtates or to foreign nations, who are beſt able to promote thoſe intereſts, and whoſe reputation for integrity inſpires and merits confidence. With ſuch men the power of making treaties may be ſafely lodged.

Although

Although the absolute necessity of system in the conduct of any business is universally known and acknowledged, yet the high importance of it in national affairs has not yet become sufficiently impressed on the public mind. They who wish to commit the power under consideration to a popular assembly, composed of members constantly coming and going in quick succession, seem not to recollect that such a body must necessarily be inadequate to the attainment of those great objects, which require to be steadily contemplated in all their relations and circumstances, and which can only be approached and atchieved by measures, which not only talents, but also exact information and often much time are necessary to concert and to execute. It was wise therefore in the convention to provide not only that the power of making treaties should be committed to able and honest men, but also that they should continue in place a sufficient time to become perfectly acquainted with our national concerns, and to form and introduce a system for the management of them. The duration prescribed is such as will give them an opportunity of greatly extending their political informations and of rendering their accumulating experience more and more beneficial to their country. Nor has the convention discovered less prudence in providing for the frequent elections of senators in such a way, as to obviate the inconvenience of periodically transferring those great affairs entirely to new men, for by leaving a considerable residue of the old ones in place, uniformity and order, as well as a constant succession of official information, will be preserved.

There are few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with, and be made to promote it. It is of much consequence that this correspondence and conformity be carefully maintained, and they who assent to the truth

truth of this position, will see and confess that it is well provided for by making the concurrence of the senate necessary both to treaties and to laws.

It seldom happens in the negotiation of treaties of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons, whether they are actuated by mercenary or friendly motives, and there doubtless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although the president must, in forming them, act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

They who have turned their attention to the affairs of men, must have perceived that there are tides in them. Tides, very irregular in their duration, strength and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs, is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay even when hours are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either, should be left in capacity to improve them. So often and so essentially have we heretofore suffered, from the want of secrecy and dispatch, that the constitution would

would have been inexcusibly defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch, are those preparatory and auxiliary measures which are no otherways important in a national view, then as they tend to facilitate the attainment of the objects of the negotiation. For these the president will find no deficulty to provide, and should any circumstance occur which requires the advice and consent of the senate, he may at any time convene them. Thus we see that the constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity and deliberate investigations on the one hand, and from secrecy and dispatch on the other.

But to this plan as to most others that have ever appeared, objections are contrived and urged.

Some are displeased with it, not on account of any errors or defects in it, but because as the treaties when made are to have the force of laws, they should be made only by men invested with legislative authority. These gentlemen seem not to consider that the judgments of our courts, and the commissions constitutionally given by our governor, are as valid and as binding on all persons whom they concern, as the laws passed by our legislature are. All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature, and therefore whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may with much propriety commit the power to a distinct body from the legislature, the executive or the judicial. It surely does not follow that because they have given the power of making laws to the legislature, that therefore they should likewise give them power to do every other act of sovereignty by which the citizens are to be bound and affected.

Others, though content that treaties ſhould be made in the mode propoſed, are averſe to their being the *ſupreme* laws of the land. They inſiſt and profeſs to believe, that treaties, like acts of aſſembly, ſhould be repealable at pleaſure. This idea ſeems to be new and peculiar to this country, but new errors as well as new truths often appear. Theſe gentlemen would do well to reflect that a treaty is only another name for a bargain; and that it would be impoſſible to find a nation who would make any bargain with us, which ſhould be binding on them *abſolutely*, but on us only ſo long and ſo far as we may think proper to be bound by it. They who make laws may without doubt amend or repeal them, and it will not be diſputed that they who make treaties may alter or cancel them; but ſtill let us not forget that treaties are made not by only one of the contracting parties but by both, and conſequently that as the conſent of both was eſſential to their formation at firſt, ſo muſt it ever afterwards be to alter or cancel them. The propoſed conſtitution therefore has not in the leaſt extended the obligation of treaties. They are juſt as binding, and juſt as far beyond the lawful reach of legiſlative acts now, as they will be at any future period, or under any form of government.

However uſeful jealouſy may be in republics, yet when, like bile in the natural, it abounds too much in the body politic; the eyes of both become very liable to be deceived by the deluſive appearances which that malady caſts on ſurrounding objects. From this cauſe probably proceed the fears and apprehenſions of ſome, that the preſident and ſenate may make treaties without an equal eye to the intereſts of all the ſtates. Others ſuſpect that the two-thirds will oppreſs the remaining third, and aſk whether thoſe gentlemen are made ſufficiently reſponſible for their conduct—whether if they act corruptly they can be puniſhed; and if they make diſadvantageous treaties, how are we to get rid of thoſe treaties?

As

As all the ſtates are equally repreſented in the ſenate, and by men the moſt able and the moſt willing to promote the intereſt of their conſtituents, they will all have an equal degree of influence in that body, eſpecially while they continue to be careful in appointing proper perſons, and to inſiſt on their punctual attendance. In proportion as the United States aſſume a national form, and a national character, ſo will the good of the whole be more and more an object of attention; and the government muſt be a weak one indeed, if it ſhould forget that the good of the whole can only be promoted by advancing the good of each of the parts or members which compoſe the whole. It will not be in the power of the preſident and ſenate to make any treaties, by which they and their families and eſtates will not be equally bound and affected with the reſt of the community; and having no private intereſt diſtinct from that of the nation, they will be under no temptations to neglect the latter.

As to corruption, the caſe is not ſuppoſeable, he muſt either have been very unfortunate in his intercourſe with the world, or poſſeſs a heart very ſuſceptible of ſuch impreſſions, who can think it probable that the preſident and two-thirds of the ſenate will ever be capable of ſuch unworthy conduct. The idea is too groſs and too invidious to be entertained. But in ſuch a caſe, if it ſhould ever happen, the treaty ſo obtained from us would, like all other fraudulent contracts, be null and void by the laws of nations.

With reſpect to their reſponſibility, it is difficult to conceive how it could be encreaſed. Every conſideration that can influence the human mind, ſuch as honour, oaths, reputation, conſcience, the love of country, and family affections and attachments, afford ſecurity for their fidelity. In ſhort, as the conſtitution has taken the utmoſt care that they ſhall be men of talents and integrity, we have reaſon to be perſuaded that the treaties they make will be

as advantageous as all circumſtances considered could be made; and ſo far as the fear of puniſhment and diſgrace can operate, that motive to good behaviour is amply afforded by the article on the ſubject of impeachments.

PUBLIUS.

NUMBER LXV.

A further View of the Conſtitution of the Senate, in Relation to its Capacity as a Court for the Trial of Impeachments.

THE remaining powers which the plan of the convention allots to the ſenate, in a diſtinct capacity, are compriſed in their participation with the executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments. As in the buſineſs of appointments the executive will be the principal agent, the proviſions relating to it will moſt properly be diſcuſſed in the examination of that department. We will therefore conclude this head with a view of the judicial character of the ſenate.

A well conſtituted court for the trial of impeachments, is an object not more to be deſired than difficult to be obtained in a government wholly elective. The ſubjects of its juriſdiction are those offences which proceed from the miſconduct of public men, or in other words from the abuſe or violation of ſome public truſt. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the ſociety itſelf. The proſecution of them, for this reaſon, will ſeldom fail to agitate the paſſions of the whole community, and to divide it into parties, more

or leſs friendly, or inimical, to the accuſed. In many caſes, it will connect itſelf with the pre-exiſting factions, and will inliſt all their animoſities, partialities, influence and intereſt on one ſide, or on the other; and in ſuch caſes there will always be the greateſt danger, that the deciſion will be regulated more by the comparative ſtrength of parties than by the real demonſtrations of innocence or guilt.

The delicacy and magnitude of a truſt, which ſo deeply concerns the political reputation and exiſtence of every man engaged in the adminiſtration of public affairs, ſpeak for themſelves. The difficulty of placing it rightly in a government reſting entirely on the baſis of periodical electons will as readily be perceived, when it is conſidered that the moſt conſpicuous characters in it will, from that circumſtance, be too often the leaders, or the tools of the moſt cunning or the moſt numerous faction; and on this account can hardly be expected to poſſeſs the requiſite neutrality towards thoſe whoſe conduct may be the ſubject of ſcrutiny.

The convention, it appears, thought the ſenate the moſt fit depoſitary of this important truſt. Thoſe who can beſt diſcern the intrinſic difficulty of the thing, will be leaſt haſty in condemning that opinion; and will be moſt inclined to allow due weight to the arguments which may be ſuppoſed to have produced it.

What it may be aſked, is the true ſpirit of the inſtitution itſelf? Is it not deſigned as a method of NATIONAL INQUEST into the conduct of public men? If this be the deſign of it, who can ſo properly be the inquiſitors for the nation as the repreſentatives of the nation themſelves? It is not diſputed that the power of originating the inquiry, or in other words, of preferring the impeachment ought to be lodged in the hands of one branch of the legiſlative body; will not the reaſons which indicate the propriety of this arrangement, ſtrongly plead for an

admiſſion of the other branch of that body to a ſhare of the inquiry? The model, from which the idea of this inſtitution has been borrowed, pointed out that courſe to the convention. In Great-Britain, it is the province of the houſe of commons to preſer the impeachment; and of the houſe of lords to decide upon it. Several of the ſtate conſtitutions have followed the example. As well the latter as the former ſeem to have regarded the practice of impeachments, as a bridle in the hands of the legiſlative body upon the executive ſervants of the government. Is not this the true light in which it ought to be regarded?

Where elſe, than in the ſenate, could have been found a tribunal ſufficiently dignified, or ſufficiently independent? What other body would be likely to feel *confidence enough in its own ſituation*, to preſerve unawed and uninfluenced the neceſſary impartiality between an *individual* accuſed, and the *repreſentatives of the people, his accuſers?*

Could the ſupreme court have been relied upon as anſwering this deſcription? It is much to be doubted whether the members of that tribunal would, at all times, be endowed, with ſo eminent a portion of fortitude, as would be called for in the execution of ſo difficult a taſk, and it is ſtill more to be doubted, whether they would poſſeſs the degree of credit and authority, which might, on certain occaſions be indiſpenſable, towards reconciling the people to a deciſion that ſhould happen to claſh with an accuſation brought by their immediate repreſentatives. A deficiency in the firſt would be fatal to the accuſed, in the laſt, dangerous to the public tranquility. The hazard in both theſe reſpects could only be avoided, if at all, by rendering that tribunal more numerous than would conſiſt with a reaſonable attention to economy. The neceſſity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by ſuch ſtrict

rules,

rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the judges as in common cases serve to limit the discretion of courts in favour of personal security. There will be no jury to stand between the judges, who are to pronounce the sentence of the law and the party who is to receive or suffer it. The awful discretion, which a court of impeachments must necessarily have, to doom to honour or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.

These considerations seem alone sufficient to authorise a conclusion that the supreme court would have been an improper substitute for the senate, as a court of impeachments. There remains a further consideration which will not a little strengthen this conclusion. It is this—The punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law. Would it be proper that the persons, who had disposed of his fame and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune? Would there not be the greatest reason to apprehend, that error in the first sentence would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights, which might be brought to vary the complexion of another decision? Those, who know any thing of human nature, will not hesitate to answer these questions in the affirmative; and will be at no loss to perceive, that by making the same persons judges in both cases, those who might happen to be the objects of prosecution

would

would in a great meaſure be deprived of the double ſecurity intended them by a double trial. The loſs of life and eſtate would often be virtually included in a ſentence, which, in its terms, imported nothing more than diſmiſſion from a preſent, and diſqualification for a future office. It may be ſaid, that the intervention of a jury, in the ſecond inſtance, would obviate the danger. But juries are frequently influenced by the opinions of judges. They are ſometimes induced to find ſpecial verdicts which refer the main queſtion to the deciſion of the court. Who would be willing to ſtake his life and his eſtate upon the verdict of a jury, acting under the auſpices of judges, who had predetermined his guilt?

Would it have been an improvement of the plan to have united the ſupreme court with the ſenate in the formation of the court of impeachments? This union would certainly have been attended with ſeveral advantages; but would they not have been overballanced by the ſignal diſadvantage, already ſtated, ariſing from the agency of the ſame judges in the double proſecution to which the offender would be liable? To a certain extent, the benefits of that union will be obtained from making the chief juſtice of the ſupreme court, the preſident of the court of impeachments, as is propoſed to be done in the plan of the convention; while the inconveniencies of an entire incorporation of the former into the latter will be ſubſtantially avoided. This was perhaps the prudent mean. I forbear to remark upon the additional pretext for clamour, againſt the judiciary, which ſo conſiderable an augmentation of its authority would have afforded.

Would it have been deſirable to have compoſed the court for the trial of impeachments of perſons wholly diſtinct from the other departments of the government? There are weighty arguments, as well againſt, as in favour of ſuch a plan. To ſome minds, it will not appear a trivial objection, that it would tend to

increaſe

increaſe the complexity of the political machine, and to add a new ſpring to the government, the utility of which would at beſt be queſtionable. But an objection which will not be thought by any unworthy of attention, is this.—A court formed upon ſuch a plan would either be attended with heavy expence, or might in practice be ſubject to a variety of caſualities and inconveniencies. It muſt either conſiſt of permanent officers ſtationary at the ſeat of government, and of courſe entitled to fixed and regular ſtipends, or of certain officers of the ſtate governments, to be called upon whenever an impeachment was actually depending. It will not be eaſy to imagine any third mode materially different, which could rationally be propoſed. As the court, for reaſons already given, ought to be numerous; the firſt ſcheme will be reprobated by every man, who can compare the extent of the public wants, with the means of ſupplying them; the ſecond will be eſpouſed with caution by thoſe, who will ſeriouſly conſider the difficulty of collecting men diſperſed over the whole union; the injury to the innocent, from the procraſtinated determination of the charges which might be brought againſt them; the advantage to the guilty, from the opportunities which delay would afford to intrigue and corruption, and in ſome caſes the detriment to the ſtate, from the prolonged inaction of men, whoſe firm and faithful execution of their duty might have expoſed them to the perſecution of an intemperate or deſigning majority in the houſe of repreſentatives. Though this latter ſuppoſition may ſeem harſh, and might not be likely often to be verified; yet it ought not to be forgotten, that the demon of faction will at certain ſeaſons extend his ſceptre over all numerous bodies of men.

But though one or the other of the ſubſtitutes which have been examined, or ſome other that might be deviſed, ſhould be thought preferable to the plan, in this reſpect, reported by the convention, it will not

follow

follow that the conſtitution ought for this reaſon to be rejected. If mankind were to reſolve to agree in no inſtitution of government, until every part of it had been adjuſted to the moſt exact ſtandard of perfection, ſociety would ſoon become a general ſcene of anarchy, and the world a deſert. Where is the ſtandard of perfection to be found? Who will undertake to unite the diſcordant opinions of a whole community, in the ſame judgement of it; and to prevail upon one conceited projector to renounce his *infallible* criterion, for the *fallible* criterion of his more *conceited neighbour?* To anſwer the purpoſe of the adverſaries of the conſtitution, they ought to prove not merely, that particular proviſions in it are not the beſt, which might have been imagined; but that the plan upon the whole is bad and pernicious.

PUBLIUS.

NUMBER LXVI.

The ſame Subject continued.

A REVIEW of the principal objections that have appeared againſt the propoſed court for the trial of impeachments, will not improbably eradicate the remains of any unfavorable impreſſions which may ſtill exiſt, in regard to this matter.

The *firſt* of theſe objections is, that the proviſion in queſtion confounds legiſlative and judiciary authorities in the ſame body, in violation of that important and well-eſtabliſhed maxim, which requires a ſeparation between the different departments of power. The true meaning of this maxim has been diſcuſſed and aſcertained in another place, and has been ſhewn to be entirely compatible with a partial intermixture of thoſe departments for ſpecial purpoſes, preſerving them in the main diſtinct and unconnected.

unconnected. This partial intermixture is even in ſome caſes not only proper, but neceſſary to the mutual defence of the ſeveral members of the government againſt each other. An abſolute or qualified negative in the executive, upon the acts of the legiſlative body, is admitted by the ableſt adepts in political ſcience, to be an indiſpenſable barrier againſt the encroachments of the latter upon the former. And it may perhaps with not leſs reaſon, be contended, that the powers relating to impeachments are, as before intimated, an eſſential check in the hands of that body upon the encroachments of the executive. The diviſion of them between the two branches of the legiſlature; aſſigning to one the right of accuſing, to the other the right of judging; avoids the inconvenience of making the ſame perſons both accuſers and judges; and guards againſt the danger of perſecution from the prevalency of a factious ſpirit in either of thoſe branches. As the concurrence of two-thirds of the ſenate will be requiſite to a condemnation, the ſecurity to innocence, from this additional circumſtance, will be as complete as itſelf can deſire.

It is curious to obſerve with what vehemence this part of the plan is aſſailed, on the principle here taken notice of, by men who profeſs to admire without exception the conſtitution of this ſtate; while that conſtitution makes the ſenate, together with the chancellor and judges of the ſupreme court, not only a court of impeachments, but the higheſt judicatory in the ſtate in all cauſes, civil and criminal. The proportion, in point of numbers, of the chancellor and judges to the ſenators, is ſo inconſiderable, that the judiciary authority of New-York in the laſt reſort may, with truth, be ſaid to reſide in its ſenate. If the plan of the convention be in this reſpect chargeable with a departure from the celebrated maxim which has been ſo often mentioned, and ſeems to be ſo little

underſtood, how much more culpable muſt be the conſtitution of New-York* ?

A *ſecond* objection to the ſenate, as a court of impeachments, is, that it contributes to an undue accumulation of power in that body, tending to give to the government a countenance too ariſtocratic. The ſenate it is obſerved, is to have concurrent authority with the executive in the formation of treaties, and in the appointment to offices: If, ſay the objectors, to theſe prerogatives is added that of determining in all caſes of impeachment, it will give a decided predominancy to ſenatorial influence. To an objection ſo little preciſe in itſelf, it is not eaſy to find a very preciſe anſwer. Where is the meaſure or criterion to which we can appeal, for eſtimating what will give the ſenate too much, too little, or barely the proper degree of influence? Will it not be more ſafe, as well as more ſimple, to diſmiſs ſuch vague and uncertain calculations, to examine each power by itſelf, and to decide on general principles where it may be depoſited with moſt advantage and leaſt inconvenience?

If we take this courſe it will lead to a more intelligible, if not to a more certain reſult. The diſpoſition of the power of making treaties, which has obtained in the plan of the convention, will then, if I miſtake not, appear to be fully juſtified by the conſiderations ſtated in a former number, and by others which will occur under the next head of our enquiries. The expediency of the junction of the ſenate with the executive in the power of appointing to offices will, I truſt, be placed in a light not leſs ſatisfactory, in the diſquiſitions under the ſame head. And I flatter myſelf the obſervations in my laſt paper muſt have gone no inconſiderable way towards proving that it was not eaſy, if practicable, to find a more fit receptacle for the power of determining impeach-

ments

* In that of New-Jerſey alſo the final judiciary authority is in a branch of the legiſlature. In New-Hampſhire, Maſſachuſetts, Pennſylvania and South-Carolina, one branch of the legiſlative is the court for the trial of impeachments.

ments, than that which has been chosen. If this be truly the case, the hypothetical danger of the too great weight of the senate ought to be discarded from our reasonings.

But this hypothesis, such as it is, has already been refuted in the remarks applied to the duration in office prescribed for the senators. It was by them shewn, as well on the credit of historical examples, as from the reason of the thing, that the most *popular* branch of every government, partaking of the republican genius, by being generally the favourite of the people, will be as generally a full match, if not an overmatch, for every other member of the government.

But independent of this most active and operative principle; to secure the equilibrium of the national house of representatives, the plan of the convention has provided in its favour, several important counterpoises to the additional authorities, to be conferred upon the senate. The exclusive privilege of originating money bills will belong to the house of representatives. The same house will possess the sole right of instituting impeachments: Is not this a complete counterballance to that of determining them?—The same house will be the umpire in all elections of the president, which do not unite the suffrages of a majority of the whole number of electors; a case which it cannot be doubted will sometimes, if not frequently happen. The constant possibility of the thing must be a fruitful source of influence to that body. The more it is contemplated, the more important will appear this ultimate, though contingent power of deciding the competitions of the most illustrious citizens of the union, for the first office in it. It would not perhaps be rash to predict, that as a mean of influence it will be found to outweigh all the peculiar attributes of the senate.

A third objection to the senate as a court of impeachments is drawn from the agency they are to have in the appointments to office. It is imagined

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that they would be too indulgent judges of the conduct of men, in whose official creation they had participated. The principle of this objection would condemn a practice, which is to be seen in all the state governments, if not in all the governments, with which we are acquainted: I mean that of rendering those, who hold offices during pleasure, dependent on the pleasure of those, who appoint them. With equal plausibility might it be alledged in this case that the favouritism of the latter would always be an asylum for the misbehaviour of the former. But that practice, in contradiction to this principle, proceeds upon the presumption, that the responsibility of those who appoint, for the fitness and competency of the persons, on whom they bestow their choice, and the interest they have in the respectable and prosperous administration of affairs, will inspire a sufficient disposition, to dismiss from a share in it, all such who, by their conduct, may have proved themselves unworthy of the confidence reposed in them. Though facts may not always correspond with this presumption yet if it be in the main just, it must destroy the supposition, that the senate, who will merely sanction the choice of the executive, should feel a byass towards the objects of that choice, strong enough to blind them to the evidences of guilt so extroardinary as to have induced the representatives of the nation to become its accusers.

If any further argument were necessary to evince the improbability of such a byass, it might be found in the nature of the agency of the senate, in the business of appointments. It will be the office of the president to *nominate*, and with the advice and consent of the senate to *appoint*. There will of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, he may have made. They might even entertain a preference

ference to ſome other perſon, at the very moment they were aſſenting to the one propoſed; becauſe there might be no poſitive ground of oppoſition to him; and they could not be ſure, if they withheld their aſſent, that the ſubſequent nomination would fall upon their own favourite, or upon any other perſon in their eſtimation more meritorious than the one rejected. Thus it could hardly happen that the majority of the ſenate would feel any other complacency towards the object of an appointment, than ſuch, as the appearances of merit, might inſpire, and the proofs of the want of it, deſtroy.

A fourth objection to the ſenate, in the capacity of a court of impeachments, is derived from their union with the executive in the power of making treaties. This, it has been ſaid, would conſtitute the ſenators their own jndges, in every caſe of a corrupt or perfidious execution of that truſt. After having combined with the executive in betraying the intereſts of the nation in a ruinous treaty, what proſpect, it is aſked, would there be of their being made to ſuffer the puniſhment, they would deſerve, when they were themſelves to decide upon the accuſation brought againſt them for the treachery of which they had been guilty?

This objection has been circulated with more earneſtneſs and with greater ſhew of reaſon, than any other which has appeared againſt this part of the plan; and yet I am deceived if it does not reſt upon an erroneous foundation.

The ſecurity eſſentially intended by the conſtitution againſt corruption and treachery in the formation of treaties, is to be ſought for in the numbers and characters of thoſe who are to make them. The JOINT AGENCY of the chief magiſtrate of the union, and of two thirds of the members of a body ſelected by the collective wiſdom of the legiſlatures of the ſeveral ſtates, is deſigned to be the pledge for the fidelity of the national councils in this particular.

The convention might with propriety have meditated the punishment of the executive, for a deviation from the instructions of the senate, or a want of integrity in the conduct of the negotiations committed to him: They might also have had in view the punishment of a few leading individuals in the senate, who should have prostituted their influence in that body, as the mercenary instruments of foreign corruption: But they could not with more or with equal propriety have contemplated the impeachment and punishment of two thirds of the senate, consenting to an improper treaty, than of a majority of that or of the other branch of the national legislature, consenting to a pernicious or unconstitutional law: a principle which I believe has never been admitted into any government. How in fact could a majority of the house of representatives, impeach themselves? Not better, it is evident, than two thirds of the senate might try themselves. And yet what reason is there, that a majority of the house of representatives, sacrificing the interests of the society, by an unjust and tyrannical act of legislation, should escape with impunity more than two-thirds of the senate, sacrificing the same interests in an injurious treaty with a foreign power? The truth is, that in all such cases it is essential to the freedom and to the necessary independence of the deliberations of the body, that the members of it should be exempt from punishment for acts done in a collective capacity; and the security to the the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good.

So far as might concern the misbehaviour of the executive in perverting the instructions, or contravening the views of the senate, we need not be apprehensive of the want of a disposition in that body to punish the abuse of their confidence, or to vindicate

cate their own authority. We may thus far count upon their pride, if not upon their virtue. And so far even as might concern the corruption of leading members, by whose arts and influence the majority may have been inveigled into measures odious to the community; if the proofs of that corruption should be satisfactory, the usual propensity of human nature will warrant us in concluding, that there would be commonly no defect of inclination in the body, to divert the public resentment from themselves, by a ready sacrifice of the authors of their mismanagement and disgrace.

PUBLIUS.

NUMBER LXVII.

Concerning the Constitution of the President: A gross Attempt to misrepresent this Part of the Plan detected.

THE constitution of the executive department of the proposed government claims next our attention.

There is hardly any part of the system, which could have been attended with greater difficulty in the arrangement of it than this; and there is perhaps none, which has been inveighed against with less candor, or criticised with less judgement.

Here the writers against the constitution seem to have taken pains to signalize their talent of misrepresentation. Calculating upon the aversion of the people to monarchy, they have endeavoured to inlist all their jealousies and apprehensions in opposition to the intended president of the United States; not merely as the embryo but as the full grown progeny of that detested parent. To establish the pretended

affinity they have not ſcrupled to draw reſources even from the regions of fiction. The authorities of a magiſtrate, in few inſtances greater, and in ſome inſtances leſs than thoſe of a governor of New-York, have been magnified into more than royal prerogatives. He has been decorated with attributes ſuperior in dignity and ſplendor to thoſe of a king of Great-Britain. He has been ſhewn to us with the diadem ſparkling on his brow, and the imperial purple flowing in his train. He has been ſeated on a throne ſurrounded with minions and miſtreſſes; giving audience to the envoys of foreign potentates, in all the ſupercilious pomp of majeſty. The images of Aſiatic deſpotiſm and voluptuouſneſs have ſcarcely been wanting to crown the exaggerated ſcene. We have been almoſt taught to tremble at the terrific viſages of murdering janiſſaries; and to bluſh at the unveiled myſteries of a future ſeraglio.

Attempts ſo extravagant as theſe to diſfigure, or it might rather be ſaid, to metamorphoſe the object, render it neceſſary to take an accurate view of its real nature and form; in order as well to aſcertain its true aſpect and genuine appearance, as to unmaſk the diſingenuity and expoſe the fallacy of the counterfeit reſemblances which have been ſo inſidiouſly as well as induſtriouſly propagated.

In the execution of this taſk there is no man, who would not find it an arduous effort, either to behold with moderation or to treat with ſerioufneſs the devices not leſs weak than wicked, which have been contrived to pervert the public opinion in relation to the ſubject. They ſo far exceed the uſual, though unjuſtifiable, licenſes of party-artifice, that even in a diſpoſition the moſt candid and tolerant they muſt force the ſentiments which favor an indulgent conſtruction of the conduct of political adverſaries to give place to a voluntary and unreſerved indignation. It is impoſſible not to beſtow the imputation of deliberate impoſture and deception upon the groſs pre-

tence

tence of a ſimilitude between a king of Great-Britain and a magiſtrate of the character marked out for that of the preſident of the United States. It is ſtill more impoſſible to withold that imputation from the raſh and bareſaced expedients which have been employed to give ſucceſs to the attempted impoſition.

In one inſtance, which I cite as a ſample of the general ſpirit, the temerity has proceeded ſo far as to aſcribe to the preſident of the United States a power, which by the inſtrument reported is *expreſsly* allotted to the executives of the individual ſtates.—I mean the power of filling caſual vacancies in the ſenate.

This bold experiment upon the diſcernment of his countrymen, has been hazarded by a writer who (whatever may be his real merit) has had no inconſiderable ſhare in the applauſes of his party* ;—and who upon his falſe and unfounded ſuggeſtion, has built a ſeries of obſervations equally falſe and unfounded. Let him now be confronted with the evidence of the fact; and let him, if he be able, juſtify or extenuate the ſhameful outrage he has offered to the dictates of truth and to the rules of fair dealing.

The ſecond clauſe of the ſecond ſection of the ſecond article empowers the preſident of the United States "to nominate, and by and with the adviſe and con-"ſent of the ſenate to appoint ambaſſadors, other "public miniſters and conſuls, judges of the ſupreme "court, and all other *officers* of the United States, "whoſe appointments are *not* in the conſtitution *other-"wiſe provided for*, and *which ſhall be eſtabliſhed by "law*." Immediately after this clauſe follows another in theſe words—"The preſident ſhall have power to "fill up all *vacancies* that may happen *during the "receſs of the ſenate*, by granting commiſſions which "ſhall *expire at the end of their next ſeſſion*." It is from this laſt proviſion that the pretended power of the

*See Cato, No. 5.

the president to fill vacancies in the senate has been deduced. A slight attention to the connection of the clauses and to the obvious meaning of the terms will satisfy us that the deduction is not even colourable.

The first of these two clauses it is clear only provides a mode for appointing such officers, "whose "appointments are *not otherwise provided for* in the "constitution, and which *shall be established by law*;" of course it cannot extend to the appointment of senators; whose appointments are *otherwise provided for* in the constitution*, and who are *established by the constitution*, and will not require a future establishment by law. This position will hardly be contested.

The last of these two clauses, it is equally clear, cannot be understood to comprehend the power of filling vacancies in the senate, for the following reasons:—*First*. The relation in which that clause stands to the other, which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other; for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate. The ordinary power of appointment is confided to the president and senate *jointly*, and can therefore only be exercised during the session of the senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers; and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay; the succeeding clause is evidently intended to authorise the president, *singly*, to make temporary appointments "during the recess of the senate, by granting commissions which should expire at the end of their "next session." *Second*. If this clause is to be considered as supplementary to the one which precedes, the *vacancies* of which it speaks must be construed to relate to the "officers" described in the preceding

* Article 1. § 3. Clause 1.

preceding one; and this we have ſeen excludes from its deſcription the members of the ſenate.—*Third.* The time within which the power is to operate, "during the receſs of the ſenate," and the duration of the appointments, "to the end of the next ſeſſion" of that body, conſpire to elucidate the ſenſe of the proviſion which if it had been intended to comprehend ſenators, would naturally have refered the temporary power of filling vacancies to the receſs of the ſtate legiſlatures, who are to make the permanent appointments, and not to the receſs of the national ſenate, who are to have no concern in thoſe appointments; and would have extended the duration in office of the temporary ſenators to the next ſeſſion of the legiſlature of the ſtate, in whoſe repreſentation the vacancies had happened, inſtead of making it to expire at the end of the enſuing ſeſſion of the national ſenate. The circumſtances of the body authoriſed to make the permanent appointments, would of courſe have governed the modification of a power which related to the temporary appointments; and as the national ſenate is the body whoſe ſituation is alone contemplated in the clauſe upon which the ſuggeſtion under examination has been founded, the vacancies to which it alludes can only be deemed to reſpect thoſe officers, in whoſe appointment that body has a concurrent agency with the preſident. But, *laſtly*, the firſt and ſecond clauſes of the third ſection of the firſt article, not only obviate the poſſibility of doubt, but deſtroy the pretext of miſconception. The former provides that "the "ſenate of the United States ſhall be compoſed of "two ſenators from each ſtate, choſen *by the legiſla-* "*ture thereof* for ſix years;" and the latter directs, that "if vacancies in that body ſhould happen by "reſignation or otherwiſe, *during the receſs of the* "*legiſlature of* ANY STATE, the executive THEREOF "may make temporary appointments until the *next* "*meeting of the legiſlature*, which ſhall then fill ſuch "vacancies." Here is an expreſs power given, in

clear

clear and unambiguous terms, to the ſtate executives, to fill the caſual vacancies in the ſenate, by temporary appointments; which not only invalidates the ſuppoſition that the clauſe before conſidered could have been intended to confer that power upon the preſident of the United States, but proves that this ſuppoſition, deſtitute as it is even of the merit of plauſibility, muſt have originated in an intention to deceive the people, too palpable to be obſcured by ſophiſtry, and too atrocious to be palliated by hypocriſy.

I have taken the pains to ſelect this inſtance of miſrepreſentation, and to place it in a clear and ſtrong light, as an unequivocal proof of the unwarrantable arts which are practiſed to prevent a fair and impartial judgment of the real merits of the conſtitution ſubmitted to the conſideration of the people. Nor have I ſcrupled in ſo flagrant a caſe to allow myſelf in a ſeverity of animadverſion little congenial with the general ſpirit of theſe papers. I heſitate not to ſubmit it to the deciſion of any candid and honeſt adverſary of the propoſed government whether language can furniſh epithets of too much aſperity for ſo ſhameleſs and ſo proſtitute an attempt to impoſe on the citizens of America.

PUBLIUS.

NUMBER LXVIII.

The View of the Conſtitution of the Preſident continued, in Relation to the Mode of Appointment.

THE mode of appointment of the chief magiſtrate of the United States is almoſt the only part of the ſyſtem, of any conſequence, which has eſcaped without ſevere cenſure, or which has received the ſlighteſt mark of approbation from its oppo-

nents.

ments. The most plausible of these, who has appeared in the print, has even deigned to admit, that the election of the president is pretty well guarded*. I venture somewhat further, and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent. It unites in an eminent degree all the advantages, the union of which was to be desired.

It was desireable, that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men, chosen by the people for the special purpose, and at the particular conjuncture.

It was equally desireable, that the immediate election should be made by men most capable of analizing the qualities adapted to the station, and acting under circumstances favourable to deliberation and to a judicious combination of all the reasons and inducements that were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.

It was also peculiarly desireable, to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate, who was to have so important an agency in the administration of the government, as the president of the United States. But the precautions which have been so happily concerted in the system under consideration, promise an effectual security against this mischief. The choice of *several* to form an intermediate body of electors, will be much less apt to convulse the community, with any extraordinary or violent movements, than the choice of *one* who was himself to be the final object of the public wishes. And as the electors, chosen in each state, are to assemble

* Vide Federal Farmer,

aſſemble and vote in the ſtate, in which they are choſen, this detached and divided ſituation will expoſe them much leſs to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.

Nothing was more to be deſired, than that every practicable obſtacle ſhould be oppoſed to cabal, intrigue and corruption. Theſe moſt deadly adverſaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the deſire in foreign powers to gain an improper aſcendant in our councils. How could they better gratify this, than by raiſing a creature of their own to the chief magiſtracy of the union? But the convention have guarded againſt all danger of this ſort with the moſt provident and judicious attention. They have not made the appointment of the preſident to depend on any pre-exiſting bodies of men who might be tampered with beforehand to proſtitute their votes; but they have referred it in the firſt inſtance to an immediate act of the people of America, to be exerted in the choice of perſons for the temporary and ſole purpoſe of making the appointment. And they have excluded from elegibility to this truſt, all thoſe who from ſituation might be ſuſpected of too great devotion to the preſident in office. No ſenator, repreſentative, or other perſon holding a place of truſt or profit under the United States, can be of the number of the electors. Thus, without corrupting the body of the people, the immediate agents in the election will at leaſt enter upon the taſk, free from any ſiniſter byaſs. Their tranſient exiſtence, and their detached ſituation, already taken notice of, afforded a ſatisfactory proſpect of their continuing ſo, to the concluſion of it. The buſineſs of corruption, when it is to embrace ſo conſiderable a number of men, requires time, as well as means. Nor would it be found eaſy ſuddenly to

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embark them, dispersed, as they wou'd be over thirteen states, in any combinations founded upon motives, which though they could not properly be denominated corrupt, might yet be of a nature to mislead them from their duty.

Another and no less important desideratum was, that the executive should be independent for his continuance in office on all, but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence. This advantage will also be secured, by making his re-election to depend on a special body of representatives, deputed by the society for the single purpose of making the important choice.

All these advantages will be happily combined in the plan devised by the convention, which is, that the people of each state shall choose a number of persons as electors, equal to the number of senators and representatives of such state in the national government, who shall assemble within the state and vote for some fit person as president. Their votes, thus given, are to be transmitted to the seat of the national government; and the person who may happen to have a majority of the whole number of votes, will be the president. But as a majority of the votes might not always happen to centre on one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided, that in such a contingency, the house of representatives shall select out of the candidates, who shall have the five highest numbers of votes, the man who in their opinion may be best qualified for the office.

This process of election affords a moral certainty, that the office of president, will never fall to the lot of any man, who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue and the little arts of popularity may alone suffice to elevate a man to the first honours in a single state,

but it will require other talents and a different kind of merit to eſtabliſh him in the eſteem and confidence of the whole union, or of ſo conſiderable a portion of it as would be neceſſary to make him a ſucceſsful candidate for the diſtinguiſhed office of preſident of the United States. It will not be too ſtrong to ſay, that there will be a conſtant probability of ſeeing the ſtation filled by characters pre-eminent for ability and virtue. And this will be thought no inconſiderable recommendation of the conſtitution, by thoſe, who are able to eſtimate the ſhare, which the executive in every government muſt neceſſarily have in its good or ill adminiſtration. Though we cannot acquieſce in the political hereſy of the poet who ſays—

"For forms of government let fools conteſt—
"That which is beſt adminiſtred is beſt."

—yet we may ſafely pronounce, that the true teſt of a good government is its aptitude and tendency to produce a good adminiſtration.

The vice-preſident is to be choſen in the ſame manner with the preſident; with this difference, that the ſenate is to do, in reſpect to the former, what is to be done by the houſe of repreſentatives, in reſpect to the latter.

The appointment of an extraordinary perſon, as vice-preſident, has been objected to as ſuperfluous, if not miſchievous. It has been alledged, that it would have been preferable to have authoriſed the ſenate to elect out of their own body an officer, anſwering to that deſcription. But two conſiderations ſeem to juſtify the ideas of the convention in this reſpect. One is, that to ſecure at all times the poſſibility of a definitive reſolution of the body, it is neceſſary that the preſident ſhould have only a caſting vote. And to take the ſenator of any ſtate from his ſeat as ſenator, to place him in that of preſident of the ſenate, would be to exchange, in regard to the ſtate from which he came, a conſtant for a contingent vote.

vote. The other consideration is, that as the vice-president may occasionally become a substitute for the president, in the supreme executive magistracy, all the reasons, which recommend the mode of election prescribed for the one, apply with great, if not with equal force to the manner of appointing the other. It is remarkable, that in this as in most other instances, the objection which is made, would lie against the constitution of this state. We have a lieutenant-governor chosen by the people at large, who presides in the senate, and is the constitutional substitute for the governor in casualties similar to those, which would authorise the vice-president to exercise the authorities and discharge the duties of the president.

PUBLIUS.

NUMBER LXIX.

The same View continued, with a Comparison between the President and the King of Great-Britain on the one Hand, and the Governor of New-York on the other.

I PROCEED now to trace the real characters of the proposed executive as they are marked out in the plan of the convention. This will serve to place in a strong light the unfairness of the representations which have been made in regard to it.

The first thing which strikes our attention is, that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if in this particular there be a resemblance to the king of Great-Britain, there is not less a resemblance to the Grand Signior, to the Khan of Tartary, to the man of the seven mountains, or to the governor of New-York.

That magistrate is to be elected for *four* years; and is to be re-eligible as often as the people of the

United States ſhall think him worthy of their confidence. In theſe circumſtances, there is a total diſſimilitude between *him* and a king of Great-Britain; who is an *hereditary* monarch, poſſeſſing the crown as a patrimony deſcendible to his heirs forever; but there is a cloſe analogy between *him* and a governor of New-York, who is elected for *three* years, and is re-eligible without limitation or intermiſſion. If we conſider how much leſs time would be requiſite for eſtabliſhing a dangerous influence in a ſingle ſtate, than for eſtabliſhing a like influence throughout the United States, we muſt conclude that a duration of *four* years for the chief magiſtrate of the union, is a degree of permanency far leſs to be dreaded in that office, than a duration of *three* years for a correſpondent office in a ſingle ſtate.

The preſident of the United States would be liable to be impeached, tried, and upon conviction of treaſon, bribery, or other high crimes or miſdemeanors, removed from office; and would afterwards be liable to proſecution and puniſhment in the ordinary courſe of law. The perſon of the king of Great-Britain is ſacred and inviolable: There is no conſtitutional tribunal to which he is amenable; no puniſhment to which he can be ſubjected without involving the criſis of a national revolution. In this delicate and important circumſtance of perſonal reſponſibility, the preſident of confederated America would ſtand upon no better ground than a governor of New-York, and upon worſe ground than the governors of Virginia and Delaware.

The preſident of the United States is to have power to return a bill, which ſhall have paſſed the two branches of the legiſlature, for re-conſideration; and the bill ſo returned is not to become a law, unleſs upon that re-conſideration it be approved by two thirds of both houſes. The king of Great-Britain, on his part has an abſolute negative upon the acts of the two houſes of parliament. The diſuſe of that power for

a

a considerable time past, does not affect the reality of its existence; and is to be ascribed wholly to the crown's having found the means of substituting influence to authority, or the art of gaining a majority in one or the other of the two houses, to the necessity of exerting a prerogative which could seldom be exerted without hazarding some degree of national agitation. The qualified negative of the president differs widely from this absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the council of revision of this state, of which the governor is a constituent part. In this respect, the power of the president would exceed that of the governor of New-York; because the former would possess singly what the latter shares with the chancellor and judges: But it would be precisely the same with that of the governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the convention have copied.

The president is to be the "commander in chief of "the army and navy of the United States, and of the "militia of the several states when called into the "actual service of the United States. He is to have "power to grant reprieves and pardons for offences "against the United States *except in cases of impeach-* "*ment*; to recommend to the consideration of con- "gress such measures as he shall judge necessary and "expedient; to convene on extraordinary occasions "both houses of the legislature, or either of them, and "in case of disagreement between them *with respect* "*to the time of adjournment*, to adjourn them to such "time as he shall think proper; to take care that the "laws be faithfully executed; and to commission all "officers of the United States." In most of these particulars the power of the president will resemble equally that of the king of Great-Britain and of the governor of New-York. The most material points of difference are these:—*First*. The president will have only the occasional command of such part of the

militia of the nation, as by legiſlative proviſion may be called into the actual ſervice of the union. The king of Great Britain and the governor of New-York, have at all times the entire command of all the militia within their ſeveral juriſdictons. In this article therefore the power of the preſident would be inferior to that of either the monarch or the governor. *Second*, The preſident is to be commander in chief of the army and navy of the United States. In his reſpect his authority would be nominally the ſame with that of the king of Great-Britain, but in ſubſtance much inferior to it. It would amount to nothing more than the ſupreme command and direction of the military and naval forces, as firſt general and admiral of the confederacy; while that of the Britiſh king extends to the *declaring* of war, and to the *raiſing* and *regulating* of fleets and armies; all which by the conſtitution under conſideration, would appertain to the legiſlature.* The governor of New-York, on the other hand, is by the conſtitution of the ſtate veſted only with the command of its militia and navy. But the conſtitutions of ſeveral of the ſtates, expreſsly declare their governors to be commanders in chief as well of the army as navy; and it may well be a queſtion whether thoſe of New-Hampſhire and Maſſachuſetts, in particular, do not in this inſtance confer larger powers upon their reſpective governors, than could be claimed by a preſident of the United States.

Third.

* A writer in a Pennſylvania paper, under the ſignature of TAMONY, has aſſerted that the king of Great-Britain owes his prerogatives as commander in chief to an annual mutiny bill. The truth is on the contrary, that his prerogative in this reſpect is immemorial, and was only diſputed "contrary to all reaſon "and precedent," as Blackſtone, vol. 1, page 262, expreſſes it, by the long parliament of Charles Firſt; but by the ſtatute the 13th of Charles Second, chap. 6. it was declared to be in the king alone, for that the ſole ſupreme government and command of the militia within his majeſty's realms and dominions, and of all forces by ſea and land, and of all forts and places of ſtrength, EVER WAS AND IS the undoubted right of his majeſty and his royal predeceſſors kings and queens of England, and that both or either houſe of parliament cannot nor ought to pretend to the ſame.

Third. The power of the president in respect to pardons would extend to all cases, *except those of impeachment.* The governor of New-York may pardon in all cases, even in those of impeachment, except for treason and murder. Is not the power of the governor in this article, on a calculation of political consequences, greater than that of the president? All conspiracies and plots against the government, which have not been matured into actual treason, may be screened from punishment of every kind, by the interposition of the prerogative of pardoning. If a governor of New York therefore should be at the head of any such conspiracy, until the design had been ripened into actual hostility, he could ensure his accomplices and adherents an entire impunity. A president of the union on the other hand, though he may even pardon treason, when prosecuted in the ordinary course of law, could shelter no offender in any degree from the effects of impeachment and conviction. Would not the prospect of a total indemnity for all the preliminary steps be a greater temptation to undertake and persevere in an enterprise against the public liberty than the mere prospect of an exemption from death and confiscation, if the final execution of the design, upon an actual appeal to arms, should miscarry? Would this last expectation have any influence at all, when the probability was computed that the person who was to afford that exemption might himself be involved in the consequences of the measure; and might be incapacitated by his agency in it, from affording the desired impunity? The better to judge of this matter, it will be necessary to recollect that by the proposed constitution the offence of treason is limited "to levying war upon the United "States, and adhering to their enemies, giving them "aid and comfort," and that by the laws of New-York it is confined within similar bounds.—*Fourth.* The president can only adjourn the national legislature in the single case of disagreement about the time

of

of adjournment. The British monarch may prorogue or even dissolve the parliament. The governor of New-York may also prorogue the legislature of this state for a limited time; a power which in certain situations may be employed to very important purposes.

The president is to have power with the advice and consent of the senate to make treaties; provided two thirds of the senators present concur. The king of Great-Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description. It has been insinuated, that his authority in this respect is not conclusive, and that his conventions with foreign powers are subject to the revision, and stand in need of the ratification of parliament. But I believe this doctrine was never heard of till it was broached upon the present occasion. Every jurist* of that kingdom and every other man acquainted with its constitution knows, as an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction. The parliament, it is true, is sometimes seen employing itself in altering the existing laws to conform them to the stipulations in a new treaty; and this may have possibly given birth to the imagination that its co-operation was necessary to the obligatory efficacy of the treaty. But this parliamentary interposition proceeds from a different cause; from the necessity of adjusting a most artificial and intricate system of revenue and commercial laws to the changes made in them by the operation of the treaty; and of adapting new provisions and precautions to the new state of things, to keep the machine from running into disorder. In this respect therefore, there is no comparison

* Vide Blackstone's Commentaries, vol. 1. page 257.

rison between the intended power of the president, and the actual power of the British sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature. It must be admitted that in this instance the power of the federal executive would exceed that of any state executive. But this arises naturally from the exclusive possession by the union of that part of the sovereign power which relates to treaties. If the confederacy were to be dissolved, it would become a question, whether the executives of the several states were not solely invested with that delicate and important prerogative.

The president is also to be authorised to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance, which will be without consequence in the administration of the government; and it was far more convenient that it should be arranged in this manner, than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor.

The president is to nominate, and *with the advice and consent of the senate* to appoint ambassadors and other public ministers, judges of the supreme court, and in general all officers of the United States established by law, and whose appointments are not otherwise provided for by the constitution. The king of Great-Britain is emphatically and truly stiled the fountain of honor. He not only appoints to all offices, but can create offices. He can confer titles of nobility at pleasure; and has the disposal of an immense number of church preferments. There is evidently a great inferiority, in the power of the president in this particular, to that of the British king; nor is it equal to that of the governor of New-York, if we are to interpret the meaning of the constitution of the

state

ſtate by the practice which has obtained under it. The power of appointment is with us lodged in a council compoſed of the governor and four members of the ſenate choſen by the aſſembly. The governor *claims* and has frequently *exerciſed* the right of nomination, and is *entitled* to a caſting vote in the appointment. If he really has the right of nominating, his authority is in this reſpect equal to that of the preſident, and exceeds it in the article of the caſting vote. In the national government, if the ſenate ſhould be divided, no appointment could be made: In the government of New-York, if the council ſhould be divided the governor can turn the ſcale and confirm his own nomination*. If we compare the publicity which muſt neceſſarily attend the mode of appointment by the preſident and an entire branch of the national legiſlature, with the privacy in the mode of appointment by the governor of New-York, cloſetted in ſecret appartment with at moſt four, and frequently with only two perſons; and if we at the ſame time conſider how much more eaſy it muſt be to influence the ſmall number of which a council of appointment conſiſts, than the conſiderable number of which the national ſenate would conſiſt, we cannot heſitate to pronounce, that the power of the chief magiſtrate of this ſtate in the diſpoſition of offices muſt in practice be greatly ſuperior to that of the chief magiſtate of the union.

Hence it appears, that except as to the concurrent authority of the preſident in the article of treaties, it would be difficult to determine whether that magiſtrate would in the aggregate poſſeſs more or leſs power than the governor of New-York. And it appears

* Candor however demands an acknowledgement, that I do not think the claim of the governor to a right of nomination well founded. Yet it is always juſtifiable to reaſon from the practice of a government till its propriety has been conſtitutionally queſtioned. And independent of this claim, when we take into view the other conſiderations and purſue them through all their conſequences, we ſhall be inclined to draw much the ſame concluſion.

appears yet more unequivocally that there is no pretence for the parallel which has been attempted between him and the king of Great-Britain. But to render the contrast, in this respect, still more striking, it may be of use to throw the principal circumstances of dissimilitude into a closer groupe.

The president of the United States would be an officer elected by the people for *four* years. The king of Great-Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace: The person of the other is sacred and inviolable. The one would have a *qualified* negative upon the acts of the legislative body: The other has an *absolute* negative. The one would have a right to command the military and naval forces of the nation: The other in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority. The one would have a concurrent power with a branch of the legislature in the formation of treaties: The other is the *sole possessor* of the power of making treaties. The one would have a like concurrent authority in appointing to offices: The other is the sole author of all appointments. The one can confer no privileges whatever: The other can make denizens of aliens, noblemen of commoners, can erect corporations with all the rights incident to corporate bodies. The one can prescribe no rules concerning the commerce or currency of the nation: The other is in several respects the arbiter of commerce, and in this capacity can establish markets and fairs, can regulate weights and measures, can lay embargoes for a limited time, can coin money, can authorise or prohibit the circulation of foreign coin. The one has no particle of spiritual jurisdiction: The other is the supreme head and governor of the national church!—What answer shall we give to those who would pursuade us that things so unlike resemble each other?—The same that ought to be

given

given to those who tell us, that a government, the whole power of which would be in the hands of the elective and periodical servants of the people, is an aristocracy, a monarchy, and a despotism.

PUBLIUS.

NUMBER LXXX.

The same View continued in Relation to the UNITY *of the Executive, and with an Examination of the Project of an Executive Council.*

THERE is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. The enlightened well wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high-handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy. Every man the least conversant in Roman story, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals, who aspired to the tyranny, and the seditions of whole classes of the community, whose conduct threatened the existence of all government, as against the

the invasions of external enemies, who menaced the conquest and destruction of Rome.

There can be no need however, to multiply arguments or examples on this head. A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution: And a government ill executed, whatever it may be in theory, must be in practice a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic executive, it will only remain to inquire, what are the ingredients which constitute this energy—how far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterise the plan which has been reported by the convention?

The ingredients which constitute energy in the executive, are, unity—duration—an adequate provision for its support—competent powers.

The ingredients which constitute safety in the republican sense are, a due dependence on the people—a due responsibility.

Those politicians and statesmen, who have been the most celebrated for the soundness of their principles, and for the justness of their views, have declared in favor of a single executive and a numerous legislative. They have with great propriety considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have with equal propriety considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people, and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy and dispatch, will generally characterise the proceedings of one man,

in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the controul and co-operation of others, in the capacity of counsellors, to him. Of the first the two consuls of Rome may serve as an example; of the last we shall find examples in the constitutions of several of the states. New-York, and New-Jersey, if I recollect right, are the only states, which have entrusted the executive authority wholly to single men*. Both these methods of destroying the unity of the executive have their partisans; but the votaries of an executive council are the most numerous. They are both liable, if not to equal, to similar objections, and may in most lights be examined in conjunction.

The experience of other nations will afford little instruction on this head. As far however as it teaches any thing, it teaches us not to be enamoured of plurality in the executive. We have seen that the Achæans on an experiment of two prætors, were induced to abolish one. The Roman history records many instances of mischiefs to the republic from the dissentions between the consuls, and between the military tribunes, who were at times substituted to the consuls. But it gives us no specimens of any peculiar advantages derived to the state, from the plurality of those magistrates. That the dissentions between them were not more frequent or more fatal, is matter of astonishment; until we advert to the singular position in which the republic was almost continually placed, and to the prudent policy

* New York has no council except for the single purpose of appointing to offices; New-Jersey has a council, whom the governor may consult. But I think from the terms of the constitution their resolutions do not bind him.

policy pointed out by the circumſtances of the ſtate, and purſued by the conſuls, of making a diviſion of the government between them. The patricians engaged in a perpetual ſtruggle with the plebeians for the preſervation of their antient authorities and dignities; the conſuls, who were generally choſen out of the former body, were commonly united by the perſonal intereſt they had in the defence of the privileges of their order. In addition to this motive of union, after the arms of the republic had conſiderably expanded the bounds of its empire, it became an eſtabliſhed cuſtom with the conſuls to divide the adminiſtration between themſelves by lot; one of them remaining at Rome to govern the city and its environs; the other taking the command in the more diſtant provinces. This expedient muſt no doubt have had great influence in preventing thoſe colliſions and rivalſhips, which might otherwiſe have embroiled the republic.

But quitting the dim light of hiſtorical reſearch, and attaching ourſelves purely to the dictates of reaſon and good ſenſe, we ſhall diſcover much greater cauſe to reject than to approve the idea of plurality in the executive, under any modification whatever.

Wherever two or more perſon are engaged in any common enterprize or purſuit, there is always danger of difference of opinion. If it be a public truſt or office in which they are cloathed with equal dignity and authority, there is peculiar danger of perſonal emulation and even animoſity. From either and eſpecially from all theſe cauſes, the moſt bitter diſſentions are apt to ſpring. Whenever theſe happen, they leſſen the reſpectability, weaken the authority, and diſtract the plans and operations of thoſe whom they divide. If they ſhould unfortunately aſſail the ſupreme executive magiſtracy of a country, conſiſting of a plurality of perſons, they might impede or fruſtrate the moſt important meaſures of the government in the moſt critical emergencies of the ſtate. And

what is ſtill worſe they might ſplit the community into violent and irreconciliable factions, adhering differently to the different individuals who compoſed the magiſtracy.

Men often oppoſe a thing merely becauſe they have had no agency in planning it, or becauſe it may have been planned by thoſe whom they diſlike. But if they have been conſulted and have happened to diſapprove, oppoſition then becomes in their eſtimation an indiſpenſible duty of ſelf love. They ſeem to think themſelves bound in honor, and by all the motives of perſonal infallibility to defeat the ſucceſs of what has been reſolved upon, contrary to their ſentiments. Men of upright and benevolent tempers have too many opportunities of remarking with horror, to what deſperate lengths this diſpoſition is ſometimes carried, and how often the great intereſts of ſociety are ſacrificed to the vanity, to the conceit and to the obſtinacy of individvals, who have credit enough to make their paſſions and their caprices intereſting to mankind. Perhaps the queſtion now before the public may in its conſequences afford melancholy proofs of the effects of this deſpicable frailty, or rather deteſtable vice in the human character.

Upon the principles of a free government, inconveniencies from the ſource juſt mentioned muſt neceſſarily be ſubmitted to in the formation of the legiſlature; but it is unneceſſary and therefore unwiſe to introduce them into the conſtitution of the executive. It is here too that they may be moſt pernicious. In the legiſlature, promptitude of deciſion is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may ſometimes obſtruct ſalutary plans, yet often promote diliberation and circumſpection; and ſerve to check exceſſes in the majority. When a reſolution too is once taken, the oppoſition muſt be at an end. That reſolution is a law, and reſiſtance to it puniſhable. But no favourable

circumſtances palliate or atone for the diſadvantages of diſſention in the executive department. Here they are pure and unmixed. There is no point at which they ceaſe to operate. They ſerve to embarraſs and weaken the execution of the plan or meaſure, to which they relate, from the firſt ſtep to the final concluſion of it. They conſtantly counteract thoſe qualities in the executive, which are the moſt neceſſary ingredients in its compoſition, vigour and expedition, and this without any counterballancing good. In the conduct of war, in which the energy of the executive is the bulwark of the national ſecurity, every thing would be to be apprehended from its plurality.

It muſt be confeſſed that theſe obſervations apply with principal weight to the firſt caſe ſuppoſed, that is to a plurality of magiſtrates of equal dignity and authority; a ſcheme the advocates for which are not likely to form a numerous ſect: But they apply, though not with equal, yet with conſiderable weight, to the project of a council, whoſe concurrence is made conſtitutionally neceſſary to the operations of the oſtenſible executive. An artful cabal in that council would be able to diſtract and to enervate the whole ſyſtem of adminiſtration. If no ſuch cabal ſhould exiſt, the mere diverſity of views and opinions would alone be ſufficient to tincture the exercise of the executive authority with a ſpirit of habitual feebleneſs and dilatorineſs.

But one of the weightieſt objections to a plurality in the executive, and which lies as much againſt the laſt as the firſt plan, is that it tends to conceal faults, and deſtroy reſponſibility. Reſponſibility is of two kinds, to cenſure and to puniſhment. The firſt is the moſt important of the two; eſpecially in an elective office. Men, in public truſt, will much oftener act in ſuch a manner as to render them unworthy of being any longer truſted, than in ſuch a manner as to make them obnoxious to legal puniſhment. But the multiplication of the executive adds to the diffi-

culty of detection in either case. It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated, that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.

"I was overruled by my council. The council "were so divided in their opinions, that it was im-"possible to obtain any better resolution on the "point." These and similar pretexts are constantly at hand, whether true or false. And who is there that will either take the trouble or incur the odium of a strict scrutiny into the secret springs of the transaction? Should there be found a citizen zealous enough to undertake the unpromising task, if there happen to be a collusion between the parties concerned, how easy is it to cloath the circumstances with so much ambiguity, as to render it uncertain what was the precise conduct of any of those parties?

In the single instance in which the governor of this state is coupled with a council, that is in the appointment to offices, we have seen the mischiefs of it in the view now under consideration. Scandalous appointments to important offices have been made. Some cases indeed have been so flagrant, that ALL PARTIES have agreed in the impropriety of the thing. When enquiry has been made, the blame has been laid by the governor on the members of the council; who on their part have charged it upon his nomination: While the people remain altogether

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at a loſs to determine by whoſe influence their intereſts have been committed to hands ſo unqualified, and ſo manifeſtly improper. In tenderneſs to individuals, I forbear to deſcend to particulars.

It is evident from theſe conſiderations, that the plurality of the executive tends to deprive the people of the two greateſt ſecurities they can have for the faithful exerciſe of any delegated power. *First*. The reſtraints of public opinion, which loſe their efficacy as well on account of the diviſion of the cenſure attendant on bad meaſures among a number, as on account of the uncertainty on whom it ought to fall; and *ſecondly*, the opportunity of diſcovering with facility and clearneſs the miſconduct of the perſons they truſt, in order either to their removal from office, or to their actual puniſhment, in caſes which admit of it.

In England the king is a perpetual magiſtrate; and it is a maxim which has obtained for the ſake of the public peace, that he is unaccountable for his adminiſtration, and his perſon ſacred. Nothing therefore can be wiſer in that kingdom than to annex to the king a conſtitutional council, who may be reſponſible to the nation for the advice they give. Without this there would be no reſponſibility whatever in the executive department, an idea inadmiſſible in a free government. But even there the king is not bound by the reſolutions of his council, though they are anſwerable for the advice they give. He is the abſolute maſter of his own conduct in the exerciſe of his office; and may obſerve or diſregard the counſel given to him at his ſole diſcretion.

But in a republic, where every magiſtrate ought to be perſonally reſponſible for his behaviour in office, the reaſon which in the Britiſh conſtitution dictates the propriety of a council, not only ceaſes to apply, but turns againſt the inſtitution. In the monarchy of Great-Britain, it furniſhes a ſubſtitute for the prohibited reſponſibility of the chief magiſtrate; which

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ſerves in ſome degree as a hoſtage to the national juſtice for his good behaviour. In the American republic it would ſerve to deſtroy, or would greatly diminiſh the intended and neceſſary reſponſibility of the chief magiſtrate himſelf.

The idea of a council to the executive, which has ſo generally obtained in the ſtate conſtitutions, has been derived from that maxim of republican jealouſy which conſiders power as ſafer in the hands of a number of men than of a ſingle man. If the maxim ſhould be admitted to be applicable to the caſe, I ſhould contend that the advantage on that ſide would not counterballance the numerous diſadvantages on the oppoſite ſide. But I do not think the rule at all applicable to the executive power. I clearly concur in opinion in this particular with a writer whom the celebrated Junius pronounces to be "deep, ſolid and "ingenious," that "the executive power is more "eaſily confined when it is ONE*:" That it is far more ſafe there ſhould be a ſingle object for the jealouſy and watchfulneſs of the people; and in a word, that all multiplication of the executive is rather dangerous than friendly to liberty.

A little conſideration will ſatisfy us, that the ſpecies of ſecurity ſought for in the multiplication of the executive is unattainable. Numbers muſt be ſo great as to render combination difficult; or they are rather a ſource of danger than of ſecurity. The united credit and influence of ſeveral individuals muſt be more formidable to liberty than the credit and influence of either of them ſeparately. When power, therefore is placed in the hands of ſo ſmall a number of men, as to admit of their intereſts and views being eaſily combined in a common enterprize, by an artful leader, it becomes more liable to abuſe, and more dangerous when abuſed, than if it be lodged in the hands of one man; who, from the very circumſtance of

* De Lolme.

of his being alone, will be more narrowly watched and more readily suspected, and who cannot unite so great a mass of influence as when he is associated with others. The decemvirs of Rome, whose name denotes their number*, were more to be dreaded in their usurpation than any ONE of them would have been. No person would think of proposing an executive much more numerous than that body; from six to a dozen have been suggested for the number of the council. The extreme of these numbers is not too great for an easy combination; and from such a combination America would have more to fear, than from the ambition of any single individual. A council to a magistrate, who is himself responsible for what he does, are generally nothing better than a clog upon his good intentions; are often the instruments and accomplices of his bad, and are almost always a cloak to his faults.

I forbear to dwell upon the subject of expence; though it be evident that if the council should be numerous enough to answer the principal end, aimed at by the institution, the salaries of the members, who must be drawn from their homes to reside at the seat of government, would form an item in the catalogue of public expenditures, too serious to be incurred for an object of equivocal utility.

I will only add, that prior to the appearance of the constitution, I rarely met with an intelligent man from any of the states, who did not admit as the result of experience, that the unity of the executive of this state was one of the best of the distinguishing features of our constitution.

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* Ten.

NUMBER LXXI.

The ſame View continued, in regard to the Duration of the Office.

DURATION in office has been mentioned as the ſecond requiſite to the energy of the executive authority. This has relation to two objects: To the perſonal firmneſs of the executive magiſtrate in the employment of his conſtitutional powers; and to the ſtability of the ſyſtem of adminiſtration which may have been adopted under his auſpices. With regard to the firſt, it muſt be evident, that the longer the duration in office, the greater will be the probability of obtaining ſo important an advantage. It is a general principle of human nature, that a man will be intereſted in whatever he poſſeſſes, in proportion to the firmneſs or precariouſneſs of the tenure, by which he holds it; will be leſs attached to what he holds by a momentary or uncertain title, than to what he enjoys by a durable or certain title; and of courſe will be willing to riſk more for the ſake of the one, than for the ſake of the other. This remark is not leſs applicable to a political privilege, or honor, or truſt, than to any article of ordinary property. The inference from it is, that a man acting in the capacity of chief magiſtrate, under a conſciouſneſs, that in a very ſhort time he *muſt* lay down his office, will be apt to feel himſelf too little intereſted in it, to hazard any material cenſure or perplexity, from the independent exertion of his powers, or from encountering the ill-humors, however tranſient, which may happen to prevail either in a conſiderable part of the ſociety itſelf, or even in a predominant faction in the legiſlative body. If the caſe ſhould only be, that he *might* lay it down, unleſs continued by a new choice; and if he ſhould be deſirous of being continued, his wiſhes

wiſhes conſpiring with his fears would tend ſtill more powerfully to corrupt his integrity, or debaſe his fortitude. In either caſe feebleneſs and irreſolution muſt be the characteriſtics of the ſtation.

There are ſome, who would be inclined to regard the ſervile pliancy of the executive to a prevailing current, either in the community, or in the legiſlature as its beſt recommendation. But ſuch men entertain very crude notions, as well of the purpoſes for which government was inſtituted, as of the true means by which the public happineſs may be promoted. The republican principle demands, that the deliberate ſenſe of the community ſhould govern the conduct of thoſe to whom they intruſt the management of their affairs; but it does not require an unqualified complaiſance to every ſudden breeſe of paſſion, or to every tranſient impulſe which the people may receive from the arts of men, who flatter their prejudices to betray their intereſts. It is a juſt obſervation, that the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. But their good ſenſe would deſpiſe the adulator, who ſhould pretend that they always *reaſon right* about the *means* of promoting it. They know from experience, that they ſometimes err; and the wonder is, that they ſo ſeldom err as they do; beſet as they continually are by the wiles of paraſites and ſycophants by the ſnares of the ambitious, the avaricious, the deſperate; by the artifices of men, who poſſeſs their confidence more than they deſerve it, and of thoſe who ſeek to poſſeſs, rather than to deſerve it. When occaſions preſent themſelves in which the intereſts of the people are at variance with their inclinations, it is the duty of the perſons whom they have appointed to be the guardians of thoſe intereſts, to withſtand the temporary deluſion, in order to give them time and opportunity for more cool and ſedate reflection. Inſtances might be cited, in which a conduct of this kind has ſaved the people from very fatal conſequences of their own

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miſtakes, and has procured laſting monuments of their gratitude to the men, who had had courage and magnanimity enough to ſerve them at the peril of their diſpleaſure.

But however inclined we might be to inſiſt upon an unbounded complaiſance in the executive to the inclinations of the people, we can with no propriety contend for a like complaiſance to the humors of the legiſlature. The latter may ſometimes ſtand in oppoſition to the former; and at other times the people may be intirely neutral. In either ſuppoſition, it is certainly deſireable that the executive ſhould be in a ſituation to dare to act his own opinion with vigour and deciſion.

The ſame rule which teaches the propriety of a partition between the various branches of power, teaches likewiſe that this partition ought to be ſo contrived as to render the one independent of the other. To what purpoſe ſeparate the executive or the judiciary from the legſlative, if both the executive and the judiciary are ſo conſtituted as to be at the abſolute devotion of the legiſlative? Such a ſeparation muſt be merely nominal, and incapable of producing the ends for which it was eſtabliſhed. It is one thing to be ſubordinate to the laws, and another to be dependent on the legiſlative body. The firſt comports with, the laſt violates, the fundamental principles of good government; and whatever may be the forms of the conſtitution, unites all power in the ſame hands. The tendency of the legiſlative authority to abſorb every other, has been fully diſplayed and illuſtrated by examples in ſome preceding numbers. In governments purely republican, this tendency is almoſt irreſiſtable. The repreſentatives of the people, in a popular aſſembly, ſeem ſometimes to fancy that they are the people themſelves, and betray ſtrong ſymptoms of impatience and diſguſt at the leaſt ſign of oppoſition from any other quarter, as if the exerciſe of its rights by either the executive or

judiciary

judiciary were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious controul over the other departments, and as they commonly have the people on their side, they always act with such momentum, as to make it very difficult for the other members of the government to maintain the balance of the constitution.

It may perhaps be asked, how the shortness of the duration in office can affect the independence of the executive on the legislative, unless the one were possessed of the power of appointing or displacing the other? One answer to this inquiry may be drawn from the principle already remarked, that is, from the slender interest a man is apt to take in a short lived advantage, and the little inducement it affords him to expose himself on account of it to any considerable inconvenience or hazard. Another answer, perhaps more obvious, though not more conclusive, will result from the consideration of the influence of the legislative body over the people, which might be employed to prevent the re-election of a man, who by an upright resistance to any sinister project of that body, should have made himself obnoxious to its resentment.

It may be asked also whether a duration of four years would answer the end proposed, and if it would not, whether a less period which would at least be recommended by greater security against ambitious designs, would not for that reason be preferable to a longer period, which was at the same time too short for the purpose of inspiring the desired firmness and independence of the magistrate?

It cannot be affirmed, that a duration of four years or any other limited duration would completely answer the end proposed; but it would contribute towards it in a degree which would have a material influence upon the spirit and character of the government. Between the commencement and termination of such a period there would always be a considerable

interval, in which the prospect of annihilation would be sufficiently remote not to have an improper effect upon the conduct of a man endued with a tolerable portion of fortitude; and in which he might reasonably promise himself, that there would be time enough before it arrived, to make the community sensible of the propriety of the measures he might incline to pursue. Though it be probable, that as he approached the moment when the public were by a new election to signify their sense of his conduct, his confidence, and with it, his firmness would decline; yet both the one and the other would derive support from the opportunities, which his previous continuance in the station had afforded him of establishing himself in the esteem and good will of his constituents. He might then hazard with safety, in proportion to the proofs he had given of his wisdom and integrity, and to the title he had acquired to the respect and attachment of his fellow citizens. As on the one hand, a duration of four years will contribute to the firmness of the executive in a sufficient degree to render it a very valuable ingredient in the composition; so on the other it is not long enough to justify any alarm for the public liberty. If a British house of commons, from the most feeble beginnings, *from the mere power of assenting or disagreeing to the imposition of a new tax*, have by rapid strides, reduced the prerogatives of the crown and the privileges of the nobility within the limits they conceived to be compatible with the principles of a free government; while they raised themselves to the rank and consequence of a co-equal branch of the legislature; if they have been able in one instance to abolish both the royalty and the aristocracy, and to overturn all the antient establishments as well in the church as state; if they have been able on a recent occasion to make the monarch tremble at the prospect of an innovation* attempted by them; what

* This was the case with respect to Mr. Fox's India bill which was carried in the house of commons, and rejected in the house of lords, to the entire satisfaction, as it is said, of the people.

what would be to be feared from an elective magistrate of four years duration, with the confined authorities of a president of the United States? What but that he might be unequal to the task which the constitution assigns him?—I shall only add that if his duration be such as to leave a doubt of his firmness that doubt is inconsistent with a jealousy of his encroachments.

PUBLIUS.

NUMBER LXXII.

The same View continued in Regard to the Re-eligibility of the President.

THE ADMINISTRATION of government, in its largest sense, comprehends all the operations of the body politic, whether legislative, executive or judiciary, but in its most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public monies, in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war; these and other matters of a like nature constitute what seems to be most properly understood by the administration of government. The persons therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence. This view of the subject will at once suggest to us the intimate con-

nection between the duration of the executive magistrate in office, and the ſtability of the ſyſtem of administration. To reverſe and undo what has been done by a predeceſſor is very often conſidered by a ſucceſſor, as the beſt proof he can give of his own capacity and deſert; and, in addition to this propenſity, where the alteration has been the reſult of public choice, the perſon ſubſtituted is warranted in ſuppoſing, that the diſmiſſion of his predeceſſor has proceeded from a diſlike to his meaſures, and that the leſs he reſembles him the more he will recommend himſelf to the favour of his conſtituents. Theſe conſiderations, and the influence of perſonal confidences and attachments, would be likely to induce every new preſident to promote a change of men to fill the ſubordinate ſtations; and theſe cauſes together could not fail to occaſion a diſgraceful and ruinous mutability in the adminiſtration of the government.

With a poſitive duration of conſiderable extent, I connect the circumſtance of re-elegibility. The firſt is neceſſary to give the officer himſelf the inclination and the reſolution to act his part well, and to the community time and leiſure to obſerve the tendency of his meaſures, and thence to form an experimental eſtimate of their merits. The laſt is neceſſary to enable the people, when they ſee reaſon to approve of his conduct, to continue him in the ſtation, in order to prolong the utility of his talents and virtues, and to ſecure to the government, the advantage of permanency in a wiſe ſyſtem of adminiſtration.

Nothing appears more plauſible at firſt ſight, nor more ill founded upon cloſe inſpection, than a ſcheme which in relation to the preſent point has had ſome reſpectable advocates — I mean that of continuing the chief magiſtrate in office for a certain time, and then excluding him from it, either for a limited period or for ever after. This excluſion whether temporary or perpetual would have nearly the ſame effects; and

these effects would be for the most part rather pernicious than salutary.

One ill effect of the exclusion would be a diminution of the inducements to good behaviour. There are few men who would not feel much less zeal in the discharge of a duty, when they were conscious that the advantage of the station, with which it was connected, must be relinquished at a determinate period, then when they were permitted to entertain a hope of *obtaining* by *meriting* a continuance of them. This position will not be disputed, so long as it is admitted that the desire of reward is one of the strongest incentives of human conduct, or that the best security for the fidelity of mankind is to make their interest coincide with their duty. Even the love of fame, the ruling passion of the noblest minds, which would prompt a man to plan and undertake extensive and arduous enterprises for the public benefit, requiring considerable time to mature and perfect them, if he could flatter himself with the prospect of being allowed to finish what he had begun, would on the contrary deter him from the undertaking, when he foresaw that he must quit the scene, before he could accomplish the work, and must commit that, together with his own reputation, to hands which might be unequal or unfriendly to the task. The most to be expected from the generality of men, in such a situation, is the negative merit of not doing harm instead of the positive merit of doing good.

Another ill effect of the exclusion would be the temptation to sordid views, to peculation, and in some instances, to usurpation. An avaricious man, who might happen to fill the office, looking forward to a time when he must at all events yield up the advantages he enjoyed, would feel a propensity, not easy to be resisted by such a man, to make the best use of his opportunities, while they lasted; and might not scruple to have recourse to the most corrupt expedients to make the harvest as abundant

as it was transitory; though the same man probably with a different prospect before him, might content himself with the regular emoluments of his station, and might even be unwilling to risk the consequences of an abuse of his opportunities. His avarice might be a guard upon his avarice. Add to this, that the same man might be vain or ambitious as well as avaricious. And if he could expect to prolong his honors, by his good conduct, he might hesitate to sacrifice his appetite for them to his appetite for gain. But with the prospect before him of approaching and inevitable annihilation, his avarice would be likely to get the victory over his caution, his vanity or his ambition.

An ambitious man too, finding himself seated on the summit of his country's honors, looking forward to the time at which he must descend from the exalted eminence forever, and reflecting that no exertion of merit on his part could save him from the unwelcome reverse, would be much more violently tempted to embrace a favourable conjuncture for attempting the prolongation of his power, at every personal hazard, than if he had the probability of answering the same end by doing his duty.

Would it promote the peace of the community, or the stability of the government, to have half a dozen men who had had credit enough to raise themselves to the seat of the supreme magistracy, wandering among the people like discontented ghosts, and sighing for a place which they were destined never more to possess?

A third ill effect of the exclusion would be the depriving the community of the advantage of the experience gained by the chief magistrate in the exercise of his office. That experience is the parent of wisdom is an adage, the truth of which is recognized by the wisest as well as the simplest of mankind. What more desirable or more essential than this quality in the governors of nations? Where more desirable or more essential than in the first magistrate of a nation?

nation? Can it be wise to put this desirable and essential quality under the ban of the constitution; and to declare that the moment it is acquired, its possessor shall be compelled to abandon the station in which it was acquired, and to which it is adapted? This nevertheless is the precise import of all those regulations which exclude men from serving their country, by the choice of their fellow citizens, after they have, by a course of service fitted themselves for doing it with a greater degree of utility.

A fourth ill effect of the exclusion would be the banishing men from stations, in which in certain emergencies of the state their presence might be of the greatest moment to the public interest or safety. There is no nation which has not at one period or another experienced an absolute necessity of the services of particular men, in particular situations, perhaps it would not be too strong to say, to the preservation of its political existence. How unwise therefore must be every such self-denying ordinance, as serves to prohibit a nation from making use of its own citizens, in the manner best suited to its exigences and circumstances! Without supposing the personal essentiality of the man, it is evident that a change of the chief magistrate, at the breaking out of a war, or any similar crisis, for another even of equal merit, would at all times be detrimental to the community; inasmuch as it would substitute inexperience to experience, and would tend to unhinge and set afloat the already settled train of the administration.

A fifth ill effect of the exclusion would be, that it would operate as a constitutional interdiction of stability in the administration. By *necessitating* a change of men, in the first office in the nation, it would necessitate a mutability of measures. It is not generally to be expected, that men will vary; and measures remain uniform. The contrary is the usual course of things. And we need not be apprehensive that there will be too much stability, while there is

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even the option of changing; nor need we desire to prohibit the people from continuing their confidence, where they think it may be safely placed, and where by constancy on their part, they may obviate the fatal inconveniences of fluctuating councils and a variable policy.

These are some of the disadvantages, which would flow from the principle of exclusion. They apply most forcibly to the scheme of a perpetual exclusion; but when we consider that even a partial one would always render the re-admission of the person a remote and precarious object, the observations which have been made will apply nearly as fully to one case as to the other.

What are the advantages promised to counterballance these disadvantages? They are represented to be—1st. Greater independence in the magistrate; 2d. Greater security to the people. Unless the exclusion be perpetual, there will be no pretence to infer the first advantage. But even in that case, may he have no object beyond his present station to which he may sacrifice his independence? May he have no connections, no friends, for whom he may sacrifice it? May he not be less willing, by a firm conduct, to make personal enemies, when he acts under the impression, that a time is fast approaching, on the arrival of which he not only MAY, but MUST be exposed to their resentments, upon an equal, perhaps upon an inferior footing? It is not an easy point to determine whether his independence would be most promoted or impaired by such an arrangement.

As to the second supposed advantage, there is still greater reason to entertain doubts concerning it, especially if the exclusion were to be perpetual. In this case, as already intimated, a man of irregular ambition, of whom alone there could be reason in any case to entertain apprehensions, would with infinite reluctance yield to the necessity of taking his leave for ever of a post, in which his passion for power and

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pre-eminence had acquired the force of habit. And if he had been fortunate or adroit enough to conciliate the good will of the people, he might induce them to consider as a very odious and unjustifiable restraint upon themselves, a provision which was calculated to debar them of the right of giving a fresh proof of their attachment to a favorite. There may be conceived circumstances in which this disgust of the people, seconding the thwarted ambition of such a favorite, might occasion greater danger to liberty, than could ever reasonably be dreaded from the possibility of a perpetuation in office, by the voluntary suffrages of the community, exercising a constitutional privilege.

There is an excess of refinement in the idea of disabling the people to continue in office men, who had entitled themselves, in their opinion, to approbation and confidence; the advantages of which are at best speculative and equivocal, and are overbalanced by disadvantages far more certain and decisive.

PUBLIUS.

NUMBER LXXIII.

The same View continued, in Relation to the Provision concerning Support, and the Power of the Negative.

THE third ingredient towards constituting the vigour of the executive authority is an adequate provision for its support. It is evident that without proper attention to this article, the separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments of the chief magistrate, could render him as obsequious to their will, as they might think proper to make him. They might in most cases either

reduce

reduce him by famine, or tempt him by largeſſes, to ſurrender at diſcretion his judgment to their inclinations. Theſe expreſſions taken in all the latitude of the terms would no doubt convey more than is intended. There are men who could neither be diſtreſſed nor won into a ſacrifice of their duty; but this ſtern virtue is the growth of few ſoils: And in the main it will be found, that a power over a man's ſupport is a power over his will. If it were neceſſary to confirm ſo plain a truth by facts, examples would not be wanting, even in this country, of the intimidation or ſeduction of the executive by the terrors, or allurements, of the pecuniary arrangements of the legiſlative body.

It is not eaſy therefore to commend too highly the judicious attention which has been paid to this ſubject in the propoſed conſtitution. It is there provided that "The preſident of the United States ſhall at "ſtated times receive for his ſervice a compenſation, "*which ſhall neither be increaſed nor diminiſhed, during* "*the period for which he ſhall have been elected*, and "he ſhall *not receive within that period any other emo-* "*lument* from the United States or any of them." It is impoſſible to imagine any proviſion which would have been more eligible than this. The legiſlature on the appointment of a preſident is once for all to declare what ſhall be the compenſation for his ſervices during the time for which he ſhall have been elected. This done, they will have no power to alter it either by increaſe or diminution, till a new period of ſervice by a new election commences. They can neither weaken his fortitude by operating upon his neceſſities; not corrupt his integrity, by appealing to his avarice. Neither the union nor any of its members will be at liberty to give, nor will he be at liberty to receive any other emolument, than that which may have been determined by the firſt act. He can of courſe have no pecuniary inducement to renounce or deſert the independence intended for him by the conſtitution.

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The last of the requisites to energy which have been enumerated are competent powers. Let us proceed to consider those which are proposed to be vested in the president of the United States.

The first thing that offers itself to our observation, is the qualified negative of the president upon the acts or resolutions of the two houses of the legislature; or in other words his power of returning all bills with objections; to have the effect of preventing their becoming laws, unless they should afterwards be ratified by two thirds of each of the component members of the legislative body.

The propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments, has been already more than once suggested; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body, to invade the rights of the executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left at the mercy of the other, but ought to possess a constitutional and effectual power of self defence.

But the power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enaction

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of improper laws. It eſtabliſhes a ſalutary check upon the legiſlative body calculated to guard the community againſt the effects of faction, precipitancy, or of any impulſe unfriendly to the public good, which may happen to influence a majority of that body.

The propriety of a negative, has upon ſome occaſions been combated by an obſervation, that it was not to be preſumed a ſingle man would poſſeſs more virtue or wiſdom, than a number of men; and that unleſs this preſumption ſhould be entertained, it would be improper to give the executive magiſtrate any ſpecies of controul over the legiſlative body.

But this obſervation, when examined, will appear rather ſpecious than ſolid. The propriety of the thing does not turn upon the ſuppoſition of ſuperior wiſdom or virtue in the executive; but upon the ſuppoſition that the legiſlative will not be infallible: That the love of power may ſometimes betray it into a diſpoſition to encroach upon the rights of the other members of the government; that a ſpirit of faction may ſometimes pervert its deliberations; that impreſſions of the moment may ſometimes hurry it into meaſures which itſelf, on maturer reflection, would condemn. The primary inducement to conferring the power in queſtion upon the executive, is to enable him to defend himſelf; the ſecondary one is to encreaſe the chances in favour of the community againſt the paſſing of bad laws, through haſte, inadvertence, or deſign. The oftener a meaſure is brought under examination, the greater the diverſity in the ſituations of thoſe who are to examine it, the leſs muſt be the danger of thoſe errors which flow from want of due deliberation, or of thoſe miſteps which proceed from the contagion of ſome common paſſion or intereſt. It is far leſs probable, that culpable views of any kind ſhould infect all the parts of the government, at the ſame moment and in relation to the ſame object, than that they ſhould by turns govern and miſlead every one of them.

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It may perhaps be ſaid, that the power of preventing bad laws includes that of preventing good ones; and may be uſed to the one purpoſe as well as to the other. But this objection will have little weight with thoſe who can properly eſtimate the miſchiefs of that inconſtancy and mutability in the laws which form the greateſt blemiſh in the character and genius of our governments. They will conſider every inſtitution calculated to reſtrain the exceſs of law-making, and to keep things in the ſame ſtate in which they may happen to be at any given period, as much more likely to do good than harm; becauſe it is favorable to greater ſtability in the ſyſtem of legiſlation. The injury which may poſſibly be done by defeating a few good laws will be amply compenſated by the advantage of preventing a number of bad ones.

Nor is this all. The ſuperior weight and influence of the legiſlative body in a free government, and the hazard to the executive in a trial of ſtrength with that body, afford a ſatisfactory ſecurity, that the negative would generally be employed with great caution, and that there would oftener be room for a charge of timidity than of raſhneſs, in the exerciſe of it. A king of Great Britain, with all his train of ſovereign attributes, and with all the influence he draws from a thouſand ſources, would at this day heſitate to put a negative upon the joint reſolutions of the two houſes of parliament. He would not fail to exert the utmoſt reſources of that influence to ſtrangle a meaſure diſagreeable to him, in its progreſs to the throne, to avoid being reduced to the dilemma of permitting it to take effect, or of riſking the diſpleaſure of the nation, by an oppoſition to the ſenſe of the legiſlative body. Nor is it probable that he would ultimately venture to exert his prerogative, but in a caſe of manifeſt propriety, or extreme neceſſity. All well informed men in that kingdom will accede to the juſtneſs of this remark. A very conſiderable

period has elapſed ſince the negative of the crown has been exerciſed.

If a magiſtrate, ſo powerful and ſo well fortified as a Britiſh monarch, would have ſcruples about the exerciſe of the power under conſideration, how much greater caution may be reaſonably expected in a preſident of the United States, cloathed for the ſhort period of four years with the executive authority of a government wholly and purely republican?

It is evident that there would be greater danger of his not uſing his power when neceſſary, than of his uſing it too often, or too much. An argument indeed againſt its expediency has been drawn from this very ſource. It has been repreſented on this account as a power odious in appearance, uſeleſs in practice. But it will not follow, that becauſe it might be rarely exerciſed, it would never be exerciſed. In the caſe for which it is chiefly deſigned, that of an immediate attack upon the conſtitutional rights of the executive, or in a caſe in which the public good was evidently and palpably ſacrificed, a man of tolerable firmneſs would avail himſelf of his conſtitutional means of defence, and would liſten to the admonitions of duty and reſponſibility. In the former ſuppoſition, his fortitude would be ſtimulated by his immediate intereſt in the power of his office; in the latter by the probability of the ſanction of his conſtituents; who though they would naturally incline to the legiſlative body in a doubtful caſe, would hardly ſuffer their partiality to delude them in a very plain caſe. I ſpeak now with an eye to a magiſtrate poſſeſſing only a common ſhare of firmneſs. There are men, who under any circumſtances will have the courage to do their duty at every hazard.

But the convention have purſued a mean in this buſineſs; which will both facilitate the exerciſe of the power veſted in this reſpect in the executive magiſtrate, and make its efficacy to depend on the ſenſe of a conſiderable part of the legiſlative body.

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Instead of an absolute negative, it is proposed to give the executive the qualified negative already described. This is a power, which would be much more readily exercised than the other. A man who might be afraid to defeat a law by his single VETO, might not scruple to return it for re-consideration; subject to being finally rejected only in the event of more than one third of each house concurring in the sufficiency of his objections. He would be encouraged by the reflection, that if his opposition should prevail, it would embark in it a very respectable proportion of the legislative body, whose influence would be united with his in supporting the propriety of his conduct, in the public opinion. A direct and categorical negative has something in the appearance of it more harsh, and more apt to irritate, than the mere suggestion of argumentative objections to be approved or disapproved, by those to whom they are addressed. In proportion as it would be less apt to offend, it would be more apt to be exercised; and for this very reason it may in practice be found more effectual. It is to be hoped that it will not often happen, that improper views will govern so large a proportion as two-thirds of both branches of the legislature at the same time; and this too in defiance of the counterpoising weight of the executive. It is at any rate far less probable, that this should be the case, than that such views should taint the resolutions and conduct of a bare majority. A power of this nature, in the executive, will often have a silent and unperceived though forcible operation. When men engaged in unjustifiable pursuits are aware, that obstructions may come from a quarter which they cannot controul, they will often be restrained by the bare apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared.

This qualified negative, as has been elsewhere remarked, is in this state vested in a council, consist-

ing of the governor, with the chancellor and judges of the supreme court, or any two of them. It has been freely employed upon a variety of occasions, and frequently with success. And its utility has become so apparent, that persons who in compiling the constitution were violent opposers of it have from experience become its declared admirers.*

I have in another place remarked, that the convention in the formation of this part of their plan, had departed from the model of the constitution of this state, in favor of that of Massachusetts;—two strong reasons may be imagined for this preference. One is that the judges, who are to be the interpreters of the law, might receive an improper bias from having given a previous opinion in their revisionary capacity. The other is, that by being often associated with the executive they might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments. It is impossible to keep the judges too distinct from every other avocation than that of expounding the laws. It is peculiarly dangerous to place them in a situation to be either corrupted or influenced by the executive.

PUBLIUS.

NUMBER LXXIV.

The same View continued, in Relation to the Command of the national Forces, and the Power of pardoning.

THE president of the United States is to be "commander in chief of the army and navy "of the United States, and of the militia of the "several states *when called into the actual service* of the United

* Mr. Abraham Yates, a warm opponent of the plan of the convention, is of this number.

"United States." The propriety of this provision is so evident in itself; and it is at the same time so consonant to the precedents of the state constitutions in general, that little need be said to explain or enforce it. Even those of them, which have in other respects coupled the chief magistrate with a council have for the most part concentred the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.

"The president may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." This I consider as a mere redundancy in the plan; as the right for which it provides would result of itself from the office.

He is also to be authorised "to grant reprieves and pardons for offences against the United States *except in cases of impeachment*." Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow creature depended on his *sole fiat*, would naturally inspire

ſcrupulouſneſs and caution: The dread of being accuſed of weakneſs or connivance would beget equal circumſpection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be leſs ſenſible to the apprehenſion of ſuſpicion or cenſure for an injudicious or affected clemency. On theſe accounts, one man appears to be a more eligible diſpenſer of the mercy of the government than a body of men.

The expediency of veſting the power of pardoning in the preſident has, if I miſtake not, been only conteſted in relation to the crime of treaſon. This, it has been urged, ought to have depended upon the aſſent of one or both of the branches of the legiſlative body. I ſhall not deny that there are ſtrong reaſons to be aſſigned for requiring in this particular the concurrence of that body, or of a part of it. As treaſon is a crime levelled at the immediate being of the ſociety, when the laws have once aſcertained the guilt of the offender, there ſeems a fitneſs in refering the expediency of an act of mercy towards him to the judgment of the legiſlature. And this ought the rather to be the caſe, as the ſuppoſition of the connivance of the chief magiſtrate ought not to be entirely excluded. But there are alſo ſtrong objections to ſuch a plan. It is not to be doubted that a ſingle man of prudence and good ſenſe, is better fitted, in delicate conjunctures, to balance the motives which may plead for and againſt the remiſſion of the puniſhment, than any numerous body whatever. It deſerves particular attention, that treaſon will often be connected with ſeditions, which embrace a large proportion of the community; as lately happened in Maſſachuſetts. In every ſuch caſe, we might expect to ſee the repreſentation of the people tainted with the ſame ſpirit which had given birth to the offence. And when parties were pretty equally matched, the ſecret ſympathy of the friends and

favorers

favorers of the condemned, availing itſelf of the good nature and weakneſs of others, might frequently beſtow impunity where the terror of an example was neceſſary. On the other hand, when the ſedition had proceeded from cauſes which had inflamed the reſentments of the major party, they might often be found obſtinate and inexorable, when policy demanded a conduct of forbearance and clemency. But the principal argument for repoſing the power of pardoning in this caſe in the chief magiſtrate is this; in ſeaſons of inſurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the inſurgents or rebels may reſtore the tranquility of the commonwealth; and which, if ſuffered to paſs unimproved, it may never be poſſible afterwards to recall. The dilatory proceſs of convening the legiſlature, or one of its branches, for the purpoſe of obtaining its ſanction to the meaſure, would frequently be the occaſion of letting ſlip the golden opportunity. The loſs of a week, a day, an hour, may ſometimes be fatal. If it ſhould be obſerved that a diſcretionary power with a view to ſuch contingencies might be occaſionally confered upon the preſident; it may be anſwered in the firſt place, that it is queſtionable whether, in a limited conſtitution, that power could be delegated by law; and in the ſecond place, that it would generally be impolitic before-hand to take any ſtep which might hold out the proſpect of impunity. A proceeding of this kind, out of the uſual courſe, would be likely to be conſtrued into an argument of timidity or of weakneſs, and would have a tendency to embolden guilt.

PUBLIUS.

NUMBER

NUMBER LXXV.

The ſame View continued in Relation to the Power of making Treaties.

THE preſident is to have power "by and with "the advice and conſent of the ſenate, to make "treaties provided two-thirds of the ſenators preſent "concur." Though this proviſion has been aſſailed on different grounds, with no ſmall degree of vehemence, I ſcruple not to declare my firm perſuaſion, that it is one of the beſt digeſted and moſt unexceptionable parts of the plan. One ground of objection is, the trite topic of the intermixture of powers; ſome contending that the preſident ought alone to poſſeſs the power of making treaties; and others, that it ought to have been excluſively depoſited in the ſenate. Another ſource of objection is derived from the ſmall number of perſons by whom a treaty may be made. Of thoſe who eſpouſe this objection, a part are of opinion that the houſe of repreſentatives ought to have been aſſociated in the buſineſs, while another part ſeem to think that nothing more was neceſſary than to have ſubſtituted two-thirds of *all* the members of the ſenate to two-thirds of the members *preſent*. As I flatter myſelf the obſervations made in a preceding number, upon this part of the plan, muſt have ſufficed to place it to a diſcerning eye in a very favourable light, I ſhall here content myſelf with offering only ſome ſupplementary remarks, principally with a view to the objections which have been juſt ſtated.

With regard to the intermixture of powers, I ſhall rely upon the explanations already given, in other places, of the true ſenſe of the rule, upon which that objection is founded; and ſhall take it for granted, as an inference from them, that the union of the executive with the ſenate, in the article of treaties, is no infringment of that rule. I venture to add that the

the particular nature of the power of making treaties indicates a peculiar propriety in that union. Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition: For if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or in other words to prescribe rules for the regulation of the society. While the execution of the laws and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is plainly neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones, and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive. The qualities elsewhere detailed, as indispensable in the management of foreign negociations, point out the executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a part of the legislative body in the office of making them.

However proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate

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of four years duration. It has been remarked upon another occasion, and the remark is unquestionably just, that an hereditary monarch, though often the oppressor of his people, has personally too much at stake in the government to be in any material danger of being corrupted by foreign powers. But that a man raised from the station of a private citizen to the rank of chief magistrate, possessed of but a moderate or slender fortune, and looking forward to a period not very remote, when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States.

To have entrusted the power of making treaties to the senate alone, would have been to relinquish the benefits of the constitutional agency of the president, in the conduct of foreign negotiations. It is true, that the senate would in that case have the option of employing him in this capacity; but they would also have the option of letting it alone; and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representative of the nation; and of course would not be able to act with an equal degree

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of weight or efficacy. While the union would from this cauſe loſe a conſiderable advantage in the management of its external concerns, the people would loſe the additional ſecurity, which would reſult from the co-operation of the executive. Though it would be imprudent to conſide in him ſolely ſo important a truſt; yet it cannot be doubted, that his participation in it would materially add to the ſafety of the ſociety. It muſt indeed be clear to a demonſtration, that the joint poſſeſſion of the power in queſtion by the preſident and ſenate would afford a greater proſpect of ſecurity, than the ſeparate poſſeſſion of it by either of them. And whoever has maturely weighed the circumſtances, which muſt concur in the appointment of a preſident will be ſatisfied, that the office will always bid fair to be filled by men of ſuch characters as to render their concurrence in the formation of treaties peculiarly deſirable, as well on the ſcore of wiſdom as on that of integrity.

The remarks made in a former number, which has been alluded to in another part of this paper, will apply with concluſive force againſt the admiſſion of the houſe of repreſentatives to a ſhare in the formation of treaties. The fluctuating, and taking its future increaſe into the account, the multitudinous compoſition of that body, forbid us to expect in it thoſe qualities which are eſſential to the proper execution of ſuch a truſt. Accurate and comprehenſive knowledge of foreign politics; a ſteady and ſyſtematic adherence to the ſame views; a nice and uniform ſenſibility to national character, deciſion, *ſecrecy* and diſpatch; are incompatible with the genius of a body ſo variable and ſo numerous. The very complication of the buſineſs by introducing a neceſſity of the concurrence of ſo many different bodies, would of itſelf afford a ſolid objection. The greater frequency of the calls upon the houſe of repreſentatives, and the greater length of time which it would often be neceſſary to keep them together when convened, to obtain

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their ſanction in the progreſſive ſtages of a treaty, would be ſource of ſo great inconvenience and expence as alone ought to condemn the project.

The only objection which remains to be canvaſſed is that which would ſubſtitute the proportion of two thirds of all the members compoſing the ſenatorial body, to that of two thirds of the members *preſent*. It has been ſhewn under the ſecond head of our enquiries that all proviſions which require more than the majority of any body to its reſolutions have a direct tendency to embarraſs the operations of the government and an indirect one to ſubject the ſenſe of the majority to that of the minority. This conſideration ſeems ſufficient to determine our opinion, that the convention have gone as far in the endeavour to ſecure the advantage of numbers in the formation of treaties as could have been reconciled either with the activity of the public councils or with a reaſonable regard to the major ſenſe of the community. If two thirds of the whole number of members had been required, it would in many caſes from the non-attendence of a part amount in practice to a neceſſity of unanimity. And the hiſtory of every political eſtabliſhment in which this principle has prevailed is a hiſtory of impotence, perplexity and diſorder. Proofs of this poſition might be adduced from the examples of the Roman tribuneſhip, the Poliſh diet and the ſtates general of the Netherlands; did not an example at home render foreign precedents unneceſſary.

To require a fixed proportion of the whole body would not in all probability contribute to the advantages of a numerous agency, better than merely to require a proportion of the attending members. The former by increaſing the difficulty of reſolutions diſagreeable to the minority diminiſhes the motives to punctual attendance. The latter by making the capacity of the body to depend on a *proportion* which may be varied by the abſence or preſence of a ſingle member, has the contrary effect. And as, by promoting

moting punctuality, it tends to keep the body complete, there is great likelihood that its resolutions would generally be dictated by as great a number in this case as in the other; while there would be much fewer occasions of delay. It ought not to be forgotten that under the existing confederation two members *may* and usually *do* represent a state; whence it happens that congress, who now are solely invested with *all the powers* of the union, rarely consists of a greater number of persons than would compose the intended senate. If we add to this, that as the members vote by states, and that where there is only a single member present from a state, his vote is lost, it will justify a supposition that the active voices in the senate, where the members are to vote individually, would rarely fall short in number of the active voices in the existing congress. When in addition to these considerations we take into view the co-operation of the president, we shall not hesitate to infer that the people of America would have greater security against an improper use of the power of making treaties, under the new constitution, than they now enjoy under the confederation. And when we proceed still one step further, and look forward to the probable augmentation of the senate, by the erection of new states we shall not only perceive ample ground of confidence in the sufficiency of the numbers, to whose agency that power will be entrusted; but we shall probably be led to conclude that a body more numerous than the senate would be likely to become, would be very little fit for the proper discharge of the trust.

PUBLIUS.

NUMBER LXXVI.

The same View continued, in Relation to the Appointment of the Officers of the Government.

THE president is "to *nominate* and by and with "the advice and consent of the senate to "appoint ambassadors, other public ministers and "consuls, judges of the supreme court, and all other "officers of the United States, whose appointments "are not otherwise provided for in the constitution. "But the congress may by law vest the appointment "of such inferior officers as they think proper in the "president alone, or in the courts of law, or in the "heads of departments. The president shall have "power to fill up *all vacancies* which may happen "*during the recess of the senate*, by granting commis-"sions which shall *expire* at the end of their next "session."

It has been observed in a former paper that "the "true test of a good government is its aptitude and "tendency to produce a good administration." If the justness of this observation be admitted, the mode of appointing the officers of the United States contained in the foregoing clauses, must, when examined, be allowed to be entitled to particular commendation. It is not easy to conceive a plan better calculated than this, to promote a judicious choice of men for filling the offices of the union; and it will not need proof that on this point must essentially depend the character of its administration.

It will be agreed on all hands, that the power of appointment in ordinary cases can be properly modified only in one of three ways. It ought either to be vested in a single man—or in a *select* assembly of a moderate number—or in a single man with the concurrence

concurrence of ſuch an aſſembly. The exerciſe of it by the people at large, will be readily admitted to be impracticable; as, waving every other conſideration it would leave them little time to do any thing eiſe. When therefore mention is made in the ſubſequent reaſonings of an aſſembly or body of men, what is ſaid muſt be underſtood to relate to a ſelect body or aſſembly of the deſcription already given. The people collectively from their number and from their diſperſed ſituation cannot be regulated in their movements by that ſyſtematic ſpirit of cabal and intrigue, which will be urged as the chief objections to repoſing the power in queſtion in a body of men.

Thoſe who have themſelves reflected upon the ſubject, or who have attended to the obſervations made in other parts of theſe papers, in relation to the appointment of the preſident, will, I preſume, agree to the poſition that there would always be great probability of having the place ſupplied by a man of abilities, at leaſt reſpectable. Premiſing this, I proceed to lay it down as a rule, that one man of diſcernment is better fitted to analiſe and eſtimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of ſuperior diſcernment.

The ſole and undivided reſponſibility of one man will naturally beget a livelier ſenſe of duty and a more exact regard to reputation. He will on this account feel himſelf under ſtronger obligations, and more intereſted to inveſtigate with care the qualities requiſite to the ſtations to be filled, and to prefer with impartiality the perſons who may have the faireſt pretenſions to them. He will have *fewer* perſonal attachments to gratify than a body of men, who may each be ſuppoſed to have an equal number, and will be ſo much the leſs liable to be miſled by the ſentiments of friendſhip and of affection. There is nothing ſo apt to agitate the paſſions of mankind as perſonal conſiderations, whether they relate to

ourſelves or to others, who are to be the objects of our choice or preference. Hence, in every exerciſe of the power of appointing to offices by an aſſembly of men, we muſt expect to ſee a full diſplay of all the private and party likings and diſlikes, partialities and antipathies, attachments and animoſities, which are felt by thoſe who compoſe the aſſembly. The choice which may at any time happen to be made under ſuch circumſtances will of courſe be the reſult either of a victory gained by one party over the other, or of a compromiſe between the parties. In either caſe, the intrinſic merit of the candidate will be too often out of ſight. In the firſt, the qualifications beſt adapted to uniting the ſuffrages of the party will be more conſidered than thoſe which fit the perſon for the ſtation. In the laſt, the coalition will commonly turn upon ſome intereſted equivalent, "Give us the man we wiſh for this office, and you "ſhall have the one you wiſh for that." This will be the uſual condition of the bargain. And it will rarely happen that the advancement of the public ſervice will be the primary object either of party victories or of party negotiations.

The truth of the principles here advanced ſeems to have been felt by the moſt intelligent of thoſe who have found fault with the proviſion made in this reſpect by the convention. They contend that the preſident ought ſolely to have been authoriſed to make the appointments under the federal government. But it is eaſy to ſhew that every advantage to be expected from ſuch an arrangement would in ſubſtance be derived from the power of *nomination*, which is propoſed to be conferred upon him; while ſeveral diſadvantages which might attend the abſolute power of appointment in the hands of that officer would be avoided. In the act of nomination, his judgment alone would be exerciſed; and as it would be his ſole duty to point out the man, who with the approbation of the ſenate ſhould fill an office, his

responsibility would be as complete as if he were to make the final appointment. There can in this view be no difference between nominating and appointing. The same motives which would influence a proper discharge of his duty in one case, would exist in the other. And as no man could be appointed, but upon his previous nomination, every man who might be appointed would be in fact his choice.

But his nomination may be overruled:—This it certainly may, yet it can only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference though perhaps not in the first degree. It is also not very probable that his nomination would often be overruled. The senate could not be tempted by the preference they might feel to another to reject the one proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain that a future nomination would present a candidate in any degree more acceptable to them: And as their dissent might cast a kind of stigma upon the individual rejected; and might have the appearance of a reflection upon the judgement of the chief magistrate; it is not likely that their sanction would often be refused, where there were not special and strong reasons for the refusal.

To what purpose then require the co-operation of the senate? I answer that the necessity of their concurrence would have a powerful, though in general a silent operation. It would be an excellent check upon a spirit of favoritism in the president, and would tend greatly to preventing the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity. And, in addition to this, it would be an efficacious source of stability in the administration.

It will readily be comprehended, that a man, who had himself the sole disposition of offices, would be governed much more by his private inclinations and interests, than when he was bound to submit the propriety of his choice to the discussion and determination of a different and independent body; and that body an entire branch of the legislature. The possibility of rejection would be a strong motive to care in proposing. The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism, or an unbecoming pursuit of popularity, to the observation of a body, whose opinion would have great weight in forming that of the public, could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same state to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

To this reasoning, it has been objected, that the president, by the influence of the power of nomination, may secure the complaisance of the senate to his views. The supposition of universal venality in human nature, is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of virtue and honour among mankind, which may be a reasonable foundation of confidence. And experience justifies the theory: It has been found to exist in the most corrupt periods of the most corrupt governments. The venality of the British house of commons has been long a topic of accusation against that body, in the country to which they belong, as well as in this; and it cannot be doubted that the charge is to a considerable extent well founded.

founded. But it is as little to be doubted that there is always a large proportion of the body, which consists of independent and public spirited men, who have an influential weight in the councils of the nation. Hence it is (the present reign not excepted) that the sense of that body is often seen to control the inclinations of the monarch, both with regard to men and to measures. Though it might therefore be allowable to suppose that the executive might occasionally influence some individuals in the senate, yet the supposition that he could in general purchase the integrity of the whole body, would be forced and improbable. A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence in the probity of the senate, to rest satisfied not only that it will be impracticable to the executive to corrupt or seduce a majority of its members; but that the necessity of its co-operation in the business of appointments will be a considerable and salutary restraint upon the conduct of that magistrate. Nor is the integrity of the senate the only reliance. The constitution has provided some important guards against the danger of executive influence upon the legislative body: It declares that "no senator or representative "shall, during the time *for which he was elected*, be "appointed to any civil office under the United "States, which shall have been created, or the emo-"luments whereof shall have been encreased during "such time; and no person holding any office under "the United States, shall be a member of either "house during his continuance in office."

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The View of the Constitution of the President concluded, with a further Consideration of the Power of Appointment, and a concise Examination of his remaining Powers.

IT has been mentioned as one of the advantages to be expected from the co-operation of the senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the chief magistrate therefore would not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained from attempting a change, in favor of a person more agreeable to him, by the apprehension that the discountenance of the senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that body, which from the greater permanency of its own composition, will in all probability be less subject to inconstancy, than any other member of the government.

To this union of the senate with the president, in the article of appointments, it has in some cases been objected, that it would serve to give the president an undue influence over the senate; and in others, that it would have an opposite tendency; a strong proof that neither suggestion is true.

To state the first in its proper form is to refute it. It amounts to this; the president would have an

improper

improper *influence over* the ſenate; becauſe the ſenate would have the power of *reſtraining* him. This is an abſurdity in terms. It cannot admit of a doubt that the entire power of appointment would enable him much more effectually to eſtabliſh a dangerous empire over that body, than a mere power of nomination ſubject to their control.

Let us take a view of the converſe of the propoſition, "The ſenate would influence the executive." As I have had occaſion to remark in ſeveral other inſtances, the indiſtinctneſs of the objection forbids a preciſe anſwer. In what manner is this influence to be exerted? In relation to what objects? The power of influencing a perſon, in the ſenſe in which it is here uſed, muſt imply a power of conferring a benefit upon him. How could the ſenate confer a benefit upon the preſident by the manner of employing their right of negative upon his nominations? If it be ſaid they might ſometimes gratify him by an acquieſcence in a favourite choice, when public motives might dictate a different conduct; I anſwer that the inſtances in which the preſident could be perſonally intereſted in the reſult, would be too few to admit of his being materially affected by the compliances of the ſenate. Beſides this, it is evident that the POWER which can *originate* the diſpoſition of honors and emoluments, is more likely to attract than to be attracted by the POWER which can merely obſtruct their courſe. If by influencing the preſident be meant *reſtraining* him, this is preciſely what muſt have been intended. And it has been ſhewn that the reſtraint would be ſalutary, at the ſame time that it would not be ſuch as to deſtroy a ſingle advantage to be looked for from the uncontroled agency of that magiſtrate. The right of nomination would produce all the good, without the ill.

Upon a compariſon of the plan for the appointment of the officers of the propoſed government with that which

which is eſtabliſhed by the conſtitution of this ſtate a decided preference muſt be given to the former. In that plan the power of nomination is unequivocally reſted in the executive. And as there would be a neceſſity for ſubmitting each nomination to the judgement of an entire branch of the legiſlative, the circumſtances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public could be at no loſs to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the preſident ſingly and abſolutely. The cenſure of rejecting a good one would lie entirely at the door of the ſenate; aggravated by the conſideration of their having counteracted the good intentions of the executive. If an ill appointment ſhould be made the executive for nominating and the ſenate for approving would participate though in different degrees in the opprobrium and diſgrace.

The reverſe of all this characteriſes the manner of appointment in this ſtate. The council of appointment conſiſts of from three to five perſons, of whom the governor is always one. This ſmall body, ſhut up in a private apartment, impenetrable to the public eye, proceed to the execution of the truſt committed to them. It is known that the governor claims the right of nomination, upon the ſtrength of ſome ambiguous expreſſions in the conſtitution; but it is not known to what extent, or in what manner he exerciſes it; nor upon what occaſions he is contradicted or oppoſed. The cenſure of a bad appointment, on account of the uncertainty of its author, and for want of a determinate object, has neither poignancy nor duration. And while an unbounded field for cabal and intrigue lies open, all idea of reſponſibility is loſt. The moſt that the public can know is, that the governor claims the right of nomination: That *two* out of the conſiderable number of *four* men can too often be managed without much difficulty: That if ſome

ſome of the members of a particular council ſhould happen to be of an uncomplying character, it is frequently not impoſſible to get rid of their oppoſition, by regulating the times of meeting in ſuch a manner as to render their attendance inconvenient: And that, from whatever cauſe it may proceed, a great number of very improper appointments are from time to time made. Whether a governor of this ſtate avails himſelf of the aſcendant he muſt neceſſarily have, in this delicate and important part of the adminiſtration, to prefer to offices men who are beſt qualified for them: Or whether he proſtitutes that advantage to the advancement of perſons, whoſe chief merit is their implicit devotion to his will, and to the ſupport of a deſpicable and dangerous ſyſtem of perſonal influence, are queſtions which unfortunately for the community can only be the ſubjects of ſpeculation and conjecture.

Every mere council of appointment, however conſtituted, will be a conclave, in which cabal and intrigue will have their full ſcope. Their number, without an unwarrantable increaſe of expence, cannot be large enough to preclude a facility of combination. And as each member will have his friends and connections to provide for, the deſire of mutual gratification will beget a ſcandalous bartering of votes and bargaining for places. The private attachments of one man might eaſily be ſatisfied; but to ſatisfy the private attachments of a dozen, or of twenty men, would occaſion a monopoly of all the principal employments of the government, in a few families, and would lead more directly to an ariſtocracy or an oligarchy, than any meaſure that could be contrived. If to avoid an accumulation of offices, there was to be a frequent change in the perſons who were to compoſe the council, this would involve the miſchiefs of a mutable adminiſtration in their full extent. Such a council would alſo be more liable to executive influence than the ſenate, becauſe they would be fewer

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in number, and would act less immediately under the public inspection. Such a council in fine as a substitute for the plan of the convention, would be productive of an increase of expence, a multiplication of the evils which spring from favoritism and intrigue in the distribution of the public honors, a decrease of stability in the administration of the government, and a diminution of the security against an undue influence of the executive. And yet such a council has been warmly contended for as an essential amendment in the proposed constitution.

I could not with propriety conclude my observations on the subject of appointments, without taking notice of a scheme, for which there has appeared some, though but a few advocates; I mean that of uniting the house of representatives in the power of making them. I shall however do little more than mention it, as I cannot imagine that it is likely to gain the countenance of any considerable part of the community. A body so fluctuating, and at the same time so numerous, can never be deemed proper for the exercise of that power. Its unfitness will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons. All the advantages of the stability, both of the executive and of the senate, would be defeated by this union; and infinite delays and embarrassments would be occasioned. The example of most of the states in their local constitutions, encourages us to reprobate the idea.

The only remaining powers of the executive, are comprehended in giving information to congress of the state of the union; in recommending to their consideration such measures as he shall judge expedient; in convening them, or either branch, upon extraordinary occasions; in adjourning them when they cannot themselves agree upon the time of adjournment; in receiving ambassadors and other public ministers; in faithfully executing the laws; and

and in commiſſioning all the officers of the United States.

Except ſome cavils about the power of convening *either* houſe of the legiſlature and that of receiving ambaſſadors, no objection has been made to this claſs of authorities; nor could they poſſibly admit of any. It required indeed an inſatiable avidity for cenſure to invent exceptions to the parts which have been excepted to. In regard to the power of convening either houſe of the legiſlature, I ſhall barely remark, that in reſpect to the ſenate at leaſt, we can readily diſcover a good reaſon for it. As this body has a concurrent power with the executive in the article of treaties, it might often be neceſſary to call it together with a view to this object, when it would be unneceſſary and improper to convene the houſe of repreſentatives. As to the reception of ambaſſadors, what I have ſaid in a former paper will furniſh a ſufficient anſwer.

We have now compleated a ſervey of the ſtructure and powers of the executive department, which, I have endeavoured to ſhew, combines, as far as republican principles will admit, all the requiſites to energy. The remaining enquiry is—does it alſo combine the requiſites to ſafety in the republican ſenſe—a due dependence on the people—a due reſponſibility? The anſwer to this queſtion has been anticipated in the inveſtigation of its other characteriſtics, and is ſatisfactorily deducible from theſe circumſtances, the election of the preſident once in four years by perſons immediately choſen by the people for that purpoſe; and his being at all times liable to impeachment, trial, diſmiſſion from office, incapacity to ſerve in any other; and to the forfeiture of life and eſtate by ſubſequent proſecution in the common courſe of law. But theſe precautions, great as they are, are not the only ones, which the plan of the convention has provided in favor of the public ſecurity. In the only inſtances in which the abuſe of the executive

 authority

authority was materially to be feared, the chief magiſtrate of the United States would by that plan be ſubjected to the control of a branch of the legiſlative body. What more can an enlightened and reaſonable people deſire?

PUBLIUS.

NUMBER LXXVIII.

A View of the Conſtitution of the Judicial Department, in Relation to the Tenure of good Behaviour.

WE proceed now to an examination of the judiciary department of the propoſed government.

In unfolding the defects of the exiſting confederation, the utility and neceſſity of a federal judicature have been clearly pointed out. It is the leſs neceſſary to recapitulate the conſiderations there urged; as the propriety of the inſtitution in the abſtract is not diſputed: The only queſtions which have been raiſed being relative to the manner of conſtituting it, and to its extent. To theſe points therefore our obſervations ſhall be confined.

The manner of conſtituting it ſeems to embrace theſe ſeveral objects—1ſt. The mode of appointing the judges—2d. The tenure by which they are to hold their places—3d. The partition of the judiciary authority between different courts, and their relations to each other.

Firſt. As to the mode of appointing the judges: This is the ſame with that of appointing the officers of the union in general, and has been ſo fully diſcuſſed in the two laſt numbers, that nothing can be ſaid here which would not be uſeleſs repetition.

Second. As to the tenure by which the judges are to hold their places: This chiefly concerns their duration

duration in office; the provisions for their support; and the precautions for their responsibility.

According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices *during good behaviour*, which is conformable to the most approved of the state constitutions; and among the rest, to that of this state. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behaviour for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: In a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislative not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This ſimple view of the matter ſuggeſts ſeveral important conſequences. It proves inconteſtibly that the judiciary is beyond compariſon the weakeſt of the three departments of power*; that it can never attack with ſucceſs either of the other two; and that all poſſible care is requiſite to enable it to defend itſelf againſt their attacks. It equally proves, that though individual oppreſſion may now and then proceed from the courts of juſtice, the general liberty of the people can never be endangered from that quarter: I mean, ſo long as the judiciary remains truly diſtinct from both the legiſlative and executive. For I agree that "there "is no liberty, if the power of judging be not ſepa- "rated from the legiſlative and executive powers†." And it proves, in the laſt place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of ſuch an union muſt enſue from a dependence of the former on the latter, notwithſtanding a nominal and apparent ſeparation; that as from the natural feebleneſs of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches; and that as nothing can contribute ſo much to its firmneſs and independence, as permanency in office, this quality may therefore be juſtly regarded as an indiſpenſable ingredient in its conſtitution; and in a great meaſure as the citadel of the public juſtice and the public ſecurity.

The complete independence of the courts of juſtice is peculiarly eſſential in a limited conſtitution. By a limited conſtitution I underſtand one which contains certain ſpecified exceptions to the legiſlative authority; ſuch for inſtance as that it ſhall paſs no bills of attainder, no *ex poſt facto* laws, and the like. Limitations of this kind can be preſerved in practice no other

* The celebrated Monteſquieu ſpeaking of them ſays, "of the "three powers above mentioned, the JUDICIARY is next to "nothing." Spirit of Laws, vol. 1. page 186.

† Idem. page 181.

other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in

order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcileable variance between the two, that which has the superior obligation and validity ought of course to be prefered; or in other words, the constitution ought to be prefered to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation: So far as they can by any fair construction be reconciled to each other; reason and law conspire to dictate that this should be done: Where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is mere rule of construction,

tion, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an *equal* authority, that which was the last indication of its will, should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be prefered to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former.

It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body.

If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges, which

must

must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill-humours which the arts of designing men, or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the mean time to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed constitution will never concur with its enemies* in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing constitution, would on that account be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have by some solemn and authoritative act annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the constitution, where legislative invasions of it had

* Vide Protest of the minority of the convention of Pennsylvania, Martin's speech, &c.

had been instigated by the major voice of the community.

But it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead, universal distrust and distress.

That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice,

juſtice, can certainly not be expected from judges who hold their offices by a temporary commiſſion. Periodical appointments, however regulated, or by whomſoever made, would in ſome way or other be fatal to their neceſſary independence. If the power of making them was committed either to the executive or legiſlative, there would be danger of an improper complaiſance to the branch which poſſeſſed it; if to both, there would be an unwillingneſs to hazard the diſpleaſure of either; if to the people, or to perſons choſen by them for the ſpecial purpoſe, there would be too great a diſpoſition to conſult popularity, to juſtify a reliance that nothing would be conſulted but the conſtitution and the laws.

There is yet a further and a weighty reaſon for the permanency of the judicial offices; which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety, that a voluminous code of laws is one of the inconveniencies neceſſarily connected with the advantages of a free government. To avoid an arbitrary diſcretion in the courts, it is indiſpenſable that they ſhould be bound down by ſtrict rules and precedents, which ſerve to define and point out their duty in every particular caſe that comes before them; and it will readily be conceived from the variety of controverſies which grow out of the folly and wickedneſs of mankind, that the records of thoſe precedents muſt unavoidably ſwell to a very conſiderable bulk, and muſt demand long and laborious ſtudy to acquire a competent knowledge of them. Hence it is that there can be but few men in the ſociety, who will have ſufficient ſkill in the laws to qualify them for the ſtations of judges. And making the proper deductions for the ordinary depravity of human nature, the number muſt be ſtill ſmaller of thoſe who unite the requiſite integrity with the requiſite knowledge. Theſe conſiderations appriſe us, that the government can have no great option between fit characters;

racters; and that a temporary duration in office, which would naturally discourage such characters from quiting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behaviour* as the tenure of their judicial offices in point of duration; and that so far from being blameable on this account, their plan would have been inexcuseably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

PUBLIUS.

NUMBER LXXIX.

A further View of the Judicial Department, in Relation to the Provisions for the Support and Responsibility of the Judges.

NEXT to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the president, is equally applicable here. In the general course of human nature, *a power over a man's subsistence*

ſiſtence amounts to a power over his will. And we can never hope to ſee realiſed in practice the complete ſeparation of the judicial from the legiſlative power, in any ſyſtem, which leaves the former dependent for pecuniary reſources on the occaſional grants of the latter. The enlightened friends to good government, in every ſtate, have ſeen cauſe to lament the want of preciſe and explicit precautions in the ſtate conſtitutions on this head. Some of theſe indeed have declared that *permanent** ſalaries ſhould be eſtabliſhed for the judges; but the experiment has in ſome inſtances ſhewn that ſuch expreſſions are not ſufficiently definite to preclude legiſlative evaſions. Something ſtill more poſitive and unequivocal has been evinced to be requiſite. The plan of the convention accordingly has provided, that the judges of the United States "ſhall at *ſtated times* receive for their ſervices "a compenſation, which ſhall not be *diminiſhed* during "their continuance in office."

This, all circumſtances conſidered, is the moſt eligible proviſion that could have been deviſed. It will readily be underſtood, that the fluctuations in the value of money, and in the ſtate of ſociety, rendered a fixed rate of compenſation in the conſtitution inadmiſſible. What might be extravagant to day, might in half a century become penurious and inadequate. It was therefore neceſſary to leave it to the diſcretion of the legiſlature to vary its proviſions in conformity to the variations in circumſtances; yet under ſuch reſtrictions as to put it out of the power of that body to change the condition of the individual for the worſe. A man may then be ſure of the ground upon which he ſtands, and can never be deterred from his duty by the apprehenſion of being placed in a leſs eligible ſituation. The clauſe which has been quoted combines both advantages. The ſalaries of judicial offices may from time to time be altered, as occaſion ſhall

* Vide Conſtitution of Maſſachuſetts, Chap. 2. Sect. 1. Art. 13.

ſhall require, yet ſo as never to leſſen the allowance with which any particular judge comes into office, in reſpect to him. It will be obſerved that a difference has been made by the convention between the compenſation of the preſident and of the judges. That of the former can neither be increaſed nor diminiſhed. That of the latter can only not be diminiſhed. This probably aroſe from the difference in the duration of the reſpective offices. As the preſident is to be elected for no more than four years, it can rarely happen that an adequate ſalary, fixed at the commencement of that period, will not continue to be ſuch to the end of it. But with regard to the judges, who, if they behave properly, will be ſecured in their places for life, it may well happen, eſpecially in the early ſtages of the government, that a ſtipend, which would be very ſufficient at their firſt appointment, would become too ſmall in the progreſs of their ſervice.

This proviſion for the ſupport of the judges bears every mark of prudence and efficacy; and it may be ſafely affirmed that, together with the permanent tenure of their offices, it affords a better proſpect of their independence than is diſcoverable in the conſtitutions of any of the ſtates, in regard to their own judges.

The precautions for their reſponſibility are comprised in the article reſpecting impeachments. They are liable to be impeached for mal-conduct by the houſe of repreſentatives, and tried by the ſenate, and if convicted, may be diſmiſſed from office and diſqualified for holding any other. This is the only proviſion on the point, which is conſiſtent with the neceſſary independence of the judicial character, and is the only one which we find in our own conſtitution in reſpect to our own judges.

The want of a proviſion for removing the judges on account of inability, has been a ſubject of complaint. But all conſiderate men will be ſenſible that

ſuch a proviſion would either not be practiſed upon, or would be more liable to abuſe than calculated to anſwer any good purpoſe. The menſuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability, would much oftener give ſcope to perſonal and party attachments and enmities, than advance the intereſts of juſtice, or the public good. The reſult, except in the caſe of inſanity, muſt for the moſt part be arbitrary; and inſanity without any formal or expreſs proviſion, may be ſafely pronounced to be a virtual diſqualification.

The conſtitution of New-York, to avoid inveſtigations that muſt forever be vague and dangerous, has taken a particular age as the criterion of inability. No man can be a judge beyond ſixty. I believe there are few at preſent, who do not diſapprove of this proviſion. There is no ſtation in relation to which it is leſs proper than to that of a judge. The deliberating and comparing faculties generally preſerve their ſtrength much beyond that period, in men who ſurvive it; and when in addition to this circumſtance, we conſider how few there are who outlive the ſeaſon of intellectual vigour, and how improbable it is that any conſiderable proportion of the bench, whether more or leſs numerous, ſhould be in ſuch a ſituation at the ſame time, we ſhall be ready to conclude that limitations of this ſort have little to recommend them. In a republic, where fortunes are not affluent, and penſions not expedient, the diſmiſſion of men from ſtations in which they have ſerved their country long and uſefully, on which they depend for ſubſiſtence, and from which it will be too late to reſort to any other occupation for a livelihood, ought to have ſome better apology to humanity, than is to be found in the imaginary danger of a ſuperannuated bench.

PUBLIUS.

NUMBER

NUMBER LXXX.

A further View of the Judicial Department, in Relation to the Extent of its Powers.

TO judge with accuracy of the proper extent of the federal judicature, it will be necessary to consider in the first place what are its proper objects.

It seems scarcely to admit of controversy that the judiciary authority of the union ought to extend to these several descriptions of causes. 1st. To all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d. to all those which concern the execution of the provisions expressly contained in the articles of union; 3d. to all those in which the United States are a party; 4th. to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th. to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the state tribunals cannot be supposed to be impartial and unbiassed.

The first point depends upon this obvious consideration that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What for instance would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the interests of the union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions

would be ſcrupulouſly regarded, without ſome effectual power in the government to reſtrain or correct the infractions of them. This power muſt either be a direct negative on the ſtate laws, or an authority in the federal courts, to over-rule ſuch as might be in manifeſt contravention of the articles of union. There is no third courſe that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I preſume will be moſt agreeable to the ſtates.

As to the ſecond point, it is impoſſible by any argument or comment to make it clearer than it is in itſelf. If there are ſuch things as political axioms, the propriety of the judicial power of a government being co-extenſive with its legiſlative, may be ranked among the number. The mere neceſſity of uniformity in the interpretation of the national laws, decides the queſtion. Thirteen independent courts of final juriſdiction over the ſame cauſes, ariſing upon the ſame laws, is a hydra in government, from which nothing but contradiction and confuſion can proceed.

Still leſs need be ſaid in regard to the third point. Controverſies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reaſon, to precedent, and to decorum.

The fourth point reſts on this plain propoſition, that the peace of the WHOLE ought not to be left at the diſpoſal of a PART. The union will undoubtedly be anſwerable to foreign powers for the conduct of its members. And the reſponſibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perverſion of juſtice by the ſentences of courts, as well as in any other manner, is with reaſon claſſed among the juſt cauſes of war, it will follow that the federal judiciary ought to have cognizance of all cauſes in which the citizens of other countries are concerned. This is not leſs eſſential to the preſervation of the public faith, than to the

ſecurity

security of the public tranquility. A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations, and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the states. But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations. And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complection and those of the other. So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.

The power of determining causes between two states, between one state and the citizens of another, and between the citizens of different states, is perhaps not less essential to the peace of the union than that which has been just examined. History gives us a horrid picture of the dissentions and private wars which distracted and desolated Germany prior to the institution of the IMPERIAL CHAMBER by Maximilian, towards the close of the fifteenth century; and informs us at the same time of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences between the members of the Germanic body.

A method of terminating territorial disputes between the states, under the authority of the federal head, was not unattended to, even in the imperfect system by which they have been hitherto held together.

gether. But there are many other ſources, beſides interfering claims of boundary, from which bickerings and animoſities may ſpring up among the members of the union. To ſome of theſe we have been witneſſes in the courſe of our paſt experience. It will readily be conjectured that I allude to the fraudulent laws which have been paſſed in too many of the ſtates. And though the propoſed conſtitution eſtabliſhes particular guards againſt the repetition of thoſe inſtances which have heretofore made their appearance, yet it is warrantable to apprehend that the ſpirit which produced them will aſſume new ſhapes that could not be foreſeen, nor ſpecifically provided againſt. Whatever practices may have a tendency to diſturb the harmony between the ſtates, are proper objects of federal ſuperintendence and control.

It may be eſteemed the baſis of the union, that "the citizens of each ſtate ſhall be entitled to all "the privileges and immunities of citizens of the "ſeveral ſtates." And if it be a juſt principle that every government *ought to poſſeſs the means of executing its own proviſions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preſide in all caſes in which one ſtate or its citizens are oppoſed to another ſtate or its citizens. To ſecure the full effect of ſo fundamental a proviſion againſt all evaſion and ſubterfuge, it is neceſſary that its conſtruction ſhould be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different ſtates and their citizens, and which, owing its official exiſtence to the union, will never be likely to feel any bias inauſpicious to the principles on which it is founded.

The fifth point will demand little animadverſion. The moſt bigotted idolizers of ſtate authority have not thus far ſhewn a diſpoſition to deny the national judiciary

judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are by the present confederation submitted to federal jurisdiction.

The reasonableness of the agency of the national courts in cases in which the state tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different states and their citizens. And it ought to have the same operation in regard to some cases between the citizens of the same state. Claims to land under grants of different states, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting states could be expected to be unbiassed. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the state to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

Having thus laid down and discussed the principles which ought to regulate the constitution of the federal judiciary, we will proceed to test, by these principles, the particular powers of which, according to the plan of the convention, it is to be composed. It is to comprehend, "all cases in law and "equity arising under the constitution, the laws of "the United States, and 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;

"jurisdiction; to controversies to which the United "States shall be a party; to controversies between "two or more states, between a state and citizens "of another state, between citizens of different "states, between citizens of the same state claiming "lands under grants of different states, and between "a state or the citizens thereof, and foreign states, "citizens and subjects." This constitutes the entire mass of the judicial authority of the union. Let us now review it in detail. It is then to extend,

First. To all cases in law and equity *arising under the constitution* and *the laws of the United States*. This corresponds to the two first classes of causes which have been enumerated as proper for the jurisdiction of the United States. It has been asked what is meant by "cases arising under the constitution," in contradistinction from those "arising under the laws of "the United States." The difference has been already explained. All the restrictions upon the authority of the state legislatures, furnish examples of it. They are not, for instance, to emit paper money; but the interdiction results from the constitution, and will have no connection with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising upon the constitution, and not upon the laws of the United States, in the ordinary signification of the terms. This may serve as a sample of the whole.

It has also been asked, what need of the word "equity"? What equitable causes can grow out of the constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not involve those ingredients of *fraud*, *accident*, *trust* or *hardship*, which would render the matter an object of equitable, rather than of legal jurisdiction, as the distinction is known and established in several of the states. It is the peculiar province, for instance, of a court of equity to relieve

against

against what are called hard bargains: These are contracts, in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law; yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable, as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different states, may afford another example of the necessity of an equitable jurisdiction in the federal courts. This reasoning may not be so palpable in those states where the formal and technical distinction between LAW and EQUITY is not maintained as in this state, where it is exemplified by every day's practice.

The judiciary authority of the union is to extend—

Second. To treaties made, or which shall be made under the authority of the United States, and to all cases affecting ambassadors, other public ministers and consuls. These belong to the fourth class of the enumerated cases, as they have an evident connection with the preservation of the national peace.

Third. To cases of admiralty and maritime jurisdiction. These form altogether the fifth of the enumerated classes of causes proper for the cognizance of the national courts.

Fourth. To controversies to which the United States shall be a party. These constitute the third of those classes.

Fifth. To controversies between two or more states, between a state and citizens of another state, between citizens of different states. These belong to the fourth of those classes, and partake in some measure of the nature of the last.

Sixth. To cases between the citizens of the same state, *claiming lands under grants of different states.*

These

These fall within the last class, and *are the only instance in which the proposed constitution directly contemplates the cognizance of disputes between the citizens of the same state.*

Seventh. To cases between a state and the citizens thereof, and foreign states, citizens, or subjects. These have been already explained to belong to the fourth of the enumerated classes, and have been shewn to be in a peculiar manner the proper subjects of the national judicature.

From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears, that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniencies should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniencies. The possibility of particular mischiefs can never be viewed by a well-informed mind as a solid objection to a general principle, which is calculated to avoid general mischiefs, and to obtain general advantages.

PUBLIUS.

NUMBER LXXXI.

A further View of the Judicial Department, in Relation to the Distribution of its Authority.

LET us now return to the partition of the judiciary authority between different courts, and their relations to each other.

"The judicial power of the United States is (by "the plan of the convention) to be vested in one "supreme court, and in such inferior courts as the "congress

"congreſs may from time to time ordain and "eſtabliſh."*

That there ought to be one court of ſupreme and final jurisdiction is a propoſition which has not been, and is not likely to be conteſted. The reaſons for it have been aſſigned in another place, and are too obvious to need repetition. The only queſtion that ſeems to have been raiſed concerning it, is whether it ought to be a diſtinct body, or a branch of the legiſlature. The ſame contradiction is obſervable in regard to this matter, which has been remarked in ſeveral other caſes. The very men who object to the ſenate as a court of impeachments, on the ground of an improper intermixture of powers, advocate, by implication at leaſt, the propriety of veſting the ultimate deciſion of all cauſes in the whole, or in a part of the legiſlative body.

The arguments or rather ſuggeſtions, upon which this charge is founded, are to this effect: "The "authority of the propoſed ſupreme court of the "United States, which is to be a ſeparate and inde-"pendent body, will be ſuperior to that of the "legiſlature. The power of conſtruing the laws, "according to the *ſpirit* of the conſtitution, will "enable that court to mould them into whatever "ſhape it may think proper; eſpecially as its de-"ciſions will not be in any manner ſubject to the "reviſion or correction of the legiſlative body. This "is as unprecedented as it is dangerous. In Britain, "the judicial power in the laſt reſort, reſides in the "houſe of lords, which is a branch of the legiſ-"lature; and this part of the Britiſh government "has been imitated in the ſtate conſtitutions in "general. The parliament of Great-Britain, and "the legiſlatures of the ſeveral ſtates, can at any "time rectify by law, the exceptionable deciſions "of their reſpective courts. But the errors and "uſurpations of the ſupreme court of the United States

* Article 3. Sec. 1.

"States will be uncontrolable and remedileſs." This, upon examination, will be found to be altogether made up of falſe reaſoning upon miſconceived fact.

In the firſt place, there is not a ſyllable in the plan under conſideration, which *directly* empowers the national courts to conſtrue the laws according to the ſpirit of the conſtitution, or which gives them any greater latitude in this reſpect, than may be claimed by the courts of every ſtate. I admit however, that the conſtitution ought to be the ſtandard of conſtruction for the laws, and that wherever there is an evident oppoſition, the laws ought to give place to the conſtitution. But this doctrine is not deducible from any circumſtance peculiar to the plan of the convention; but from the general theory of a limited conſtitution; and as far as it is true, is equally applicable to moſt, if not to all the ſtate governments. There can be no objection therefore, on this account, to the federal judicature, which will not lie againſt the local judicatures in general, and which will not ſerve to condemn every conſtitution that attempts to ſet bounds to the legiſlative diſcretion.

But perhaps the force of the objection may be thought to conſiſt in the particular organization of the propoſed ſupreme court; in its being compoſed of a diſtinct body of magiſtrates, inſtead of being one of the branches of the legiſlature, as in the government of Great-Britain and in that of this ſtate. To inſiſt upon this point, the authors of the objection muſt renounce the meaning they have laboured to annex to the celebrated maxim requiring a ſeparation of the departments of power. It ſhall nevertheleſs be conceded to them, agreeably to the interpretation given to that maxim in the courſe of theſe papers, that it is not violated by veſting the ultimate power of judging in a *part* of the legiſlative body. But though this be not an abſolute violation of that excellent rule; yet it verges ſo nearly upon it, as on this

account

account alone to be leſs eligible than the mode preferred by the convention. From a body which had had even a partial agency in paſſing bad laws, we could rarely expect a diſpoſition to temper and moderate them in the application. The ſame ſpirit, which had operated in making them, would be too apt to operate in interpreting them: Still leſs could it be expected, that men who had infringed the conſtitution, in the character of legiſlators, would be diſpoſed to repair the breach, in the character of judges. Nor is this all:—Every reaſon, which recommends the tenure of good behaviour for judicial offices, militates againſt placing the judiciary power in the laſt reſort in a body compoſed of men choſen for a limited period. There is an abſurdity in referring the determination of cauſes in the firſt inſtance to judges of permanent ſtanding, and in the laſt to thoſe of a temporary and mutable conſtitution. And there is a ſtill greater abſurdity in ſubjecting the deciſions of men ſelected for their knowledge of the laws, acquired by long and laborious ſtudy, to the reviſion and control of men, who for want of the ſame advantage cannot but be deficient in that knowledge. The members of the legiſlature will rarely be choſen with a view to thoſe qualifications which fit men for the ſtations of judges; and as on this account there will be great reaſon to apprehend all the ill conſequences of defective information; ſo on account of the natural propenſity of ſuch bodies to party diviſions, there will be no leſs reaſon to fear, that the peſtilential breath of faction may poiſon the fountains of juſtice. The habit of being continually marſhalled on oppoſite ſides, will be too apt to ſtifle the voice both of law and of equity.

Theſe conſiderations teach us to applaud the wiſdom of thoſe ſtates, who have committed the judicial power in the laſt reſort, not to a part of the legiſlature, but to diſtinct and independent bodies of men. Contrary to the ſuppoſition of thoſe, who have repreſented the plan of the convention in this

respect as novel and unprecedented, it is but a copy of the constitutions of New-Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia; and the preference which has been given to these models is highly to be commended.

It is not true, in the second place, that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorises the revisal of a judicial sentence, by a legislative act. Nor is there any thing in the proposed constitution more than in either of them, by which it is forbidden. In the former as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the state governments, as to the national government, now under consideration. Not the least difference can be pointed out in any view of the subject.

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative

parative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords at the same time a cogent argument for constituting the senate a court for the trial of impeachments.

Having now examined, and I trust removed the objections to the distinct and independent organization of the supreme court, I proceed to consider the propriety of the power of constituting inferior courts,* and the relations which will subsist between these and the former.

The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the supreme court, in every case of federal cognizance. It is intended to enable the national government to institute or *authorise* in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits.

* This power has been absurdly represented as intended to abolish all the county courts in the several states, which are commonly called inferior courts. But the expressions of the constitution are to constitute "tribunals INFERIOR TO THE "SUPREME COURT," and the evident design of the provision is to enable the institution of local courts subordinate to the supreme, either in states or larger districts. It is ridiculous to imagine that county courts were in contemplation.

But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the state courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude; yet the substance of the power in question, may still be regarded as a necessary part of the plan, if it were only to empower the national legislature to commit to them the cognizance of causes arising out of the national constitution. To confer the power of determining such causes upon the existing courts of the several states, would perhaps be as much "to constitute tribunals," as to create new courts with the like power. But ought not a more direct and explicit provision to have been made in favour of the state courts? There are, in my opinion, substantial reasons against such a provision: The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states, would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them, there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or diffidence of the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction in the several classes of causes to which it is extended by the plan of the convention, I should consider every thing calculated to give in practice, an *unrestrained course* to appeals as a source of public and private inconvenience.

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I am not sure but that it will be found highly expedient and useful to divide the United States into four or five, or half a dozen districts; and to institute a federal court in each district, in lieu of one in every state. The judges of these courts, with the aid of the state judges, may hold circuits for the trial of causes in the several parts of the respective districts. Justice through them may be administered with ease and dispatch; and appeals may be safely circumscribed within a very narrow compass. This plan appears to me at present the most eligible of any that could be adopted, and in order to it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is to be found in the proposed constitution.

These reasons seem sufficient to satisfy a candid mind, that the want of such a power would have been a great defect in the plan. Let us now examine in what manner the judicial authority is to be distributed between the supreme and the inferior courts of the union.

The supreme court is to be invested with original jurisdiction, only "in cases affecting ambassadors, "other public ministers and consuls, and those in "which A STATE shall be a party." Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned, are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper, that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a state might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.

Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here, a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of state sovereignty, were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorise suits against states, for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state govern-

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ments, a power which would involve ſuch a conſequence, would be altogether forced and unwarrantable.

Let us reſume the train of our obſervations; we have ſeen that the original juriſdiction of the ſupreme court would be confined to two claſſes of cauſes, and thoſe of a nature rarely to occur. In all other cauſes of federal cognizance, the original juriſdiction would appertain to the inferior tribunals, and the ſupreme court would have nothing more than an appellate juriſdiction, "with ſuch *exceptions*, and under ſuch "*regulations* as the congreſs ſhall make."

The propriety of this appellate juriſdiction has been ſcarcely called in queſtion in regard to matters of law; but the clamours have been loud againſt it as applied to matters of fact. Some well intentioned men in this ſtate, deriving their notions from the language and forms which obtain in our courts, have been induced to conſider it as an implied ſuperſedure of the trial by jury, in favour of the civil law mode of trial, which prevails in our courts of admiralty, probates and chancery. A technical ſenſe has been affixed to the term "appellate", which in our law parlance is commonly uſed in reference to appeals in the courſe of the civil law. But if I am not miſinformed, the ſame meaning would not be given to it in any part of New-England. There an appeal from one jury to another is familiar both in language and practice, and is even a matter of courſe, until there have been two verdicts on one ſide. The word "appellate" therefore will not be underſtood in the ſame ſenſe in New-England as in New-York, which ſhews the impropriety of a technical interpretation derived from the juriſprudence of any particular ſtate. The expreſſion taken in the abſtract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient cuſtom or legiſlative proviſion, (in a new

government

government it must depend on the latter) and may be with or without the aid of a jury, as may be judged adviseable. If therefore the re-examination of a fact, once determined by a jury, should in any case be admitted under the proposed constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the supreme court.

But it does not follow that the re-examination of a fact once ascertained by a jury, will be permitted in the supreme court. Why may it not be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this state, that the latter has jurisdiction of the fact, as well as the law? It is true it cannot institute a new enquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it.* This is jurisdiction of both fact and law, nor is it even possible to separate them. Though the common law courts of this state ascertain disputed facts by a jury, yet they unquestionably have jurisdiction of both fact and law; and accordingly, when the former is agreed in the pleadings, they have no recourse to a jury, but proceed at once to judgment. I contend therefore on this ground, that the expressions, "appellate "jurisdiction, both as to law and fact," do not necessarily imply a re examination in the supreme court of facts decided by juries in the inferior courts.

The following train of ideas may well be imagined to have influenced the convention in relation to this particular provision. The appellate jurisdiction of the supreme court (may it have been argued) will extend to causes determinable in different modes, some in the course of the COMMON LAW, and others in the course of the CIVIL LAW. In the former, the

* This word is a compound of JUS and DICTIO, juris, dictio, or a speaking or pronouncing of the law.

the revision of the law only, will be, generally speaking, the proper province of the supreme court; in the latter, the re-examination of the fact is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is therefore necessary, that the appellate jurisdiction should, in certain cases, extend in the broadest sense to matters of fact. It will not answer to make an express exception of cases, which shall have been originally tried by a jury, because in the courts of some of the states, *all causes* are tried in this mode;* and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniencies, it will be safest to declare generally, that the supreme court shall possess appellate jurisdiction, both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

This view of the matter, at any rate puts it out of all doubt that the supposed *abolition* of the trial by jury, by the operation of this provision, is fallacious and untrue. The legislature of the United States would certainly have full power to provide that in appeals to the supreme court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorised exception; but if for the reason already intimated it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial.

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* I hold that the states will have concurrent jurisdiction with the subordinate federal judicatories, in many cases of federal cognizance, as will be explained in my next paper.

The amount of the obſervations hitherto made on the authority of the judicial department is this—that it has been carefully reſtricted to thoſe cauſes which are manifeſtly proper for the cognizance of the national judicature, that in the partition of this authority a very ſmall portion of original juriſdiction has been reſerved to the ſupreme court, and the reſt conſigned to the ſubordinate tribunals—that the ſupreme court will poſſeſs an appellate juriſdiction both as to law and fact in all the caſes refered to them, but ſubject to any *exceptions* and *regulations* which may be thought adviſeable; that this appellate juriſdiction does in no caſe *aboliſh* the trial by jury, and that an ordinary degree of prudence and integrity in the national councils will inſure us ſolid advantages from the eſtabliſhment of the propoſed judiciary, without expoſing us to any of the inconveniencies which have been predicted from that ſource.

PUBLIUS.

NUMBER LXXXII.

A further View of the Judicial Department, in reference to ſome miſcellaneous Queſtions.

THE erection of a new government, whatever care or wiſdom may diſtinguiſh the work, cannot fail to originate queſtions of intricacy and nicety; and theſe may in a particular manner be expected to flow from the eſtabliſhment of a conſtitution founded upon the total or partial incorporation of a number of diſtinct ſovereignties. 'Tis time only that can mature and perfect ſo compound a ſyſtem, can liquidate the meaning of all the parts, and can adjuſt them to each other in a harmonious and conſiſtent WHOLE.

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Such questions accordingly have arisen upon the plan proposed by the convention, and particularly concerning the judiciary department. The principal of these respect the situation of the state courts in regard to those causes, which are to be submitted to federal jurisdiction. Is this to be exclusive, or are those courts to possess a concurrent jurisdiction? If the latter, in what relation will they stand to the national tribunals? These are inquiries which we meet with in the mouths of men of sense, and which are certainly intitled to attention.

The principles established in a former paper* teach us, that the states will retain all *pre-existing* authorities, which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases; where an exclusive authority is in express terms granted to the union; or where a particular authority is granted to the union, and the exercise of a like authority is prohibited to the states, or where an authority is granted to the union with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power; yet I am inclined to think that they are in the main just with respect to the former as well as the latter. And under this impression I shall lay it down as a rule that the state courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.

They only thing in the proposed constitution, which wears the appearance of confining the causes of federal cognizance to the federal courts is contained in this passage—"The JUDICIAL POWER of the "United States *shall be vested* in one supreme court, "and in *such* inferior courts as the congress shall from "time to time ordain and establish"—This might either be construed to signify, that the supreme and subordinate

ſubordinate courts of the union ſhould alone have the power of deciding thoſe cauſes, to which their authority is to extend; or ſimply to denote that the organs of the national judiciary ſhould be one ſupreme court and as many ſubordinate courts as congreſs ſhould think proper to appoint, or in other words, that the United States ſhould exerciſe the judicial power with which they are to be inveſted through one ſupreme tribunal and a certain number of inferior ones to be inſtituted by them. The firſt excludes, the laſt admits the concurrent juriſdiction of the ſtate tribunals: And as the firſt would amount to an alienation of ſtate power by implication, the laſt appears to me the moſt natural and the moſt defenſible conſtruction.

But this doctrine of concurrent juriſdiction is only clearly applicable to thoſe deſcriptions of cauſes of which the ſtate courts have previous cognizance. It is not equally evident in relation to caſes which may grow out of, and be *peculiar* to the conſtitution to be eſtabliſhed: For not to allow the ſtate courts a right of juriſdiction in ſuch caſes can hardly be conſidered as the abridgement of a pre-exiſting authority. I mean not therefore to contend that the United States in the courſe of legiſlation upon the objects entruſted to their direction may not commit the deciſion of cauſes ariſing upon a particular regulation to the federal courts ſolely, if ſuch a meaſure ſhould be deemed expedient; but I hold that the ſtate courts will be diveſted of no part of their primitive juriſdiction, further than may relate to an appeal; and I am even of opinion, that in every caſe in which they were not expreſsly excluded by the future acts of the national legiſlature, they will of courſe take cognizance of the cauſes to which thoſe acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the ſyſtem. The judiciary power of every government looks beyond its own local or municipal laws, and in civil

civil cases lays hold of all subjects of litigation between parties within its jurisdiction though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan not less than of New-York may furnish the objects of legal discussion to our courts. When in addition to this, we consider the state governments and the national governments as they truly are, in the light of kindred systems and as parts of ONE WHOLE, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

Here another question occurs—what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the supreme court of the United States. The constitution in direct terms, gives an appellate jurisdiction to the supreme court in all the enumerated cases of federal cognizance, in which it is not to have an original one; without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance and from the reason of the thing it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the union may be cluded at the pleasure of every plantiff or prosecutor. Neither of these consequences ought without evident necessity to be involved; the latter would be intirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as ONE WHOLE. The courts of the latter will of course be

natural auxiliaries to the execution of the laws of the union, and an appeal from them will as naturally lie to that tribunal, which is destined to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of the convention is that all the causes of the specified classes, shall for weighty public reasons receive their original or final determination in the courts of the union. To confine therefore the general expressions giving appellate jurisdiction to the supreme court to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation.

But could an appeal be made to lie from the state courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the convention in the first place authorises the national legislature "to constitute tribunals inferior to the supreme court"* It declares in the next place that, "the JUDICIAL POWER of the United States *shall be vested* in one supreme court and in such inferior courts as congress shall ordain and establish;" and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the supreme court into original and appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are that they shall be "inferior to the supreme court" and that they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate or both is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the state courts to

* Section 8th, Article 1st.

to the ſubordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminiſh the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate juriſdiction of the ſupreme court. The ſtate tribunals may then be left with a more entire charge of federal cauſes; and appeals in moſt caſes in which they may be deemed proper inſtead of being carried to the ſupreme court, may be made to lie from the ſtate courts to diſtrict courts of the union.

PUBLIUS.

NUMBER LXXXIII.

A further View of the Judicial Department, in Relation to the Trial by Jury.

THE objection to the plan of the convention, which has met with moſt ſucceſs in this ſtate, and perhaps in ſeveral of the other ſtates, is *that* relative to *the want of a conſtitutional proviſion* for the trial by jury in civil caſes. The diſingenuous form in which this objection is uſually ſtated, has been repeatedly adverted to and expoſed; but continues to be purſued in all the converſations and writings of the opponents of the plan. The mere ſilence of the conſtitution in regard to *civil cauſes*, is repreſented as an abolition of the trial by jury; and the declamations to which it has afforded a pretext, are artfully calculated to induce a perſuaſion that this pretended abolition is complete and univerſal; extending not only to every ſpecies of civil, but even to *criminal cauſes*. To argue with reſpect to the latter, would, however, be as vain and fruitleſs, as to attempt the ſerious proof of the *exiſtence* of *matter*, or to demonſtrate any of theſe propoſitions which by their own internal evidence force

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conviction, when expressed in language adapted to convey their meaning.

With regard to civil causes, subtleties almost too contemptible for refutation, have been adopted to countenance the surmise that a thing, which is only *not provided for*, is entirely *abolished*. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*. But as the inventors of this fallacy have attempted to support it by certain *legal maxims* of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

The maxims on which they rely are of this nature, "a specification of particulars is an exclusion of "generals;" or, "the expression of one thing is "the exclusion of another." Hence, say they, as the constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury in regard to the latter.

The rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws. The true test therefore, of a just application of them, in its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with reason or common sense to suppose, that a provision obliging the legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorise or permit that mode of trial in other cases? Is it natural to suppose, that a command to do one thing, is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it cannot be rational to maintain that an injunction of the trial by jury in certain cases is an interdiction of it in others.

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A power to conſtitute courts, is a power to preſcribe the mode of trial; and conſequently, if nothing was ſaid in the conſtitution on the ſubject of juries, the legiſlature would be at liberty either to adopt that inſtitution, or to let it alone. This diſcretion in regard to criminal cauſes is abridged by the expreſs injunction of trial by jury in all ſuch caſes; but it is of courſe left at large in relation to civil cauſes, there being a total ſilence on this head. The ſpecification of an obligation to try all criminal cauſes in a particular mode, excludes indeed the obligation or neceſſity of employing the ſame mode in civil cauſes, but does not abridge *the power* of the legiſlature to exerciſe that mode if it ſhould be thought proper. The pretence therefore, that the national legiſlature would not be at full liberty to ſubmit all the civil cauſes of federal cognizance to the determination of juries, is a pretence deſtitute of all juſt foundation.

From theſe obſervations, this concluſion reſults, that the trial by jury in civil caſes would not be aboliſhed, and that the uſe attempted to be made of the maxims which have been quoted, is contrary to reaſon and common ſenſe, and therefore not admiſſible. Even if theſe maxims had a preciſe technical ſenſe, correſponding with the ideas of thoſe who employ them upon the preſent occaſion, which, however, is not the caſe, they would ſtill be inapplicable to a conſtitution of government. In relation to ſuch a ſubject, the natural and obvious ſenſe of its proviſions, apart from any technical rules, is the true criterion of conſtruction.

Having now ſeen that the maxims relied upon will not bear the uſe made of them, let us endeavour to aſcertain their proper uſe and true meaning. This will be beſt done by examples. The plan of the convention declares that the power of congreſs or in other words of the *national legiſlature*, ſhall extend to certain enumerated caſes. This ſpecification of particulars evidently excludes all pretenſion to a general

legiſlative authority; becauſe an affirmative grant of ſpecial powers would be abſurd as well as uſeleſs, if a general authority was intended.

In like manner, the judicial authority of the federal judicatures, is declared by the conſtitution to comprehend certain caſes particularly ſpecified. The expreſſion of thoſe caſes marks the preciſe limits beyond which the federal courts cannot extend their juriſdiction; becauſe the objects of their cognizance being enumerated, the ſpecification would be nugatory if it did not exclude all ideas of more extenſive authority.

Theſe examples might be ſufficient to elucidate the maxims which have been mentioned, and deſignate the manner in which they ſhould be uſed. But that there may be no poſſibility of miſapprehenſion upon this ſubject I ſhall add one caſe more, to demonſtrate the proper uſe of theſe maxims, and the abuſe which has been made of them.

Let us ſuppoſe that by the laws of this ſtate, a married woman was incapable of conveying her eſtate, and that the legiſlature, conſidering this as an evil, ſhould enact that ſhe might diſpoſe of her property by deed executed in the preſence of a magiſtrate. In ſuch a caſe there can be no doubt but the ſpecification would amount to an excluſion of any other mode of conveyance; becauſe the woman having no previous power to alienate her property, the ſpecification determines the particular mode which ſhe is, for that purpoſe, to avail herſelf of. But let us further ſuppoſe that in a ſubſequent part of the ſame act it ſhould be declared that no woman ſhould diſpoſe of any eſtate of a determinate value without the conſent of three of her neareſt relations, ſignified by their ſigning the deed; could it be inferred from this regulation that a married woman might not procure the approbation of her relations to a deed for conveying property of inferior value? The poſition is too abſurd to merit a refutation, and yet this is

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precisely the position which those must establish who contend that the trial by juries, in civil cases, is abolished, because it is expressly provided for in cases of a criminal nature.

From these observations it must appear unquestionably true that trial by jury is in no case abolished by the proposed constitution, and it is equally true that in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the same situation in which it is placed by the state constitutions, and will be in no degree altered or influenced by the adoption of the plan under consideration. The foundation of this assertion is that the national judiciary will have no cognizance of them, and of course they will remain determinable as heretofore by the state courts only, and in the manner which the state constitutions and laws prescribe. All land causes, except where claims under the grants of different states come into question, and all other controversies between the citizens of the same state, unless where they depend upon positive violations of the articles of union by acts of the state legislatures, will belong exclusively to the jurisdiction of the state tribunals. Add to this that admiralty causes, and almost all those which are of equity jurisdiction are determinable under our own government without the intervention of a jury, and the inference from the whole will be that this institution, as it exists with us at present, cannot possibly be affected to any great extent by the proposed alteration in our system of government.

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government. For my own part, the more

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the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defence against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty. But I must acknowledge that I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the convention.

It has been observed, that trial by jury is a safeguard against an oppressive exercise of the power of taxation. This observation deserves to be canvassed.

It is evident that it can have no influence upon the legislature, in regard to the *amount* of the taxes to be laid, to the *objects* upon which they are to be imposed, or to the *rule* by which they are to be apportioned. If it can have any influence therefore, it must be upon the mode of collection, and the conduct of the officers entrusted with the execution of the revenue laws.

As to the mode of collection in this state, under our own constitution, the trial by jury is in most cases out of use. The taxes are usually levied by the

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more ſummary proceeding of diſtreſs and ſale, as in caſes of rent. And it is acknowledged on all hands, that this is eſſential to the efficacy of the revenue laws. The dilatory courſe of a trial at law to recover the taxes impoſed on individuals, would neither ſuit the exigencies of the public, nor promote the convenience of the citizens. It would often occaſion an accumulation of coſts, more burthenſome than the original ſum of the tax to be levied.

And as to the conduct of the officers of the revenue, the proviſion in favor of trial by jury in criminal caſes, will afford the ſecurity aimed at. Wilful abuſes of a public authority, to the oppreſſion of the ſubject, and every ſpecies of official extortion, are offences againſt the government; for which, the perſons who commit them, may be indicted and puniſhed according to the circumſtances of the caſe.

The excellence of the trial by jury in civil caſes, appears to depend on circumſtances foreign to the preſervation of liberty. The ſtrongeſt argument in its favour is, that it is a ſecurity againſt corruption. As there is always more time and better opportunity to tamper with a ſtanding body of magiſtrates than with a jury ſummoned for the occaſion, there is room to ſuppoſe, that a corrupt influence would more eaſily find its way to the former than to the latter. The force of this conſideration, is however, diminiſhed by others. The ſheriff who is the ſummoner of ordinary juries, and the clerks of courts who have the nomination of ſpecial juries, are themſelves ſtanding officers, and acting individually, may be ſuppoſed more acceſſible to the touch of corruption than the judges, who are a collective body. It is not difficult to ſee that it would be in the power of thoſe officers to ſelect jurors who would ſerve the purpoſe of the party as well as a corrupted bench. In the next place, it may fairly be ſuppoſed that there would be leſs difficulty in gaining ſome of the jurors promiſcuouſly taken from the public maſs, than in gaining men who had been choſen by

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the government for their probity and good character. But making every deduction for these considerations the trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution, which the judges might have to surmount, must certainly be much fewer while the co-operation of a jury is necessary, than they might be if they had themselves the exclusive determination of all causes.

Notwithstanding therefore the doubts I have expressed as to the essentiality of trial by jury, in civil cases, to liberty, I admit that it is in most cases, under proper regulations, an excellent method of determining questions of property; and that on this account alone it would be entitled to a constitutional provision in its favour, if it were possible to fix the limits within which it ought to be comprehended. There is however, in all cases, great difficulty in this; and men not blinded by enthusiasm, must be sensible that in a federal government which is a composition of societies whose ideas and institutions in relation to the matter materially vary from each other, that difficulty must be not a little augmented. For my own part, at every new view I take of the subject, I become more convinced of the reality of the obstacles, which we are authoritatively informed, prevented the insertion of a provision on this head in the plan of the convention.

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The great difference between the limits of the jury trial in different states is not generally understood. And as it must have considerable influence on the sentence we ought to pass upon the omission complained of, in regard to this point, an explanation of it is necessary. In this state our judicial establishments resemble more nearly, than in any other, those of Great-Britain. We have courts of common law, courts of probates (analogous in certain matters to the spiritual courts in England) a court of admiralty, and a court of chancery. In the courts of common law only the trial by jury prevails, and this with some exceptions. In all the others a single judge presides and proceeds in general either according to the course of the cannon or civil law, without the aid of a jury.* In New-Jersey there is a court of chancery which proceeds like ours, but neither courts of admiralty, nor of probates, in the sense in which these last are established with us. In that state the courts of common law have the cognizance of those causes, which with us are determinable in the courts of admiralty and of probates, and of course the jury trial is more extensive in New-Jersey than in New-York. In Pennsylvania this is perhaps still more the case, for there is no court of chancery in that state, and its common law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New-York, as does also Virginia, except that the latter has a plurality of chancellors. North-Carolina bears most affinity to Pennsylvania; South-Carolina to Virginia. I believe however that in some of those states which have distinct courts of admiralty, the causes depending in them are triable by juries. In

* It has been erroneously insinuated, with regard to the court of chancery, that this court generally tries disputed facts by a jury. The truth is, that references to a jury in that court rarely happen, and are in no case necessary, but where the validity of a devise of land comes into question.

In Georgia there are none but common law courts, and an appeal of course lies from the verdict of one jury to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut they have no distinct courts, either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common law courts have admiralty, and to a certain extent, equity jurisdiction. In cases of importance their general assembly is the only court of chancery. In Connecticut therefore the trial by jury extends in *practice* further than in any other state yet mentioned. Rhode Island is I believe in this particular pretty much in the situation of Connecticut. Massachusetts and New-Hampshire, in regard to the blending of law, equity and admiralty, jurisdictions are in a similiar predicament. In the four eastern states the trial by jury not only stands upon a broader foundation than in the other states, but it is attended with a peculiarity unknown in its full extent to any of them. There is an appeal *of course* from one jury to another till there have been two verdicts out of three on one side.

From this sketch it appears, that there is a material diversity as well in the modification as in the extent of the institution of trial by jury in civil cases in the several states; and from this fact, these obvious reflections flow. First, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the states; and secondly, that more, or at least as much might have been hazarded, by taking the system of any one state for a standard, as by omitting a provision altogether, and leaving the matter as it has been left, to legislative regulation.

The propositions which have been made for supplying the omission, have rather served to illustrate than to obviate the difficulty of the thing. The minority of Pennsylvania have proposed this mode of expression for

for the purpose—"trial by jury shall be as here-"tofore"—and this I maintain would be absolutely senseless and nugatory. The United States, in their united or collective capacity, are the OBJECT to which all general provisions in the constitution must necessarily be construed to refer. Now it is evident, that though trial by jury with various limitations is known in each state individually, yet in the United States *as such*, it is at this time altogether unknown, because the present federal government has no judiciary power whatever; and consequently there is no proper antecedent or previous establishment to which the term *heretofore* could relate. It would therefore be destitute of a precise meaning, and inoperative from its uncertainty.

As on the one hand, the form of the provision would not fulfil the intent of its proposers; so on the other, if I apprehend that intent rightly, it would be in itself inexpedient. I presume it to be, that causes in the federal courts should be tried by jury, if in the state where the courts sat, that mode of trial would obtain in a similiar case in the state courts—that is to say admiralty causes should be tried in Connecticut by a jury, and in New-York without one. The capricious operation of so dissimilar a method of trial in the same cases, under the same government, is of itself sufficient to indispose every well regulated judgment towards it. Whether the cause should be tried with or without a jury, would depend in a great number of cases, on the accidental situation of the court and parties.

But this is not in my estimation the greatest objection. I feel a deep and deliberate conviction, that there are many cases in which the trial by jury is an ineligible one. I think it so particularly in cases which concern the public peace with foreign nations; that is in most cases where the question turns wholly on the laws of nations. Of this nature among others are all prize causes. Juries cannot be supposed com-

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petent to investigations, that require a thorough knowledge of the laws and usages of nations, and they will sometimes be under the influence of impressions which will not suffer them to pay sufficient regard to those considerations of public policy which ought to guide their enquiries. There would of course be always danger that the rights of other nations might be infringed by their decisions, so as to afford occasions of reprisal and war. Though the proper province of juries be to determine matters of fact, yet in most cases legal consequences are complicated with fact in such a manner as to render a separation impracticable.

It will add great weight to this remark in relation to prize causes to mention that the method of determining them has been thought worthy of particular regulation in various treaties between different powers of Europe, and that pursuant to such treaties they are determinable in Great-Britain in the last resort before the king himself in his privy council, where the fact as well as the law undergoes a re-examination. This alone demonstrates the impolicy of inserting a fundamental provision in the constitution which would make the state systems a standard for the national government in the article under consideration, and the danger of incumbering the government with any constitutional provisions, the propriety of which is not indisputable.

My convictions are equally strong that great advantages result from the separation of the equity from the law jurisdiction; and that the causes which belong to the former would be improperly committed to juries. The great and primary use of a court of equity is to give relief *in extraordinary cases*, which are *exceptions** to general rules. To unite the jurisdiction of such cases with the ordinary jurisdiction must

* It is true that the principles by which that relief is governed are now reduced to a regular system, but it is not the less true that they are in the main, applicable to SPECIAL circumstances which form exceptions to general rules.

must have a tendency to unsettle the general rules and to subject every case that arises to a *special* determination. While the separation of the one from the other has the contrary effect of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this the circumstances that constitute cases proper for courts of equity, are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long, deliberate and critical investigation as would be impracticable to men called from their occupations and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require that the matter to be decided should be reduced to some single and obvious point; while the litigations usual in chancery frequently comprehend a long train of minute and independent particulars.

It is true that the separation of the equity from the legal jurisdiction is peculiar to the English system of jurisprudence; which is the model that has been followed in several of the states. But it is equally true, that the trial by jury has been unknown in every case in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law, but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity will not only be unproductive of the advantages which may be derived from courts of chancery, on the plan upon which they are established in this state, but will tend gradually to change the nature of the courts of law, and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode.

These appear to be conclusive reasons against incorporating the systems of all the states in the formation of the national judiciary; according to what may be conjectured to have been the intent of the Pennsylvania minority. Let us now examine how far the proposition of Massachusetts is calculated to remedy the supposed defect.

It is in this form—"In civil actions between citizens of different states, every issue of fact, arising in *actions at common law*, may be tried by a jury, if the parties, or either of them, request it."

This at best is a proposition confined to one description of causes; and the inference is fair either that the Massachusetts convention considered that as the only class of federal causes, in which the trial by jury would be proper; or that if desirous of a more extensive provision, they found it impracticable to devise one which would properly answer the end. If the first, the omission of a regulation respecting so partial an object, can never be considered as a material imperfection in the system. If the last, it affords a strong corroboration of the extreme difficulty of the thing.

But this is not all: If we advert to the observations already made respecting the courts that subsist in the several states of the union, and the different powers exercised by them, it will appear, that there are no expressions more vague and indeterminate than those which have been employed to characterise *that* species of causes which it is intended shall be entitled to a trial by jury. In this state the boundaries between actions at common law and actions of equitable jurisdiction are ascertained in conformity to the rules which prevail in England upon that subject. In many of the other states, the boundaries are less precise. In some of them, every cause is to be tried in a court of common law, and upon that foundation every action may be considered as an action at common law, to be determined by a jury, if the parties or either of them

chuſe it. Hence the ſame irregularity and confuſion would be introduced by a compliance with this propoſition, that I have already noticed as reſulting from the regulation propoſed by the Pennſylvania minority. In one ſtate a cauſe would receive its determination from a jury, if the parties or either of them requeſted it; but in another ſtate a cauſe exactly ſimilar to the other muſt be decided without the intervention of a jury, becauſe the ſtate judicatories varied as to common law juriſdiction.

It is obvious therefore that the Maſſachuſetts propoſition, upon this ſubject, cannot operate as a general regulation until ſome uniform plan, with reſpect to the limits of common law and equitable juriſdictions ſhall be adopted by the different ſtates. To deviſe a plan of that kind is a taſk arduous in itſelf, and which it would require much time and reflection to mature. It would be extremely difficult, if not impoſſible, to ſuggeſt any general regulation that would be acceptable to all the ſtates in the union, or that would perfectly quadrate with the ſeveral ſtate inſtitutions.

It may be aſked, why could not a reference have been made to the conſtitution of this ſtate, taking that, which is allowed by me to be a good one, as a ſtandard for the United States? I anſwer that it is not very probable the other ſtates ſhould entertain the ſame opinion of our inſtitutions which we do ourſelves. It is natural to ſuppoſe that they are hitherto more attached to their own, and that each would ſtruggle for the preference. If the plan of taking one ſtate as a model for the whole had been thought of in the convention, it is to be preſumed that the adoption of it in that body, would have been rendered difficult by the predilection of each repreſentation in favour of its own government; and it muſt be uncertain which of the ſtates would have been taken as the model. It has been ſhewn that many of them would be improper ones. And I leave it to conjecture whether,

under all circumſtances, it is moſt likely that New-York or ſome other ſtate would have been preferred. But admit that a judicious ſelection could have been effected in the convention, ſtill there would have been great danger of jealouſy and diſguſt in the other ſtates, at the partiality which had been ſhewn to the inſtitutions of one. The enemies of the plan would have been furniſhed with a fine pretext for raiſing a hoſt of local prejudices againſt it, which perhaps might have hazarded in no inconſiderable degree, its final eſtabliſhment.

To avoid the embarraſſments of a definition of the caſes which the trial by jury ought to embrace, it is ſome times ſuggeſted by men of enthuſiaſtic tempers, that a proviſion might have been inſerted for eſtabliſhing it in all caſes whatſoever. For this I believe no precedent is to be found in any member of the union; and the conſiderations which have been ſtated in diſcuſſing the propoſition of the minority of Pennſylvania, muſt ſatisfy every ſober mind that the eſtabliſhment of the trial by jury in *all* caſes, would have been an unpardonable error in the plan.

In ſhort, the more it is conſidered, the more arduous will appear the taſk of faſhioning a proviſion in ſuch a form, as not to expreſs too little to anſwer the purpoſe, or too much to be adviſeable; or which might not have opened other ſources of oppoſition to the great and eſſential object of introducing a firm national government.

I cannot but perſuade myſelf on the other hand, that the different lights in which the ſubject has been placed in the courſe of theſe obſervations, will go far towards removing in candid minds, the apprehenſions they may have entertained on the point. They have tended to ſhew that the ſecurity of liberty is materially concerned only in the trial by jury in criminal caſes, which is provided for in the moſt ample manner in the plan of the convention; that even in far the greateſt proportion of civil caſes, and

those in which the great body of the community is interested, that mode of trial will remain in its full force, as established in the state constitutions, untouched and unaffected by the plan of the convention: That it is no case abolished * by that plan; and that there are great if not insurmountable difficulties in the way of making any precise and proper provision for it in a constitution for the United States.

The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit that the changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails. For my own part, I acknowledge myself to be convinced that even in this state, it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men, that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these states as in Great-Britain, afford a strong presumption that its former extent has been found inconvenient; and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the legislature.

This is now clearly understood to be the case in Great-Britain, and it is equally so in the state of Connecticut; and yet it may be safely affirmed, that more numerous encroachments have been made upon the

* Vide No. LXXXI, in which the supposition of its being abolished by the appellate jurisdiction in matters of fact being vested in the supreme court is examined and refuted.

the trial by jury in this ſtate ſince the revolution, though provided for by a poſitive article of our conſtitution, than has happened in the ſame time either in Connecticut or Great-Britain. It may be added that theſe encroachments have generally originated with the men who endeavour to perſuade the people they are the warmeſt deſenders of popular liberty, but who have rarely ſuffered conſtitutional obſtacles to arreſt them in a favourite career. The truth is that the general GENIUS of a government is all that can be ſubſtantially relied upon for permanent effects. Particular proviſions, though not altogether uſeleſs, have far leſs virtue and efficacy than are commonly aſcribed to them; and the want of them will never be with men of ſound diſcernment a deciſive objection to any plan which exhibits the leading characters of a good government.

It certainly ſounds not a little harſh and extraordinary to affirm that there is no ſecurity for liberty in a conſtitution which expreſsly eſtabliſhes the trial by jury in criminal caſes, becauſe it does not do it in civil alſo; while it is a notorious fact that Connecticut, which has been always regarded as the moſt popular ſtate in the union, can boaſt of no conſtitutional proviſion for either.

PUBLIUS.

NUMBER LXXXIV.

Concerning ſeveral miſcellaneous Objections.

IN the courſe of the foregoing review of the conſtitution I have taken notice of, and endeavoured to anſwer, moſt of the objections which have appeared againſt it. There however remain a few which either did not fall naturally under any particular head, or were forgotten in their proper places. Theſe

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shall now be discussed; but as the subject has been drawn into great length, I shall so far consult brevity as to comprise all my observations on these miscellaneous points in a single paper.

The most considerable of these remaining objections is, that the plan of the convention contains no bill of rights. Among other answers given to this, it has been upon different occasions remarked, that the constitutions of several of the states are in a similar predicament. I add, that New-York is of this number. And yet the opposers of the new system in this state, who profess an unlimited admiration for its constitution, are among the most intemperate partizans of a bill of rights. To justify their zeal in this matter, they alledge two things; one is, that though the constitution of New-York has no bill of rights prefixed to it, yet it contains in the body of it various provisions in favour of particular privileges and rights, which in substance amount to the same thing; the other is, that the constitution adopts in their full extent the common and statute law of Great-Britain, by which many other rights not expressed in it are equally secured.

To the first I answer, that the constitution proposed by the convention contains, as well as the constitution of this state, a number of such provisions.

Independent of those, which relate to the structure of the government, we find the following:—Article I. section 3. clause 7. "Judgment in cases of impeach-"ment shall not extend further than to removal from "office, and disqualification to hold and enjoy any "office of honour, trust or profit under the United "States; but the party convicted shall nevertheless "be liable and subject to indictment, trial, judgment "and punishment, according to law."—Section 9. of the same article, clause 2. "The privilege of the "writ of *habeas corpus* shall not be suspended, unless "when in cases of rebellion or invasion the public "safety may require it."—Clause 3. "No bill of

"attainder or *ex post facto* law shall be passed."—Clause 7. "No title of nobility shall be granted by "the United States: And no person holding any "office of profit or trust under them, shall, without "the consent of the congress, accept of any present, "emolument, office or title, of any kind whatever, "from any king, prince or foreign state."—Article III. section 2. clause 3. "The trial of all crimes, "except in cases of impeachment, shall be by jury; "and such trial shall be held in the state where the "said crimes shall have been committed; but when "not committed within any state, the trial shall be "at such place or places as the congress may by law "have directed."—Section 3, of the same article, "Treason against the United States shall consist only "in levying war against them, or in adhering to "their enemies, giving them aid and comfort. No "person shall be convicted of treason unless on the "testimony of two witnesses to the same overt act, "or on confession in open court."—And clause 3, of the same section. "The congress shall have power to "declare the punishment of treason, but no attainder "of treason shall work corruption of blood, or for-"feiture, except during the life of the person "attainted."

It may well be a question whether these are not upon the whole, of equal importance with any which are to be found in the constitution of this state. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, *to which we have no corresponding provisions in our constitution*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments have been in all ages the favourite and most formidable instruments of tyranny. The observations

obſervations of the judicious Blackſtone* in reference to the latter, are well worthy of recital. "To bereave "a man of life (ſays he) or by violence to confiſcate "his eſtate, without accuſation or trial, would be ſo "groſs and notorious an act of deſpotiſm, as muſt at "once convey the alarm of tyranny throughout the "whole nation; but confinement of the perſon by "ſecretly hurrying him to goal, where his ſufferings "are unknown or forgotten, is a leſs public, a leſs "ſtriking, and therefore *a more dangerous engine* of "arbitrary government." And as a remedy for this fatal evil, he is every where peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls "the BULWARK of the Britiſh "conſtitution."†

Nothing need be ſaid to illuſtrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner ſtone of republican government; for ſo long as they are excluded, there can never be ſerious danger that the government will be any other than that of the people.

To the ſecond, that is, to the pretended eſtabliſhment of the common and ſtatute law by the conſtitution, I anſwer, that they are expreſsly made ſubject "to ſuch alterations and proviſions as the legiſlature "ſhall from time to time make concerning the "ſame." They are therefore at any moment liable to repeal by the ordinary legiſlative power, and of courſe have no conſtitutional ſanction. The only uſe of the declaration was to recognize the ancient law, and to remove doubts which might have been occaſioned by the revolution. This conſequently can be conſidered as no part of a declaration of rights, which under our conſtitutions muſt be intended as limitations of the power of the government itſelf.

It has been ſeveral times truly remarked, that bills of rights are in their origin, ſtipulations between kings

* Vide Blackſtone's Commentaries, vol. 1, page 136.
† Idem, vol. 4, page 438.

kings and their ſubjects, abrigements of prerogative in favor of privilege, reſervations of rights not ſurrendered to the prince. Such was MAGNA CHARTA, obtained by the Barons, ſword in hand, from king John. Such were the ſubſequent confirmations of that charter by ſubſequent princes. Such was the *petition of right* aſſented to by Charles the Firſt, in the beginning of his reign. Such alſo was the declaration of right preſented by the lords and commons to the prince of Orange in 1688, and afterwards thrown into the form of an act of parliament, called the bill of rights. It is evident, therefore, that according to their primitive ſignification, they have no application to conſtitutions profeſſedly founded upon the power of the people, and executed by their immediate repreſentatives and ſervants. Here, in ſtrictneſs, the people ſurrender nothing, and as they retain every thing, they have no need of particular reſervations. "WE THE PEOPLE of the United "States, to ſecure the bleſſings of liberty to ourſelves "and our poſterity, do *ordain* and *eſtabliſh* this con-"ſtitution for the United States of America." Here is a better recognition of popular rights than volumes of thoſe aphoriſms which make the principal figure in ſeveral of our ſtate bills of rights, and which would ſound much better in a treatiſe of ethics than in a conſtitution of government.

But a minute detail of particular rights is certainly far leſs applicable to a conſtitution like that under conſideration, which is merely intended to regulate the general political intereſts of the nation, than to a conſtitution which has the regulation of every ſpecies of perſonal and private concerns. If therefore the loud clamours againſt the plan of the convention on this ſcore, are well founded, no epithets of reprobation will be too ſtrong for the conſtitution of this ſtate. But the truth is, that both of them contain all, which in relation to their objects, is reaſonably to be deſired.

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I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

On the subject of the liberty of the press, as much has been said, I cannot forbear adding a remark or two: In the first place, I observe that there is not a syllable concerning it in the constitution of this state; and in the next, I contend that whatever has been said about it in that of any other state, amounts to nothing. What signifies a declaration that "the "liberty of the press shall be inviolably preserved?" What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this, I infer, that its security, whatever fine declarations may be inserted in any constitution

respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government.* And here, after all, as intimated upon another occasion, must we seek for the only solid basis of all our rights.

There remains but one other view of this matter to conclude the point. The truth is, after all the declamation we have heard, that the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights, in Great-Britain, form its constitution, and conversely the constitution of each state is its bill of rights. And the proposed constitution, if adopted, will be the bill of rights of the union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention, comprehending various precautions for the public security, which are not to be found in any of the state constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding,

* To show that there is a power in the constitution by which the liberty of the press may be affected, recourse has been had to the power of taxation. It is said that duties may be laid upon publications so high as to amount to a prohibition. I know not by what logic it could be maintained that the declarations in the state constitutions, in favour of the freedom of the press, would be a constitutional impediment to the imposition of duties upon publications by the state legislatures. It cannot certainly be pretended that any degree of duties, however low, would be an abrigement of the liberty of the press. We know that newspapers are taxed in Great-Britain, and yet it is notorious that the press no where enjoys greater liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that after all, general declarations respecting the liberty of the press will give it no greater security than it will have without them. The same invasions of it may be effected under the state constitutions which contain those declarations through the means of taxation, as under the proposed constitution which has nothing of the kind. It would be quite as significant to declare that government ought to be free, that taxes ought not to be excessive, &c. as that the liberty of the press ought not to be restrained.

proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens, if they are to be found in any part of the instrument which establishes the government. And hence it must be apparent that much of what has been said on this subject rests merely on verbal and nominal distinctions, which are entirely foreign from the substance of the thing.

Another objection, which has been made, and which from the frequency of its repetition it is to be presumed is relied on, is of this nature:—It is improper (say the objectors) to confer such large powers, as are proposed, upon the national government; because the seat of that government must of necessity be too remote from many of the states to admit of a proper knowledge on the part of the constituent, of the conduct of the representative body. This argument, if it proves any thing, proves that there ought to be no general government whatever. For the powers which it seems to be agreed on all hands, ought to be vested in the union, cannot be safely intrusted to a body which is not under every requisite controul. But there are satisfactory reasons to shew that the objection is in reality not well founded. There is in most of the arguments which relate to distance a palpable illusion of the imagination. What are the sources of information by which the people in Montgomery county must regulate their judgment of the conduct of their representatives in the state legislature? Of personal observation they can

have no benefit. This is confined to the citizens on the ſpot. They muſt therefore depend on the information of intelligent men, in whom they confide—and how muſt theſe men obtain their information? Evidently from the compleſtion of public meaſures, from the public prints, from correſpondences with their repreſentatives, and with other perſons who reſide at the place of their deliberation. This does not apply to Montgomery county only, but to all the counties, at any conſiderable diſtance from the ſeat of government.

It is equally evident that the ſame ſources of information would be open to the people, in relation to the conduct of their repreſentatives in the general government; and the impediments to a prompt communication which diſtance may be ſuppoſed to create, will be overballanced by the effects of the vigilance of the ſtate governments. The executive and legiſlative bodies of each ſtate will be ſo many centinels over the perſons employed in every department of the national adminiſtration; and as it will be in their power to adopt and purſue a regular and effectual ſyſtem of intelligence, they can never be at a loſs to know the behaviour of thoſe who repreſent their conſtituents in the national councils, and can readily communicate the ſame knowledge to the people. Their diſpoſition to apprize the community of whatever may prejudice its intereſts from another quarter, may be relied upon, if it were only from the rivalſhip of power. And we may conclude with the fulleſt aſſurance, that the people, through that channel, will be better informed of the conduct of their national repreſentatives, than they can be by any means they now poſſeſs of that of their ſtate repreſentatives.

It ought alſo to be remembered, that the citizens who inhabit the country at and near the ſeat of government, will in all queſtions that affect the general liberty and proſperity, have the ſame intereſt with thoſe who are at a diſtance; and that they will ſtand

ready

ready to ſound the alarm when neceſſary, and to point out the actors in any pernicious project. The public papers will be expeditious meſſengers of intelligence to the moſt remote inhabitants of the union.

Among the many extraordinary objections which have appeared againſt the propoſed conſtitution, the moſt extraordinary and the leaſt colourable one, is derived from the want of ſome proviſion reſpecting the debts due *to* the United States. This has been repreſented as a tacit relinquiſhment of thoſe debts, and as a wicked contrivance to ſcreen public defaulters. The newſpapers have teemed with the moſt inflammatory railings on this head; and yet there is nothing clearer than that the ſuggeſtion is entirely void of foundation, and is the offſpring of extreme ignorance or extreme diſhoneſty. In addition to the remarks I have made upon the ſubject in another place, I ſhall only obſerve, that as it is a plain dictate of common ſenſe, ſo it is alſo an eſtabliſhed doctrine of political law, that "*States neither* "*loſe any of their rights, nor are diſcharged from any* "*of their obligations by a change in the form of their* "*civil government.*"*

The laſt objection of any conſequence which I at preſent recollect, turns upon the article of expence. If it were even true that the adoption of the propoſed government would occaſion a conſiderable increaſe of expence, it would be an objection that ought to have no weight againſt the plan. The great bulk of the citizens of America, are with reaſon convinced that union is the baſis of their political happineſs. Men of ſenſe of all parties now, with few exceptions, agree that it cannot be preſerved under the preſent ſyſtem, nor without radical alterations; that new and extenſive powers ought to be granted to the national head, and that theſe require

* Vide Rutherford's Inſtitutes, vol. 2. book 11. chap. x. ſect. xiv. and xv.—Vide alſo Grotius, book 11. chap. ix. ſect. viii. and ix.

a different organization of the federal government, a single body being an unsafe depository of such ample authorities. In conceding all this, the question of expence must be given up, for it is impossible, with any degree of safety, to narrow the foundation upon which the system is to stand. The two branches of the legislature are in the first instance, to consist of only sixty-five persons, which is the same number of which congress, under the existing confederation, may be composed. It is true that this number is intended to be increased; but this is to keep pace with the increase of the population and resources of the country. It is evident, that a less number would, even in the first instance, have been unsafe; and that a continuance of the present number would, in a more advanced stage of population, be a very inadequate representation of the people.

Whence is the dreaded augmentation of expence to spring? One source pointed out, is the multiplication of offices under the new government. Let us examine this a little.

It is evident that the principal departments of the administration under the present government, are the same which will be required under the new. There are now a secretary at war, a secretary for foreign affairs, a secretary for domestic affairs, a board of treasury consisting of three persons, a treasurer, assistants, clerks, &c. These offices are indispensable under any system, and will suffice under the new as well as under the old. As to ambassadors and other ministers and agents in foreign countries, the proposed constitution can make no other difference, than to render their characters, where they reside, more respectable, and their services more useful. As to persons to be employed in the collection of the revenues, it is unquestionably true that these will form a very considerable addition to the number of federal officers; but it will not follow, that this will occasion an increase of public expence.

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It will be in most cases nothing more than an exchange of state officers for national officers. In the collection of all duties, for instance, the persons employed will be wholly of the latter description. The states individually will stand in no need of any for this purpose. What difference can it make in point of expence, to pay officers of the customs appointed by the state, or those appointed by the United States? There is no good reason to suppose, that either the number or the salaries of the latter, will be greater than those of the former.

Where then are we to seek for those additional articles of expence which are to swell the account to the enormous size that has been represented to us? The chief item which occurs to me, respects the support of the judges of the United States. I do not add the president, because there is now a president of congress, whose expences may not be far, if any thing, short of those which will be incurred on account of the president of the United States. The support of the judges will clearly be an extra expence, but to what extent will depend on the particular plan which may be adopted in practice in regard to this matter. But it can upon no reasonable plan amount to a sum which will be an object of material consequence.

Let us now see what there is to counterballance any extra expences that may attend the establishment of the proposed government. The first thing that presents itself is, that a great part of the business, which now keeps congress sitting through the year, will be transacted by the president. Even the management of foreign negociations will naturally devolve upon him according to general principles concerted with the senate, and subject to their final concurrence. Hence it is evident, that a portion of the year will suffice for the session of both the senate and the house of representatives: We may suppose about a fourth for the latter, and a third or perhaps a half for the former. The extra business of treaties

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and appointments may give this extra occupation to the ſenate. From this circumſtance we may infer, that until the houſe of repreſentatives ſhall be increaſed greatly beyond its preſent number, there will be a conſiderable ſaving of expence from the difference between the conſtant ſeſſion of the preſent, and the temporary ſeſſion of the future congreſs.

But there is another circumſtance, of great importance in the view of economy. The buſineſs of the United States has hitherto occupied the ſtate legiſlatures as well as congreſs. The latter has made requiſitions which the former have had to provide for. Hence it has happened that the ſeſſions of the ſtate legiſlatures have been protracted greatly beyond what was neceſſary for the execution of the mere local buſineſs of the ſtates. More than half their time has been frequently employed in matters which related to the United States. Now the members who compoſe the legiſlatures of the ſeveral ſtates amount to two thouſand and upwards; which number has hitherto performed what under the new ſyſtem will be done in the firſt inſtance by ſixty-five perſons, and probably at no future period by above a fourth or a fifth of that number. The congreſs under the propoſed government will do all the buſineſs of the United States themſelves, without the intervention of the ſtate legiſlatures, who thenceforth will have only to attend to the affairs of their particular ſtates, and will not have to ſit in any proportion as long as they have heretofore done. This difference, in the time of the ſeſſions of the ſtate legiſlatures, will be all clear gain, and will alone form an article of ſaving, which may be regarded as an equivalent for any additional objects of expence that may be occaſioned by the adoption of the new ſyſtem.

The reſult from theſe obſervations is, that the ſources of additional expence from the eſtabliſhment of the propoſed conſtitution are much fewer than may have been imagined, that they are counterbalanced by

by considerable objects of saving, and that while it is questionable on which side the scale will preponderate, it is certain that a government less expensive would be incompetent to the purposes of the union.

PUBLIUS.

NUMBER LXXXV.

Conclusion.

ACCORDING to the formal division of the subject of these papers, announced in my first number, there would appear still to remain for discussion, two points, "the analogy of the proposed government to your own state constitution," and "the additional security, which its adoption will afford to republican government, to liberty and to property." But these heads have been so fully anticipated and exhausted in the progress of the work, that it would now scarcely be possible to do any thing more than repeat, in a more dilated form, what has been heretofore said; which the advanced stage of the question, and the time already spent upon it conspire to forbid.

It is remarkable, that the resemblance of the plan of the convention to the act which organizes the government of this state holds, not less with regard to many of the supposed defects, than to the real excellencies of the former. Among the pretended defects, are the re-eligibility of the executive, the want of a council, the omission of a formal bill of rights, the omission of a provision respecting the liberty of the press: These and several others, which have been noted in the course of our inquiries, are as much chargeable on the existing constitution of this state, as on the one proposed for the Union. And a man must have slender pretensions to consistency, who can rail at the latter for imperfections

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which he finds no difficulty in excuſing in the former. Nor indeed can there be a better proof of the inſincerity and affectation of ſome of the zealous adverſaries of the plan of the convention among us, who profeſs to be the devoted admirers of the government under which they live, than the fury with which they have attacked that plan, for matters in regard to which our own conſtitution is equally, or perhaps more vulnerable.

The additional ſecurities to republican government, to liberty and to property, to be derived from the adoption of the plan under conſideration, conſiſt chiefly in the reſtraints which the preſervation of the union will impoſe on local factions and inſurrections, and on the ambition of powerful individuals in ſingle ſtates, who might acquire credit and influence enough, from leaders and favorites, to become the deſpots of the people; in the diminution of the opportunities to foreign intrigue, which the diſſolution of the confederacy would invite and facilitate; in the prevention of extenſive military eſtabliſhments, which could not fail to grow out of wars between the ſtates in a diſunited ſituation; in the expreſs guarantee of a republican form of government to each; in the abſolute and univerſal excluſion of titles of nobility; and in the precautions againſt the repetition of thoſe practices on the part of the ſtate governments, which have undermined the foundations of property and credit, have planted mutual diſtruſt in the breaſts of all claſſes of citizens, and have occaſioned an almoſt univerſal proſtration of morals.

Thus have I, my fellow citizens, executed the taſk I had aſſigned to myſelf; with what ſucceſs, your conduct muſt determine. I truſt at leaſt you will admit, that I have not failed in the aſſurance I gave you reſpecting the ſpirit with which my endeavours ſhould be conducted. I have addreſſed myſelf purely to your judgments, and have ſtudiouſly avoided thoſe aſperities which are too apt to diſgrace

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political disputants of all parties, and which have been not a little provoked by the language and conduct of the opponents of the constitution. The charge of a conspiracy against the liberties of the people, which has been indiscriminately brought against the advocates of the plan, has something in it too wanton and too malignant not to excite the indignation of every man who feels in his own bosom a refutation of the calumny. The perpetual changes which have been rung upon the wealthy, the well-born and the great, have been such as to inspire the disgust of all sensible men. And the unwarrantable concealments and misrepresentations which have been in various ways practiced to keep the truth from the public eye, have been of a nature to demand the reprobation of all honest men. It is not impossible that these circumstances may have occasionally betrayed me into intemperances of expression which I did not intend: It is certain that I have frequently felt a struggle between sensibility and moderation, and if the former has in some instances prevailed, it must be my excuse, that it has been neither often nor much.

Let us now pause and ask ourselves whether, in the course of these papers, the proposed constitution has not been satisfactorily vindicated from the aspersions thrown upon it, and whether it has not been shewn to be worthy of the public approbation, and necessary to the public safety and prosperity. Every man is bound to answer these questions to himself, according to the best of his conscience and understanding, and to act agreeably to the genuine and sober dictates of his judgment. This is a duty, from which nothing can give him a dispensation.—'Tis one that he is called upon, nay, constrained by all the obligations that form the bands of society, to discharge sincerely and honestly.—No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will justify to himself, to his country or to his

posterity,

posterity, an improper election of the part he is to act. Let him beware of an obstinate adherence to party.—Let him reflect that the object upon which he is to decide is not a particular interest of the community, but the very existence of the nation.—And let him remember that a majority of America has already given its sanction to the plan, which he is to approve or reject.

I shall not dissemble, that I feel an intire confidence in the arguments, which recommend the proposed system to your adoption; and that I am unable to discern any real force in those by which it has been opposed. I am persuaded, that it is the best which our political situation, habits and opinions will admit, and superior to any the revolution has produced.

Concessions on the part of the friends of the plan, that it has not a claim to absolute perfection, have afforded matter of no small triumph to its enemies. Why, say they, should we adopt an imperfect thing? Why not amend it, and make it perfect before it is irrevocably established? This may be plausible enough, but it is only plausible. In the first place I remark, that the extent of these concessions has been greatly exaggerated. They have been stated as amounting to an admission, that the plan is radically defective; and that, without material alterations, the rights and the interests of the community cannot be safely confided to it. This, as far as I have understood the meaning of those who make the concessions, is an intire perversion of their sense. No advocate of the measure can be found who will not declare as his sentiment, that the system, though it may not be perfect in every part, is upon the whole a good one, is the best that the present views and circumstances of the country will permit, and is such an one as promises every species of security which a reasonable people can desire.

I answer in the next place, that I should esteem it the extreme of imprudence to prolong the precarious

state

ſtate of our national affairs, and to expoſe the union to the jeopardy of ſucceſſive experiments, in the chimerical purſuit of a perfect plan. I never expect to ſee a perfect work from imperfect man. The reſult of the deliberations of all collective bodies muſt neceſſarily be a compound as well of the errors and prejudices, as of the good ſenſe and wiſdom of the individuals of whom they are compoſed. The compacts which are to embrace thirteen diſtinct ſtates, in a common bond of amity and union, muſt as neceſſarily be a compromiſe of as many diſſimilar intereſts and inclinations. How can perfection ſpring from ſuch materials?

The reaſons aſſigned in an excellent little pamphlet lately publiſhed in this city* are unanſwerable to ſhew the utter improbability of aſſembling a new convention, under circumſtances in any degree ſo favourable to a happy iſſue, as thoſe in which the late convention met, deliberated and concluded. I will not repeat the arguments there uſed, as I preſume the production itſelf has had an extenſive circulation. It is certainly well worthy the peruſal of every friend to his country. There is however one point of light in which the ſubject of amendments ſtill remains to be conſidered; and in which it has not yet been exhibited to public view. I cannot reſolve to conclude, without firſt taking a ſurvey of it in this aſpect.

It appears to me ſuſceptible of abſolute demonſtration, that it will be far more eaſy to obtain ſubſequent than previous amendments to the conſtitution. The moment an alteration is made in the preſent plan, it becomes, to the purpoſe of adoption, a new one, and muſt undergo a new deciſion of each ſtate. To its complete eſtabliſhment throughout the union, it will therefore require the concurrence of thirteen ſtates. If, on the contrary, the conſtitution propoſed ſhould once be ratified by all the ſtates as it ſtands, alterations in it may at any time be effected by nine ſtates.

* Intitled "An Addreſs, to the people of the ſtate of New-York."

Here then the chances are as thirteen to nine* in favour of ſubſequent amendments, rather than of the original adoption of an intire ſyſtem.

This is not all. Every conſtitution for the United States muſt inevitably conſiſt of a great variety of particulars, in which thirteen independent ſtates are to be accommodated in their intereſts or opinions of intereſt. We may of courſe expect to ſee, in any body of men charged with its original formation, very different combinations of the parts upon different points. Many of thoſe who form the majority on one queſtion may become the minority on a ſecond, and an aſſociation diſſimilar to either may conſtitute the majority on a third. Hence the neceſſity of moulding and arranging all the particulars which are to compoſe the whole in ſuch a manner as to ſatisfy all the parties to the compact; and hence alſo an immenſe multiplication of difficulties and caſualties in obtaining the collective aſſent to a final act. The degree of that multiplication muſt evidently be in a ratio to the number of particulars and the number of parties.

But every amendment to the conſtitution, if once eſtabliſhed, would be a ſingle propoſition, and might be brought forward ſingly. There would then be no neceſſity for management or compromiſe, in relation to any other point, no giving nor taking. The will of the requiſite number would at once bring the matter to a deciſive iſſue. And conſequently whenever nine,† or rather ten ſtates, were united in the deſire of a particular amendment, that amendment muſt infallibly take place. There can therefore be no compariſon between the facility of effecting an amendment, and that of eſtabliſhing in the firſt inſtance a complete conſtitution.

In oppoſition to the probability of ſubſequent amendments it has been urged, that the perſons delegated to the adminiſtration of the national government,

* † It may rather be ſaid TEN, for though two-thirds may ſet on foot the meaſure, three-fourths muſt ratify.

ment, will always be disinclined to yield up any portion of the authority of which they were once possessed. For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful, will be applicable to the organization of the government, not to the mass of its powers; and on this account alone, I think there is no weight in the observation just stated. I also think there is little weight in it on another account. The intrinsic difficulty of governing THIRTEEN STATES at any rate, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly *impose* on the national rulers the *necessity* of a spirit of accommodation to the reasonable expectations of their constituents. But there is yet a further consideration, which proves beyond the possibility of doubt, that the observation is futile. It is this, that the national rulers, whenever nine states concur, will have no option upon the subject. By the fifth article of the plan the congress will be *obliged*, "on the application "of the legislatures of two-thirds of the states, (which "at present amounts to nine) to call a convention for "proposing amendments, which *shall be valid* to all "intents and purposes, as part of the constitution, "when ratified by the legislatures of three-fourths "of the states, or by conventions in three-fourths "thereof." The words of this article are peremptory. The congress "*shall* call a convention." Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about their disinclination to a change, vanishes in air. Nor however difficult it may be supposed to unite two-thirds or three-fourths of the state legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the state legislatures

to erect barriers against the encroachments of the national authority.

If the foregoing argument is a fallacy, certain it is that I am myself deceived by it; for it is, in my conception, one of those rare instances in which a political truth can be brought to the test of mathematical demonstration. Those who see the matter in the same light with me, however zealous they may be for amendments, must agree in the propriety of a previous adoption, as the most direct road to their own object.

The zeal for attempts to amend, prior to the establishment of the constitution, must abate in every man, who, is ready to accede to the truth of the following observations of a writer, equally solid and ingenious:—"To balance a large state or society "(says he) whether monarchical or republican, on "general laws, is a work of so great difficulty, that "no human genius, however comprehensive, is able "by the mere dint of reason and reflection, to effect "it. The judgments of many must unite in the "work: EXPERIENCE must guide their labour: "TIME must bring it to perfection: And the FEEL-"ING of inconveniences must correct the mistakes "which they *inevitably* fall into, in their first trials "and experiments."* These judicious reflections contain a lesson of moderation to all the sincere lovers of the union, and ought to put them upon their guard against hazarding anarchy, civil war, a perpetual alienation of the states from each other, and perhaps the military despotism of a victorious demagogue, in the pursuit of what they are not likely to obtain, but from TIME and EXPERIENCE. It may be in me a defect of political fortitude, but I acknowledge, that I cannot entertain an equal tranquillity with those who affect to treat the dangers of a longer continuance in our present situation as imaginary. A

NATION

* Hume's Essays, vol. 1, page 128.—The rise of arts and sciences.

NATION without a NATIONAL GOVERNMENT is, in my view, an awful ſpectacle. The eſtabliſhment of a conſtitution, in time of profound peace, by the voluntary conſent of a whole people, is a PRODIGY, to the completion of which I look forward with trembling anxiety. I can reconcile it to no rules of prudence to let go the hold we now have, in ſo arduous an enterpriſe, upon ſeven out of the thirteen ſtates; and after having paſſed over ſo conſiderable a part of the ground to recommence the courſe. I dread the more the conſequences of new attempts, becauſe I KNOW that POWERFUL INDIVIDUALS, in this and in other ſtates, are enemies to a general national government, in every poſſible ſhape.

PUBLIUS.

ARTICLES

OF THE

NEW CONSTITUTION;

AS ADOPTED BY THE

FEDERAL CONVENTION,

SEPTEMBER 17, 1787.

WE the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I.

SECT. 1. ALL legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SECT. 2. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who

ARTICLES

OF THE

NEW CONSTITUTION;

AS AGREED UPON BY THE

FEDERAL CONVENTION,

SEPTEMBER 17, 1787.

WE the People of the United States, in order to form a more perfect Union, eſtabliſh Juſtice, inſure domeſtic Tranquility, provide for the common Defence, promote the general Welfare, and ſecure the Bleſſings of Liberty to ourſelves and our Poſterity, do ordain and eſtabliſh this CONSTITUTION for the United States of America.

ARTICLE I.

Sect. 1. ALL legiſlative powers herein granted ſhall be veſted in a congreſs of the United States, which ſhall conſiſt of a ſenate and houſe of repreſentatives.

Sect. 2. The Houſe of Repreſentatives ſhall be compoſed of members choſen every ſecond year by the people of the ſeveral ſtates, and the electors in each ſtate ſhall have the qualifications requiſite for electors of the moſt numerous branch of the ſtate legiſlature.

No perſon ſhall be a repreſentative who ſhall not have attained to the age of twenty-five years, and been ſeven years a citizen of the United States, and who

who ſhall not, when elected, be an inhabitant of that ſtate in which he ſhall be choſen.

Repreſentatives and direct taxes ſhall be apportioned among the ſeveral ſtates which may be included within this union, according to their reſpective numbers, which ſhall be determined by adding to the whole number of free perſons, including thoſe bound to ſervice for a term of years, and excluding Indians not taxed, three fifths of all other perſons. The actual enumeration ſhall be made within three years after the firſt meeting of the congreſs of the United States, and within every ſubſequent term of ten years, in ſuch manner as they ſhall by law direct. The number of repreſentatives ſhall not exceed one for every thirty thouſand, but each ſtate ſhall have at leaſt one repreſentative; and until ſuch enumeration ſhall be made, the ſtate of New-Hampſhire ſhall be entitled to chuſe three, Maſſachuſetts eight, Rhode-Iſland and Providence Plantations one, Connecticut five, New-York ſix, New-Jerſey four, Pennſylvania eight, Delaware one, Maryland ſix, Virginia ten, North-Carolina five, South-Carolina five, and Georgia three.

When vacancies happen in the repreſentation from any ſtate, the executive authority thereof ſhall iſſue writs of election to fill ſuch vacancies.

The houſe of repreſentatives ſhall chuſe their ſpeaker and other officers; and ſhall have the ſole power of impeachment.

Sect. 3. The ſenate of the United States ſhall be compoſed of two ſenators from each ſtate, choſen by the legiſlature thereof, for ſix years; and each ſenator ſhall have one vote.

Immediately after they ſhall be aſſembled in conſequence of the firſt election, they ſhall be divided as equally as may be into three claſſes. The ſeats of the ſenators of the firſt claſs ſhall be vacated at the expiration of the ſecond year, of the ſecond claſs at the expiration of the fourth year, and of the third claſs

claſs at the expiration of the ſixth year, ſo that one third may be choſen every ſecond year; and if vacancies happen by reſignation, or otherwiſe, during the receſs of the legiſlature of any ſtate, the executive thereof may make temporary appointments until the next meeting of the legiſlature, which ſhall then fill ſuch vacancies.

No perſon ſhall be a ſenator who ſhall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who ſhall not, when elected, be an inhabitant of the ſtate for which he ſhall be choſen.

The vice-preſident of the United States ſhall be preſident of the ſenate, but ſhall have no vote, unleſs they be equally divided.

The ſenate ſhall chooſe their other officers, and alſo a preſident *pro tempore*, in the abſence of the vice-preſident, or when he ſhall exerciſe the office of preſident of the United States.

The ſenate ſhall have the ſole power to try all impeachments. When ſitting for that purpoſe, they ſhall be on oath or affirmation. When the preſident of the United States is tried, the chief juſtice ſhall preſide: And no perſon ſhall be convicted without the concurrence of two-thirds of the members preſent.

Judgment in caſes of impeachment ſhall not extend further than to removal from office, and diſqualification to hold and enjoy any office of honor, truſt or profit under the United States; but the party convicted ſhall nevertheleſs be liable and ſubject to indictment, trial, judgment and puniſhment, according to law.

Sect. 4. The times, places and manner of holding elections for ſenators and repreſentatives, ſhall be preſcribed in each ſtate by the legiſlature thereof; But the congreſs may at any time by law make or alter ſuch regulations, except as to the places of chuſing ſenators.

The congreſs ſhall aſſemble at leaſt once in every year, and ſuch meeting ſhall be on the firſt Monday

in

in December, unless they shall by law appoint a different day.

Sect. 5. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorised to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be siting.

Sect. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same, and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been encreased during such time; and no person holding any office under the United

States

States, ſhall be a member of either houſe during his continuance in office.

Sect. 7. All bills for raiſing revenue ſhall originate in the houſe of repreſentatives; but the ſenate may propoſe or concur with amendments as on other bills.

Every bill which ſhall have paſſed the houſe of repreſentatives and the ſenate ſhall, before it become a law, be preſented to the preſident of the United States; if he approve he ſhall ſign it, but if not he ſhall return it, with his objections to that houſe in which it ſhall have originated, who ſhall enter the objections at large on their journal, and proceed to reconſider it. If aſter ſuch reconſideration two-thirds of that houſe ſhall agree to paſs the bill, it ſhall be ſent, together with the objections, to the other houſe, by which it ſhall likewiſe be reconſidered, and if approved by two-thirds of that houſe, it ſhall become a law. But in all ſuch caſes the votes of both houſes ſhall be determined by yeas and nays, and the names of the perſons voting for and againſt the bill ſhall be entered on the journal of each houſe reſpectively. If any bill ſhall not be returned by the preſident within ten days (Sundays excepted) after it ſhall have been preſented to him, the ſame ſhall be a law, in like manner as if he had ſigned it, unleſs the congreſs by their adjournment prevent its return, in which caſe it ſhall not be a law.

Every order, reſolution, or vote to which the concurrence of the ſenate and houſe of repreſentatives may be neceſſary (except on a queſtion of adjournment) ſhall be preſented to the preſident of the United States; and before the ſame ſhall take effect, ſhall be approved by him, or, being diſapproved by him, ſhall be re-paſſed by two-thirds of the ſenate and houſe of repreſentatives, according to the rules and limitations preſcibed in the caſe of a bill.

Sect. 8. The congreſs ſhall have power

To lay and collect taxes, duties, impoſts and exciſes, to pay the debts and provide for the common defence

and

and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States:

To borrow money on the credit of the United States:

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:

To establish an uniform rule of naturalization, and uniform laws on the subjects of bankruptcies throughout the United States:

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

To provide for the punishment of counterfeiting the securities and current coin of the United States:

To establish post-offices and post-roads:

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries:

To constitute tribunals inferior to the supreme court:

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations:

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years:

To provide and maintain a navy:

To make rules for the government and regulation of the land and naval forces:

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions:

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as many be employed in the service of the United States,

States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress:

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings:——And,

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

Sect. 9 The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation, or other direct tax shall be laid, unless in proportion to the *census* or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and

 a regular

a regular ſtatement and account of the receipts and expenditures of all public money ſhall be publiſhed from time to time.

No title of nobility ſhall be granted by the United States: And no perſon holding any office of profit or truſt under them, ſhall, without the conſent of the congreſs, accept of any preſent, emolument, office, or title, of any kind whatever, from any king, prince or foreign ſtate.

Sect. 10. No ſtate ſhall enter into any treaty, alliance, or confederation; grant letters of marque and repriſal; coin money; emit bills of credit; make any thing but gold and ſilver coin a tender in payment of debts; paſs any bill of attainder, *ex poſt facto* law, or law imparing the obligation of contracts, or grant any title of nobility.

No ſtate ſhall, without the conſent of the congreſs, lay any impoſts or duties on imports or exports, except what may be abſolutely neceſſary for executing its inſpection laws; and the net produce of all duties and impoſts, laid by any ſtate on imports or exports, ſhall be for the uſe of the treaſury of the United States; and all ſuch laws ſhall be ſubject to the reviſion and control of the congreſs. No ſtate ſhall, without the conſent of congreſs, lay any dutie of tonnage, keep troops, or ſhips of war in time of peace, enter into any agreement or compact with another ſtate, or with a foreign power, or engage in war, unleſs actually invaded, or in ſuch imminent danger as will not admit of delay.

ARTICLE II.

Sect. 1. The executive power ſhall be veſted in a preſident of the United States of America. He ſhall hold his office during the term of four years, and together with the vice preſident, choſen for the ſame term, be elected as follows:———

Each ſtate ſhall appoint, in ſuch manner as the legiſlature thereof may direct, a number of electors,

equal

equal to the whole number of ſenators and repreſentatives to which the ſtate may be entitled in the congreſs: but no ſenator or repreſentative, or perſon holding an office of truſt or profit under the United States, ſhall be appointed an elector.

The electors ſhall meet in their reſpective ſtates, and vote by ballot for two perſons, of whom one at leaſt ſhall not be an inhabitant of the ſame ſtate with themſelves. And they ſhall make a liſt of all the perſons voted for, and of the number of votes for each; which liſt they ſhall ſign and certify, and tranſmit ſealed to the ſeat of the government of the United States, directed to the preſident of the ſenate. The preſident of the ſenate ſhall, in the preſence of the ſenate and houſe of repreſentatives, open all the certificates, and the votes ſhall then be counted. The perſon having the greateſt number of votes ſhall be the preſident, if ſuch number be a majority of the whole number of electors appointed; and if there be more than one who have ſuch majority, and have an equal number of votes, than the houſe of repreſentatives ſhall immediately chooſe by ballot one of them for preſident; and if no perſon have a majority, then from the five higheſt on the liſt the ſaid houſe ſhall in like manner chuſe the preſident. But in chooſing the preſident, the votes ſhall be taken by ſtates, the repreſentation from each ſtate having one vote; a quorum for this purpoſe ſhall conſiſt of a member or members from two-thirds of the ſtates, and a majority of all the ſtates ſhall be neceſſary to a choice. In every caſe, after the choice of the preſident, the perſon having the greateſt number of votes of the electors ſhall be the vice-preſident. But if there ſhould remain two or more who have equal votes, the ſenate ſhall chuſe from them by ballot the vice-preſident.

The congreſs may determine the time of chooſing the electors, and the day on which they ſhall give their votes; which day ſhall be the ſame throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

The president shall, at stated times, receive for his services, a compensation, which shall neither be encreased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:——

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my ability, preserve, protect and defend the constitution of the United States."

Sect. 2. The president shall be commander in chief of the army and navy of the United States; and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principle officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the congress may by law vest the appointment of such inferior officers, as they think proper in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

Sect. 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Sect. 4. The president, vice-president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

Sect. 1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior court, shall hold their offices during good

behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuence in office.

Sect. 2. The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases 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, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exeptions, and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

Sect. 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE

ARTICLE IV.

Sect. 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Sect. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

Sect. 3. New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Sect. 4. The United States shall guarantee to every state in this Union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE

ARTICLE V.

The congreſs, whenever two-thirds of both Houſes ſhall deem it neceſſary, ſhall propoſe amendments to this conſtitution, or, on the application of the legiſlatures of two-thirds of the ſeveral ſtates, ſhall call a convention for propoſing amendments, which, in either caſe ſhall be valid to all intents and purpoſes, as part of this conſtitution, when ratified by the legiſlatures of three-fourths of the ſeveral ſtates, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be propoſed by the congreſs: Provided, that no amendment which may be made prior to the year on thouſand eight hundred and eight ſhall in any manner effect the firſt and fourth clauſes in the ninth ſection of the firſt article; and that no ſtate, without its conſent, ſhall be deprived of its equal ſuffrage in the ſenate.

ARTICLE VI.

All debts contracted and engagements entered into, before the adoption of this conſtitution ſhall be as valid againſt the United States under this conſtitution, as under the confederation.

This conſtitution, and the laws of the United States which ſhall be made in purſuance thereof; and all treaties made, or which ſhall be made, under the authority of the United States, ſhall be the ſupreme law of the land; and the judges in every ſtate ſhall be bound thereby, any thing in the conſtitution or laws of any ſtate to the contrary notwithſtanding.

The ſenators and repreſentatives before mentioned, and the members of the ſeveral ſtate legiſlatures, and all executive and judicial officers, both of the United States and of the ſeveral ſtates, ſhall be bound by oath or affirmation, to ſupport this conſtitution; but no religious teſt ſhall ever be required as a qualification to any office or public truſt under the United States.

ARTICLE

ARTICLE VII.

The ratification of the convention of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

DONE in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GEORGE WASHINGTON, President, and Deputy from VIRGINIA.

NEW-HAMPSHIRE.	John Langdon, Nicholas Gilman.
MASSACHUSETTS.	Nathaniel Gorham, Rufus King.
CONNECTICUT.	William Samuel Johnson, Roger Sherman.
NEW-YORK.	Alexander Hamilton.
NEW-JERSEY.	William Livingston, David Brearly, William Paterson, Jonathan Dayton.
PENNSYLVANIA.	Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris.
DELAWARE.	George Read, Gunning Bedford, junior, John Dickinson, Richard Bassett, Jacob Broom.
MARYLAND.	James M'Henry, Daniel of St. Tho. Jenifer, Daniel Carrol.

VIRGINIA.

VIRGINIA.	John Blair, James Madison, junior.
NORTH-CAROLINA	William Blount, Richard Dobbs Spaight, Hugh Williamson.
SOUTH-CAROLINA.	John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney, Pierce Butler.
GEORGIA.	William Few, Abraham Baldwin.

Attest. WILLIAM JACKSON, *Secretary.*

IN CONVENTION, Monday, September 17, 1787.

PRESENT,

The States of New-Hampshire, Massachusetts, Connecticut, Mr. HAMILTON from New York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia:

RESOLVED,

THAT the preceding constitution be laid before the United States in congress assembled, and that it is the opinion of this convention, that it should afterwards be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting to, and ratifying the same, should give notice thereof to the United States in congress assembled.

Resolved, That it is the opinion of this convention, that as soon as the conventions of nine states shall have ratified this constitution, the United States in congress assembled should fix a day on which electors should be appointed by the states which shall have ratified the same, and a day on which the electors should assemble to vote for the president, and the time and place for commencing proceedings under this constitution. That after such publication the electors should be appointed, and the senators and representatives elected: That the

the electors ſhould meet on the day fixed for the election of the preſident, and ſhould tranſmit their votes certified, ſigned, ſealed and directed, as the conſtitution requires, to the ſecretary of the United States in congreſs aſſembled, that the ſenators and repreſentatives ſhould convene at the time and place aſſigned; that the ſenators ſhould appoint a preſident of the ſenate, for the ſole purpoſe of receiving, opening and counting the votes for preſident; and that after he ſhall be choſen, the congreſs, together with the preſident, ſhould, without delay, proceed to execute this conſtitution.

By the unanimous order of the Convention,

GEORGE WASHINGTON, *Preſident.*

WILLIAM JACKSON, *Secretary.*

IN CONVENTION, SEPTEMBER 17, 1787.

"SIR,

"WE have now the honor to ſubmit to the conſi-
"deration of the United States in Congreſs aſſem-
"bled, that conſtitution which has appeared to us,
"the moſt adviſeable.

"The friends of our country have long ſeen and
"deſired, that the power of making war, peace and
"treaties, that of levying money and regulating
"commerce, and the correſpondent executive and
"judicial authorities ſhould be fully and effectually
"veſted in the general government of the union: but
"the impropriety of delegating ſuch extenſive truſt
"to one body of men is evident. Hence reſults the
"neceſſity of a different organization.

"It is obviouſly impracticable in the federal go-
"vernment of theſe ſtates, to ſecure all rights of
"independent ſovereignty to each, and yet provide
"for the intereſt and ſafety of all. Individuals enter-
"ing into ſociety, muſt give up a ſhare of liberty to
"preſerve the reſt. The magnitude of the ſacrifice
"muſt depend as well on ſituation and circumſtance,

"as on the object to be obtained. It is at all times "difficult to draw with precision the line between "those rights which must be surrendered, and those "which may be reserved; and on the present occasion "this difficulty was increased by a difference among "the several states as to their situation, extent, habits, "and particular interests.

"In all our deliberations on this subject we kept "steadily in our view, that which appears to us the "greatest interest of every true American, the con-"solidation of our union, in which is involved our "prosperity, felicity, safety, perhaps our national "existance. This important consideration, seriously "and deeply impressed on our minds, led each state "in the convention to be less rigid on points of inferior "magnitude, than might have been otherwise expec-"ted; and thus the constitution, which we now pre-"sent, is the result of a spirit of amity, and of that "mutual deference and concession which the peculi-"arity of our political situation rendered indispensible.

"That it will meet the full and entire approbation "of every state is not perhaps to be expected; "but each will doubtless consider, that had her in-"terests been alone consulted, the consequences might "have been particularly disagreeable or injurous to "others; that it is liable to as few exceptions as could "reasonably have been expected, we hope and believe; "that it may promote the lasting welfare of that "country so dear to us all, and secure her freedom and "happiness, is our most ardent wish.

"With great respect,

"We have the honor to be, SIR,

"Your Excellency's most

"Obedient and humble servants."

George Washington,

PRESIDENT.

By unanimous order of the Convention,

His Excellency

The PRESIDENT OF CONGRESS.

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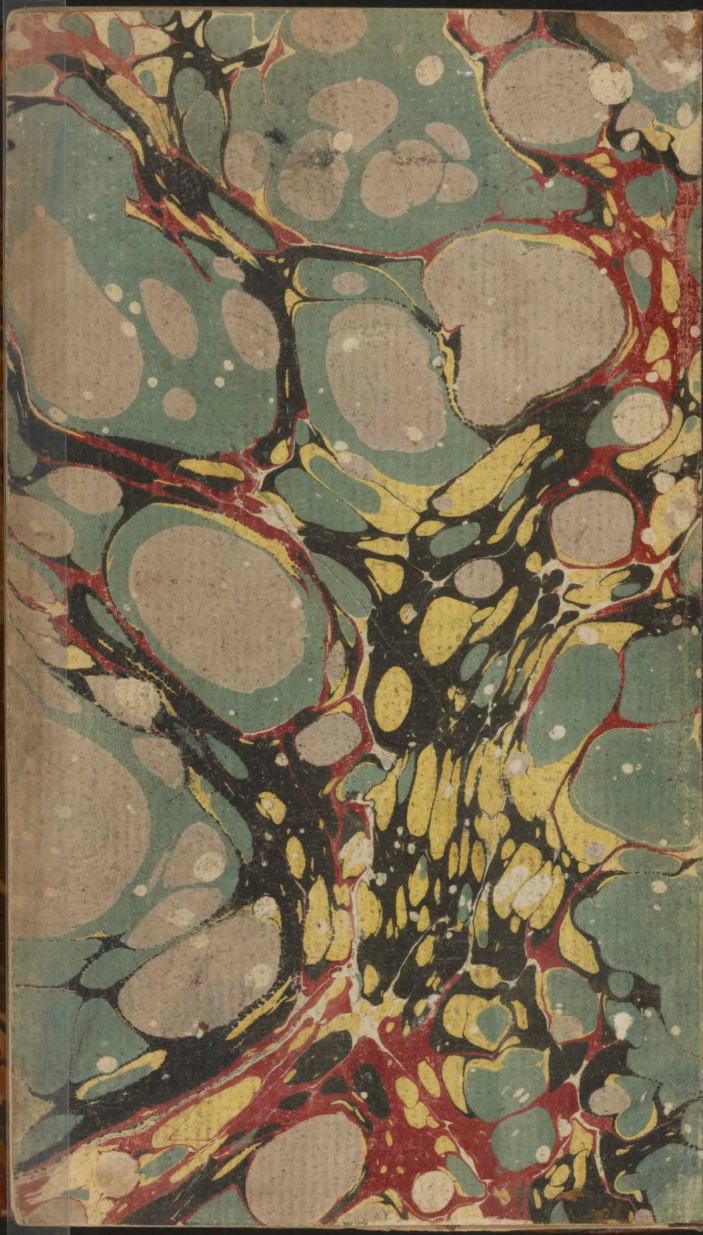
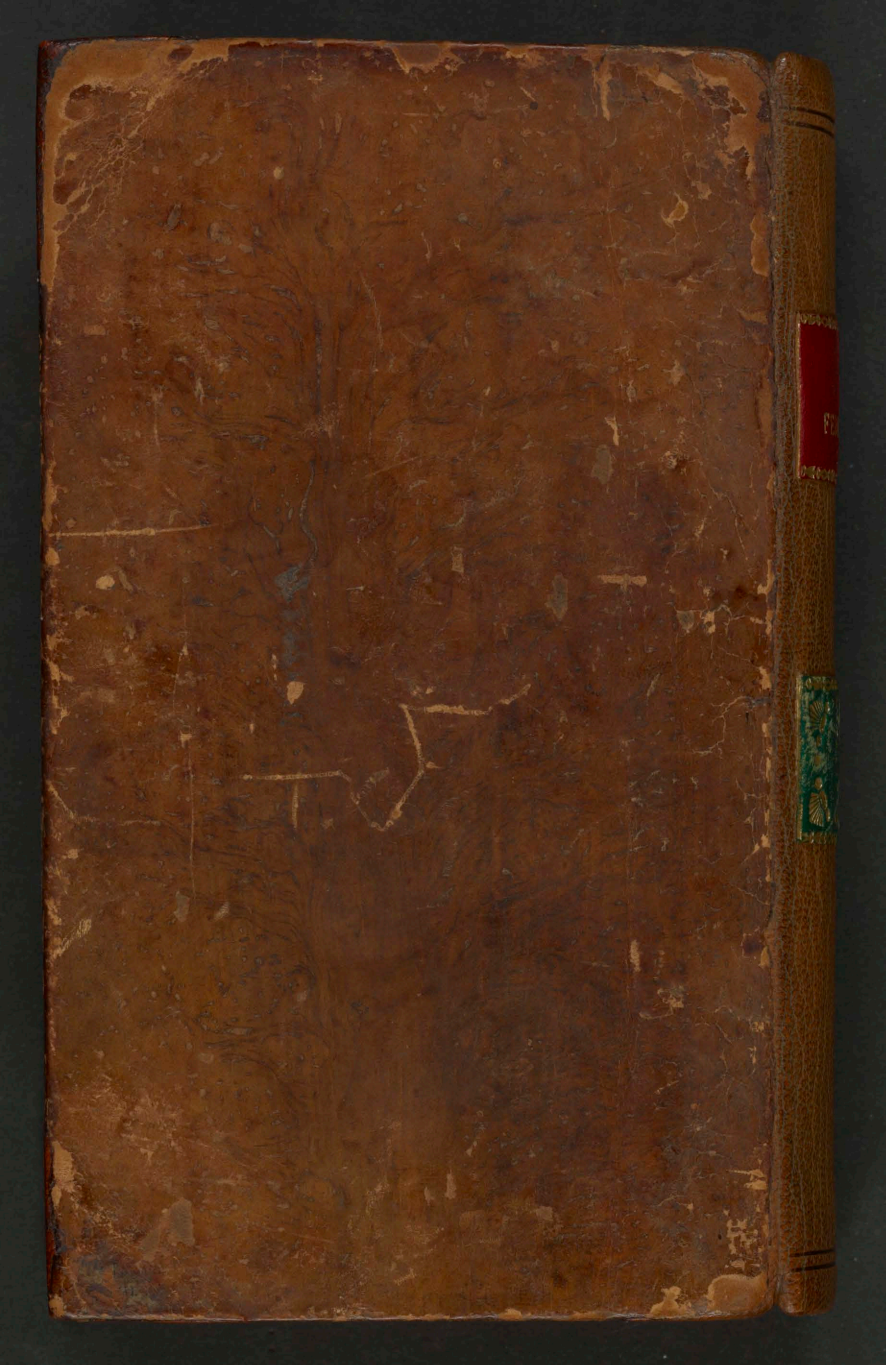
2-93-238, 39.B





	1	2	3	4	5	6	7	8	9	10	11 (A)	12	13	14	15
L*	39.12	65.43	49.87	44.26	55.56	70.82	63.51	39.92	52.24	97.06	92.02	87.34	82.14	72.06	62.15
a*	13.24	18.11	-4.34	-13.80	9.82	-33.43	34.26	11.81	48.55	-0.40	-0.60	-0.75	-1.06	-1.19	-1.07
b*	15.07	18.72	-22.29	22.85	-24.49	-0.35	59.60	-46.07	18.51	1.13	0.23	0.21	0.43	0.28	0.19
Density										0.04	0.09	0.15	0.22	0.36	0.51

	16 (M)	17	18 (B)	19	20	21	22	23	24	25	26	27	28	29	30
L*	49.25	38.62	28.86	16.19	8.29	3.44	31.41	72.46	72.95	29.37	54.91	43.96	82.74	52.79	50.87
a*	-0.16	-0.18	0.54	-0.05	-0.81	-0.23	20.98	-24.45	16.83	13.06	-38.91	52.00	3.45	50.88	-27.17
b*	0.01	-0.04	0.60	0.73	0.19	0.49	-19.43	55.93	68.80	-49.49	30.77	30.01	81.29	-12.72	-29.46
Density	0.75	0.98	1.24	1.67	2.04	2.42									