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THE
POLITICAL INSTITUTIONS
AND
CONSTITUTIONAL LAW
OF THE
UNITED STATES.

BY ALFRED CONKLING.

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Advertisement.

The following brief disquisition was designed by the author, to be read as a lecture, to the law students of the city of Rochester; but circumstances having intervened which rendered the accomplishment of this design inconvenient, he readily adopted a suggestion of the expediency of printing his lecture, with slight modifications, in the hope of thus rendering it in some degree conducive to its purpose.

TO THE
LAW STUDENTS OF THE UNITED STATES,

AND TO

"YOUNG AMERICA" IN GENERAL,

THE FOLLOWING TRACT, IN THE HOPE THAT IT MAY INCITE THOSE OF
THEM, HOWEVER FEW, INTO WHOSE HANDS IT MAY FALL,
TO A MORE CAREFUL STUDY AND A DEEPER LOVE
OF OUR FREE INSTITUTIONS,

IS CORDIALLY INSCRIBED BY THEIR FRIEND,

THE AUTHOR.

THE POLITICAL INSTITUTIONS
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That the American people are the subjects of two distinct, and, to a great extent, independent schemes of government; each having its Legislative, Executive and Judicial Department; each indued with extensive authority indispensable to the public welfare, and each, in its appropriate sphere, in constant activity—as a general fact, is familiar to us all. Next to the superior freedom we enjoy, it is the great distinctive characteristic of our system, compared with the governments of all other nations, ancient and modern. It ought perhaps to excite no great wonder, therefore, that, to Europeans, it should still be, as it always has been, a stumbling-block and a puzzle. Indeed, though the line of demarkation between the national and state governments is traced by written constitutions, there is reason to believe, that to the minds of many of our own countrymen, it is too shadowy, clearly to mark the limits of their respective spheres.

A cursory review of the history of our institutions will, I think, be conducive to my design, and I hope will be found, in itself, not altogether devoid of interest.

When our ancestors, by the achievement of their independence of Great Britain, became invested with all the powers of independent self-government, *three* alternatives presented themselves to their choice, with respect to the disposition of these powers. The thirteen colonies having become, potentially, separate and independent republics, they

might severally have assumed that character, both with regard to each other, and in their attitude towards other nations: or, secondly, they might have surrendered their separate political organization and existence altogether, by merging them in one consolidated national government, invested with plenary powers: and, lastly, there remained the alternative of resorting to a medium between these two extremes, by the surrender, on the part of the states, of portions of their sovereignty sufficient to constitute an efficient national government of limited powers, but sovereign within its proper sphere, leaving the states respectively in full possession of all the residue of their powers.

In deciding to adopt the last of these alternatives, the men of that day took upon themselves a task of transcendent difficulty, of the magnitude of which it is not easy, at this day, nor, indeed, except to those most familiar with that epoch of our history, is it possible, to form an adequate conception. That consummate wisdom was displayed in the execution of this task, has long since, with us, passed into a political axiom.

The framers of the constitution, however, as we shall see, were not wholly without the light of experience to guide them in their undertaking.

In 1774, Great Britain still persisting in turning a deaf ear to the prayers and remonstrances of colonists, deputies were appointed by several of the colonies, on the recommendations of Massachusetts, to meet in general congress, at Philadelphia, to deliberate on public affairs, and they met accordingly, in September of that year. Several highly important resolutions were passed, and other measures of great significance were adopted by this Convention, implying a lingering hope of reconciliation, but adapted also to the alternative of forcible resistance; and after a brief session, having first recommended a general congress to convene at the same place in May, the next year, they terminated their session. Their proceedings constitute the first act of the grand tragedy of the Revolution. The second revolutionary congress, commencing in 1775, con-

tinued in session until it was superseded by articles of confederation. The delegates of which it was composed had been appointed, without limitation to their period of service, by the people of the several colonies, to "concert, agree upon, direct, order and prosecute such measures as they should deem most fit and proper to obtain redress of American grievances."

Nothing short of a common sense of great impending danger, and of the necessity of united and harmonious action, could have reconciled a people so jealous of their liberties, and composing communities so jealous of each other, to the delegation of powers so comprehensive and indefinite. And notwithstanding the ominous aspect of the times, and the momentous importance of the interests at stake, so strong was the aversion of our ancestors to undefined power, that so early as June, 1776, impelled by this sentiment, and for the purpose also of giving stability to the confederacy, congress undertook the task of preparing a formal instrument defining the nature and conditions of the compact, by designating the powers of congress, and the mutual obligations of the colonies. The inherent difficulty of the undertaking, greatly enhanced as it was, by the necessity of endeavoring, as far as possible, to reconcile discordant interests and prejudices, unavoidably retarded its completion until late in 1777, when, at length, the articles of confederation and perpetual union between the states, as they were styled, was submitted to the state legislatures for examination and approval.

In passing this new ordeal they, nevertheless, encountered an opposition so strenuous and determined, that it was not until 1781 that they were ratified by the last of the thirteen states. This celebrated compact continued until it was superseded by the adoption of the present constitution. Whether it contributed in any degree to the success of our arms and the establishment of our independence, it is not, perhaps, easy to decide. But, defective as it was, it served to preserve the union of the states commencing in the revolutionary government that preceded it, and, happily, also to

demonstrate the necessity of a closer and more effective union. That it continued so long, was owing to no belief of its adaptation to render us a great and prosperous nation. Its insufficiency had become manifest long before the termination of the war, and became still more conspicuous after the peace. In fact, it was wanting in the essential elements absolutely requisite to insure either domestic concord, or the respect of foreign nations, and such was the opinion entertained of it by all enlightened men. Its defects, glaring as, in the light of experience, they now appear, ought to excite no surprise, nor ought it to diminish our respect for the wisdom of the patriotic men by whom it was devised. They were aware of its imperfections. In the circular letter accompanying its submission to the state legislatures, they described the proposed plan of union, as that which, after the most careful inquiry and the fullest information, was believed to be the best which could be adapted to the circumstances of all, and as that alone which afforded any tolerable prospect of general ratification. They recommended it to candid review and dispassionate consideration, under a sense of the difficulty of combining in one general system the various sentiments and interests of a continent, divided into so many sovereign and independent communities, under a conviction of the absolute necessity of uniting all our counsels, and all our strength, to maintain and defend our common liberties; and, finally, appealing to the magnanimity of those to whom they addressed themselves, they exhorted them, while concerned for the prosperity of their own immediate constituents, to rise superior to local attachments incompatible with the safety, happiness and glory of the general confederacy. * Such were the views they entertained of the work of their own hands. Its paramount defect, considered as a system of government—an infirmity of itself sufficient speedily to insure either its dissolution from inanition, or its extinction in the rude embrace of civil war—consisted in the absolute want of any provision for insuring obedience to the resolutions of congress, the sole depositary of the authority it conferred. The pow-

ers nominally confided to congress comprised most of the great attributes of national sovereignty, and, but for the want of independent power peacefully to carry them into effect, might have proved sufficient. But this power having been withheld, to be exercised, if at all, by the state governments, the resolutions of congress were, in reality, but recommendations to the states; and when, as often happened, they were disregarded, the only alternatives were submission on the part of congress, or coercion by military force.

Of this radical, pervading and fatal vice the framers of the articles of confederation cannot but have been aware, nor could they be insensible to its dangerous tendency. It had existed in all the confederacies among the Grecian states and in those of modern times, and had invariably been productive of bitter fruits. Of this the distinguished men composing the revolutionary congress were doubtless apprised; but they knew also how vain it would be to propose to the people of the several states to subject themselves individually to the direct action of any external authority, for it was against what they regarded as the abuse of such authority, by Great Britain, that they were warring and that their passions were enlisted. In repeating an experiment that had so often proved disastrous, reliance was placed on the obvious necessity of some general supervising authority, and on the magnanimity of the state legislatures. The result, as stated by General Washington, in one of his letters, was, that "the confederation" became "little more than a shadow without the substance."

There were other grievous faults in the structure of this compact, to which, however, it would be inconsistent with my design more particularly to advert. But had there been no other than the radical defect already specified, that alone, as I have already intimated, would have rendered it necessary to undertake the arduous task of reconstruction, for the purpose of substituting a national government for the American people, in place of a feeble and delusive league among the states. This great work was commenced, or

rather the first effective step towards it was taken, by the passage in congress, in February, 1787, of a resolution moved by the New York delegation, under instructions from the legislature of the state, recommending a convention to meet in Philadelphia, on the second Monday of May next, ensuing, "for the purpose of revising the articles of confederation, and reporting to congress, and the several legislatures, such alterations and provisions therein, as shall, when agreed to in congress and confirmed by the states, render the federal constitution adequate to the exigencies of government and the preservation of the Union."

Delegates to form such a convention were accordingly appointed in all the states except Rhode Island, and assembled at the time and place designated in the resolution of congress. I have said that they were not wholly destitute of the light of experience. They had before them as a warning, the articles of confederation—*magni nominis umbra*—and their signal failure. Insufficient as they had proved, so jealous were the states of their separate independence, that it was not, as we have seen, until 1781, that their unanimous consent to them could be obtained. The same distrustful and apprehensive temper which had so greatly retarded their ratification, remained unabated among the people of the states, and prevailed extensively among the delegates themselves. This added materially to the complexity of the task before them. *Without* this element it would have afforded ample scope for all the resources of human knowledge and wisdom. But they were well aware of the necessity of adapting their work as far as possible, consistently with its design, to the prejudices of the people of the several states, lest it should fail of their approval, and anarchy ensue. The great problem at length found its solution in the formation and adoption of the constitution of the United States. This is our second grand historic epoch. Under the system of government thus inaugurated, we have passed, creditably to our military prowess, through two wars with foreign nations, and have grown in all the material elements of national greatness and renown, with unparalleled rapidity.

The constitution is purely an artificial contrivance.

When, in 1776, the colonies declared themselves free and independent states, although this, through their representatives, was the joint act of all, yet, strictly speaking, it was to the colonies individually, as distinct communities, that the memorable declaration referred; for it was upon them severally, that the right of self-government devolved. They had united, or rather, they had acted in consort, in sending representatives to the congress by which the declaration was made, and they continued so to act, in maintaining this declaration by force of arms. But they had no aggregate political existence, and collectively could exercise no political power, except by mutual consent and voluntary co-operation. Hence the constitution necessarily became what it is, unlike the constitutions of the states, an affirmative grant of enumerated powers. Its scope is defined by a few great outlines. Its framers acted wisely in abstaining from all attempts at minute subdivision. They were too enlightened not to foresee that the practical construction of the instrument as it passed from their hands would give rise to many controversies touching its true interpretation; but they also knew that this was an inevitable consequence, and that any attempt to exclude it by descending to particulars, would, in all probability, aggravate instead of mitigating the evil, by multiplying the subjects of dispute. They felt that they were engaged in no ephemeral undertaking. They were laying the foundations of a mighty empire, which they hoped and believed would endure for ages; and while it was their unquestionable duty to adapt their work to existing exigencies, they deemed it to be no less obligatory on them to fit it also to the demands, as far as human foresight could discern them, of a distant and multitudinous posterity. But who could pretend to foresee the particular exigencies of an indefinite future, and to prescribe the particular legislation they might require? It would have been vain to attempt this for a stable and stationary community; for a young, vigorous and ever changing nation of freemen, the attempt would have been preposterous.

The powers confided to the national legislature are those only, in the just exercise of which the whole American people have a common interest ; and they are, with few exceptions, necessarily *exclusive*. The executive and judicial powers of the United States, of course, correspond, in point of general scope, with that of the legislative branch.

The restrictions upon the state powers of legislation are threefold, consisting, *first*, of powers *expressly forbidden*; *second*, of those *expressly declared to be exclusive in congress*; and, *thirdly*, of those which, though neither expressly forbidden to the states, nor expressly declared to be exclusively vested in congress, *are, in their nature, exclusive*, and are accordingly to be so considered. A brief enumeration will suffice to illustrate these distinctions :

1. The power to coin money ; to emit bills of credit ; to make anything but gold and silver coin a tender for the payment of debts ; to lay duties or excises on imports or exports, except what may be absolutely necessary for executing state inspection laws ; to lay tonnage duties ; to enter into any agreement, or compact, with another state, or with a foreign power ; to engage in war, or keep troops, or ships of war ; to make any law impairing the obligation of contracts, or to pass *ex post facto* laws, are among the *inhibited* powers.

2. The authority of congress to legislate, in all cases, over districts and places ceded, for national purposes, by the states to the United States, is, *in terms, declared to be exclusive*.

3. Among the legislative powers *denied*, by *implication*, to the states, are, the power to regulate commerce ; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States ; and to make laws for rewarding new and useful inventors and discoverers.

4. The power of direct taxation, and that of laying duties or excises on articles not imported, nor designed for exportation, are not comprised within *either* of these classes, and are, accordingly, *concurrent*.

Our ancestors adopted, also, another precaution. They were jealous of their liberties, and experience had made

them distrustful of rulers; and they accordingly saw fit, expressly to enumerate certain powers, by means of which they apprehended the rights of the citizens might otherwise be invaded, and, in express terms, to forbid their exercise by the government they were establishing. Suspension of the writ of habeas corpus, unless when, in cases of rebellion or invasion, the public safety may require it; bills of attainder; and *ex post facto* laws, are, therefore, prohibited. Treason is defined to consist *only* in levying war against the United States, or in adhering to their enemies, giving them aid and comfort; and two witnesses to the same overt act of treason, or else a confession in open court, are required to warrant a conviction. Congress are empowered to prescribe the punishment of treason; but no conviction, or, as it is expressed, no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the offender. These provisions were contained in the constitution, as originally framed and adopted. Others, likewise, designed more effectually to protect the citizen against oppression and injustice, were insisted upon by many of the states at the time of their adoption of the constitution, and were, without loss of time, added as amendments.

The constitution concludes by ordaining that "This constitution, and the laws which shall be made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state, to the contrary notwithstanding." And that "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."

It will readily be seen, therefore, that while the United States are to be considered as, to some extent, a composite state, of which the several states form the constituent ele-

ments, yet that, in a larger sense, they constitute one body politic; and that, although allegiance is due from every American citizen, as well to the state he inhabits as to the nation, yet, that, by no possibility, can any conflict arise between the two obligations. Allegiance to the national government is his paramount duty, from which no state legislature, or state convention, can absolve him, either directly or by attempting to impose obligations, or confer rights, inconsistent with that duty. So evident is this, that we are warranted in concluding, that those who profess to believe the contrary are either insincere, or the dupes of others who know better.

The immense residue of political power, after deducting that delegated to the national government, resides in the people of the several states. It comprises all political power not so delegated, nor denied by the constitution of the United States. It has been primarily exercised in all the states, by the formation of written constitutions, creating representative agencies for its exercise, subject to such regulations and restraints as it has been seen fit to impose.

The powers remaining to the states are enough, one might suppose, to satisfy all reasonable persons. The annual devotion in this state, of an hundred days to the exercise of the legislative authority, has proved hardly sufficient for the purpose; and an almost innumerable multitude of state, county and municipal officers, are incessantly employed in the administration of the laws. Whether, and if so, in what sense, the states can properly be denominated *sovereign* states, is a question which has elicited much controversy, and no inconsiderable amount of sophistry. The question is, nevertheless, in reality, devoid of practical importance. To confer this appellation upon the states, does not add a cubit to their stature; to withhold it, in no degree detracts from it. Their actual position in our system, is fixed by organic laws. That the more important attributes of sovereignty, belong exclusively to the Union, is indisputable. Nor can the states severally be recognized or known as political sovereignties by foreign nations. But,

on the other hand, to the full extent of the powers they retained, they act independently, and to this extent, therefore, may properly be considered as sovereign. In other words, while they are wanting in the high attributes of independent states, in the generic sense in which the appellation is applied by writers on international law, to designate the civilized nations of the world as distinct bodies politic; they yet possess a limited domestic sovereignty. What they severally lost by the surrender of their international sovereignty, they have gained an hundred fold, collectively, by becoming a great nation, and by their recognition as such, among the powers of the earth.

Such then, in outline, is the structure of our political institutions as delineated in our organic laws. It has been in operation just seventy-five years. During this period, and especially the first half of it, many questions—all of them important, and many of them of vital importance—have arisen in the state and national courts, depending on the just interpretation of the constitution, and which were finally adjudicated in the Supreme Court of the United States. Being essentially new, little or no light was shed upon them by antecedent decisions, and many of them were questions of great nicety. No man, not deeply versed in our antecedent history, familiar with every part of the constitution, and deeply imbued with its spirit, was qualified to grapple with them. During the infancy and adolescence of the republic, there was no lack of such men, on the bench and at the bar of the Supreme Court. Among these, preëminent over all the rest, was John Marshall, who, for 35 years, commencing in January, 1801, filled the office of Chief Justice of the court. If it be true that extraordinary emergencies affecting the destinies of nations, rarely fail to evoke human agencies specially adapted to the occasion—if, in illustration of this fact, we may point to the opportune appearance of Washington at the commencement of our revolutionary struggle, to lead our armies; and to that of Clinton, to introduce and carry forward the great work of artificial inland navigation; we may, with equal pro-

priety, adduce also that of Marshall, to undertake the hardly less important and difficult task of expounding the constitution, ascertaining the precise nature and scope of the powers it confers, and thus bringing our duplex political system into harmonious and beneficent operation. Fortunately for the country, his wonderful perspicacity, power of analysis, and precision of judgment, not only led him, with almost unerring certainty, to just conclusions; but, as manifested in his written opinions, were so evident and striking, as to ensure almost universal acquiescence; and thus to establish, one by one, most of the great principles which were to constitute the body of our constitutional law.

By thus giving prominence to this great magistrate, I have no design to disparage his learned and able associates and their successors, and am far from a wish to detract from the merits of his successor in the presidency of the court, who, after devoting himself with unsparing industry to the duties of his high office during thirty years, and rendering invaluable services to his country, has just ceased from his labors. During this long period, many cases have arisen and been decided in his court, depending upon questions of constitutional law, in most of which the judgment of the court was pronounced by him. His opinions evince surpassing ability, and if his mode of reasoning bears a less marked resemblance to a formal mathematical demonstration than that of his predecessor, they were never wanting in perspicuity or logical cogency. But for one untoward act, he would have held a high and undisputed rank among the greatest judges of the land. Constitutional questions, always, during the time of Chief Justice Marshall, and generally since, have been argued by the ablest lawyers of the American bar. In a few instances there have been re-arguments at the request of the court, and in some, of early date, questions which had already been once decided, were, on account of their great importance, again fully argued in cases subsequently arising, and were elaborately re-examined by the court; the judgment, in all these cases, I think, being delivered by the Chief Justice. Now, from

this cursory review, is it not manifest that the reports of the cases it embraces, embodying the results of a process of dialectics to the last degree exhaustive, have very high claims upon the earnest attention of the student? Can it be doubted that, in addition to their primary design of making known the doctrines they record, they are eminently adapted also to the invaluable purpose of awakening, expanding and invigorating the intellectual faculties—a purpose to which the narrow technicalities which unavoidably occupy so large a share of the thoughts of the legal profession, are by no means well fitted?

In entering upon the study of our constitutional law, and turning to the federal constitution as the first step to be taken, the student is apt to be misled in forming his estimate of the undertaking, by the remarkable brevity of the instrument before him. This characteristic is attributable to the plan upon which it was constructed as already explained. Every clause of it was maturely and anxiously considered, the intention of its framers doubtless being, to exclude from it all unnecessary verbiage. Every clause of it, therefore, is pregnant with meaning. In short, the great objects of solicitude were, first to determine what it ought to contain; and secondly, to express it with all possible precision and clearness. But all experience demonstrates that no skill or circumspection in the use of our language is proof even against honest doubt or misapprehension, much less against ingenious sophistry. The innumerable controversies touching the construction of legal instruments sufficiently attest this truth. If there is one writing which, above all others, we should naturally expect to find free from obscurity, it is a will disposing of a great estate, and penned by a learned lawyer; and yet, such wills have often been the subject of protracted and ruinous controversy.

With, I think, but one exception, there has been no difficulty in determining the object of any grant of legislative power to the federal government; nor can there be room for doubt as to some of the more obvious and direct means of accomplishing the objects of a specified power. The

difficulty generally has been to determine the limits of the power, or, in other words, in discriminating exactly between what might, and what might not, be legitimately done in execution of it. Thus, for example, no one can doubt that in virtue of the power to regulate commerce with foreign nations and among the several states, congress has authority to provide for the erection of lighthouses on the sea coast, and on the shores and islands of our inland waters; but whether in virtue of that authority, or of the war power, or the power to establish post roads, congress could constitutionally appropriate money for the construction of roads, and if so, under what conditions, are questions that have been agitated during the last forty-five years, and which, even yet, remain unsettled. So, in giving a practical construction to that clause of the constitution by which it is ordained that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction," the question presented itself, and gave rise to a vehement and protracted forensic controversy in the Supreme Court of the United States, embracing judges as well as advocates, whether this branch of jurisdiction could be extended beyond the narrow limits to which, at the time of the adoption of the constitution, it was confined in England. A similar question, much debated in congress, arose relative to the specified power, notwithstanding the comprehensive generality of its language, to make "uniform laws on the subject of bankruptcy."

Reverting now, for a moment, to the power to regulate commerce, let me add, in further illustration, that the question early arose whether, in virtue of this power, congress had the capacity to charter a national bank. The Supreme Court decided that it might be done, on the ground that, from necessity, much must be left to the discretion of congress in the choice of means to carry into effect its specified powers. The power to regulate commerce was conferred for the benefit of commerce. It authorized the use of means adapted to this end. The creation of a national bank was a measure bearing a direct and primary relation

to the subject, and congress being reasonably of opinion that it would be conducive to the object of the grant, had a right to adopt it.

The question has lately arisen and been decided in the courts of this state, whether congress has power to make anything but gold and silver coin a lawful tender in the payment of debts. In the existing condition of the country, it was a question of vital interest to the public welfare. Fortunately for the country, it has received an affirmative answer in the court of appeals, as well as in the Supreme Court, and these decisions, the result of thorough scrutiny and profound consideration, by judges of great ability, it may reasonably be hoped, will be cheerfully acquiesced in by the country at large.

Though not in strict harmony with my main design, I trust I may be excused for dwelling a little longer upon this case. The power in question it will be remembered, is expressly denied to the states; and had the question been otherwise definitively determined, it would have followed that in no emergency, however urgent,—in no crisis however alarming, could this power be exercised. But considering the nature of the power, that it is not, *per se*, an unjust power, like that to pass *ex post facto* laws, which, for that reason was expressly forbidden to congress as well as to the states; and that there was, moreover, little reason to apprehend its abuse by the representatives of a free people, while at the same time, it would have been hazardous to assume that no occasion would ever arise when its exercise would become essential to the salvation of the country; it is scarcely to be imagined that the framers of the constitution designed to exclude it from the grant of powers to the national legislature. On the contrary, there is strong ground apparent upon the face of the constitution itself, for the presumption that they believed it to be implied by one or more of the enumerated powers. Its denial, for obvious reasons, to the states, proves that it was not overlooked; and if it was intended to withhold it also from congress, why was not its exercise as well as that of the power to pass

ex post facto laws, expressly forbidden? Recent experience had demonstrated the necessity of this power to meet the exigencies of great and urgent emergencies, and it had been invoked by the revolutionary congress to the full extent of its ability. Beyond all reasonable doubt it was believed to be comprehended by the power to regulate commerce; to borrow money; or to wage war, one or all. It behooves me nevertheless, lest I should be misapprehended, in conclusion, to add, that however well founded this view of the subject may be, it would be insufficient of itself to uphold the power in question, if it could be successfully maintained that the framers of the constitution were mistaken in believing it to have been indirectly given.

The same kind of difficulty has in like manner arisen in determining the limits of the restraints, express or implied, imposed upon the legislation of the states.

The power assumed by some of them to limit and obstruct the right of the creditor to sell the property of his debtor on execution; in this state, to impose a tax on passengers by sea from foreign countries; and, in several states, to authorize the erection of bridges over navigable streams, are familiar examples of this. It cannot, then, I think, but be apparent that a mere familiarity with the text of the constitution falls very far short of an adequate knowledge of our constitutional law.

As well might we expect to acquire a thorough acquaintance with human physiology by the examination of a human skeleton. Among the multitude of unforeseen questions to which the constitution has given rise, there doubtless are many which it would have puzzled its framers themselves to decide. In a few instances the interpretations given to it by the writers of the *Federalist*, two of whom were among the very ablest of its framers, have since been held by the supreme court to be unsound. He, therefore, who would understand the constitution must resort to the full records of its authoritative interpretation.

This survey, brief and very imperfect as it is, I trust has sufficed to convey a true general notion, not only of nature,

but also of the extent of this branch of our national jurisprudence. I wish it was in my power to demonstrate the full measure of its importance. To this end let us turn and take a rapid re-survey of the field we have traversed.

Tracing back our nationality to its source, we find it to have had its origin in the free will and common consent of the American people ; and we have seen that the instrument in which that will is embodied, while it defines the functions of the government it creates, also limits and regulates those of the state governments—thereby determining the political relations between the Union and the states. All governmental authority is, in its nature, either legislative, judicial or executive. By this organic law, this authority is distributed under these several heads, among separate and distinct agents, directly or indirectly chosen by the people. This law is of paramount obligation, binding no less upon all public functionaries, whether national or state, than upon the private citizen. Every official act, whether legislative, executive or judicial, unauthorized by it, is therefore an act of usurpation. It is to the federal constitution and that of his own state, that the citizen is to look for the purpose of ascertaining to what extent his natural rights may justifiably be subjected to restraint ; and, consequently, to ascertain the limits of the natural liberty that remains to him ; or, in other words, the sum of the civil liberty he is entitled to enjoy. And it is upon these organic laws and the tribunals established under them, that he must depend for the protection of his rights. The national and state constitutions may, therefore, without hyperbole, be said to constitute the charter of our liberties ; for it is to them that we are indebted for the advantages we possess over the subjects of despotic power, and the still more unhappy victims of anarchy.

This truth, unquestionable and obvious as it seems, when brought to our recollection, is, nevertheless, apt to be overlooked or forgotten. Accustomed as we have been all our lives to the uninterrupted enjoyment of our extraordinary privileges, we are prone to regard them as the indigenous

perennial product of our soil; and, under this illusion, to become insensible to their value, and careless of their preservation. It is true that in acquiring our independence we acquired the right of self-government. So did the English nation, when, after struggling for centuries against the tyranny of the crown, they at length dethroned Charles I, by force of arms. But after first trying the experiment of a republican government through a representative house of commons; and next, submitting to the usurpation of Cromwell, during his life, they resorted, at his death, to the miserable alternative of reinstating the besotted Stuarts, with their absurd dogmas of divine right and passive obedience; saw their noblest patriots sent to the gibbet and the block, and endured thralldom and national debasement for nearly thirty years more. Whether, then, we were to be gainers or losers by the achievement of our independence, depended on the use we should make of our newly acquired power. If our ancestors had failed, as they well nigh did, "to form a more perfect union," and the American people had thus been left united only by the old articles of confederation—the sickly offspring of our revolutionary struggle, designed primarily to meet its momentous exigencies, but too feeble for its purpose, even while fortified by the pressure of common danger; or, if the thirteen states, instead of uniting under one government, had separated altogether, or divided themselves into several distinct confederacies—an alternative which had many advocates; it is easy to discern, without stopping to enumerate the particular consequences which would probably have ensued, that the illustrious prize, won by so much toil and suffering, would have been rendered worse than nugatory. That prize is embodied in the noble institutions which it enabled our progenitors to establish, and under which it is our happiness still to live. But from their very nature it follows, and if it did not, there is no lack of significant warnings to admonish us, that the enlightened vigilance as well as constant agency of the citizen, is indispensable to their beneficence, and even to their enduring vitality. They

constitute the nation and each of the states, a Representative Republic ; they can be rendered effective, whether for good or for evil, only through representatives directly or indirectly chosen by and responsible to the people. But how can the citizen judge of the qualifications requisite in these agents, or how can he know whether the trust reposed in them has been faithfully executed, if he is ignorant of its nature and extent ? This branch of our jurisprudence, is so free from legal technicalities, as to render it a fit subject of study to others than the legal profession, and ought, in my opinion, to be taught in all of our colleges and high schools.

But the American lawyer ! With what grace or propriety can any man assume this appellation until he has mastered this great branch of American jurisprudence ? Nor are there wanting strictly professional incentives to its study. A reference to reported decisions will show that a considerable proportion of them, both in the state and the national courts, have turned upon questions of constitutional law. To some of these I have already alluded ; and there is another just announced, which it has required eight or nine years, and four arguments to obtain. It affirms the power of the legislature of New York, for the accommodation and safety of some hundreds of thousands of travelers, and for the benefit of a great inland trade, to authorize the erection of a draw bridge across the Hudson river at Albany. It is to be hoped that not many years will suffice to dissipate the narrow prejudices and delusions which have so long retarded the decision. The principles it determines are of great importance ; an opposite decision would have been mischievous and deplorable, not to say humiliating.

Looking only to the object which, with a few honorable exceptions, seems, with us, to be regarded as the "chief end of man," discarding all motives higher than a desire to professional emolument ; it would, therefore, be most unwise to neglect the study of our constitutional law.

It is from the legal profession, moreover, that nearly all the judicial and most of the executive offices are filled ; and

it is by lawyers, mainly, that our statute laws are framed, and that legislative bodies are swayed ; and it is hardly necessary to add, that no one can be fitted for these employments without an acquaintance with the organic laws, in subordination to which he is bound to act. Nor does the public vocation of the lawyer end here. Until, by more thorough education, our citizens, in general, shall become better fitted for the task, to whom, if not to the legal profession, are we to look for the defense and maintenance of our constitutional rights, and the preservation of our institutions, by the prompt discernment and fearless exposure of their covert as well as open invasion ? Let those who design to become members of the profession take heed, then, to fit themselves for this high trust.

If, in a disquisition at the present time, mainly upon the frame of the national government, I were to pass in silence over the horrible pending civil war, so wantonly and shamefully waged for its overthrow, the omission might seem unnatural ; and the more so, perhaps, on the account of the novel questions of constitutional law to which it is giving rise. If this calamitous event were traceable to some radical infirmity inherent in the structure of our institutions ; if experience had at length taught the unwelcome lesson, that a republican form of government over domains so extensive and diversified as ours, could only be maintained by force of arms, our institutions would be no longer worth preserving. But, happily for us and for the oppressed of other lands, there is no reason for this conclusion. The rebellion is attributable to a cause extrinsic and fortuitous — a cause existing prior to the formation of the Union — a cause, most fortunately, which, though interwoven with the social system in the insurgent states, so extensively and intimately as to form its distinguishing characteristic, is yet susceptible of removal and likely soon to become extinct. I shall readily be understood as referring to negro slavery. To enumerate and portray its diversified, but constantly converging influences, and follow them out to their culmination in a treasonable insurrection against the Union, would far transcend

the limits I am bound to observe. Suffice it to say that the spirit by which our assailants are actuated—the same spirit that animated Cataline and his companions in conspiring against the liberties of Rome, and that, according to Milton, impelled Lucifer and his associates to wage war against the Most High, is the legitimate offspring of the cause I have mentioned. This result, sooner or later, was inevitable. To encounter it, with all its terrible responsibilities, has fallen to the lot of the loyalists of our day. How the struggle is to terminate we are even yet unable certainly to foresee; but terminate as it may it will hold a prominent and enduring place among the great eras recorded in the annals of our race. On the one hand it holds out a promise of long life, and a career of unexampled prosperity and greatness to the republic, by the defeat of the conspiracy for its overthrow, and by the extinction of its cause. On the other hand it threatens a permanent severance of the Union, to be followed by contention, border violence, standing armies, wars, further disintegration, foreign alliances, and, probably, the final abandonment or suppression of free institutions on this continent. It is the magnitude of the interests at stake, and the well founded dread of these and other evils that make it our paramount duty, at whatever cost, to persist in our efforts to suppress this unhallowed revolt. Even though they should fail, they will at least entitle us to the approval, if not to the applause of future ages; but if, as we confidently expect, our exertions shall be crowned with success, who can adequately conceive the full measure of gratitude that posterity will accord to us? Let us not repine then at the costly sacrifices, great as they are, which are required at our hands. It may be that those of our loyal countrymen collectively, who were upon the stage at the breaking out of the rebellion, had they been tame enough supinely to submit to the insolent demands of the traitors, would have personally been gainers by doing so. But let us remember that by the adoption of this alternative, we should have justly incurred the contempt and derision of mankind, forfeited our rank among

the nations, and betrayed our high trust as the assertors and guardians of the rights of man. Let us rejoice then that we have escaped this ignominy. True the great cause has exacted an innumerable army of martyrs. So did our revolutionary struggle. There can be no question that our ancestors in 1774, when the first revolutionary congress assembled, would, in the same sense, have been infinite gainers by submitting to a trifling tax unrighteously imposed by the British Parliament, instead of standing resolutely upon their rights, and incurring the horrors of a seven years war waged against them by the most powerful nation then upon earth. This they well knew, but they were animated by higher motives. They scorned to wear chains, and especially did they disdain to leave them as a heritage to their children. They were wise and thoughtful men, and they knew that life, even to its possessor, derives its chief value from the power of doing good to others; and in deciding to devote their lives to the cause of human freedom, it sufficed for them to know that, to borrow the language of a noble poet,

“ They never fail who die
In a great cause ; the block may soak their gore ;
Their heads may sodden in the sun, their limbs
Be strung to city gates and castle walls !
But still their spirit walks abroad. Though years
Elapse, and others share as dark a doom,
They but augment the deep and sweeping thoughts
Which o’erpower all others, and conduct
The world at last to freedom.”