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ART. VIII.—STORY'S COMMENTARIES — VOLS. II. AND III.

Commentaries on the Constitution of the United States, with a Preliminary Review of the Constitutional History of the Colonies and States before the adoption of the Constitution of the United States. By JOSEPH STORY, LL. D. Dane Professor of Law in Harvard University.

IN noticing the first volume of this work we have made some remarks upon its general character, and shall confine ourselves mostly, in the present article, to those parts of the second and third volumes that fall more particularly within the province of our journal; premising, however, that though the work professes to be, and in fact is strictly, a practical exposition of our constitution, it is at the same time incidentally, and, as a necessary result of the plan, a comprehensive philosophical treatise upon government in most of its principles, and the more instructive and the more interesting because it is practical as well as philosophical and speculative. How infinitely more profitable to the student, who wishes to become acquainted with the political mechanism of society, and the statesman, whose business it is to operate this machinery, to study the principles and secrets of the construction, and the actual working of the machine in its real use, than to ruminate upon the theoretical models and visionary abstractions of the recluse political philosophers? The desultory hints in Montesquieu's Spirit of Laws, and the abstract dream of Rousseau on the social compact, will never teach the student the art of governing a State, or give him a knowledge of how it is or how it should be governed. But in considering these commentaries as an exposition of the powers and operation of government in the abstract, the reader is to carry some distinctions in his mind. Every constitution necessarily has reference to a particular community, and its provisions and fundamental principles will be materially modified by the social condition and relations of its members. A circumstance in the social condition of the English nation, which enters deeply into their political constitution, and which Blackstone regards with great admiration, is wholly wanting in the United States.

He says, 'The body of nobility creates and preserves that gradual scale of dignity which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises.' Now we have no such scale or pyramid, so that whatever part of other constitutions has reference to the ranks of the different classes, or depends upon the 'horizontal' divisions of society, has no analogy to any thing in our own, which is adapted to a community, which, politically considered, is better characterized as a dead level than as a pyramid. This difference makes it necessary entirely to reverse many maxims in reference to one and the other of two such communities. The dangers to be guarded against, and the objects of jealousy, in the two, are quite different, and may be directly opposite; for in communities terminating in a royal apex the tendency to abuse and to the dissolution of freedom, may arise from the preponderance of one class or individual. If the royal power is the dangerous one, it may by degrees absorb all the others. In such communities the danger may be from some one of the 'estates,' constituting the society. But in a representative democracy, in which no permanent distinction of classes, and no exclusive privileges exist, the danger is that the powers of the government will revert to their original fountain, the people, who may be induced, by the impulse of the moment, to resume the powers they have delegated, and destroy the government, the work of their own hands; or rather they may encourage and sanction the infractions of the constitution by those who have temporary objects or their own personal aggrandisement in view. The result is, in such case, the same; it is either the direct or indirect establishment of a tyranny of one kind or another: direct, where the powers of government are seized by the leaders of a faction: indirect, where the government is demolished by a faction, and the community being thrown into a state of anarchy, will finally be ready to escape from its evils to the shelter of any tyranny, (that is, authority without check or balance,) that is powerful enough to control the discordant materials of the ruined system.

It is agreed that all governments should be constituted by checks and balances and counterpoises. The different powers and functions must be so distributed and lodged that the depositaries of each shall not only be influenced by powerful motives

to vindicate and retain them, but shall be able to defend them against encroachment. In contriving and adjusting these checks and counterpoises, it makes all the difference in the world, whether the government is, or is not, made to rest and depend for support upon the concurring and opposing interests of different classes or estates, marked by permanent political distinctions. So important is this classification of the society in the constitution of the government considered in those countries where it exists, that it has been seriously questioned whether a permanent government can be formed upon any other basis over any considerable number of people or extent of territory. And this is the experiment now in progress in the United States. When people say that the practicability of free government is to be tested by the success of ours — that the hopes of freedom depend upon it — the meaning is, not that there is in fact no other free government in the world, for the English government has been a free one for more than a century, and those of other European nations are assuming a free character, but that no government of magnitude and power, whether free or arbitrary, has hitherto been sustained without the help of the distinction of classes. Thus Blackstone, in enumerating the checks and balances of the British constitution, refers them, in a great measure, to this classification of the community.

'Herein consists the true excellence of the English government, that all the parts in it, form a mutual check upon each other. In the legislature the people are a check upon the nobility, and the nobility upon the people, by the mutual privilege of rejecting what the other has resolved; while the king is a check upon both, which preserves the executive power from encroachments; and this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching and punishing the conduct (not indeed of the king, which would destroy his constitutional independence, but, which is more beneficial to the public) of his evil and pernicious counsellors. Thus every branch of the civil polity supports and is supported, regulates and is regulated, by the rest; for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole

is prevented from separation and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each and formed out of all; a direction which forms the true line of the liberty and happiness of the community.' 1 Bl. 156.

It is those points d'appui in the different classes or permanent divisions of society, that form so essential a part of every European constitution, which distinguishes every one of those from our own. In reviewing the labors of the great architects of our political system, therefore, whether we regard the arduousness and perplexity of the labor; or are exploring the motives and reasons of the various constitutional provisions; or making a comparison of our own with foreign governments, we must keep constantly in view this fundamental distinction between the constitution of our own society and that of nations of corresponding rank and magnitude. It is generally assumed that the distinction just mentioned greatly enhanced the difficulties of the constructing a permanent, efficient, and well regulated free government in the United States, meaning by free government, one in which the laws are made in reference to the interest of the whole and are supreme, for though this is not the only sense of the word *freedom*, it is the most essential and characteristic one, for the very idea of government implies authority and subjection, and the two great classes of political organizations are those, first, in which the subjects submit to the *will* of magistrates or rulers, and, secondly, those in which the citizen yields obedience only to the abstract, invisible, supreme authority, the *laws*, made in reference to the general welfare, and not that of a class merely. This is the fundamental and pervading principle of a free government. Now any power in a community, whether that of a chief magistrate, a nobility, a faction or a mob, that can wrest to their purposes the legislation or the administration of the laws, or intercept their execution, is dangerous, and may be fatal to freedom. It is very natural that it should have been assumed by very many political philosophers, that freedom may be more effectually

secured, or can only be effectually secured, in a community consisting of permanent divisions having diverse interests, since history and experience, as far, at least, as powerful civilized communities have been concerned, have been almost entirely confined to societies so compounded. But if we should go into the inquiry as to what proportion of governments have been free in the above sense, and at the same time of any considerable duration, we should come to a result by no means encouraging. The argument drawn from precedents would certainly not be very strong in favor of the probability of forming a free government in a classified community, though it would be more favorable in regard to the prospect of forming a permanent one. But all the world is at present entirely on the side of free government as we have defined it, and men are resolved to hazard the permanency of the political constitution, rather than the liberty of the citizen, if one of the two is to be put at risk in fixing upon a political organization. The hope then of being able to secure equality and supremacy of the laws, and permanency of constitutions, must rest mainly upon the supposed progress of men in the art and science of government. And if we admit this improvement in political science and skill, why not allow that it has some weight in favor of the practicability of forming not only a free but also a permanent political organization in an unclassified community. History says that political associations of equals for the purposes of self-government have not been permanent, and that the laws in such associations have not been more equal than in other communities, and more especially that the laws when enacted have not maintained their supremacy, but that their administration has been very frequently perverted and their execution defeated; in short, that the members of such communities have not enjoyed liberty. But then a greater part of the experiments, of which the final results are settled, were made in times and circumstances very different from the present. We cannot but think that the practical operation of the government of the United States, and a study of such an exposition of its principles as that before us, will afford a satisfactory reply to all the foreboding predictions, founded upon the experience of former times and other circumstances against the efficiency and stability of free constitutions in numerous communities spread over a wide surface of

territory. In this view it seems to us that a study of the constitution of this country forms a very important branch of speculative political science.

Many of the subjects embraced by these commentaries have heretofore been, and some of them now are, the occasion of fierce party contests, and almost the first question made by every reader is, whether the author has given an impartial view of the arguments, principles, and motives of those taking different sides in regard to contested doctrines; and in this respect we do not think he has given any reason of complaint to the advocates of any doctrine or mode of construction. The author evidently most scrupulously endeavors to present in their full force and most advantageous light the doctrines to which he does not himself apparently assent.

'The first subject that particularly attracts our attention in the second volume is that of the right of suffrage, which is often spoken of as an absolute and universal right.

'The most strenuous advocate for universal suffrage has never yet contended, that the right should be absolutely universal. No one has ever been sufficiently visionary to hold, that all persons, of every age, degree, and character, should be entitled to vote in all elections of all public officers. Idiots, infants, minors, and persons insane or utterly imbecile, have been, without scruple, denied the right, as not having the sound judgment and discretion fit for its exercise. In many countries, persons guilty of crimes have also been denied the right, as a personal punishment, or as a security to society. In most countries, females, whether married or single, have been purposely excluded from voting, as interfering with sound policy, and the harmony of social life. In the few cases, in which they have been permitted to vote, experience has not justified the conclusion, that it has been attended with any correspondent advantages, either to the public, or to themselves. And yet it would be extremely difficult, upon any mere theoretical reasoning, to establish any satisfactory principle, upon which the one half of every society has thus been systematically excluded by the other half from all right of participating in government, which would not, at the same time, apply to and justify many other exclusions. If it be said, that all men have a natural, equal, and unalienable right to vote, because they are all born

free and equal; that they all have common rights and interests entitled to protection, and therefore have an equal right to decide, either personally or by their chosen representatives, upon the laws and regulations, which shall control, measure, and sustain those rights and interests; that they cannot be compelled to surrender, except by their free consent, what, by the bounty and order of Providence, belongs to them in common with all their race;—what is there in these considerations, which is not equally applicable to females, as free, intelligent, moral, responsible beings, entitled to equal rights, and interests, and protection, and having a vital stake in all the regulations and laws of society? And if an exception, from the nature of the case, could be felt in regard to persons, who are idiots, infants, and insane; how can this apply to persons, who are of more mature growth, and are yet deemed minors by the municipal law? Who has an original right to fix the time and period of pupilage, or minority? Whence was derived the right of the ancient Greeks and Romans to declare, that women should be deemed never to be of age, but should be subject to perpetual guardianship? Upon what principle of natural law did the Romans, in after times, fix the majority of females, as well as of males, at twenty-five years?[1] Who has a right to say, that in England it shall, for some purposes, be at fourteen, for others, at seventeen, and for all, at twenty-one years; while, in France, a person arrives, for all purposes, at majority, only at thirty years, in Naples at eighteen, and in Holland at twenty-five?[2] Who shall say, that one man is not as well qualified, as a voter, at eighteen years, as another is at twenty-five, or a third at forty; and far better, than most men are at eighty? And if any society is invested with authority to settle the matter of the age and sex of voters, according to its own view of its policy, or convenience, or justice, who shall say, that it has not equal authority, for like reasons, to settle any other matter regarding the rights, qualifications, and duties of voters?[3]

'The truth seems to be, that the right of voting, like many other rights, is one, which, whether it has a fixed foundation in

[1] 1 Black. Comm. 463, 464.
[2] 1 Black. Comm. 463, 464.
[3] Id. 171.

natural law or not, has always been treated in the practice of nations, as a strictly civil right, derived from, and regulated by each society, according to its own circumstances and interests.[1] It is difficult, even in the abstract, to conceive how it could have otherwise been treated. The terms and conditions, upon which any society is formed and organized, must essentially depend upon the will of those, who are associated; or at least of those, who constitute a majority, actually controlling the rest. Originally, no man could have any right but to act for himself; and the power to choose a chief magistrate or other officer to exercise dominion or authority over others, as well as himself, could arise only upon a joint consent of the others to such appointment; and their consent might be qualified exactly according to their own interests, or power, or policy. The choice of representatives to act in a legislative capacity is not only a refinement of much later stages of actual association and civilization, but could scarcely occur, until the society had assumed to itself the right to introduce such institutions, and to confer such privileges, as it deemed conducive to the public good, and to prohibit the existence of any other. In point of fact, it is well known, that representative legislative bodies, at least in the form now used, are the peculiar invention of modern times, and were unknown to antiquity. If, then, every well organized society has the right to consult for the common good of the whole, and if, upon the principles of natural law, this right is conceded by the very union of society, it seems difficult to assign any limit to this right, which is compatible with the due attainment of the end proposed. If, therefore, any society shall deem the common good and interests of the whole society best promoted under the particular circumstances, in which it is placed, by a restriction of the right of suffrage, it is not easy to state any solid ground of objection to its exercise of such an authority. At least, if any society has a clear right to deprive females, constituting one half of the whole population, from the right of suffrage, (which, with scarcely an exception, has been uniformly maintained,) it will require some astuteness to find upon what ground this exclusion can be vindicated, which does

[1] 1 Black. Comm. 171; 2 Wilson's Law Lect. 130; Montesquieu's Spirit of Laws, B. 11, ch. 6; 1 Tucker's Black. Comm. App. 52, 53.

justify, or at least excuse, many other exclusions.[1] Government (to use the pithy language of Mr. Burke) has been deemed a practical thing, made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians.[2]' pp. 53–57.

The part of the constitution relating to impeachments had been the subject of objection, and Judge Tucker, in his comments upon this part of the constitution, had even intimated that some danger to the liberties of the country might lurk in this power of the senate. The author of these commentaries has therefore examined this subject very elaborately, and, to our minds, has vindicated this part of the constitution in the most satisfactory manner. The author first considers the character of the body itself, as it is likely to be ordinarily constituted, in reference to its probable fitness as to the tribunal by which impeachments are to be tried; and then inquires in what other body this power could be lodged. In examining the qualifications of the members of this body to act as judges in the cases in question, the persons to be arraigned, and the kind of crimes or misdemeanors for which they are to be tried, are to be considered. 'The jurisdiction is to be exercised over offences which are committed by public men in violation of their public trust and duties. Those duties are, in many cases, political; and, indeed, in other cases, to which the power of impeachment will probably be applied, they will respect functionaries of a high character, where the remedy would otherwise be wholly inadequate, and the grievance be incapable of redress. Strictly speaking, then, the power partakes of a political character as it respects injuries to the society in its political character; and, on this account, it requires to be guarded in its exercise against the spirit of faction, the intolerance of party, and the sudden movements of popular feeling. The prosecution will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly, or hostile to the accused. The press, with its unsparing vigilance, will arrange itself on either side, to control, and influence public opinion; and there will always be some danger, that the decision will be

[1] See Paley's Moral Philosophy, B. 6, ch. 7, p. 392; 1 Black. Comm. 171; Montesquieu's Spirit of Laws, B. 11, ch. 6.

[2] Burke's Letter to the Sheriffs of Bristol in 1777.

regulated more by the comparative strength of parties, than by the real proofs of innocence or guilt.' The delicacy and magnitude of the trust, says the commentator, ought not to be overlooked. 'It ought not to be a power so operative and instant, that it may intimidate a modest and conscientious statesman, or other functionary, from accepting office; nor so weak and torpid, as to be capable of lulling offenders into a general security and indifference. The difficulty of placing it rightly in a government, resting entirely on the basis of periodical elections, will be more strikingly perceived, when it is considered that the ambitious and the cunning will often make strong accusations against public men the means of their own elevation to office; and thus give an impulse to the power of impeachment, by pre-occupying the public opinion.' The objections are then noticed, namely, 1. That the provision confounds the legislative and judiciary authorities. 2. That it accumulates an undue power in the senate. 3. That the efficacy of the power will be impaired by the circumstance that the senate has an agency in appointments to office. 4. That its efficacy is still more impaired by the participation of the senate in the treaty-making power. On the first of these objections the commentator remarks that it is not enough to object to vesting the same body with legislative and judicial functions in this case, without pointing out the particular evils. 'The offences which the power of impeachment is designed principally to reach, are those of a political, or of a judicial character. They are not those, which lie within the scope of the ordinary municipal jurisprudence of a country. They are founded on different principles; are governed by different maxims; are directed to different objects; and require different remedies from those which ordinarily apply to crimes.[1] So far as they are of a judicial character, it is obviously more safe to the public to confide them to the senate, than to a mere court of law. The senate may be presumed always to contain a number of distinguished lawyers, and probably some persons who have held judicial stations. At the same time they will not have any undue and immediate sympathy with the accused from that common professional, or corporation spirit, which is apt to pervade those who are engaged in similar pur-

[1] Wilson's Law Lect. 451, 452.

suits and duties. In regard to political offences, the selection of the senators has some positive advantages. In the first place, they may be fairly presumed to have a more enlarged knowledge, than persons in other situations, of political functions, and their difficulties, and embarrassments; of the nature of diplomatic rights and duties; of the extent, limits, and variety of executive powers and operations; and of the sources of involuntary error, and undesigned excess, as contradistinguished from those of meditated and violent disregard of duty and right. On the one hand, this very experience and knowledge will bring them to the trial with a spirit of candor and intelligence, and an ability to comprehend, and scrutinize the charges against the accused; and, on the other hand, their connexion with, and dependence on, the states, will make them feel a just regard for the defence of the rights, and the interests of the states and the people. And this may properly lead to another remark; that the power of impeachment is peculiarly well fitted to be left to the final decision of a tribunal composed of representatives of all the states, having a common interest to maintain the rights of all; and yet, beyond the reach of local and sectional prejudices. Surely, it will not readily be admitted by the zealous defenders of state rights and state jealousies, that the power is not safe in the hands of all the states, to be used for their own protection and honor.' As to the second objection, drawn from the supposed excessive accumulation of power in the senate, being general and vague, it hardly requires any answer, and is dismissed by the author with the remarks that the danger to be apprehended by vesting this power in the senate is not specified by those who make the objection, that the constitution of the body is a guaranty against any such danger, and that the experience in England and the several states affords no ground for such apprehension. In regard to the third objection, that as the senate has an agency concurrently with the executive in making appointments, it is not likely to be an unbiased and efficient tribunal of impeachments, it is replied that the objection would lie against all cases where the appointing power is the removing one. 'It might in such cases be urged, that the favoritism of the appointor would always screen the misbehavior of the appointees. Yet no one doubts the fitness of entrusting such a power; and confidence is reposed,

and properly reposed, in the character and responsibility of those who make the appointment. The objection is greatly diminished in its force by the consideration, that the senate has but a slight participation in the appointments to office. The president is to nominate and appoint; and the senate are called upon merely to confirm, or reject the nomination. They have no right of choice; and therefore must feel less solicitude as to the individual who is appointed. But, in fact, the objection is itself not well founded; for it will rarely occur that the persons who have concurred in the appointment will be members of the senate at the time of the trial. As one third is, or may be, changed every two years, the case is highly improbable; and still more rarely can the fact of the appointment operate upon the minds of any considerable number of the senators.' The fourth objection, says the author, has a 'more plausible foundation.' 'It has been strongly urged, that an ambassador is appointed by the president, with the concurrence of the senate; and if he makes a treaty, which is ratified by two thirds of the senate, however corrupt or exceptionable his conduct may have been, there can be little chance of redress by an impeachment. If the treaty be ratified, and the minister be impeached for concluding it, because it is derogatory to the honor, the interest, or perhaps to the sovereignty of the nation, who (it is said) are to be his judges? The senate, by whom it has been approved and ratified? If the president be impeached for giving improper instructions to the minister, and for ratifying the treaty pursuant to his instructions, who are to be his judges? The senate, to whom the treaty has been submitted, and by whom it has been approved and ratified?[1] This would be to constitute the senators their own judges in every case of a corrupt or perfidious execution of their trust.[2]' On this the commentator remarks that the objection presupposes a state of facts of a very extraordinary character, and not likely to happen. 'The case put is either one where the senate has ratified an appointment or treaty, innocently believing it to be unexceptionable, and beneficial to the country; or where the senate has corruptly ratified it, and basely betrayed their trust. In the former case,

[1] 1 Tucker's Black. Comm. App. 335, 336.
[2] The Federalist, No. 66.

the senate having acted with fidelity, according to their best sense of duty, would feel no sympathy for a corrupt executive or minister, who had acted with fraud or dishonor unknown to them. If the treaty were good, they might still desire to punish those who had acted basely or corruptly in negotiating it. If bad, they would feel indignation for the imposition practised upon them by an executive, or minister, in whom they placed confidence, instead of sympathy for his misconduct. They would feel that they had been betrayed into an error; and would rather have a bias against than in favor of the deceiver. If, on the other hand, the senate had corruptly assented to the appointment and treaty, it is certain that there would remain no effectual remedy by impeachment, so long as the same persons remained members of the senate. But even here, two years might remove a large number of the guilty conspirators; and public indignation would probably compel the resignation of all.' But the author considers the supposition of a combination between the president and senate to destroy the liberties of the country improbable and extravagant, and so not the just foundation of any reasoning.

It is then inquired in what other body this power might be lodged; and the reasons for not vesting it in the supreme court are cited at large from the Federalist; and also Mr. Justice Tucker's reply to these reasons. The commentator then reviews the arguments on both sides of the question, and comes to the conclusion, in which the reader cannot but acquiesce, that the supreme court or any merely judicial tribunal ordinarily occupied in the administration of justice, according to legal forms and technical rules, is not the most suitable court for the trial of impeachments. He remarks that 'there is little technical in the mode of proceeding; the charges are sufficiently clear, and yet in a general form; there are few exceptions, which arise in the application of the evidence, which grow out of mere technical rules and quibbles. And it has repeatedly been seen, that the functions have been better understood, and more liberally and justly expounded by statesmen, than by mere lawyers. An illustrious instance of this sort is upon record in the case of the trial of Warren Hastings, where the question, whether an impeachment was abated by a dissolution of parliament, was decided in the negative by the house of lords, as well

as the house of commons, against what seemed to be the weight of professional opinion.[1]' The party politics of the time are often implicated in these trials, and the importance of keeping the judges of the supreme court aloof from all participation in political contests is urged with great force. Another consideration of much weight is, that the members of this court may themselves be subjects of impeachment, in which case the public justice might suffer in consequence of the sympathy of the other judges with the accused, or the accused might be exposed to injustice from their prejudice and animosity.

Other plans that have been suggested for the constitution of a court of impeachment are then considered. One of those was the union of the judges of the supreme court with the senate to constitute a court for impeachments, which would undoubtedly add dignity to the tribunal, and, on the whole, add to the securities for an impartial and able trial. But some of the reasons against making the court the sole tribunal are equally applicable to the union of the members of that court with the senate for the same purpose; the reason of greatest weight against this junction seems to us to be its interference with the ordinary administraion of justice.

Another mode of constituting a court of impeachments would be the appointment of a special tribunal for this purpose, to which it is objected, that 'it would tend to increase the complexity of the political machine, and add a new spring to the operations of the government, the utility of which would be at least questionable, and might clog its just movements.[2] A court of this nature would be attended with heavy expenses; and might, in practice, be subject to many casualties and inconveniences. It must consist either of permanent officers, stationary at the seat of government, and of course entitled to fixed and regular stipends; or of national officers, called to the duties for the occasion, though previously designated by office, or rank; or of officers of the state governments, selected when the impeachment was actually depending. Now, either of these alternatives would be found full of embarrassment and intricacy, when an attempt should be made to give it a definite form and

[1] 4 Black. Comm. 400, Christian's Note.
[2] The Federalist, No. 64.

organization.' The great difficulty in the way of constituting this court of certain persons holding particular offices under the government of the United States, or of the several states, is then considered, and the objections to this plan accumulate in number and force at every step of the examination.

Judge Tucker suggests a plan drawn from the constitution of Virginia, whereby impeachments are tried by jury before an ordinary judicial tribunal, a plan evidently much less objectionable in reference to trials of impeachments in the states than in the United States. It can easily be imagined what a very incompetent tribunal a jury of twelve men chosen by lot would be for the trial of the president of the United States, a foreign ambassador, or indeed many of the officers of the government, for various descriptions of crimes and misdemeanors that might form the ground of impeachment.

The conventions in Virginia and North Carolina on the adoption of the constitution, both recommended 'that some tribunal other than the senate, be provided for the impeachment of *senators*,' without recommending any particular mode of constituting such a tribunal. The convention in New York recommended 'an amendment, that the senate, the judges of the Supreme Court, and the first or senior judge of the highest state court of general or ordinary common law jurisdiction in each state should constitute a court for the trial of impeachments. This recommendation does not change the posture of a single objection. It received no support elsewhere; and the subject has since silently slept without any effort to revive it.'

After this wide and thorough survey of the whole subject, the author concludes as follows.

'The conclusion, to which, upon a large survey of the whole subject, our judgments are naturally led, is, that the power has been wisely deposited with the senate.[1] In the language of a learned commentator, it may be said, that of all the departments of the government, "none will be found more suitable to exercise this peculiar jurisdiction, than the senate. Although, like their accusers, they are representatives of the people; yet they are by a degree more removed, and hold their stations for a longer term. They are, therefore, more independent of the

[1] The Federalist, No. 65.

people, and being chosen with the knowledge, that they may, while in office, be called upon to exercise this high function, they will bring with them the confidence of their constituents, that they will faithfully execute it, and the implied compact on their own part, that it shall be honestly discharged. Precluded from ever becoming accusers themselves, it is their duty not to lend themselves to the animosities of party, or the prejudices against individuals, which may sometimes unconsciously induce the house of representatives to the acts of accusation. Habituated to comprehensive views of the great political relations of the country, they are naturally the best qualified to decide on those charges, which may have any connexion with transactions abroad, or great political interests at home. And although we cannot say, that, like the English house of lords, they form a distinct body, wholly uninfluenced by the passions, and remote from the interests, of the people; yet we can discover in no other division of the government a greater probability of impartiality and independence."'[1] p. 245.

The subject of the punishment for contempts, either of legislative or judicial bodies, is one of no inconsiderable difficulty. It is very generally considered to be a prerogative of every judicial or supreme legislative body to repress and punish all attempts to disturb its proceedings. Such a power is absolutely essential to the conducting of legislation or the judicial administration. It was recently exercised by the French chamber of deputies by inflicting a heavy fine and an imprisonment for a period of three years. This power is, however, one of those not specifically defined and limited in the constitution, and indeed is not expressly granted. It has accordingly been denied by some that either house of congress has any such power.

'This subject has of late undergone a great deal of discussion both in England and America; and has finally received the adjudication of the highest judicial tribunals in each country. In each country, upon the fullest consideration, the result was the same, viz. that the power did exist, and that the legislative body was the proper and exclusive forum to decide, when the contempt existed, and when there was a breach of its privileges;

[1] Rawle on the Const. ch. 22, p. 212, 213.

and, that the power to punish followed, as a necessary incident to the power to take cognizance of the offence.'

'This is not the only case, in which the house of representatives has exerted the power to arrest, and punish for a contempt committed within the walls of the house. The power was exerted[1] in the case of Robert Randall, in December, 1795, for an attempt to corrupt a member;[2] in 1796, in the case of ——, a challenge given to a member, which was held a breach of privilege;[3] and in May, 1832, in the case of Samuel Houston, for an assault upon a member for words spoken in his place, and afterwards printed, reflecting on the character of Houston.[4] In the former case, the house punished the offence by imprisonment; in the latter, by a reprimand by the speaker. So in 1800, in the case of William Duane, for a printed libel against the senate, the party was held guilty of a contempt, and punished by imprisonment.[5] Nor is there any thing peculiar in the claim under the constitution of the United States. The same power has been claimed, and exercised repeatedly, under the state governments, independent of any special constitutional provision, upon the broad ground stated, by Mr. Chief Justice Shippen, that the members of the legislature are legally, and inherently possessed of all such priviliges, as are necessary to enable them, with freedom and safety, to execute the great trust reposed in them by the body of the people, who elected them.[6]

'The power to punish for contempts, thus asserted both in England and America, is confined to punishment during the session of the legislative body, and cannot be extended beyond it.[7] It seems, that the power of congress to punish cannot, in its utmost extent, proceed beyond imprisonment; and then it terminates with the adjournment, or dissolution of that body.[8]

[1] By a vote of 78 yeas against 17 nays.

[2] 1 Tuck. Black. Comm. App. 200 to 205, note; Jefferson's Manual, §3.

[3] Jefferson's Manuel, § 3.

[4] See the Speeches of Mr. Doddridge and Mr. Burges on this occasion.

[5] Journ. of Senate, 27th March, 1800; Jefferson's Manual, § 3. See also *Burdett* v. *Abbott*, 14 East, 1.

[6] *Bolton* v. *Martin*, 1 Dall. R. 296. See also House of Delegates in 1784, the case of John Warden, 1 Elliot's Debates, 69; *Coffin* v. *Coffin*, 4 Mass. R. 1, 34, 35.

[7] *Dunn* v. *Anderson*, 6 Wheat. R. 204, 230, 231.

[8] *Dunn* v. *Anderson*, 6 Wheat. R. 204, 230, 231; 1 Kent's Comm. Lect. 11, p. 221.

Whether a fine may not be imposed has been recently [in 1831] made a question in a case of contempt before the house of lords; upon which occasion Lord Chancellor Brougham expressed himself in the negative, and the other law lords, Eldon and Tenterden, in the affirmative; but the point was not then solemnly decided.[1] It had, however, been previously affirmed by the house of lords in the case of Rex *v.* Flower, (8 T. R. 314,) in case of a libel upon one of the Bishops. Lord Kenyon then said, that in ascertaining and punishing for a contempt of its privileges, the house acted in a judicial capacity.[2]' pp. 307—317.

In commenting on the clause of the constitution giving congress 'power to lay and collect taxes, duties, imposts and excises,' the author [vol. 2, p. 430] goes into an elaborate investigation of the much agitated question whether congress has power to lay taxes for any other purposes than those of revenue; and his conclusion is that other motives than the mere raising of revenue may enter into the views of the legislature in levying taxes. It seems to be difficult to come to any other conclusion without adopting rules of construction that would go totally to defeat the operations of the government. If we are to be governed by the spirit of the instrument and the maxim *ut res magis valeat quam pereat*, it will not be an easy matter to come to any other conclusion; and if the letter of the constitution is to govern, the result is the same. In this as in other cases the author exhibits with great fairness and in their full force the arguments that have been used on both sides of the question, and this, it seems to us, is all that is necessary to settle the question.

The subject of the judiciary occupies a considerable portion of the third volume. The most essential characteristic of

[1] See a learned article on this subject in the English Law Magazine for July, 1831, p. 1, &c. Parliamentary Debates, 1831.

[2] In *Yates* v. *Lansing*, (9 Johns. R. 417,) Mr. Justice Platt said, that 'the right of punishing for contempts by summary conviction is inherent in all courts of justice and legislative assemblies, and is essential to their protection and existence. It is a branch of the common law adopted and sanctioned by our state constitution. The decision involved in this power is in a great measure arbitrary and undefinable; and yet the experience of ages has demonstrated, that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice.'

freedom, as we have already urged, is the supremacy of laws enacted with a reference to the general welfare. Without competent judicial tribunals freedom in this sense cannot exist, since it is through them, in most cases, that government and laws act upon persons, property and rights. An incorruptible, independent and able judiciary is therefore essential to such a government. The judiciary is the beneficent power, to which the weak and defenceless look for protection. The proper functions of the judge are purely intellectual, and it is one of the first objects of the political constitution to remove him, as far as possible, from the interests, and passions, the parties, factions and contests, that may agitate and distract the community. The liberty of the citizen requires that he should be placed as far as possible from every sinister influence and control. The law cannot be supreme unless the judge, who is its minister and organ, is independent. It is true that he, as well as every other public officer, must be legally amenable for the proper discharge of the duties of his office; there must be a tribunal, before which he may be tried, namely, a court of impeachment; but his independence, in all other respects, is an essential condition of freedom in the community. Upon this principle the judiciary of the United States is constituted. The existence of civil liberty, and indeed of the government itself, depend, no doubt, upon the preservation of the judiciary as it is established. It is fortunate that the judiciary has been assailed, from time to time, by those who are hostile to the government, or who do not perceive that our whole civil polity rests upon its integrity and inviolability, since it awakens the public attention to the importance of this part of the constitution, and fixes more and more deeply and permanently in the minds of men, the sentiments of respect and attachment to it. The exposition of this branch of constitutional law in these commentaries is very learned and able. The subject had been very fully discussed by the authors of the Federalist, of whose labors the commentator avails himself. On the subject of the independence of the judges the author says :—

'It has sometimes been suggested, that, though in monarchical governments the independence of the judiciary is essential, to guard the rights of the subjects from the injustice and oppression of the crown; yet that the same reasons do not apply to

a republic, where the popular will is sufficiently known, and ought always to be obeyed.[1] A little consideration of the subject will satisfy us, that, so far from this being true, the reasons in favor of the independence of the judiciary apply with augmented force to republics; and especially to such as possess a written constitution with defined powers and limited rights.

'In the first place, factions and parties are quite as common, and quite as violent in republics, as in monarchies; and the same safeguards are as indispensable in the one, as in the other, against the encroachments of party spirit, and the tyranny of factions. Laws, however wholsome or necessary, are frequently the objects of temporary aversion, and popular odium, and sometimes of popular resistance.[2] Nothing is more facile in republics, than for demagogues, under artful pretences, to stir up combinations against the regular exercise of authority. Their selfish purposes are too often interrupted by the firmness and independence of upright magistrates, not to make them at all times hostile to a power which rebukes, and an impartiality which condemns them. The judiciary, as the weakest point in the constitution, on which to make an attack, is therefore constantly that to which they direct their assaults; and a triumph here, aided by any momentary popular encouragement, achieves a lasting victory over the constitution itself. Hence, in republics, those who are to profit by public commotions, or the prevalence of faction are always the enemies of a regular and independent administration of justice. They spread all sorts of delusion in order to mislead the public mind, and excite the public prejudices. They know full well that without the aid of the people their schemes must prove abortive; and they therefore employ every art to undermine the public confidence, and to make the people the instruments of subverting their own rights and liberties.

'It is obvious, that, under such circumstances, if the tenure of office of the judges is not permanent, they will soon be rendered odious, not because they do wrong, but because they refuse to do wrong; and they will be made to give way to

[1] 4 Jefferson's Corresp. 287, 288, 289, 316, 352.

[2] 1 Kent's Comm. Lect. 14, p. 275.

others, who shall become more pliant tools of the leading demagogues of the day. There can be no security for the minority in a free government, except through the judicial department. In a monarchy, the sympathies of the people are naturally enlisted against the meditated oppressions of their ruler; and they screen his victims from his vengeance. His is the cause of one against the community. But, in free governments, where the majority, who obtain power for the moment, are supposed to represent the will of the people, persecution, especially of a political nature, becomes the cause of the community against one. It is the more violent and unrelenting, because it is deemed indispensable to attain power, or to enjoy the fruits of victory. In free governments, therefore, the independence of the judiciary becomes far more important to the security of the rights of the citizens, than in a monarchy; since it is the only barrier against the oppressions of a dominant faction, armed for the moment with power, and abusing the influence, acquired under accidental excitements, to overthrow the institutions and liberties, which have been the deliberate choice of the people.[1]

'In the next place, the independence of the judiciary is indispensable to secure the people against the intentional, as well as unintentional, usurpations of the executive and legislative departments. It has been observed with great sagacity, that power is perpetually stealing from the many to the few; and the tendency of the legislative department to absorb all the other powers of the government has always been dwelt upon by statesmen and patriots, as a general truth, confirmed by all human experience.[2] If the judges are appointed at short intervals, either by the legislative, or the executive department, they will naturally, and, indeed, almost necessarily, become mere dependents upon the appointing power. If they have any desire to obtain, or to hold office, they will at all times evince a desire to follow, and obey the will of the predominant power in the state. Justice will be administered with a faultering and feeble hand. It will secure nothing, but its own place, and the approbation of those, who value, because they control it. It will decree, what best suits the opinions of the day; and it will

[1] 1 Kent's Comm. Lect. 14, p. 275, 276.

[2] 1 Wilson's Law Lect. 461, 462, 463.

forget, that the precepts of the law rest on eternal foundations. The rulers and the citizens will not stand upon an equal ground in litigations. The favorites of the day will overawe by their power, or seduce by their influence; and thus, the fundamental maxim of a republic, that it is a government of laws, and not of men, will be silently disproved, or openly abandoned.[1]

'In the next place, these considerations acquire (as has been already seen) still more cogency and force, when applied to questions of constitutional law. In monarchies, the only practical resistance, which the judiciary can present, is to the usurpations of a single department of the government, unaided, and acting for itself. But, if the executive and legislative departments are combined in any course of measures, obedience to their will becomes a duty, as well as a necessity. Thus, even in the free government of Great Britain, an act of parliament, combining, as it does, the will of the crown, and of the legislature, is absolute and omnipotent. It cannot be lawfully resisted, or disobeyed. The judiciary is bound to carry it into effect at every hazard, even though it should subvert private rights and public liberty.[2] But it is far otherwise in a republic, like our own, with a limited constitution, prescribing at once the powers of the rulers, and the rights of the citizens.[3] This very circumstance would seem conclusively to show, that the independence of the judiciary is absolutely indispensable to preserve the balance of such a constitution. In no other way can there be any practical restraint upon the acts of the government, or any practical enforcement of the rights of the citizens. This subject has been already examined very much at large, and needs only to be touched in this place. No man can deny the necessity of a judiciary to interpret the constitution and laws, and to preserve the citizens against oppression and usurpation in civil and criminal prosecutions. Does it not follow, that, to enable

[1] It is far from being true, that the gross misconduct of the English Judges in many state prosecutions, while they held their offices during the pleasure of the crown, was in compliance only with the mere will of the monarch. On the contrary, they administered but too keenly to popular vengeance, acting under delusions of an extraordinary nature, sometimes political, sometimes religious, and sometimes arising from temporary prejudices.

[2] See 1 Black. Comm. 9; Woodeson's Elements of Jurisprudence, Lect. 3, p. 48.

[3] 1 Wilson's Law Lect. 460, 461.

the judiciary to fulfil its functions, it is indispensable that the judges should not hold their offices at the mere pleasure of those whose acts they are to check, and, if need be, to declare void? Can it be supposed for a moment, that men holding their offices for the short period of two, or four, or even six years, will be generally found firm enough to resist the will of those who appoint them, and may remove them?' pp. 468–473.

In regard to the duration of the judicial office the author's remarks are very forcible.

'The argument of those, who contend for a short period of office of the judges, is founded upon the necessity of a conformity to the will of the people. But the argument proceeds upon a fallacy, in supposing that the will of the rulers and the will of the people are the same. Now, they not only may be, but often actually are, in direct variance to each other. No man in a republican government can doubt, that the will of the people is, and ought to be, supreme. But it is the deliberate will of the people, evinced by their solemn acts, and not the momentary ebullitions of those who act for the majority for a day, or a month, or a year. The constitution is the will, the deliberate will, of the people. They have declared under what circumstances, and in what manner it shall be amended, and altered; and until a change is effected in the manner prescribed, it is declared that it shall be the supreme law of the land, to which all persons, rulers, as well as citizens, must bow in obedience. When it is constitutionally altered, then and not until then, are the judges at liberty to disregard its original injunctions. When, therefore, the argument is pressed, that the judges ought to be subject to the will of the people, no one doubts the propriety of the doctrine in its true and legitimate sense.

'But those who press the argument use it in a far broader sense. In their view the will of the people, as exhibited in the choice of the rulers, is to be followed. If the rulers interpret the constitution differently from the judges, the former are to be obeyed, because they represent the opinions of the people; and, therefore, the judges ought to be removable, or appointed for a short period, so as to become subject to the will of the people, as expressed by and through their rulers. But is it not at once seen, that this is in fact subverting the constitution? Would it not make the constitution an instrument of flexible and

changeable interpretation, and not a settled form of government with fixed limitations? Would it not become, instead of a supreme law for ourselves and our posterity, a mere oracle of the powers of the rulers of the day, to which implicit homage is to be paid, and speaking at different times the most opposite commands, and in the most ambiguous voices? In short, is not this an attempt to erect, behind the constitution, a power unknown, and unprovided for by the constitution, and greater than itself? What become of the limitations of the constitution, if the will of the people, thus inofficially promulgated, forms, for the time being, the supreme law, and the supreme exposition of the law? If the constitution defines the powers of the government, and points out the mode of changing them, and yet the instrument is to expand in the hands of one set of rulers, and to contract in those of another, where is the standard? If the will of the people is to govern in the construction of the powers of the constitution, and that will is to be gathered at every successive election at the polls, and not from their deliberate judgment, and solemn acts in ratifying the constitution, or in amending it, what certainty can there be in those powers? If the constitution is to be expounded, not by its written text, but by the opinions of the rulers for the time being, whose opinions are to prevail, the first, or the last? When, therefore, it is said, that the judges ought to be subjected to the will of the people, and to conform to their interpretation of the constitution, the practical meaning must be, that they should be subjected to the control of the representatives of the people in the executive and legislative departments, and should interpret the constitution, as the latter may, from time to time, deem correct.

'But it is obvious that elections can rarely, if ever, furnish any sufficient proofs, what is deliberately the will of the people as to any constitutional or legal doctrines. Representatives and rulers must be ordinarily chosen for very different purposes; and, in many instances, their opinions upon constitutional questions must be unknown to their constituents. The only means known to the constitution, by which to ascertain the will of the people upon a constitutional question, is in the shape of an affirmative or negative proposition by way of amendment, offered for their adoption in the mode prescribed by the constitution. The elections in one year may bring one party into power; and

in the next year their opponents, embracing opposite doctrines, may succeed; and so alternate success and defeat may perpetually recur in the same districts, and in the same or different states.

'Surely it will not be pretended, that any constitution, adapted to the American people, could ever contemplate the executive and legislative departments of the government, as the ultimate depositaries of the power to interpret the constitution; or as the ultimate representatives of the will of the people, to change it at pleasure. If, then, the judges were appointed for two, or four, or six years, instead of during good behavior, the only security which the people would have for a due administration of public justice, and a firm support of the constitution, would be, that being dependent upon the executive for their appointment during their brief period of office, they might, and would represent more fully, for the time being, the constitutional opinion of each successive executive; and thus carry into effect his system of government. Would this be more wise, or more safe, more for the permanence of the constitution, or the preservation of the liberties of the people, than the present system? Would the judiciary, then, be, in fact, an independent coordinate department? Would it protect the people against an ambitious or corrupt executive; or restrain the legislature from acts of unconstitutional authority?[1]

'The truth is, that, even with the most secure tenure of office, during good behavior, the danger is not that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but, that they will be too ready

[1] Mr. Jefferson, during the latter years of his life, and indeed from the time when he became president of the United States, was a most strenuous advocate of the plan of making the judges hold their offices for a limited term of years only. He proposed, that their appointments should be for four or six years, renewable by the president and senate. It is not my purpose to bring his opinions into review, or to comment on the terms in which they are expressed. It is impossible not to perceive that he entertained a decided hostility to the judicial department; and that he allowed himself in language of insinuation against the conduct of judges, which is little calculated to add weight to his opinions. He wrote on this subject apparently with the feelings of a partisan, and under influences which his best friends will most regret. See 1 Jefferson's Corresp. 65, 66; 4 Jefferson's Corresp. 74, 75, 287, 288, 289, 317, 337, 352. His earlier opinions were of a different character. See Jefferson's Notes on Virginia, 195; Federalist, No. 48.

to yield themselves to the passions, and politics, and prejudices of the day. In a monarchy, the judges, in the performance of their duties with uprightness and impartiality, will always have the support of some of the departments of the government, or at least of the people. In republics, they may sometimes find the other departments combined in hostility against the judicial; and even the people, for a while, under the influence of party spirit and turbulent factions, ready to abandon them to their fate.[1] Few men possess the firmness to resist the torrent of popular opinion; or are content to sacrifice present ease and public favor, in order to earn the slow rewards of a conscientious discharge of duty; the sure, but distant, gratitude of the people; and the severe, but enlightened award of posterity.

'If passing from general reasoning, an appeal is made to the lessons of experience, there is every thing to convince us, that the judicial department is safe to a republic, with the tenure of office during good behavior; and that justice will ordinarily be best administered, where there is most independence. Of the state constitutions, five only out of twenty-four have provided for any other tenure of office, than during good behavior; and those adopted by the new states admitted into the Union, since the formation of the national government, have, with two or three exceptions only, embraced the same permanent tenure of office.[2] No one can hesitate to declare, that in the states, where the judges hold their offices during good behavior, justice is administered with wisdom, moderation, and firmness; and that the public confidence has reposed upon the judicial department, in the most critical times, with unabated respect. If the same can be said in regard to other states, where the judges enjoy a less permanent tenure of office, it will not answer the reasoning, unless it can also be shown, that the judges have never been removed for political causes, wholly distinct from their own merit; and yet have often deliberately placed themselves in opposition to the popular opinion.

[1] An objection was taken in the Pennsylvania convention against the constitution of the United States, that the judges were not made sufficiently independent, because they might hold other offices. 3 Elliot's Debates, 300, 313, 314.

[2] Dr. Lieber's Encyclopedia Americana, Art. *Constitutions of the United States.*

'The considerations above stated lead to the conclusion, that in republics there are, in reality, stronger reasons for an independent tenure of office by the judges, a tenure during good behavior, than in a monarchy. Indeed, a republic with a limited constitution, and yet without a judiciary sufficiently independent to check usurpation, to protect public liberty, and to enforce private rights, would be as visionary and absurd, as a society organized without any restraints of law. It would become a democracy with unlimited powers, exercising through its rulers a universal despotic sovereignty. The very theory of a balanced republic of restricted powers presupposes some organized means to control, and resist, any excesses of authority. The people may, if they please, submit all power to their rulers for the time being; but, then, the government should receive its true appellation and character. It would be a government of tyrants, elective, it is true, but still tyrants; and it would become the more fierce, vindictive, and sanguinary, because it would perpetually generate factions in its own bosom, who could succeed only by the ruin of their enemies. It would be alternately characterized, as a reign of terror, and a reign of imbecility. It would be as corrupt, as it would be dangerous. It would form another model of that profligate and bloody democracy, which, at one time, in the French revolution, darkened by its deeds the fortunes of France, and left to mankind the appalling lesson, that virtue, and religion, genius, and learning, the authority of wisdom, and the appeals of innocence, are unheard and unfelt in the frenzy of popular excitement; and, that the worst crimes may be sanctioned, and the most desolating principles inculcated, under the banners, and in the name of liberty. In human governments, there are but two controlling powers; the power of arms, and the power of laws. If the latter are not enforced by a judiciary above all fear, and above all reproach, the former must prevail; and thus lead to the triumph of military over civil institutions. The framers of the constitution, with profound wisdom, laid the corner stone of our national republic in the permanent independence of the judicial establishment. Upon this point their vote was unanimous.[1] They adopted the results of an enlightened experience. They

[1] Journal of Convention, 100, 188.

were not seduced by the dreams of human perfection into the belief, that all power might be safely left to the unchecked operation of the private ambition, or personal virtue of rulers. Nor, on the other hand, were they so lost to a just estimate of human concerns, as not to feel, that confidence must be reposed somewhere, if either efficiency, or safety are to be consulted in the plan of government. Having provided amply for the legislative and executive authorities, they established a balance-wheel, which, by its independent structure, should adjust the irregularities, and check the excesses of the occasional movements of the system.' pp. 473—483.

The proposition made in the convention, that the judges should be removable by the president on the address of both houses, was supported by only one State. A proposition was also made for a provision that judges might be removed for inability to discharge the duties of their offices. The Federalist is cited in opposition to such a provision, and the author adds his own authority to the same effect. The grounds are the liability of such a power to abuse, and the difficulty of deciding the fact of inability. But we cannot avoid thinking that this is a matter admitting of doubt. The submitting of people's rights to be determined upon by a judge *non compos mentis* is too grave an evil to be permitted without attempting a remedy even at some risk. One instance has occurred of an impeachment and removal of a judge, not in fact for any malversation in office for which he was morally responsible, but in reality on account of alienation of mind. This was an application of the trial by impeachment, which was thought to be excusable, perhaps, on account of the urgency of the case, but the necessity of resorting to such a proceeding, in such a case, argues some imperfection in the constitutional provisions.

In one respect the independence of the judiciary is more fully secured in the United States than in England. The inferior judges in the United States hold their offices during good behavior, according to the constitution, though this provision was evaded by the abolition, at the commencement of Mr. Jefferson's presidency, of the courts established shortly before. In England the tenure of office during good behavior is confined to the superior courts.

The question of the jurisdiction of the courts is very ably

treated in these volumes. Among other cases cited on this subject is that of Osborn *v.* Bank of the United States, 9 Wheat. 738, in which one question was, whether the authority given to the bank by its charter to sue in the courts of the United States is constitutional and valid, to the effect of giving these courts jurisdiction in cases not otherwise arising under the constitution or laws of the United States, than as the bank is a party. It was held in that case that the clause in the charter, giving the bank a right to sue in the courts of the United States, gave those courts jurisdiction. It is, we imagine, a necessary consequence of the decision, that congress may authorize any person or any corporation, whether chartered by congress, or any other legislature, to sue in the courts of the United States on any cause of action whatever. The construction of the constitution is the same as if it expressly provided that suits between certain parties named in the constitution might be brought in the courts of the United States, and *also suits brought by any party authorized by an act of congress to sue in those courts.* An analogous construction may be given to the jurisdiction on account of the cause of action. The constitution says that the courts of the United States shall have jurisdiction of all cases arising under the constitution, laws or treaties of the United States, and, this construction adds in effect, *in whatever case jurisdiction shall be given to them by an act of congress.* We cannot but think this a very broad construction of the constitution if the case goes this length, and it seems to us to have this extent.

We must here close our notice of this work, though we should gladly have followed the author through this chapter on juridical jurisdiction. The work is of the very highest importance, as bearing both upon legislation and jurisprudence, since it presents the subject of constitutional law, so luminously before the community, that it will be scarcely possible that any question henceforth arising on the subject, should be superficially treated either in legislative debate or forensic argument.