A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART IX.*

After a short discussion, the question was postponed, in turn, and the clause relating to the originating of money bills was taken up. It was urged that this was placing a very important power in the hands of the direct representatives of the people—and was, to that extent at least, a concession on the part of the small states in return for the concession on the part of the large states of equal representation in the second branch. It was not so regarded, however, by Mr. Wilson and others who shared his general ideas. Since both branches must concur in passing money bills, they could not see wherein the advantage lay, in giving the first branch the sole power of originating them. While, possibly, the "concession" did not amount to much practically, it certainly has a distinct recognition that the new government was to be one dependent in the first instance on the *people as such*—an idea necessarily foreign to a mere confederacy. The clause was carried (as part of the report) by a plurality vote – ayes, five—Connecticut, New Jersey, Delaware, Maryland, North Carolina; noes, three—Pennsylvania, Virginia, South Carolina; divided, three —Massachusetts, New York, Georgia. A grouping which it is hopeless to attempt to analyze.

Once more, the question as to equality of suffrage in the second branch now came before the convention—and was carried as part of the report,—several votes being given affirmatively now, because another vote was to be taken on the report itself—that is, these votes did not commit the voters to final approval of the measure. Mr. Gerry appears to have recognized the hopelessness of an agreement upon any other basis—and expressed himself as ready to agree to it on that account. But there were others who felt that equal representation in

* The series of articles by Mr. Landreth on the Constitution was discontinued in the March and April numbers owing to the lack of space caused by the publication of the addresses delivered at the opening exercises of the new Law School Building of the University of Pennsylvania. The series will conclude with the July number.

either branch would ruin the whole system of government for which they were so earnestly striving. In a warm and very clear speech, Mr. Gouverneur Morris urged upon the convention the duty of acting for America as a whole,—and Mr. Patterson again declared with great positiveness that equal representation in at least one branch was vital to the small states. There were a few men who saw—or thought they saw—that a government founded on both people and states was not only possible but desirable. The question was once more postponed to await the report of the committee appointed to consider the proposed basis of "one to every forty thousand inhabitants" in the first branch. That committee reported a scheme of representation which has a strange sound to the ears of to-day: "That in the first meeting of the [national] legislature, the first branch thereof consist of fifty-six members, of which number New Hampshire shall have 2, Massachusetts, 7, Rhode Island, 1, Connecticut 4, New York, 5, New Jersey, 3, Pennsylvania, 8, Delaware, 1, Maryland 4, Virginia, 9, North Carolina, 5, South Carolina, 5, Georgia, 2. But as the present situation of the states may probably alter as well in point of wealth as in the number of their inhabitants, that the legislature be authorized from time to time to augment the number of representatives. And in case any of the states shall hereafter be divided or any two or more states united, or any new states created within the limits of the United States, the legislature shall possess authority to regulate the number of representatives in any of the foregoing cases, upon the principles of their wealth and number of inhabitants." These propositions were somewhat puzzling to the members, and it was stated in reply to the question as to what principle they were founded on, that while little more than a guess, it was still an effort to base the representation upon population and supposed wealth. The objections to the simple rule of one to every forty thousand inhabitants were, that the representatives would soon become too numerous, and that the western states might, if admitted on this principle, soon outvote the Atlantic states—but under the plan proposed, "the Atlantic states having the government in their own hands, may take care of their own interest, by dealing out

the right of representation in safe proportions to the western states." This explanation was apparently clear—and there is no evidence that the proposition in so many words deliberately to keep a larger share of popular representation in the Atlantic states, caused any surprise, still less any shock, to the mind of anyone. It was not until two days later that Mr. Mason said that the western states must be admitted, if at all, on terms of equality. There was, it is evident, an almost ineradicable "sectionalism" pervading the entire body. The discussion went on; and the opponents now seem to be not the large and the small states, but the northern and southern states. There seems to have been a pretty general accord, at least for the time being, that wealth (as it would be the basis for assessing the public burdens) should be in some way recognized in representation—and that the legislature should, from time to time, regulate the representation according to population and wealth—though the word "wealth" was later abandoned in this connection. There is little in these discussions which concerns the question we are now examining —and it was not until the consideration of the report of the first committee was resumed, on July 14, that anything was said which requires especial notice. On that day, Mr. Gerry made the important suggestion that the states, while having an equal representation in the second branch, should vote *per capita*—to prevent the delays experienced in Congress, and to give "a national aspect and spirit to the management of business." The whole question of equality of representation in the second branch was again discussed, upon a motion by Mr. Pinckney, giving New Hampshire two votes, Massachusetts four, etc.—unequal but not proportionate representation. But the smaller states stood absolutely firm. Again they were deaf to the arguments of Mr. King, Mr. Madison, and others. Mr. King said that he considered the proposed government as substantially and formally a general and national government over the people of America. "There will never be a case in which it will act as a federal government on the states and not on the individual citizens." And Mr. Madison called "for a single instance in which the general government was not to operate on the people individually." There was an instance

given by Mr. Sherman, viz., in requiring quotas, but that was all—there was no reply—there could be none—to the arguments made. And it may well be doubted whether the Constitution would not have been greatly improved by a senate, in which there should have been at least a semblance of proportionate representation. Be this as it may, the small states stood firm, as I have said. And the report of the committee was agreed to, as amended, by a vote of five to four; Massachusetts divided, New York absent. The report provided, in substance, for a fixed number of representatives in the first branch, from the several states, varying from one from Rhode Island and Delaware to ten from Virginia; and gave the legislature authority to regulate representation upon the principle of the number of inhabitants—"provided always that representation ought to be proportioned according to direct taxation." A census within six years of the first meeting of the legislature, and once within every ten years thereafter was provided for, etc. Money bills were to originate in the first branch and were not to be altered or amended in the second branch—and in the second branch each state was to have an equal vote. The determined efforts of the small states to secure equality of suffrage in the second branch had been crowned with success, and this success was frankly stated by Mr. Randolph to be most embarrassing to him and the other advocates of the Virginia plan, as that plan had been worked out upon the theory of proportionate representation. Recognizing the necessity of some modification of this idea, at least as to the second branch, he had prepared a paper suggesting an equal vote on a number of important subjects, most of them involving the exercise of highly sovereign powers—indeed, there was hardly a power of this character omitted. But it was not submitted to the Convention, as an equal vote in all cases had been decided upon. He suggested an adjournment that the large states might consider what it was best to do "in the present solemn crisis of the business," a suggestion which seems to have been taken as a challenge by Mr. Patterson, which he instantly accepted, and proposed to adjourn *sine die*. But this proposition met with no favor—the great majority were really anxious that the Convention

should accomplish something, and voted to adjourn "until to-morrow." Before reconvening, an informal interchange of views seems to have convinced the members of the futility of further discussion of the subject, and the sixth resolution of the report of the Committee of the Whole came up for discussion. On the clause giving the general legislature power to negative all laws passed by the several states "in its opinion contravening the Articles of Union," etc., there was considerable debate, and signs were not wanting that the extremists were perhaps not so very far apart in their views. Mr. Gouverneur Morris, the most prominent centralist in the Convention, opposing the clause as "terrible to the states," and as giving the legislature a power properly exercisable by the judiciary; and Mr. Luther Martin, the great champion of state sovereignty, presenting a resolution that all laws passed by the general legislature within their proper sphere should be the supreme law of the respective states, whose judiciary should be bound by them, anything in the laws of the individual states to the contrary notwithstanding. The clause in the report was voted down decisively, and Mr. Martin's resolution was passed *nem. con.* The remaining resolutions in the plan were considered and debated, but for the present we must pass over the proceedings of the Convention until it comes to consider the question, To whom shall the new Constitution be referred for ratification? The nineteenth resolution provided for its reference to assemblies especially chosen by the people to consider it. Of course a motion was immediately forthcoming to refer it to the several legislatures, Mr. Ellsworth being the mover. Then ensued a debate which is most instructive in many ways. I do not propose now to notice it except when it concerns the particular question before us. The result of the debate was the passage of the nineteenth resolution by a vote of nine to one—Delaware, New York and New Jersey not voting. The motion of Mr. Ellsworth had been seconded by Mr. Patterson.

Mr. Mason at once took the floor in opposition. He contended that the legislatures had no power to ratify—the people must be appealed to "with whom all power remains that has not been given up in the Constitution derived from them."

He also argued that what one legislature did the next could undo—so that the general government would have a most unstable foundation. Mr. Ellsworth, in reply, differed with Mr. Mason as to both points—as to the first, because the legislatures had been considered competent to ratify the existing Articles of Confederation; and as to the second, he said, "An act to which the states, by their legislatures, make themselves parties, becomes a compact from which no one of the parties can recede of itself"; and it may be added that substantially this position had been taken many times before by the "small states" in an endeavor to prove that no number of states less than the whole could dissolve the existing confederacy. Mr. Morris pointed out that the fallacy of Mr. Ellsworth's motion was its underlying idea that they were proceeding on the basis of the confederation. And Mr. Madison thought that as the proposed changes "would make essential inroads on the state constitutions" the legislatures were clearly incompetent to ratify them. The vital and essential difference between a system founded on the legislatures only and one founded on the people, was, that the one was a *league* or *treaty*, the other a *Constitution*. Morally they were perhaps equally inviolable. Politically, there were two important differences "in favor of the latter." 1. "A law violating a treaty ratified by a pre-existing law might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the judges as null and void.

2. "The doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation." Mr. Ellsworth's motion was voted down, ayes 3 (Connecticut, Delaware, Maryland); noes 7. New York and New Jersey not voting. Mr. Morris thought the time opportune to move for one general convention of the people to ratify—but no one was prepared to go quite so far—the motion was not seconded. But the nineteenth resolution was passed as before noted. It was now moved by Mr.

Morris and Mr. King that the representatives in the second branch consist of——members from each state, who shall vote per capita.

Mr. Ellsworth said that he "had always approved of voting in that mode," and Mr. Williamson agreed with him. Mr. Martin of course did not, and expressly called attention to the fact that it was a departure from the idea of the *states* being represented in the second branch. Mr. Carroll did not object to it, but considered it a "material innovation." The blank in the resolution was filled with "two," and the resolution was thus passed. Maryland alone in the negative—New York and New Jersey not voting. The convention now took the important step of referring its proceedings to a committee to prepare and report a constitution "conformable thereto." The fact that the real conflict was between the North and the South was evidenced by a warning from General Pinckney that unless the southern states were secured against "emancipation, and taxes on exports," his duty to his state would force him to vote against the report. The committee—known as the Committee of Detail—was chosen by ballot, as follows: Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Ellsworth, Mr. Wilson. To it were referred the scheme submitted by Mr. Pinckney,—unfortunately lost to us—and the "New Jersey plan," as well as the "Virginia plan," after its passage by the Convention. In these resolutions as referred to the committee, the word "national" is used over and over again, in spite of the action of the Convention on the subject. The committee was appointed on July 24. On August 6,—one day less than two weeks later,—it made its report of a formal constitution. It consisted of a preamble and twenty-three articles. There had been no preamble in either the Virginia or the New Jersey plan—possibly there may have been in Mr. Pinckney's. The words of the preamble are: "We the people of the states of New Hampshire," etc., "do ordain, declare, and establish the following constitution for the government of ourselves and our posterity." The word "national" does not appear anywhere in the instrument. But it provides highly national and sovereign powers to be exercised by the general government, and especially mentions and defines "*Treason* against the

United States"—no such provision being in the Articles of Confederation, naturally enough. This crime is said to be "levying war against the United States *or any of them.*" In the Constitution as adopted "any of them" is omitted. It also—in common with the Constitution provides that persons charged with "treason, felony or high misdemeanor in any state, who shall flee from justice," shall be returned to that state upon requisition. The whole report bears a very strong resemblance to the Constitution. It expressly denies to the states all the higher sovereign powers, some absolutely, some "without the consent of" Congress. The absolute denials in the Constitution are more numerous than in the report.

Next day the Convention, without debate and without dissent, agreed to the preamble and the first two articles (providing for the "style" of "the United States of America," and the three grand departments), and began their discussions upon the third article. There is nothing of present interest to us in these discussions until we come to the clause in Article IV, giving the House of Representatives the sole power of originating money bills; this was struck out as likely to cause trouble, and being of no especial use—some of the most pronounced nationalists taking this view. But the members were not by any means unanimous, although the vote was eight to one. The subject was again debated quite fully and warmly a few days later, and the same conclusion was reached. The clause, however, was afterwards restored. Not long afterwards the question as to whether the members of the national legislature should be paid by the states or by the general government was argued at some length, the decided majority favoring payment out of the "national treasury"—Mr. Martin made the point that, as the Senate represented states, it ought to be paid by them—to which Mr. Carroll answered that the senators were not intended to be the advocates of state interests, and ought not to be dependent upon the states. The vote was nine to two—but in spite of Mr. Martin, Maryland voted "aye"—and for some unknown reason, Massachusetts voted "no"; the other "no" being South Carolina. There is nothing especially noteworthy to record, until the Convention took up the question of national control of the militia. The desira-

bility of uniformity of discipline, etc., was generally recognized. But it was remarked by Mr. Ellsworth that it would never do to take the whole authority over the militia away from the states, "whose consequence would pine away to nothing, after such a sacrifice of power." After some discussion, the subject was referred to a recently appointed committee. A few days later the very important clause relating to "treason" was discussed. In the report of the committee of detail, it will be remembered, that this crime against the United States was defined to be "levying war against the United States *or any of them.*" Dr. Johnson, of Connecticut, insisted that there could not be "treason" against the United States, *or* individual states. It was an offence against the sovereign, and in one community there could be but one sovereign. This was so plainly true, that it is remarkable that it should have failed of clear recognition. Dr. Johnson continued by saying that there could be no treason against a particular state, even under the confederation, "the sovereignty being in the union"—which it was not—"much less can it be under the proposed system." To this Colonel Mason answered that the United States would have a "qualified sovereignty" only. "The individual states will retain a part of their sovereignty, an act may be treason against a particular state, which is not so against the United States," and he instanced Bacon's rebellion in Virginia. To which Dr. Johnson replied that that would have been treason against the United States. Mr. King thought the question not so important, after all; the legislature might punish capitally under other names than treason. He moved to insert "sole" before "power," giving the United States the exclusive right to declare the punishment for treason. Mr. Wilson thought that in "cases of a general nature" treason could only be against the United States, "yet in many cases it might be otherwise." Mr. King insisted that there could be no line drawn, adhering to an enemy of an individual state was adhering to an enemy of the United States, which drew from Mr. Sherman the remark that the line lay between the resistance to the laws of the United States and to those of a particular state, entirely missing the point, for merely "resisting" the laws is not treason.

unless, of course, it takes the form of a revolutionary movement. Mr. Ellsworth expressed the idea a little better when he said that the United States were "sovereign on one side of the line dividing the jurisdiction—the states on the other. Each ought to have power to defend their respective sovereignties." Mr. King's motion was lost by one vote, and then the whole clause was reconsidered and amended to read, "Treason against the United States shall consist only in levying war against them," etc.

There was a great deal of confusion apparent in the minds of the members during the debate, occasioned by the failure to recognize the clear proposition of Dr. Johnson, viz., that there can be but one really sovereign power in the community, and that "treason" is an offence against it. The practical wisdom of allowing a state to punish any one who should seek to overturn and seize upon its government may be at once conceded; there could be no object in depriving it of this power. But it is a confusion in terms to call this "treason" against a particular state, if there is to be such a thing as, "treason against the United States." And if there was one thing certain and agreed upon on all sides, it was that there *should* be a provision in the new Constitution upon that very subject; there never was a word to indicate that owing to the provisions for "treason" against the states individually, in their several constitutions, it would be better, after all, for consistency's sake, not to mention or define such a thing as "treason" against the *United States*; on the contrary, the narrow margin of one vote prevented the United States from having the *sole power* to punish that particular crime; and, as far as can be gathered, the real reason for a failure to make a logical provision on the subject, *i. e.*, one which would have left out all reference to the states as such with regard to it, was, as suggested above, the fear that the states would be deprived of the power of self-defence against attacks upon their governments, which could easily have been provided for under another and truer name—insurrection, riot, etc., if by force, conspiracy (for nobody would "go it alone," in such a case) if without force.

When they came to the question of taxation, Mr. Luther

Martin characteristically moved that the legislature (*i. e.*, Congress) should make requisitions upon the states for their respective quotas and only pass laws for imposing and collecting taxes upon the failure of a state to comply with the requisition. There was no debate and the motion was promptly defeated by a vote of eight to one—New Jersey. Mr. Martin's own state was divided.

A few days later, Mr. Pinckney again introduced the question of giving the national legislature a power to negative all laws passed by the several states, which, in their opinion, interfered with the general interests or harmony of the Union. It had already been provided that the Constitution and laws made in pursuance of it should be the supreme law of the land, and the proposition was rather a bold one in view of all that had passed. It again found support, however, from some of the best men in the convention, though Mr. Rutledge said that it alone would damn, and ought to damn the Constitution—it would bind the states hand and foot. Mr. Ellsworth remarked that it might as well be provided that the state executives should be appointed by the general government, and have control over the state laws. To which Mr. Pinckney retorted that that was exactly what ought to be done, and what he thought would be done, if another convention were called—a very extreme position and one which was no doubt rather in advance of his real views; in the heat of controversy in the Constitutional Convention, decorous body though it was, men were apt now and then to say more than they would afterwards have subscribed to. The giving to the national legislature a revisionary power over the acts of the state legislature would have been a grievous error—and its support by some of the very best and ablest men in the Convention can only be accounted for by the ever-present fear in their minds of disruptive tendencies on the part of the states. It was too much for even so ardent a nationalist as Mr. Gouverneur Morris, who said that he did not see the utility or practicability of the proposition. From this point onward, oddly enough, there is nothing in the debates, highly interesting as they are, which calls for especial comment now. And we have therefore completed, practically, one line of investigation. The debates

have been carefully gone over, and we are now ready to decide —*not* what was meant by the Constitution—but *what its framers judged by their own words and actions while framing it*, understood it to be. It seems clear enough, that it was thought on all hands to be a radical departure from the Articles of Confederation—and that it was intended to be so, and was for that very reason unacceptable to some of the members. It must be equally clear, I think, that there was no intention on the part of the Convention to abolish the states as such, or to reduce them quite to the situation of "mere corporations." But while preserving them as inviolable local autonomies, with certain powers beyond the reach of Congress or the general government—and giving them as collectivities an equal representation in the Senate, the Constitution as proposed, and adopted, expressly denuded them of all the higher and really sovereign powers. I believe, of course, that the Constitution was the result of numerous compromises, as to a good many parts of it, at least. And the marvel is that the balance was so nicely kept. But the general thought of the Virginia plan underlies it, and that a great majority of its members thought they were framing and intended to frame a general or national government, as contradistinguished from a confederacy or league there can be no doubt. Of course, I speak now only of the conclusion to be reached from the proceedings of the Constitutional Convention.

We shall see whether other evidence confirms or disproves this conclusion.

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