FEDERAL USURPATION

FRANKLIN PIERCE

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FEDERAL USURPATION

FRANKLIN PIERCE

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"If, in the opinion of the people, the distribution of the constitutional powers be in any particular wrong, let it be corrected in the way which the Constitution designates.

"But let there be no change by usurpation, for this, though it may in one instance be the instrument of good, is the ordinary weapon by which free governments are destroyed.."

WASHINGTON.

"It is my duty and my oath to maintain inviolate the right of the States to order and control under the Constitution their own affairs by their own judgment exclusively. Such maintenance is essential for the preservation of that balance of power on which our institutions rest.."

LINCOLN.

Published January, 1908

NEW YORK

TO MY WIFE ANNA SHEPARD PIERCE
WITHOUT WHOSE AID THIS BOOK COULD NOT HAVE BEEN WRITTEN

"Evil for evil, a good despotism in a country at all advanced in civilization is more noxious than a bad one, for it is more relaxing and enervating to the thoughts, feelings, and energies
of the people."

JOHN STUART MILL.

"As we cannot, without the risk of evils from which the imagination recoils, employ physical force as a check on misgovern–ment, it is evidently our wisdom to keep all the constitutional checks on misgovemment in the highest state of efficiency, to watch with jealousy the first beginnings of encroachment, and never to suffer irregularities, even when harmless in themselves, to pass unchallenged, lest they acquire the force of precedents."

MACAULAY.

PREFACE

THIS book is a plea for the sacredness of the Constitution of the United States. I do not mean by this that I consider our Constitution, framed a hundred and twenty years ago, well suited to the needs of our existing government. Its rigid provisions, its system of checks and balances, are an obstacle to popular government, and they should be radically changed by amendment, but never by construction or usurpation. This book was suggested by the President's speech at Harrisburg in 1906, in which he declared that the power of the Federal Government should be increased "through executive action . . . and through judicial interpretation and construction of law." A little later, at the Pennsylvania Society in New York, Mr. Root, the head of the Cabinet and the close friend of the President, declared that if the people desire it "sooner or later constructions of the Constitution . . . will be found" to vest additional power in the National Government. Hitherto governmental usurpation generally has advanced by silent and gradual attacks upon constitutional safeguards. Never before in human history, I believe, has the head of a constitutional government who had sworn to protect, preserve, and defend its fundamental provisions publicly advised their subversion "through executive action and through judicial interpretation." In recent days every abuse on the part of corporations engaged in interstate commerce has been eagerly grasped by the President as the reason for an encroachment upon constitutional guarantees, while every opposition to such encroachment has been seized as a reason for a stronger national government to put down opposition. Unless the people are stirred to a recognition of the danger of such usurpations, they will never be checked.

Well–defined usurpations of power by the National Government had a commencement in our Civil War. They gathered force during the Reconstruction period, but were slightly checked in the administrations of Presidents Hayes and Arthur and the first administration of Mr. Cleveland. In the present administration they have increased with amazing rapidity. We are told by the President that "such interpretation as the interests of the whole people demand " should be given to the Constitution, leaving this to be determined by tlie National Government. Impelled by such conceptions of constitutional law, a National Employers' Liability Act, applying to railway servants, has been passed, a National Pure Food Law has been enacted, and the Department of Agriculture now claims the power of "making the standards of composition for food products." About every industry, however remotely connected with interstate commerce, is sought to be controlled by child–labor laws, commissions, or licenses, and ere long we will fully adopt the methods of Continental Europe by which the local and domestic affairs of the people are under the supervision of the central government. Unless a determined body of citizens arise and oppose such usurpations, the doom of our state governments is already sounded.

There is no doubt that there is a natural evolution in our times toward centralization. A hundred agencies combine to bring men and industries to great central points. This tendency cannot be stopped, but centralization which results from natural causes should be sharply distinguished from concentration of power through usurpation. It is usurpation for the National Government to take over the powers of the states without employing the proper means of acquiring them through amendments to the National Constitution. "State rights," says President Roosevelt, "should be preserved when they mean the people's rights, but not when they mean the people's wrongs." Even Alexander Hamilton, the most pronounced advocate of a strong centralized national government, entertained no such conception of state rights as this. In the debates before the New York Constitutional Convention, he said:

"The state governments are essentially necessary to the form and spirit of the general system. As long, therefore, as Congress have a full conviction of this necessity, they must, even upon principles purely national, have as firm an attachment to the one as to the other. This conviction can never leave them, unless they become madmen. While the Constitution continues to be read, and its principles known, the states must, by every rational man, be considered as essential, component parts of the Union; and therefore the idea of sacrificing the former to the latter is wholly inadmissible." The difficulty in our day is found in the fact that when we speak of state rights the minds of men naturally go back to the Civil War and the claims of the South in that contest. We who oppose usurpation by the National Government of the rights of the states plant ourselves upon the same principles as those for which the North waged that war. The National Government has no more right to destroy the reserved

powers of the states than the South had to destroy the powers delegated by the states to the National Government. The Constitution of the United States secures to the states their reserved rights in the same way that it secures the rights delegated by the states to the National Government.

In each of the chapters of this book, after the first, I have sought to gather the facts illustrating usurpations of government at some particular period or by some particular department. I am aware that it may be said that the public interest in such facts is temporary rather than permanent and that political parties will uncover these facts. Our political parties to−day are mere political machines living upon the spoils of office and giving little heed to great public questions. The leaders of these parties deal in glittering generalities, the one seeming to favor centralization of power in the National Government and the other espousing the cause of state rights, but it is apparent that they do not widely differ in reality as to details. The very existence of these parties depends upon extending the power of government, multiplying commissions, licenses, offices, and special privileges. Exposure of usurpations will never come from those who profit by usurpations.

The most important public affairs are unknown to the people. Law−making in the House of Representatives to−day is as carefully hidden in its secret committees from popular gaze as was the action of the Council at Venice in the Middle Ages. In January, 1907, Mr. De Armond introduced a bill in the House of Representatives conferring upon the President of the United States the right to remove from office, without charges and without a hearing, any one or all of the twenty−nine United States Circuit Court judges and the eighty−two District Court judges of the United States District Courts, and the bill gave him the power of appointment of new judges in their places by and with the advice and consent of the Senate. This proposed bill, conferring as despotic powers upon the President as was ever exercised by any ruler in the history of the world, was so hidden from the American people behind the door of the secret Congressional committee that probably not one citizen in a hundred thousand ever heard of its existence.

The United States Supreme Court, recognizing that the National Government is one of delegated powers, recently decided, in the case of Kansas v. Colorado, that the powers conferred upon the Supreme Court were an exception to the rule, and that as respects their judicial power there was practically no limitation. Do the people know of this proposed law and of the danger of this recent decision? Has any alarm of danger been sounded by political parties as to these measures? Are such measures questions only of temporary interest? Is there anything which should concern free men so greatly as the preservation of their freedom? The individual man is the essential unit of any society that hopes to retain the principles of growth and progress. His personal liberty is the source of personal initiative and national wealth and strength. Our progress in wealth has depended more upon that individual liberty than upon all other causes combined. But liberty has higher ends tlian to fire the soul of the individual to action and to urge him to the attainment of high political ends. Lord Acton well said: "Liberty is not a means to a higher political end. It is of itself the highest political end." Liberty nourishes self−respect, self−reliance, and every impulse to a higher life. It gives birth to art, literature, and culture. It ever has been the source of all the higher impulses and aspirations of men. On the other hand, a usurping government destroys these qualities, turns the attention of the citizen to foreign politics, dazzles him with military glory, and destroys his aspirations for liberty. Surely the importance to the individual man and to our country of the preservation of liberty justifies a discussion of the present danger from usurpation of power.

Without any desire to influence men's political associations, I have attempted in this book to show the causes of present conditions, to arouse the citizen to an appreciation of the dangers of usurpation, and to point out remedies for existing evils through amendments to the Constitution of the United States. I shall be happy if this examination may aid in any way the present growing interest in the preservation of constitutional guarantees. The age of the birth of the Constitution produced our greatest constructive statesmen. The period between 1820 and 1850, when its meaning was so thoroughly discussed, called forth the great powers of Webster and Calhoun. A nonpartisan discussion today of the dangers which exist from usurpation may happily lead to that elevation of public character and public life which will regenerate political parties and lead them to make fighting issues on the fundamental principles of government.

FRANKLIN PIERCE. December 1, 1907. "Though small in their mere dimensions, the events here summarized were in a remarkable degree germinal events, fraught with more tremendous alternatives of future welfare or misery for mankind than it is easy for the imagination to grasp."

JOHN FISKE.

"The Constitution has found many learned and intelligent commentators; but they have all considered its excellence to be an undoubted and universally admitted fact. What should have been only the result of their investigation they made the premises of their arguments. . . . The historical fact is that it was 'extorted from the grinding necessity of a reluctant people.'"

VON HOLST.

"The English Constitution, in a word, is framed on the principle of choosing a single sovereign authority, and making it good; the American, upon the principle of having many sovereign authorities, and hoping that their multitude may atone for their inferiority."

BAGEHOT.

CHAPTER I. THE BIRTH OF THE CONSTITUTION

A CONSIDERABLE proportion of our American people have ever deprecated any criticism of the Constitution of the United States. Any suggestion that the constitutional adjustment of Congress, the President, and the Supreme Court is defective is considered unpatriotic and un−American. They appear to think that it is the duty of the true patriot to ignore imperfections lest they throw discredit upon the sacred provisions of the Constitution. No free government can exist long unless there are a considerable number of men ready for unsparing examination and criticism of its weaknesses.

It is uncommon to see the laws and constitution of a state openly disregarded. It is the silent and gradual attacks that the citizen should watch with jealous care. When government inspectors supervised the elections for representatives in Congress in the reconstruction days, and counted ballots for state candidates as well as for members of Congress, the citizen felt the indignity and assailed it with resentment. When, however, usurpations may be hidden behind a government so complicated by checks and balances that the citizen cannot perceive them, the nature of the government may entirely change and the spirit of the original constitution be lost before he awakes to the danger. Such a form of government, which hides usurpation and is a constant temptation to usurpation, we certainly have.

Prior to the formation of our National Government the people imposed limitations upon the monarch or upon some centralized power of the government. Magna Charta, the Petition of Right, the Bill of Rights, all were imposed as limitations upon the power of the English king. In all modern parliamentary governments the power of the people in the representative body of the government is supreme. We alone have limited the power of our House of Representatives to such an extent as to cripple effective action on their part. A bill introduced in the House of Representatives and there passed must receive the assent of the Senate, a body elected not by the people but by the State Legislatures, before becoming a law. If the Senate does assent, it then goes to the President, who can reject the same giving his reasons therefor. If passed a second time by a two−thirds majority of each House, the Supreme Court of the United States may still hold it unconstitutional.

The chief value of a constitution in a democratic form of government, such as we are supposed to have, is to afford ready means for the expression in laws of the will of the people through responsive legislative action. The best form of party government is found where two parties espouse conflicting principles and fight out the question of their value in the open. The Constitution of the United States does not give such free and effective play to public opinion in government.

The checks and balances which it has created make the free expression of the convictions of the people by a political party almost impossible. In eleven different Congresses since the adoption of the Constitution both the President and the Senate have been of a different political faith from the House of Representatives. During a period of eighty−four years of our constitutional history a majority in the House of Representatives has not been supported by all the other branches of the Government. Between 1874 and 1896 there were but two years, the Fifty−first Congress, during which the same party had a majority in all the branches of the Government.1

Clean−cut issues between parties upon principles of government are impossible with such a Constitution, whereby the President and the Senate may represent one party, and the House of Representatives another party, and where both parties, hidden behind Congressional committees, may be acting collusively. If public opinion upon national questions is to be made effective in government, the House of Representatives, elected directly by the people, must eventually become the governing power in this country. Its decay during the last thirty years is an omen of great danger.

We hear much said in these days about the extension of the powers of the National Government by judicial construction, but no appeal is made by the President and Mr. Root to the people or to Congress for an amendment conferring such extension. And why not? Such an amendment cannot be considered by the people 1 Smith, The Spirit of American Government, p. 227.

unless two thirds of both Houses of Congress shall deem it necessary and shall propose the amendment to the People for their adoption, or two thirds of the several states shall call a convention for proposing the amendment, and in each case it must be ratified by the legislatures of three fourths of the several states. We are fold that during

the fifteen years from 1889 to 1904 435 amendments to the Constitution were proposed in Congress,1 and not one passed both Houses. No force less than the force of revolution can be expected to move this cumbrous machinery. The President and Mr. Root well know this. They know the difficulties of bringing about an amendment, and so we are told that the results will be accomplished by the exercise of judicial discretion in the construction of the Constitution.

Such a constitution, with so many checks and balances, with so many difficulties of amendment, is a constant temptation to President and Secretary, to Senate and House, to usurp power. Unless the American People awaken to the danger of usurpation and make one supreme struggle to modify the conditions on which the Constitution may be amended, we are in imminent danger of an entire change in our institutions through gradual encroachments upon the power of the states. Our state constitutions are amended with ease. Many of them provide for constitutional conventions each twenty years to consider the changes which new conditions have made necessary. But our National Constitution continued from early in the nineteenth century for

1 Smith, The Spirit of American Government, p. 47, note.

over sixty years without a single amendment, and from the Reconstruction Period until the present time without another.

Let us now inquire how this undemocratic Constitution came into existence. Who conceived all these checks and balances upon the representatives of the people in the lower House, and what considerations impelled the making of such a Constitution? That the people had no such fear of their representatives is shown by the fact that the first constitutions of the thirteen states in nearly every case gave almost unlimited power to the popular branch of the Legislature. In nine states the judges were appointed by the state legislatures, either with or without the consent of the Council. The appointing power of the governor was largely restricted in nearly all these states. In six of them this power was given to the Legislature or to the Legislature and Council. The veto power was given the governor in only two states, Massachusetts and New York. The Assembly in each state was hampered but little by executive veto or by the courts. Madison, speaking in the convention which framed the Constitution, said: "Experience shows a tendency in our government to throw all power into the legislative vortex. The executives of the states are little more than ciphers; the legislatures are omnipotent."

England had parliamentary government with Pitt as Prime Minister at the time when our Constitution was framed, but the English Government of that time was by no means so popular in form as the governments of the thirteen states. The masses of the people were just as strong then in the sincerity of their belief in liberty as we are to–day in the cynicism of our single–hearted faith in riches. They had staked everything in the world for the vindication of the principles of liberty. No people in the world at that time would have been so quick to resent and so ready to scrutinize and so brave to fight attacks upon their liberties. They took alarm at once at a Constitution which they feared would imperil those liberties. The fear of kings might be a reason why they should erect barriers against the encroachments of the President, but why they should place limitation after limitation on the powers conferred upon the House of Representatives elected by their direct vote is not so easily explained. That explanation, however, is found in the opinions of the men who drafted the Constitution. They had great fear of popular government, and their fear would seem to have had considerable ground at that time for its existence.

We shall not appreciate why the limitations in the Constitution upon popular action were created if we do not understand clearly the conditions of the people in the thirteen states at the time of its formation. John Fiske, in his book entitled "The Critical Period of American History," has described fully those conditions. The characteristic feature of the Constitution, putting limitation after limitation upon popular action, was a direct result of the reaction which came from popular tumult and popular abuses during that critical period.

During their seven years' war the 2,500,000 people of the thirteen states had placed nearly 300,000 troops in the field, and had raised $170,000,000. The army, however, had dwindled from 46,901 toward the middle of the war to 13,832 in 1781, and the revenue had dwindled from $22,000,000 to $2,000,000 annually. But for the timely aid of France the Revolution could never have been successful. At the end of the war the resources of the country were so exhausted that no money was left to pay the arrears of the soldiers in the field nor the running expenses of government.

The treaty between the Confederation and England in 1783, while it terminated the war, at the same time destroyed the foreign commerce of the states. Prior to the Revolution the New England States had been largely engaged in the carrying trade between the colonies and the West Indies. The building of ships and the sailing of

ships was the great industry of New England. The treaty of 1783 closed the ports of every English colony to New England ships. The English Navigation Act impaired very greatly the ability of the Southern and Middle States to export their products. The result was that New England and the South, without money in gold and silver, with only their continental currency, and with their trade destroyed, were crippled in all their industries. Suffering intensely from these conditions, a large body of the people, heavily indebted, subject to judgments and imprisonment for debt, developed such bitter feelings as to cause the reaction shown by the framers of the Constitution.

By the Articles of Confederation the central government had no power to impose taxes upon the people of the several states, but depended entirely upon requisitions made upon the states for their proportion of the supply necessary to meet the demands of government. New Hampshire, North Carolina, and New Jersey refused to respond to these requisitions. New York, Pennsylvania, and Connecticut were the only states which responded in full. Of the continental taxes assessed in 1783 only a fifth part had been paid by the middle of 1785. The Government had become so helpless that it was actually forced to make loans abroad, not only to pay the interest upon the public debt, but to pay the actual current expenses of government.

The several states imposed direct taxes as they do to–day, and also laid duties upon exports and imports, each according to its own view of its local interests. Connecticut imposed duties upon goods coming from Massachusetts and from New York, Pennsylvania upon goods coming from Delaware, and New York upon goods coming from Connecticut and New Jersey. The State of New York raised from £60,000 to £80,000 by duties upon foreign imports. Connecticut consumed probably one third of these goods imported, consequently she paid one third of this amount of duties in enhanced prices for the goods which she purchased from New York. Pennsylvania, Virginia, and South Carolina were each importing states. Madison quaintly describes the condition of the times as follows: "Some of the states had no convenient ports for foreign commerce and were subject to be taxed by their neighbors through whose ports their commerce was carried on. New Jersey placed between Philadelphia and New York was likened to a 'cask tapped at both ends,' and North Carolina between Virginia and South Carolina, to a 'patient bleeding at both arms.'"

The states shared with Congress the powers of coining money, of emitting bills, and of making promissory notes legal tender for debts. This power left to the states was the one which brought untold evil. With little or no gold or silver in the country, with no medium of exchange, bending under their indebtedness, their commerce destroyed, no markets for their products, exhausted by the great burdens of the Revolutionary War, and disappointed because liberty had not brought blessings to them, the people in all the states but Connecticut and Delaware provided for the issue of paper money.

In Rhode Island the farmers gave mortgages on their land for the loan of paper money issued by the State, and when they tendered the money to a storekeeper in payment for goods he refused to accept it. Then laws were passed in Rhode Island and in many other states requiring creditors to accept the money in payment of debts, and, in case of refusal, permitting debtors to go before any magistrate and tender this money in payment of a debt, whereupon a certificate was given by the magistrate as evidence of payment. In North Carolina the money was used by the State to purchase tobacco, the State paying twice the value of it in order to get the people to take the money. Finally, South Carolina, Georgia, and Rhode Island were driven to pass penal statutes punishing those who would not accept the money in full payment. So little of currency was there in the country that the people reverted to the practice of barter, whisky in North Carolina and tobacco in Virginia doing duty as money. Some states even passed laws permitting their products to be given in payment of debts at a certain price. The result was mobs in Rhode Island that attempted to intimidate the court in passing upon the constitutionality of its Legal Tender Act, and an insurrection in Massachusetts which broke up courts and was finally put down by armed troops.

That this turbulence and passion naturally inspired a very grave distrust of the people in the men who framed the Constitution is well established. More than fifty years after the formation of the Constitution the notes of Madison, giving the sentiments of the men who drafted the Constitution, were published. Then for the first time the world knew what these men thought of the people and why they created so many limitations upon the action of the House of Representatives. Governor Randolph of Virginia said in the convention:

"In tracing these evils to their sources every man has found it in the turbulence and follies of democracy." George Mason of the same State said: "The injustice and oppression experienced among us arises from

democracy." Roger Sherman of Connecticut thought "that the people would never be sufficiently informed to vote intelligently on all candidates that might be presented." Elbridge T. Gerry of Massachusetts declared that "the follies which we experience flow from the excess of democracy." Hamilton, Gouverneur Morris, and many of the other delegates made like expressions.

Reading Madison's notes (the only complete statement of what occurred in the National Convention), there can be but one conclusion: that the limitations upon the popular branch of Congress were created because of the deep−seated distrust of democratic government on the part of the men who framed the Constitution. They believed that a popular majority was a menace to liberty and feared the people, so they created the Constitution with the idea of making control by the people ineffective. Governor Clinton, before the convention in New York called for the purpose of considering the adoption of the Constitution, well said: "I ever lamented the feebleness of the Confederation, for this reason, among others, that the experience of its weakness would one day drive the people into an adaption of a constitution dangerous to our liberties. I know the people are too apt to vibrate from one extreme to another." 1

The conditions resulting from the control by the states of commerce, as permitted by the Articles of Confederation, were simply intolerable. The National Assembly in 1785 requested the several states to allow the Confederation to impose duties upon imports of tea, coffee, sugar, and other like articles, to provide for the current expenses of government. Ten states consented, but attached such conditions to their consent as made them of no value.

Finally, at a meeting at Mount Vernon, in 1785, of commissioners from the States of Maryland and Virginia to define their respective jurisdiction, a suggestion was

1 Elliot's Deb., vol. ii, p. 359.

made that a general convention of the states should be held to provide plans for the common control of all foreign and interstate commerce. The Legislature of Virginia thereupon sent to the Legislatures of the states an invitation to send representatives to Annapolis in 1786 to devise common commercial regulations of foreign and interstate trade. Only the States of Virginia, Pennsylvania, New York, and Delaware responded. With so few states present the convention at Annapolis deferred action, but through Alexander Hamilton drafted a report to Congress. Hamilton prepared this report with careful reference to a convention of all the states, not to amend the Articles of Confederation, but to create an entirely new government, urging Congress to call a convention to devise "such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union, and to report to Congress such an act as, when agreed to by them and confirmed by the Legislature of every state, would effectually provide for the same." Congress neglected to act until a culmination of evils forced them to issue an address to the different states asking that commissioners be sent, and adopting the language of Hamilton in his report of the Annapolis convention.

In May, 1787, fifty−five delegates, representing all the states but Rhode Island, assembled in Philadelphia. Mr. Fiske tells us that twenty−nine of these delegates were university men, graduates of Yale, Harvard, Princeton, Columbia, William and Mary, Oxford, Glasgow, and Edinburgh. Among the twenty−six who were not uni versity men were Washington and Franklin. John Adams and Thomas Jefferson were in Europe. Samuel Adams, Patrick Henry, and Richard Henry Lee disapproved of the convention, and remained at home. The convention selected George Washington for its president.

The first resolution passed by the convention is in the following words: "Resolved, That it is the opinion of this committee that a national government should be established, consisting of a supreme, legislative, executive, and judiciary." Six states, Massachusetts, Pennsylvania, Delaware, Virginia, North Carolina, and South Carolina, voted for this resolution. Connecticut voted no; New York was divided. It often has been claimed that the separation of these departments of government in our Constitution was the result of the teachings of Montesquieu, who had published his "Spirit of the Laws" about thirty years before the Constitution was adopted. Montesquieu was a great admirer of the English Constitution, and attributed its success to the fact that there was a division of the government into executive, legislative, and judicial departments. He held this up to his readers as a model form of government, and described at great length the advantages to be derived from this separation. From time to time, later in the debates of the convention, the writings of Montesquieu were referred to, but no reference to them was made in connection with the passage of this resolution. Certainly Montesquieu was mistaken as to the real condition of the English Government at the time when he wrote. The men who framed the Constitution were

prob– ably better acquainted with its actual workings than was the author of the "Spirit of the Laws." They well knew that Lord North, as Prime Minister during the Revolutionary War, had been controlled by George III. They appreciated that the subservient parliaments of the administration of Lord North represented the estates and the money of the peers and the influence of the king rather than the great body of the English people, and there is much more reason to believe that they had in mind the tyranny of George III in providing for this separation rather than the teachings of Montesquieu.

Two plans of government were presented to the convention, one known as the Virginia plan and the other as the New Jersey plan. The Virginia plan had been carefully drafted by James Madison and given to Governor Edmund Randolph for presentation as the leading representative of the State of Virginia. The Virginia plan went at once to the root of the whole evil of the Confederation by creating a new government with power to enforce its decrees upon the people of the states. In the convention in New York for the adoption of the Constitution, Lansing said: "I know not that history furnishes an example of a Federated Republic coercing the states composing it by the mild influence of laws operating on the individuals of those states." James Madison states that Noah Webster, in the winter of 1784–85, first proposed "A new system of government which should act, not on the states, but directly on individuals, and vest in Congress full power to carry its laws into effect." 1 The New Jersey plan proposed to

1 Elliot's Deb., vol. v, p. 118.

leave the states instead of the people of the states as the basis of government, thus permitting the very causes of the existing evils to continue.

The great contest before the convention was over the questions of the control of commerce and of the institution of slavery in the Southern States. New Hampshire, Massachusetts, and Rhode Island had united in passing in the Legislatures of each of those states what were known as Navigation Acts, providing that no goods should be shipped in English vessels, with other provisions tending to destroy English commerce in our ports. The ships of the New England States transported most of the exported products of the South. So exceedingly fertile and profitable were the lands of South Carolina that, in the single port of Charleston, a hundred large ships were loaded yearly with rice and indigo. The annual exports of tobacco from Virginia alone were 700,000 or 800,000 pounds.

The imposition of duties upon foreign commerce being left with Congress, the South feared that New England and the Middle States would unite and control commerce against her interests, imposing heavy freight charges upon her exports and obstructing the importation of goods to her ports by protective tariffs. Massachusetts was the only state in the nation at that time which did not own slaves, and though slaves were held in all the other Northern States the system of slavery was rapidly dying out in the North. The Massachusetts delegates, as well as the delegates from Virginia, favored limitations upon the importation of slaves. The result was that a committee consisting of one dele– gate from each state was appointed to adjust the questions of slavery and the control of foreign commerce. The Southern men insisted that no Navigation Act or act controlling commerce should be passed without a majority vote of two thirds of the members of each branch of the Congress. The Northern men, on the other hand, urged that limitations should be put upon the existence of slavery, and that the evil should be gradually destroyed. The result was a compromise permitting the importation of slaves until the year 1808, and consenting that commerce should be controlled by Congress upon a mere majority vote. This compromise was baleful seed for the new nation, producing two of the greatest evils which this country has ever known. We destroyed slavery by the sacrifice of the blood of a million men and of billions of treasure, but we continue to allow Congress, by a mere majority vote, to pass navigation and high tariff acts that obstruct commerce for the profit of manufacturing interests, and thus we prolong an all–pervasive source of corruption. "By an inevitable chain of causes and effects Providence punishes national sins with national calamities."

When James Wilson and Charles Pinckney suggested that the executive power should be intrusted in the hands of one man, it is said that a profound stillness fell upon the convention and no one spoke for several minutes, until Washington from the chair asked if he should put the question. Sherman and other members of the convention spoke of the executive as "nothing more than an institution for carrying the will of the legislature into effect." After it had been determined that the executive power should be intrusted to one man, the question of the time of office was discussed and terms of one, two, three, four, ten, and fifteen years were suggested, but Rufus King of Massachusetts remarked: "Better call it twenty, it is the average reign of princes."

After four or five weeks of constant sittings of the convention grave doubt existed as to whether any agreement could be reached. Dr. Franklin, who was not conspicuous for his religious fervor, seeing the danger and lamenting it, arose and said: "Mr. President: The progress we have made after four or five weeks' close attendance and continual reasoning with each other — our different sentiments on almost every question, several of the last producing as many 'noes ' as 'ayes' — is methinks a melancholy proof of the imperfection of the human understanding — in this situation of this Assembly groping, as it were, in the dark to find political truth, scarcely able to distinguish it when presented to us, how has it happened, sir, that we have not hitherto once thought of applying to the Father of Lights to illuminate our understandings?" He then moved that each session of the convention be opened with prayer. Hamilton and several of the other members suggested that it was too late a day for this innovation, and after several unsuccessful attempts to adjourn the convention without acting upon the proposition, it was at length carried.1

Madison's notes show that again and again expressions were made by members of the convention to the effect that such language must be used in the Constitu−1 Elliot's Deb., vol. v, pp. 253, 254.

tion as would not arouse apprehension on the part of the people that their liberties were being affected lest they reject it. A single instance of the spirit of many of the men of the convention is shown by a letter written by Gouverneur Morris in Jefferson's administration. Our country had just secured the great Louisiana Territory from France by a treaty which provided that the territory should be divided up into states and eventually made part of the Union. While the right to acquire territory by treaty was conceded, Jefferson believed that it could not be divided into states and received into the Union without an amendment to the Constitution, as his letters written at the time to Breckinridge, Gallatin, Dunbar, and Nicholas clearly establish. The final draft of the Constitution was made by Gouverneur Morris, and he, more than any other member of the convention, was responsible for the wording of each section. Article 4, Section 3, provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; nothing in this Constitution shall be so construed as to prejudice any claim of the United States or of any particular State."

Gouverneur Morris, writing to his friend Henry Livingston with reference to the right of the United States to purchase this territory and take it into the Union as states, said: "I always thought that when we would acquire Canada and Louisiana it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief that had it been more pointedly expressed, a strong opposition would have been made."l The leading men of the state conventions who adopted the Constitution well knew that a democratic republic could not govern subject races, and that every democracy which had attempted empire had met with disaster. Yet Gouverneur Morris intended, according to his own admission, to draft this section in such a way as not to disclose the intent to hold the people of newly acquired territories as subjects, well knowing that if the intent was understood the Constitution would be defeated.

The Constitution was now sent by Congress to the several states for their consideration and adoption, and with its submission arose one of the most vigorous struggles upon questions of political principles which our country has ever seen. The columns of newspapers were filled with articles by writers, ardent for its adoption or its rejection, who concealed their personalities under such classic and sonorous names as Cassius, Agrippa, Cato, Cæsar, or Aristides. The struggle was carried on most vigorously in Virginia, Massachusetts, and New York, the Constitution being passed in each state only after long discussion and by very small majorities. Those engaged in commerce and residing in the cities were uniformly favorable to the Constitution, while those settled in the remoter parts of the states and engaged in agriculture were quite as uniformly opposed to it. In New York, Albany and Tryon Counties were arrayed against the southern part of the State. In Mas−

1 Columbia Law Review, March, 1905, p. 195.

sachusetts, Boston and the surrounding country was opposed by the central and western part of the State. The Constitution never could have been adopted had it not been for the desperate conditions of the different states at that time. In Virginia, Patrick Henry, George Mason, Benjamin Harrison and John Tyler (the fathers of the two future presidents) and James Monroe each opposed its adoption.

Article 1, Section 1, of the Constitution1 provides that "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of the Senate and House of Representatives." The powers referred to as granted to Congress are limited by the words "herein granted," and they are found enumerated in

Section 8 of Article 1. No power is conferred upon Congress except those specified in the seventeen subdivisions of that section. The eighteenth subdivision, providing that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," is the provision in the Constitution over which much of the litigation as to the constitutionality of acts of Congress has arisen. This may seem strange to the reader, because that provision is no more than would be implied from the granting of an express power, since every power carries with it by implication the right to exercise all necessary and proper powers for its execution. These words would therefore seem to be unnecessary. Yet under this last clause have arisen the questions of the constitutionality of the Bank of the United 1 A copy of the Constitution may be found in the Appendix.

States; of the Legal Tender Acts; of the vast works of internal improvement; of the power to use billions of dollars of the people's money to foster agriculture and irrigate arid lands; of the power to lay embargoes on shipping, and of enacting protective tariffs and navigation acts.

In Section 9 of Article 1 are the provisions prohibiting acts on the part of Congress, while in Section 10 of Article 1 are gathered the prohibitions upon the actions of the different states. In this connection it is most important to observe that the grants of power found in Section 8 of Article 1 on the part of the states to the National Government are not exclusive in their nature except in those cases where the state is forbidden in Section 10 from doing the same act. Thus the state is forbidden from entering into any treaty, alliance, or confederation, from coining money, emitting bills of credit, making anything but gold or silver coin a payment of debts, passing any bill of attainder, ex post facto law, or impairing the obligation of contracts. Until Congress has exercised these powers of Section 8, the state can continue to exercise such of them as are not thus prohibited to the states and are not national in their nature.1 So for a hundred years after the passage of the Constitution the state governments imposed quarantine against other states, and that power recently has been absorbed by the National Government. Each state

1 Cooley v. Port Wardens, 12 How., 310, 319; Pound v. Truck, 95 U. S., 459; Cardwell v. Am. River Bridge Co., 113 U. S., 205;

Leisy v. Hardin, 135 U. S., 100; Louisiana v. Texas, 176 U. S., 1; Compaignie v. Board of Health, 186 U. S., 399.

may pass bankruptcy laws which exist until the National Government has provided for a system of uniform laws on the subject of bankruptcy throughout the United States. Each state may provide for the punishment of counterfeiting– the securities and current coin of the United States, and each state may regulate foreign and interstate commerce upon subjects which are of such a nature that Congressional legislation is not necessary to reach them, such as inspection of pilotage, port regulations, and improvements of harbors.1 In all the cases referred to above, and others not enumerated, the state has what is called "concurrent power " to execute powers which were delegated to the National Government, until Congress has passed a statute controlling the matter.

There is no such thing as an inherent right in Congress to exercise any power not specified in the seventeen subdivisions of Article 1, Section 8.2 When a power is implied by the courts it must be implied as necessary and proper for carrying into execution an express power granted. "The powers affecting the internal affairs of the states not granted to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States."3 So all

1 Bowman v. Chicago Ry. Co., 125 U. S., 215, 507; Cooley's Constitutional Lim., pp. 215, 723.

2 Kansas v. Colorado, 206 U. S., 89.

3 Kansas v. Colorado, 206 U. S., 90.

powers not affecting the internal affairs of the states, and at the same time being national in their nature, but not delegated by the people to the National Government, are reserved to the people of the United States and they, if they desire, can confer them, by an amendment to the Constitution, upon the United States.1

Turning now to the executive power in Article 2, Section 1, and to the judicial power, Article 3, Section 1, we find that neither executive power nor judicial power are limited to powers "herein granted." Section 1 of Article 2 provides that "The executive power shall be vested in a President of the United States of America." Section 1 of Article 3 provides that "The judicial power of the United States shall be vested in one Supreme Court." So that notwithstanding each of these general grants of power are followed by an enumeration of special powers granted,

the general grant of power we are told to our surprise by the United States Supreme Court is not limited by the enumeration.2

The first eight amendments to the Constitution enumerate popular rights, the origin of which can be traced to some event or series of events in English history where the right was won as the result of years of struggle. The Constitution of the United States creates none of these rights. Every one of these enumerated safeguards exist under the common law or in the Constitution of each state, and the only result of their incorporation by amendment in the Constitution of the

1 Kansas v. Colorado, 206 U. S., 90. 2 Kansas v. Colorado, 206 U. S., 82.

United States is as a restraint upon the action of the United States Government.1

Next it is important to observe that the ninth and tenth amendments to the Constitution preserve to the states all powers not delegated to the United States by the Constitution, nor prohibited by it to the states, and that the enumeration of certain rights delegated to the National Government shall not be construed to deny or disparage others retained by the people. These amendments, say the United States Supreme Court in a recent case, were "adopted with prescience " under "fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted."2 This august court long ago declared "that the maintenance of the state governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible states." 3

The thirteenth amendment, besides abolishing forever slavery and involuntary servitude, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to such slavery or involuntary servitude, except as punishment for crime.

1 Presser v. Illinois, 116 U. S., 252; Maxwell v. Dow, 176 U. S., 581, Barrington v. Missouri, 205 U. S., 483.

2 Kansas v. Colorado, 206 U. S., 90.

3 Texas v. White, 7 Wallace, 725; South Carolina v. United States, 199 U. S., 453.

The object of the fourteenth amendment to the Constitution was to secure the negroes from discrimination on the part of the state governments. Before its adoption a Civil Rights Act had been passed seeking to secure that end, but had been declared unconstitutional. The fourteenth amendment was then framed, passed by a two–thirds majority through both Houses of Congress, and approved by three fourths of the States. It recognized, if it did not create, a national citizenship as contra–distinguished from that of the States. It provided that no state should make or enforce any law which should abridge the privileges and immunities of citizens of the United States; and it was contended later with great vigor that these words referred to the first eight amendments of the Constitution, and thus secured to the citizens of every state in the Union all of the privileges and immunities set forth in detail in those amendments.

If this claim had been sustained it would have made the United States Supreme Court a guardian of the personal rights of the citizen of every state. The citizen's rights would have been measured, not by the guarantees of personal liberty assured by his own state constitution, but by the National Government's standard as set forth in the first eight amendments; and the United States Supreme Court would have been called upon in thousands of cases to enforce upon the states the observance of these amendments. This contention, however, was not sustained.1 The construction put by the

1 The Slaughter House Cases, 16 Wallace, 36; Minor v. Happersett, 21 Wallace, 162; Maxwell v. Dow, 176 U. S., 594; United States Supreme Court upon the words, "nor shall any State deprive any person of life, liberty, or property without due process of law," in the fourteenth amendment, is a narrow one, securing to the citizen of the state few rights. This provision has been construed to mean simply that liberty and property has not been taken without due process of law when it is taken in the course of the regular administration of the law in established state tribunals. If the regular administration of the law in the established tribunals of the states authorize a particular act, the United States Court will not interfere.1

The fifteenth amendment relates to the right of a citizen to vote. It does not confer the right of suffrage on anyone. It merely invests the authorities of the United States with the constitutional power of protecting citizens in their enjoyment of the elective franchise from discrimination on account of race, color, or previous condition of servitude.2

So the reader will see that although the United States Government, within the last four or five years, has held

the attention of the citizen because it promises to rectify great abuses, still his State Government controls him exclusively as to taxes, schools, trades, inheritance, marriage, divorce, courts, police, local boards, and in a hundred other different ways, and that the proper place to rectify evils is at home, where he

Dounce v. Bidwell, 182 U. S., 244, Cooley, Constitutional Lim., 4th ed., p 497, marg , p 387.

1 Ballard v. Hunter, 204 U S , 242.

2 United States v. Reese, 92 U. S., 214; United States v. Cruikshank, 92 U. S., 542.

sees and appreciates them and can apply a direct remedy.

The sources from which the men who framed the Constitution drew their plan and material has ever been a subject of interest. Mr. Gladstone spoke of the Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man." The trouble with this statement is that the Constitution was not struck off at a given time by the brain and purpose of man, but was the result of a progressive growth reaching back to the time of the Anglo–Saxon invasion of England. The Anglo–Saxons had developed in Germany the mark and the hundred and the tribe which present in detail the gradations of local independence and central authority. In England the mark became the town. The federation of Anglo–Saxon townships constituted the Anglo–Saxon kingdom or what later became the shire. The shire possessed a general assembly made up of all the freeholders together with the representative element comprising, like the hundred court, the head men and four chosen men from each town of the shire. The shire assembly elected its own chief magistrate, the earldorman, and its sheriff. The judicial executive exercised an authority over the general affairs of the whole shire quite similar to that exercised by our National Government over the several states. The Norman Conquest impaired these institutions, but their remembrance, and to some extent their existence, continued, and the Pilgrims brought them to this country.

The central government of each of the New Eng– land colonies was based partly upon the people and partly upon the towns as integral elements of the colony. The governor, deputy governor, and assistants, who constituted the upper House in the Colonial Assembly, were chosen in a general election by the whole body of freemen when not appointed by the Crown, while the deputies, who constituted the lower House, were chosen by an equal representation from the several towns. Each citizen was responsible to the central government of the colony and to the government of his own town. This form of government was taken into Connecticut by the emigrants from the Massachusetts Bay Colony, and in Connecticut we find the same disposition of general and special powers between the central government of the colonies and the governments of the constituent communities. This relationship was most instrumental in bringing about the peculiar form of our National Government, with its representation by states in the United States Senate and its representation of the people in the House of Representatives. The government of Rhode Island was the same as in Connecticut; and when each of these charter colonies at the time of the Revolution desired to change their form of government they did it by simply declaring that the people had ascended the throne of the deposed king, and this was all that was deemed necessary to change the charter of each into a constitution. Connecticut continued under her old charter as a constitution until 1818, and Rhode Island until 1842.

Our ancestors sought a new country, and they found not only a new country but a new condition of mind.

Here, face to face with Nature, they were taught to rely mainly on themselves, and manhood became a fact of prime importance. The neglect of England became their opportunity. Nowhere had local self–government reached so high a degree of efficiency as in New England. They believed it to be all important that people should manage their own affairs instead of having them managed by a strong central government. How different their attitude toward government than was that of their Canadian neighbors. The more the citizen obeys the inclination to rely on help from others, the community or the state, the less is his force of initiative developed, the less is he inclined to exert himself, not alone with the idea of making a living but of attaining the highest development. Never was there a more striking contrast than between the government of the people of New England and the French Canadians of Quebec.

Twelve years before the Pilgrims landed at Plymouth Quebec was founded, and this was only one year after the first permanent settlement in America at Jamestown in Virginia. The colony grew and developed under the benevolent government of Louis XIV. The omnipresent, inquisitorial nose of the French Intendant followed the peasant into every detail of his life. The price of wheat and the price of about every necessary of life were regulated by imperial edicts. The question of race suicide was ever one of great importance. Girls for the colonies

were taken from the houses of refuge in Paris and Lyons and sent by shiploads to Quebec. There they were provided husbands with little delay. All single men arriving in the country were obliged to marry within a fortnight after the landing of the prospective brides, and the Intendant Talon forbade them while unmarried to fish, hunt, or go into the woods with the Indians under any pretense whatever. Upon their marriage the governor general gave the newly married couple an ox, or a cow, or a pair of swine, or a pair of fowls, or a few crowns of money.1

Large families were greatly encouraged by the Government. The king, in council, passed a decree that all the heads of families who should have living children to the number of ten born in lawful wedlock should be paid a pension of 300 livres, and those who should have twelve children a pension of 400 livres.2 The king devoted 40,000 livres for the purpose of encouraging the art of shipbuilding, and the Intendant Talon built a ship to show the people how they were built, and to lead them to imitation. Louis XIV trusted the intendant to issue an ordinance having the force of a law whenever he thought necessary and, in the words of his commission, "to order everything as he shall see just and proper." 3 The in–tendants, under such directions, controlled public meetings, restrained the people from speaking their minds, regulated them in all the details of their life, destroyed individual initiative, and stunted and exhausted the energy of the people. The New Englander learned how to govern himself because he lived in a society in which each man worked as his own master, where he depended

1 The Old Regime, Parkman, 221, 226. 2 The Old Regime, Parkman, 227. 3 The Old Regime, Parkman, 275.

on his individual action for promotion, and where he controlled the government in which he lived. These little democracies of New England prided themselves in being sufficient unto themselves, and out of them came the liberties of the states and the greatness of our country.

Most of the provisions of the Constitution can be found in the first constitutions of the states.1 The provision for vesting the legislative power in two chambers finds its counterpart in the constitution of six different states. The term of service of the members of the Maryland Senate suggested the six years' term in the United States Senate; and the election of the Maryland senators was the model of the provision for electing the President through electors named by the legislatures of the different states. The provision for the impeachment of the President of the United States or of any official is almost identically the same as that existing in the Constitution of 1777 of the State of New York. The provision associating the Senate with the President in the exercise of the appointing power is very similar to a system pursued under the New York Constitution, which provided that the governor should make his appointments "by and with the consent of a select committee of the Senate." The provision requiring the consent of the President before an act of Congress could become a law and permitting him to veto the same is copied almost word for word from the Constitution of Massachusetts.

1 Am. Academy of Political and Social Science, pamphlet No. 9.

In every one of the states, with the exception of New York and North Carolina, the upper House was denied the right of originating money bills, and in Maryland, Virginia, South Carolina, and New Jersey the Senate was denied the right of even amending such bills. The qualification for senators in ten states which had bicameral legislatures was on a distinct basis of taxable property, and a higher qualification was required for electors and members of the Senate in several of the states. Gouverneur Morris and other members of the Constitutional Convention contended that the United States Senate should be regarded as representative of property; while the House of Representatives, immediately elected by the people, should be regarded as representative of the people. From one third to one half of the members of the Federal Convention had been members of the conventions which had framed the several state constitutions. It certainly is not a violent presumption when we find provisions in the state constitutions similar to those in the National Constitution, to assume that the model was found in the state provision.

George Mason, in the Virginia Convention, in discussing the proposed Constitution, said: "Now suppose oppression should arise under this government, and any writer should dare to stand forth and expose to the community at large the abuses of those powers, could not Congress, under the idea of providing for the general welfare and under their own construction, say that this was destroying the general peace, encouraging sedition, and poisoning the minds of the people? And could they not, in order to provide against this, lay a dangerous restriction on the press? Might they not thus destroy the trial by jury?" Just what Mr. Mason apprehended actually occurred. Hardly had Washington left the Presidency when, in July, 1798, a statute was passed by Congress

making it a crime to write, print, utter, or publish or cause to be written, printed, uttered, or published, or to knowingly assist in publishing any false, scandalous, and malicious writing against the Government of the United States with intent to defame the said Government, or either House of the said Congress, or the President, or to bring them into contempt.1 The statute made this an offense, subject to prosecution in the national courts, which, under the reserved powers of the states, could be cognizable only in the state courts. Matthew Lyon, of Vermont, was convicted under this statute and sentenced to four months' imprisonment in jail, and a fine of $1,000, because he declared that the President's Mes–

1 It is interesting to observe that a statute almost identical with the sedition law was passed a few years ago in the Philippines. The statute reads:

"Every person who shall utter seditious words or speeches, write, publish, or circulate scurrilous libels against the Government of the United States or the insular government of the Philippine Islands, or who shall print, write, publish, utter, or make any statement or speech or do any act which may tend to disturb or obstruct any lawful officer in executing his office, or which may tend to instigate others to cabal or meet together for unlawful purposes, or which suggest or incite rebellious conspiracies or riots, or which tend to stir up the people against the lawful authorities or to disturb the peace of the community, the safety and order of the government, or who shall knowingly conceal such evil practices, shall be punished by a fine not exceeding $2,000 or by imprisonment not exceeding two years, or both, at the discretion of the courts."

sage to Congress "was a bullying speech which the Senate in a stupid answer had echoed with more servility than ever George III experienced from either House of Parliament."

At the same time a statute was passed, called the Alien Law, which declared "that it shall be lawful for the President to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable ground to suspect are concerned in any treasonable or secret machinations against the government, to depart," etc. The President, by this statute, was made judge of what was dangerous to the peace and safety of the United States. He was permitted to determine what was a reasonable ground to suspect a man of secret machinations and, having determined as judge this judicial question, he was permitted to send the man out of the country. Thomas Jefferson, writing to Abigail Adams, wife of John Adams, years after these acts were passed, said of these alien and sedition laws that he considered them "unconstitutional, and a nullity as absolute and palpable as if Congress had ordered us to fall down and worship a graven image." The result of these acts was that the old Federal Party was swept out of power, and for forty years Jefferson and his successors in the Presidency carried on the government.

The generation that framed the Constitution looked upon the document as most imperfect, but they adopted it after a most bitter experience under the Confederation. Having adopted it, like good Americans, they set out to make the Constitution popular, and they praised it far beyond its merits. The result was so complete a can onization of our Constitution as to form an obstacle to its amendment. The men who framed it were men of the greatest constructive statesmanship which our country has ever produced, and the Constitution which they prepared was indeed a blessing to the people during the eighteenth century, perhaps well along into the nineteenth century.

In those days the people were much more jealous of power than now, and more vigilant in examining the actions of their public servants. George Mason, in giving his reasons for not signing the Constitution, said:

"This government will commence in a moderate aristocracy. It is at present impossible to see whether it will, in its operation, produce a monarchy or a corrupt, oppressive aristocracy. It will probably vibrate some years between the two and then terminate in the one or the other." It will never terminate in a monarchy in name. The forms of a democratic government charm the people long after the spirit of democracy has fled. Politicians are wise enough to appreciate this fact, and to continue with scrupulous care the form of a democracy. If the people can be aroused to change the conditions of amendment so that the change in our civil life will be accompanied by changes in our fundamental law, the republic will live on in fact as well as in form for a long period of time. But if our original Constitution is left unamended, if the limitations which it imposes upon popular government are continued to hide the corruption which exists, and the party in power continues irresponsible to the popular will, the days of real liberty to the people are numbered. If consolidation, centralization, and usurpation in the National Government continue, long before we reach the point where Washington rules the United States, as Paris rules France, the spirit of liberty will have ceased.

We will now see to what extent the Constitution has changed with time, to what extent it has bent to the force of circumstances, to what extent the Executive and Congress and the courts have set it aside to meet the supposed necessities of great crises.

II

USURPATION IN THE CIVIL WAR AND RECONSTRUCTION PERIOD "When dangers thicken, the only device may be the Roman one of a temporary dictatorship. Something like this happened in the War of Secession, for the powers then conferred upon President Lincoln, or exercised without Congressional censure by him, were almost as much in excess of those enjoyed under the ordinary law as the authority of a Roman dictator exceeded that of a Roman consul."

JAMES BRYCE.

"In the plenitude of their powers as absolute rulers the generals" (of the reconstruction period) "were above the constituent assemblies of the inchoate new states as distinctly as they were above the governmental organs of the expiring old states."

PROFESSOR DUNNING.

Those pitiless years of reconstruction! worse than the calamities of war were the 'desolating furies of peace.'"

BISHOP GALLOWAY.

CHAPTER II. USURPATION IN THE CIVIL WAR AND RECONSTRUCTION PERIOD

THERE is, in the mind of the younger generation which has come up since the war, a tradition of an attack on the Union by men who believed in state rights. By reason thereof state rights, in their mind, has a bad name. The usurpation of power by the Government in our day is occurring in times of peace and so secretly and so all–pervasively that men have become accustomed to it, and are not moved as they were by such violent wrestings of liberty from large bodies of people as occurred in many states during Reconstruction days. The period of the Civil War and Reconstruction, better than any other in our history, shows these violent usurpations of power. During the war, necessity took the place of the Constitution, and we see the written guarantees of liberty grow dim in the smoke of battle. During the Reconstruction period, however, with no necessity to justify their action. Congress established a despotism in nearly every one of the Southern States, which, when well known and fully understood by the younger generation of to–day, will be condemned by them for its cruel injustice.

There is no statute of limitations in the law of cause and effect, and the usurpations of the war and Recon–struction days are the fundamental causes of the existing conditions to–day. Not only the clear, unquestioned acts of usurpation of that period deserve examination, but the origin of the great centralizing forces coming out of protective tariffs and national banks and a paper currency and other legacies of like kind from the Civil War are worthy of the reader's attention. It is not a pleasant duty to recite the acts that make the darkest picture in all American history, and nothing short of averting usurpation on the part of our National Government to–day can justify such a recital.

Early in the Civil War President Lincoln by proclamation authorized General Scott to suspend the writ of habeas corpus at any point on the military line between Philadelphia and Washington. The portion of the country covered by the proclamation was not in insurrection, and the publishing of the proclamation left hundreds of thousands of people in a region where there was no war without any protection from this writ. There was much doubt as to whether the President, under the circumstances, had a right to suspend its operation. Story and other writers upon the Constitution had maintained that Congress alone had the right to suspend the writ and the United States Supreme Court had indicated its opinion to that effect.1 In 1807, when an act was proposed suspending the writ in connection with the Burr conspiracy, there was no intimation in Congress or the country that the power was in the President.2

1 Bollman v. Swartout, 4 Cranch, 75. 2 Dunning, Essays on the Civil War and Reconstruction, p. 41.

Without warrant and without any sworn statement, but merely upon an order of the Secretary of State or the Secretary of War, hundreds of men were arrested for the expression of words construed as tending to inflame party spirit or as sympathetic with the Southern cause, and hurried away to Forts Lafayette, Warren, McHenry, Delaware, Mifflin, Old Capitol Prison, penitentiaries and military camps in the different parts of the country. So many arrests were being made that an attempt was made to test the validity of the President's action. In 1861 one John Merryman was held in detention at Fort McHenry by General George Cadwalader, under one of these orders of Secretary Seward, on a charge of treason. An application was made to Judge Taney, Chief Justice of the United States Supreme Court, for a writ of habeas corpus requiring the production of the prisoner before the judge on the ground that he was wrongfully detained. Chief Justice Taney signed the writ commanding General Cadwalader to produce Merryman before him and show cause for his detention. When the marshal of the United States Court presented the writ to General Cadwalader at the fort, Cadwalader refused to obey it, and when Taney issued a body attachment against him the general shut the marshal out of the fort. Thereupon the chief justice wrote an opinion as to the law, which was sent to the President, holding that the prisoner was entitled to his liberty and should be discharged and that Congress alone had the right to suspend the writ of habeas corpus. Lincoln ignored this, but later, in a message to Congress, asserted his right to suspend the writ of habeas corpus without limitation or interference.

On September 24, 1862, the President issued a proclamation ordering that all persons discouraging voluntary enlistments, resisting military drafts, guilty of any disloyal practices, or of offering aid and comfort to the rebels, should be subject to martial law and liable to trial by a military commission, and that the writ of habeas corpus

should be suspended in respect to all such persons arrested or held by military authority. It is to be observed that this last order of the President applied to all parts of the North where there was no insurrection, yet it caused the arrest of men without warrant, detained them without a hearing, and convicted them of treason and murder by a court–martial without a jury and without observing a single one of the guarantees in the Bill of Rights of the Constitution.

The writ of habeas corpus was secured to English people by the Great Charter which, Mr. Hallam tells us, was sent to all the sheriffs of England, was kept posted in each cathedral and church, and publicly read twice a year, accompanied by solemn sentences of excommunication against all who should infringe it, and provided that "any judgments contrary to these provisions should be invalid and 'holden for naught.'" This charter, made sacred by these sanctions and handed down for five hundred years by the English people, was deliberately disregarded. Thousands of men, without any evidence whatever of treasonable words on their part, were dragged from their homes to the different fortresses of the government upon a mere telegram from Washington to a United States marshal or even a police officer of a state. The newsboys of the street were arrested for the offense of selling newspapers which some military commander disapproved. Old men of seventy were dragged from their beds at midnight and hurried to prison by squads of soldiers. Many loyal men of the North were shocked by these brutal arrests, and all classes of men rose up in protest against such usurpation of power.1 Even John Sherman wrote to his brother of "a wanton and unnecessary use of power to arrest without trial."

There lies before me as I write, a book under the title of "The American Bastile," written by one John A. Marshall, bearing date of August, 1869, in which he describes the circumstances of the arrest of seventy citizens imprisoned in these fortresses from all of the Northern States except New Hampshire, Rhode Island, and Wisconsin. Among them were foreign ministers, United States senators, members of Congress, members of state legislatures, judges, lawyers, ministers, doctors, farmers, editors, merchants, and men from all the other walks of life. The details connected with the arrests of these men, as described by him, are as terrible as those accompanying the state arrests in Russia today, and one draws back from his vivid descriptions with doubt lest perhaps Mr. Marshall's experiences caused him to exaggerate the conditions.

But we are not dependent upon his statements for the facts. A few years ago the United States Government published the records of these different fortresses showing these arrests and the names of many of the prisoners, the time when they were brought to the place of 1 Peck, Twenty Years of the Republic, p. 114.

imprisonment, the records made by the keepers of the fortresses, and the correspondence between the relatives and Secretary Seward.1 These records, by the Government's own statement, show that hundreds of simple–minded men living in country villages in different parts of the United States had unwittingly spoken a word now and then which political adversaries had construed as evidence of treasonable intent. Information was given to the War Department or to the Department of State, and the matter was laid before some United States marshal or police officer, for all police officers of any state or town or district were authorized to arrest and imprison. These published prison records have a most suspicious appearance. Descriptions are given of many of the men, but not their names. Even their residence in many cases is not disclosed. Nothing is said of the nature of their offenses. There, far away from their homes, they were imprisoned by the government for months, until the influence of their Congressman or of other powerful friends secured their release. The practices of Russia to–day of casting men into solitary dungeons and keeping them for months without trial, and of finally trying them at night by drumhead court–martials and condemning them without any of the safeguards of English law, is merely a repetition in almost every feature of the action of our National Government toward its citizens in the Civil War.

Such a storm of indignation arose from the people in every part of the North at these arrests that on 1 War of Rebellion House Documents, vol. lxvii.

March 3, 1863, Congress authorized the President during the Rebellion to suspend the privileges of the writ of habeas corpus in any case throughout the United States or any part thereof. This authorization provided for the discharge of any person held in duress, upon the failure of the Federal Jury sitting in the district where the imprisonment occurred to indict at its next session after the arrest. To secure action on the part of the grand juries and give them opportunity to investigate the cases, it was provided that the officials having charge of the prisoners should present lists to the court in each judicial district of the United States. In case of failure to indict them it was provided that they be released. But few indictments were ever obtained, the arrests proving unwarrantable in nearly all of the cases.

In connection with the act of March 3, 1863, an act of indemnity making the prior illegal acts of the President legal, and relieving him from all liability, was passed by Congress. It also provided that for every arrest caused by him in the future he should be free from legal liability. The military commissions with authority to try the people arrested were continued. The same act provided that in case an action was brought in any state court against an officer acting under an order of the President or his secretaries, to recover damages for an arrest or false imprisonment, the officer thus sued should have the right to apply to the United States Circuit Court in the same district in which the action was brought, and said court, by an order or writ, could remove the case to the United States Circuit Court to be tried there as if origi– nally commenced therein. The United States Supreme Court, however, declared this law unconstitutional.1

On September 15, 1863, Mr. Lincoln proclaimed a general suspension of the writ of habeas corpus, limiting it to persons held as prisoners of war, spies, or aiders or abettors of the enemy. The words "aiders or abettors " were defined by him as follows: "He is to be an enemy who seeks to exalt the motives, character, and capacity of armed traitors; to magnify their resources, etc. He who overrates the success of our adversaries or underrates our own, and he who seeks false causes of complaint against our government, or inflames party spirit among ourselves and gives to the enemy that moral support which is more valuable to them than regiments of soldiers or millions of dollars." United States deputy marshals and police officers continued to determine on their own judgment whether the citizens overrated the successes of the South or underrated the successes of the North. They continued to determine the "false causes of complaint" against the officers of our government, and hundreds more men were hurried to prison.

Finally, after the war had ended, and thousands of people had been arrested who lived far removed from the seat of war, the following case reached the United States Supreme Court, which determined that the Government had no right to arrest men in the North without warrant and to try them before military commissions. On August 13, 1864, Lambdin P. Milligan, a lawyer 1 The Justices v. Murray, 76 U. S., 274.

residing at Huntington, Indiana, delivered a political speech at a large meeting at Fort Wayne, Indiana. The speech criticised the National Government, and particularly Governor Morton of Indiana, who at that time was a candidate for reflection. On October 5, 1864, Milligan was arrested and taken to Indianapolis before Brevet Major General Hovey, military commandant of the district of Indiana. On the 21st of that month he was placed on trial before a military commission, being charged with conspiracy against the Government of the United States, offering aid and comfort to rebels, and of disloyal practices. He was found guilty and sentenced to death. He contended that the military commission had no authority to try him or condemn him, and thereafter petitioned a United States Court judge for a writ of habeas corpus. Upon denial, an appeal was taken to the Circuit Court, which, being divided upon the question of his right to the writ, certified the matter to the United States Supreme Court.

In December, 1866, the highest court of the nation, for the first time, had an opportunity of determining the right of the United States Government to make these arrests and try the persons arrested under military commissions in portions of the United States removed from the seat of war. Justice David Davis wrote the opinion on behalf of the court, holding that the military commission had no jurisdiction to convict Milligan, and said:

"It follows from what has been said on this subject that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, it is necessary to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws again have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a great usurpation of power. Martial rule can never exist where the courts we open, and in the proper and unobstructed exercise of their jurisdiction, it is also confined to the locality of actual war." 1

There was talk among the radical men of impeaching the judges, and John A. Bingham, a member of the House of Representatives, and a bitter partisan, said:

"Let us sweep away at once every appellate jurisdiction in all cases, if the court by virtue of its original jurisdiction usurps the power to decide political cases and defy a free people's will." Thaddeus Stevens, referring to the same case, said in the House of Representatives, "That decision, although in terms and purposes not as infamous as the Dred Scott decision, is yet far more dangerous in its operation upon the lives and liberties of the

loyal men of this country."

There is a story, one of the many attributed to Mr. Lincoln, in which he is reported to have said to his Secretary of the Treasury: "The South has violated the Constitution to break up the Union; I am ready to violate it to preserve the Union; and between you and me, 1 Ex parte Milligan, 4 Wallace, 2.

Chase, before we get through this Constitution is going to have a tough time."1 It is certain at least that he wrote to Mr. Hodges on April 8, 1864, "I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the Union. Right or wrong, I assumed this ground and now avow it."2 There is no evidence that Lincoln himself ever personally ordered any of these arrests. The lovable character of Mr. Lincoln, his reconstruction of some of the Southern States upon liberal and humane terms, his last words of mercy toward the South, his sweet and gentle life and noble purposes, will endear him forever to the American people, and we review these acts of his administration only for the purpose of showing the danger of such usurpations of power.

In August, 1861, Congress passed an act known as the Confiscation Act. This act directed the President to cause the seizure of all the property of whatever kind belonging to specified classes of persons, namely: officers of the rebel army and navy, officers of the civil administration of the Southern Confederacy and of its so–called Federal State judges, and persons owning property in a loyal state who should give aid and comfort to the Rebellion. The property so seized was to be proceeded against by action in rem in the United States courts, and the proceeds were to be used for the support of the army of the United States. Of this act. Professor

1 Bradford, The Lessons of Popular Government, vol. II, p. 390, note.

2 Bryce, The American Commonwealth, vol. i, p. 388, note.

Dunning says:1 "This act assumed the power in Congress to deprive several millions of persons of all their property, and this by simple legislative act. By the theory of our Constitution, such power must be granted by the organic law, or be inferable from some clearly granted power. There was no claim of an express grant. By implication, the power was held to be deducible from the clauses authorizing Congress 'to declare war,' 'to make rules concerning captures on land and water,' 'to provide for calling forth the militia to ... suppress insurrections,' and finally, 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.' On the other hand, the Constitution contains the following prohibitions: 'No bill of attainder shall be passed'; 'no person shall be ... deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation '; and finally, 'no attainder of treason shall work . . . forfeiture except during the life of the person attainted.' The exercise of authority under the grants enumerated involved of necessity the violation of these prohibitions. Respect for both at the same time was inconceivable."

Everyone acquainted with the Civil War who has carefully watched events since that time must have seen a gradually accelerated movement of the centralization of government commencing at that time. This was brought about by the government's issue of legal–tender notes, by the creation of our national banking system,

1 Dunning, Essays on the Civil War and Reconstruction, pp. 30, 31.

and especially by the protective tariff then instituted and since continued. Hamilton, in his masterly statement on the currency, said that bills of credit and paper emissions were expressly forbidden to the states by our present Constitution, and that the spirit of that prohibition extended to the National Government. Notwithstanding that it was the intent of the framers of the Constitution to prohibit the National Government, as well as the states, from making paper money legal tender, Congress, in 1862, declared such paper lawful money and a legal tender in payment of public and private debts, and authorized the issue of $150,000,000 in notes, our present greenbacks. Never before had a statute of the United States made anything but gold and silver coin a legal tender in payment of debts. The United States Supreme Court, at a later date, in a suit where these notes had been tendered and rejected in payment of a debt existing before the war, held that the act making them legal tender was unconstitutional; but afterwards, when the court was differently constituted, reversed its own decision. Without discussing further at the present time the constitutionality of this issue, all will acknowledge that the exercise of the power has made the government all powerful in banking and commercial affairs. When a government issues the money of the country and has the tempting power to increase the amount for use in aiding private bankers, such power makes the government almost omnipotent.

On February 5, 1791, the first national bank was established. At that time there were only three banks in the United States, and it was contended that it would secure the collection, transportation, and circulation of the

national revenue from one part of the country to another. This was thought to be a sufficient justification for its creation. It was proposed in the Constitutional Convention to insert a provision for the creation of such a corporation, but this was opposed by James Madison and many of the other members, and was defeated.1 When the question of the renewal of the bank charter came up in 1810, Henry Clay declared it as his opinion that the Constitution conferred no power upon Congress to charter a bank or to renew its charter. Clay well said, "Is it to be imagined that a power so vast would have been left by the wisdom of the Constitution to doubtful inference? ... If, then, you could establish a bank to collect and distribute revenue, it ought to be expressly restricted to the purposes of such collection and distribution."2

Now the original bank was permitted for the restricted purposes of the collection and distribution of the moneys of the United States Government, which at that time were collected at different points throughout the whole country. Because of the small number of banks, it was regarded as a necessary means of carrying on the fiscal powers of the government. When the national banking system was established during the war there were ample banking facilities throughout the country. The National Government, however, by passing an act imposing a tax of ten per cent upon the circulation of these state banks, actually destroyed them and sub–

1 4 Elliot's, Deb , pp 413, 474, 611; 5 Elliot's Deb , p. 440. 2 4 Elliot's Deb , p. 458.

stituted its vast banking system, now counting upward of fifteen thousand banks scattered in every city and village of the land.1 It is true that the United States Supreme Court, in the case of McCulloch v. Maryland, sustained the constitutionality of the act renewing in 1816 the charter of the bank of the United States. But the charter of this bank was renewed as the fiscal agent of the government at a time when there were comparatively few banks. The national banking system, however, was created, as we have said, to supplant the State banks, and did supplant them by taxing their circulation out of existence. The result of the national banking act was the creation of thousands of banks, not a single bank.

Senator Beveridge, of Indiana, in The Reader of March, 1907, says: "State rights denied the existence of this power, 'the power of the general government to create a national bank,' and it seemed that state rights had the best of the argument, contending that the national government has only the enumerated powers, and has no power except such as is expressly delegated to it by the Constitution." However this may be, the creation of thousands of banks scattered all over the land more than any other one cause has centralized power in the National Government. Once admit the authority to create corporations by the government, and the other authority to interfere with the internal affairs of the states through the power to regulate commerce, and it would seem to follow that Congress may enact a general law for the creation of as many corporations as promoters desire, may control railways and all means of 1 Veazie Bank v. Fenno, 8 Wallace, 533.

intercommunication and reduce the states to insignificance.

Under the cover of levying customs duties at seaports, Congress, by the war tariffs, took control of the whole manufacturing industry of the country. About every manufacturer in the whole land is now looking to Congress for the creation of prosperity by obstructing foreign commerce through high protective tariffs. Under the power to regulate commerce the government destroys foreign imports or cripples them to such an extent as will benefit the few thousands who manufacture the same kind of goods in our own country. This is done at the expense of tens of millions who buy them at enhanced prices, and it is the exercise of the most despotic power conceivable on the part of government. In this way the United States Government has come into close touch with these manufacturing interests all over the land, and is actually fixing the price of the necessaries of life for eighty millions of people. It exercises the power of determining the price of every shred of clothing which a man wears, of every piece of furniture in his home, of every piece of lumber, every nail, every piece of glass that enters into the construction of his house. Nobody would doubt that a law attempting to fix the prices at which the domestic manufacturer could sell his product would be unconstitutional, yet the Government indirectly, by means of its taxing power, and its regulation of foreign commerce, passes a law which enhances the price of the necessaries of life to everyone. This despotic power in government, more than anything else, has brought about corruption. It has turned the eyes of fifty thousand manufacturers to Washington for governmental privilege. It is simply a usurpation of power on the part of the government exercised for the benefit of the few at the expense of the remainder of its citizens.

President Lincoln stated that, in his opinion, it was impossible for a state to secede from the Union. He reaffirmed his statement in his first message to Congress, and in his Non–Intercourse Proclamation of August 16,

1861, declared, "Not the states but the inhabitants of the states were in insurrection against the United States." The theory which he maintained throughout the war and down until his death was that the state was indestructible either through its own act or through the act of the United States Government. During his lifetime he established a state government in Louisiana and one or two other of the Southern States, and he maintained until the day of his death that the states were in the Union and had never been out of the Union. In the last speech which he ever made, April n, 1865, four days before his death by assassination, he said: "I am much censured from some supposed agency in setting up and seeking to sustain the new state government of Louisiana. In this, I have done just so much as, and no more than, the public knows."

Never once in diplomatic correspondence or in proclamations or in any act of Congress during the war, did the Federal Government directly admit the existence of a state of war in the South. The carrying of mails and the performance of all governmental functions in the South continued during the war so far as the Government was able to carry them on. At the close of the war the United States courts commenced to sit in the circuits of the South and the United States Supreme Court commenced to hear appeals from the Southern States. Lincoln's view of the indissoluble character of the Union was sustained by the United States Supreme Court. Chief Justice Chase, speaking for the Court, said of the ordinances of secession: "They were utterly without operation in law. The obligations of the state, as a member of the Union and as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the state did not cease to be a state, nor her citizens to be citizens of the Union."1

President Johnson adopted the attitude of Lincoln toward the Southern States and tried to carry out the dead President's ideas. He established a state government in each of the Southern States. The thirteenth amendment to the Constitution was submitted to many of these states and was approved by them, so that it would seem that their legality was recognized by Congress. The temporary organization of the Southern States under the proclamations of Presidents Lincoln and Johnson were permitted to remain in force until the spring of 1867. The Republican Party in the House of Representatives, led by Thaddeus Stevens, openly admitted that they desired to reconstruct the Southern States so as to destroy the Democratic majorities which had existed there before the war. In the language of Mr. Stevens, they maintained that the Southern States were only "dead carcasses lying within the Union. . . . 1 Texas v. White, 74 U. S., 726 of opinion.

They have torn their constitutional states to atoms and built on their foundations fabrics of a totally different character. Dead men cannot raise themselves. Dead states cannot restore their own existence 'as it was.' Whose especial duty is it to do it? In whom does the Constitution place the power? "1 And he concluded that that power was in the Congress and that the Southern States might be treated as subject provinces and new states created therein.

Accordingly, Mr. Stevens, as leader of the House, with a rancor of hatred never exceeded, devised a law for the reconstruction of the Southern States as odious for tyranny and cruel injustice as was ever conceived by the perverse intelligence of man. On March 2, 1867, Congress passed, over the President's veto, a bill entitled "An Act to Provide for the More Efficient Government of the Rebel States." It was, however, an act for the more thorough military subjection of the Southern States and is known as The Reconstruction Act. This act recited that no legal state government or adequate protection of life and property existed in the states of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and it provided that these states should be divided into five military districts under the command of officers of the army, assigned thereto by the President. Each of these commanders was to have under his control troops enough to enforce his authority. They were endowed with unlimited power over all the people of each district, the will of the military commander tak–1 Cox, Three Decades of Federal Legislation, p. 367.

ing the place of the law. He could declare anything a crime which he chose to call so, and condemn and punish whomsoever he pleased. He was empowered to arrest the people of his department without warrant, accusation, or proof of probable cause. He could have them tried before local magistrates or before himself. He was empowered to remove all local magistrates if he desired. If, without his permission, a state court presumed to exercise legal jurisdiction over the trial of a person arrested he could break up the trial and punish the judge and the jurors.

In vetoing the bill, President Johnson said: "Such a power has not been wielded by any monarch in more than five hundred years. In all that time no people who speak the English language have borne such servitude." The

States of Mississippi and Georgia hastened to commence actions in the United States Supreme Court, asking the court to enjoin the President from the enforcement of this unconstitutional law which they declared would absolutely destroy the existence of their states, but the court held that it had no jurisdiction to enjoin the action of the President.1

The supplementary act of reconstruction of July 19, 1867, provided that the commanders of any district might remove any state, municipal, or other official and fill his place subject only to the disapproval of the general of the army; and it was made a duty of the commander "to remove from office all persons who are disloyal to the government of the United States or who

1 Mississippi v. Johnson, 4 Wallace, 475, Georgian. Stanton, 6 Wallace, 50.

use their influence in any manner to hinder, delay, prevent, or obstruct the due and proper administration of this act and the acts to which it is supplementary." The act provided that no commander should be bound by any opinion of any civil officer of the United States. General Schofield was assigned to the first district, which included Virginia; General Sickles to the second district of North and South Carolina; General Pope to the third district of Georgia, Alabama, and Florida; General Ord to the fourth district of Mississippi and Arkansas, and General Sheridan to the fifth district of Louisiana and Texas.

Now observe how some of these generals ruled their departments. General Sickles prohibited the manufacture of whisky in North Carolina, saying that the grain was needed for food, and he prohibited the hotel keepers from selling intoxicating liquor; he created a trustee of Newbern Academy, enacted stay laws in North and South Carolina, and abolished imprisonment for debt; suspended the sale of property upon execution for liabilities contracted before December 19, 1860, and suspended the foreclosure of mortgages for one year. In his mightiness he decreed that the wages of agricultural labor were liens upon the crops; created homestead exemptions for those having families dependent upon their labor; abolished distress for rent;

ordered that the currency of the United States be recognized as legal tender; decreed that absent debtors be exempted from attachment, and forbade bail in suits brought to recover ordinary contract debts. He prohibited discrimination in public conveyances between citizens because of color, and decreed that anyone injured by such discrimination had a right of action for damages. He acted as a reviewing court and set aside a decree of the South Carolina Court of Chancery providing that the portion of a fund raised to remount a Confederate cavalry force in 1865 remaining unused was to be returned to the contributors, and he judicially determined that the money belonged to the United States.

General Pope removed the mayor, the chief of police, and other municipal officers of Mobile, and filled their places with "efficient Union men"; decreed that the printing patronage in his department should be given only to the newspapers that did not oppose reconstruction; allowed Republican candidates for office in his department to act as election officials, charged with the supervision of the voting in which they had an interest, and authorized them to receive the votes of persons who were not registered in the precinct in which they offered their votes.

General Sheridan, at New Orleans, removed Governor Wells, of Louisiana, and appointed another man as governor in his place; decreed that colored men should be accepted as jurors; abolished the Louisiana Levee Board and assigned its duties to commissioners of his own appointing. He also abrogated an act of the Texas Legislature arranging the judicial districts in that state, upon the ground that the act, as he believed, had been passed for the purpose of legislating two Union judges out of office.

General Ord suspended proceedings looking to the sale of an estate on account of a deed of trust for money due for the purchase of negroes; commanded that illicit stills and their products be sold for the benefit of the poor on the ground that "poverty increased where whisky abounds"; suspended until the end of the year 1867 the judgment sale of lands under cultivation, crops, or agricultural implements, in actions arising before January 1, 1866; and caused the arrest and conviction by court−martial of W. H. McCardle, the editor of a Vicksburg newspaper, on the charge that he had published articles in his paper to incite the people to a breach of the peace and to impede reconstruction.1

McCardle procured a writ of habeas corpus from Judge Hill of the United States District Court. Upon the return thereof General Ord set forth that he held the prisoner by authority of the acts of Congress known as the Reconstruction Acts, and the court dismissed the writ. McCardle appealed from the decision to the Circuit and then to the Supreme Court of the United States, which denied a motion to dismiss his appeal and heard the case argued. The case, inasmuch as it involved the constitutionality of the Reconstruction Acts, was argued very fully

before the United States Supreme Court between the second and ninth days of March, 1868. Mr. Rhodes says:2 "The constitutionality of the Reconstruction Acts was involved, and as five out of the nine Supreme Court judges believed them unconstitutional (so an apparently well–founded report ran) the

1 Dunning, Essays on the Civil War and Reconstruction, pp. 162 — 72.

2 Rhodes, History of the United States, vol. vi, pp. 96, 97.

Republicans in Congress were much alarmed. The House passed a bill requiring– two thirds of the judges to concur before any law should be deemed invalid, but this was never brought to the Senate from its Judiciary Committee. Later, however, the two Houses agreed on an act passing the same over the President's veto (March 27, 1868) which, though general in its terms, took away from the Supreme Court its jurisdiction in the McCardle case and the appeal was therefore dismissed."1

This method of heading off appeals was a common one in Reconstruction days. About every important act passed in that period when it once reached the United States Supreme Court was declared unconstitutional. The Tenure of Office Act was another illustration of such methods, practically taking away from President Johnson his right of removal from office. He removed Stanton, Secretary of the War Department, putting General Thomas in his place. An altercation and arrest followed, and an effort was made by the attorney–general to raise the question of the constitutionality of this act by appeal, but the complaint of Secretary Stanton was withdrawn and the effort to test its constitutionality thus destroyed.

In 1789 the leading members of the House of Representatives discussed at great length the power of the President of the United States to remove a Secretary of the Department of Foreign Affairs from office without the consent of the Senate, and it was determined, by a vote of thirty–four to twenty, that the President had full 1 Ex parte McCardle, 6 Wallace, 634, 7 Wallace, 512.

power to remove without the concurrence of the Senate.1 The determination then made was followed until the administration of President Johnson, and then the Tenure of Office Act was passed for the purpose of depriving him of the right of removal. Since that time the right has been acknowledged and to–day is unquestioned.

The Reconstruction Act provided for the election of a constitutional convention, and the formation of a constitutional government in each of the Southern States, excluding the greater part of the white voters of those states from taking part in the formation of their government. Then Congress made their adoption of the fourteenth amendment to the Constitution a condition of its receiving as members the representatives of the states which had framed constitutions.

Congress, in April, 1866, passed what was known as the Civil Rights Act. On March 31, 1870, it passed what was known as the Enforcement Act; again on February 28, 1871, a third act amending the Enforcement Act; and on April 20, 1871, a fourth act amending the Enforcement Act. All of these laws were unconstitutional. The last amendment provided as follows: "If two or more persons in any state or territory conspire or go in disguise upon the highway or upon the premises of another for the purpose of depriving, either directly or indirectly, any persons or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from

1 Elliot's Deb., pp. 350–404.

giving or securing to all persons within such state or territory the equal protection of the laws; he or they are guilty of a misdemeanor and, upon conviction, liable to a fine of not less than $500 or greater than $5,000, and imprisonment for not less than six months nor more than six years, or both said fine and imprisonment."

This law was known as the Ku Klux Law, and it sought to give to the National Government the power to execute the criminal laws in each of the states, especially in each of the Southern States where it was alleged that the Ku Klux were committing depredations upon the property and taking the lives of colored people. For eleven years this continued to be enforced. Finally, a case deciding their constitutionality reached the United States Supreme Court, and that court held that the law was not directed to the act of a state, but only against the acts of individuals gathering for the commission of crime, and that the fourteenth amendment to the Constitution did not apply to such a condition; that the law was directed merely against ordinary crime in the state, of which the state courts had exclusive jurisdiction, and that the law was unconstitutional and void.1

On March 1, 1875, General Grant approved a bill known as the Civil Rights Bill, the first bill mentioned above being unconstitutional. Its object was to secure to negroes equal rights in inns, public conveyances, and places of public amusement, and to prevent them from being deprived of the right of sitting on juries. Eight

1 United States v Harris, 106 U. S., 629, United States v. Cruikshank, 92 U. S., 542.

years later the United States Supreme Court declared the first and second sections of the act null and void, holding that so long as a state did not pass a law depriving the negro of these rights the Supreme Court could not interfere, since the prohibition of the fourteenth amendment was directed against a state which discriminated against a citizen for any reason, and deprived him of the civil rights which other citizens enjoyed; and that, under the fourteenth amendment, Congress had no authority to attempt to regulate the rights of the citizens of the states, thus leaving the whole question of the social rights of a citizen where it had ever belonged — to the state governments.1

The constitutions in many of the states, reorganized by carpetbag politicians, contained many provisions intended to prevent the Southern leaders, who had had connection with the war, from even earning their livelihood. In the Constitution of Missouri there was a provision to the effect that every person who had aided and sympathized with the South was incapable of holding any office of honor or profit or trust in the state. No such person could be an officer, trustee, or manager of any public or private corporation, he could not act as a professor or teacher in any educational institution or in any common school, nor could he hold any real estate or other property in trust for any church, religious society, or congregation. An oath of loyalty was required as a condition precedent to his exercising the calling of a bishop, priest, deacon, clergyman, or lawyer, such oath being that he had never directly or indirectly done Civil Rights Cases, 109 U. S., 1.

any of the acts of disqualification against which the amendment was leveled.

Sixty days after this Constitution took effect no person was to be allowed, without first taking this oath, to practice as attorney at law, or to act as priest, deacon, minister, clergyman, etc., of any religious persuasion. If he continued without taking such oath after the sixty days he was liable, on conviction thereof, to be punished by a fine of not less than $500, or imprisonment of not less than six months in the county jail, or both, at the discretion of the court. The Rev. Mr. Cummings, a priest of the Catholic Church and a citizen of Missouri, was indicted and convicted in the Circuit Court of Pike County for continuing his work as priest without taking such oath. He was sentenced to pay a fine of $500 and to be committed to jail until the fine and the costs were paid. On appeal from this decision to the United States Supreme Court, the question was presented whether this act was not in fact a bill of attainder, and whether it was not obnoxious to that clause of the Constitution of the United States which prohibited a state from passing such bill of attainder or ex post facto law. That court held the law ex post facto in its nature and reversed the decision of the state court.1

The Constitution provides that the times, places, and manner of holding the elections for senators and representatives shall be prescribed in each state by the legislature thereof, but that Congress at any time may

1 Cmnmings v. State of Missouri, 4 Wallace, 277; ex parte Garland, 4 Wallace, 333.

alter such regulations, except as to places of choosing the senators. No clause in the Constitution created so much opposition before the conventions of the adopting states. The conventions in North Carolina, South Carolina, Virginia, Massachusetts, Rhode Island, New Hampshire, and New York strongly remonstrated against it, but the people were assured that the National Government would never avail itself of the provision. For many years, however, after the Civil War and until well down in the eighties. Federal supervisors and marshals were empowered by a statute of Congress to supervise elections in every state where members of Congress were to be elected. They supervised the polls in New York and many other states where assemblymen, mayors, state and city judges were being elected. They often examined the ballots for these state officers, claiming that they were authorized to be present at the opening of all the boxes, those for state and local officials as well as those for Congressmen. By the provisions of the statute authorizing this provision the United States District Court could appoint two supervisors for each district, and the United States marshal could create as many deputies as he deemed necessary to aid him in enforcing the law. It is said that 15,000 supervisors and deputy marshals surrounded the polls at the general election of 1876, and many state officers were punished by the Federal courts for alleged violations of both the national statute and state laws at that election.

In the autumn of 1874 an election for members of the Legislature took place in the State of Louisiana.

On the face of the returns the Conservatives, or what were known as the white man's party, had a majority of five in a House of Representatives of one hundred and eleven members. The government of Louisiana had been so bad for many years under the control of the negro party that even the better class of negroes, becoming disgusted, deserted their party and voted for the white candidates. The Returning Board, controlled by Governor

Kellogg and Marshal Packard, found that fifty–three Republicans and only fifty–three of what were known as the Conservatives had been elected, and rendered no decision as to the other five seats. A committee appointed by the United States House of Representatives to examine as to the act of the Returning Board, and as to the honesty of the Conservatives, whose members had been rejected because of alleged intimidation and fraud, consisting of Charles Foster, afterwards Secretary of the Treasury, William Walter Phelps, and Clarkson N. Potter, visited New Orleans and made their report to the effect that the action of the Returning Board was illegal, and that in substance the Conservative majority was procured by honest means. When, however, the Legislature came to assemble, General de Trobriand, of the army of the United States, entered the House of Representatives in uniform, his sword at his side and escorted by his staff. Furnished with an order by Governor Kellogg to clear the hall of all not returned as legal members by the Returning Board, he removed the five members by force, leaving the Republicans in control, who finally organized the House and proceeded to do business. The acts of Charles I and of Cromwell, in removing members from the House of Commons by violence, ever since have been landmarks in usurpation. This act of President Grant and of his general ought to stand side by side with these early acts of tyranny.

Property of considerable value was abandoned from time to time by citizens of the Southern States during the Civil War, and was taken possession of and sold by the National Government and the proceeds deposited in the United States Treasury. On December 8, 1863, the President, pursuant to the authority of Congress, made a proclamation offering pardon to citizens of the South who would take a prescribed oath and return to their allegiance to the National Government. As an inducement to bring about this result the President promised restoration of all their rights of property except as to slaves, and offered to return to the owners of abandoned property the proceeds thereof in the United States Treasury. Thousands of Southern men availed themselves of this proclamation, and after the war many claims for the proceeds of such abandoned property were filed in the Court of Claims. The fact that the claimant had taken the oath after the proclamation, had availed himself of the conditions of the proclamation, and had received the pardon of the President was regarded as sufficient to entitle him to prosecute his claim before the court without other proof of his loyalty. On July 12, 1870, Congress passed, as a rider to the Appropriation Bill, a law providing that no prior pardon of the President should be admissible in evidence on the part of any claimant in the Court of Claims in support of his claim for the proceeds of abandoned property, and that proof of his loyalty must be made irrespective of the effect of the proclamation of the President and his availing himself thereof; and that where the claim had been dismissed and the claimant took an appeal therefrom, that the Appellate Court, when it appeared that proof of loyalty depended alone upon such pardon, should affirm the judgment of the Court of Claims. This statute was declared unconstitutional as an infringement of the right of the President to grant such pardon and as destroying its effect.1

During all the period between 1789, when the first Congress under the Constitution convened, and 1863 the United States Supreme Court had declared only two statutes unconstitutional.2 It is true that in two other cases during that period the court had held that duties imposed upon it by the Congress were not judicial in their nature and that therefore they were under no obligations to perform them.3 In addition to the unconstitutional acts described in this chapter passed in the war and Reconstruction days, the United States Supreme Court declared four other acts of that period unconstitutional.4 Between the years 1863 and 1870 eleven

1 United States v. Klein, So U. S., 129–47.

2 Marbury v. Madison, 1 Cranch, 137 (1803); Dred Scott v. Sanford, 19 Howard, 393 (1857).

3 Heybum's Case, 2 Dall., 409 (1792), United States v. Ferreira, 13 Howard, 40.

4 Collector v. Day, 8 Wallace, 113; Hepburn v. Griswold, 8 Wallace, 603; United States v. Reese, 92 U. S., 214; James v. Bowman, 190 U. S., 127.

statutes were passed by Congress which were declared unconstitutional by the Supreme Court of the United States. During the same period the examination by the Supreme Court of several Congressional statutes was prevented by acts of Congress repealing the law allowing appeals to that court. So that during seventy–four years of the history of the country between 1789 and 1863 the United States Supreme Court declared two Congressional acts unconstitutional; while during the period from 1863 to 1870, a period of only seven years, eleven statutes were declared unconstitutional and many more would have been declared unconstitutional had the court ever had the opportunity to pass upon them. No facts could more strongly demonstrate that this era of the latter part of the Civil War and the Reconstruction Period was an era of usurpation than the decision of the highest court that so

many statutes passed in that period were void as usurping the rights of the several states.

The importance of the facts which we have given are found in their violence. We, perhaps, have no reason for fear in this country that our liberties will be violently wrested from us. The danger is that they will be secretly undermined and gradually destroyed. The usurping acts of the war were white compared with the cold calculating despotism of Reconstruction days. Mr. Rhodes quotes Bishop Galloway, of Mississippi, as saying in 1903:1 "Those pitiless years of reconstruction! Worse than the calamities of war were the 'desolating furies of peace.' No proud people ever suffered such 1 History of the United States, vol. vii, p. 141.

indignities or endured such humiliation and degradation."

After the Battle of the Boyne, for more than a century England kept the Irish Catholics reduced to the condition of helots, attempting to extirpate their religion, excluding them from Parliament, from municipal office, from legislatures, and from the jury box. The prevailing party of reconstruction sought to accomplish the same results, not because they feared the South as England feared Catholicism, but for the selfish and wicked purpose of political supremacy. Senator Howe, speaking in the United States Senate in those days in behalf of the reconstruction policy of his party, said:

"Do senators comprehend what consequences would result necessarily from restoring the functions of those states! It will add fifty eight members to the House of Representatives, more than one fourth of its present membership. It will add twenty two members to the Senate; more than one half of the present membership. The Constitution designed the legislature to be independent of the Executive. But what independence has that legislature in which the executive at his pleasure may pour so many votes!"1

When General Terry, in command of the department which included the State of Georgia, ousted twenty–four Democrats from the Legislature and by his own appointment filled their places by Republicans, at the same time restoring a number of negroes who had been expelled, Carl Schurz declared in the United States Senate that these acts of General Terry's were usurpations. 1 Cox, Three Decades of Federal Legislation, p. 352.

Senator Henry Wilson, of Massachusetts, replied:

"Law or no law, we want to keep this state government in power." In the House of Representatives Thaddeus Stevens, with a malignity as bitter as characterized the leaders of the French Revolution, and that unscrupulous demagogue, Benjamin F. Butler, fired their followers with hatred and fanaticism to enact these pitiless and unconstitutional laws.

War is never done. It leaves its baleful seed for generations. We are suffering to–day from these usurpations. The exercise of such powers accustomed our people to the sight of tyranny, and as a partial result of those deeds our Government is being transformed. Already the Constitution by construction has been stretched to cover a multitude of conditions never anticipated by its makers; and we are face to face with the problem whether ours is a government under a written constitution and the laws made pursuant thereto, or whether it is a government by ambitious and usurping men.

III

EXECUTIVE USURPATION "The only liberty that humanity can tolerate is the liberty that is under the law."

E. J. PHELPS.

"Reasonings from the excesses of liberty or the neglect of the people, in favor of arbitrary government, involve the tacit fallacy that perfect or at least superior wisdom and virtue will be found in such government."

HALLAM.

"It is necessary to create in the multitude, and through them to force upon the leading ambitious men, that rare and difficult sentiment which we may term a constitutional morality * * * a paramount reverence for the forms of the constitution, enforcing obedience to the authorities acting under and within those forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts."

GROTE.

"Despotism often promises to make amends for a thousand ills; it supports the right, it protects the oppressed, and it maintains public order. The nation is lulled by the temporary prosperity which accrues to it; until it is roused to a sense of its own misery."

DE TOCQUEVILLE.

CHAPTER III. EXECUTIVE USURPATION

PRESIDENT ROOSEVELT, in his message of December, 1906, in justification of his criticism of Federal judges, said: "It is the only practicable and available instrument in the hands of free people to keep such judges alive to the reasonable demands of those they serve." These words might be invoked as a justification of what may appear, in this and the next chapter, to be a severe criticism of his executive action, but it would seem that the only limitations upon criticism, even of one holding the exalted position of head of the nation, should be those which justice, impartiality, and honest motives necessarily impose.

Before discussing the acts of the President which exceed his authority, let us observe for a moment the vast power which he legitimately exercises. All of the power necessary to execute the laws is conferred upon the President. It is true that there is an enumeration of executive powers, but in view of a recent decision of the United States Supreme Court,1 upon the like scope of judicial power in the Constitution, we might well assume that the powers enumerated as executive powers are not exclusive of such other powers as are necessary 1 Kansas v. Colorado, 206 U. S., 83.

to the execution of the laws. Besides ambassadors and members connected with the diplomatic and consular service, the President now nominates, subject to confirmation by the Senate, about 8,000 officials. On June 30, 1905, there were upward of 300,000 positions in the executive civil service, excluding– those of the diplomatic and consular service. At that time about 100,000 of them were not subject to the rules requiring the appointments to be made from competitive examinations. Under the Federal Rate Bill the Interstate Commerce Commission, which is appointed by the President, is given power to establish the freight rates of the commerce of over 80,000,000 of people, on 220,–000 miles of railway. What greater power could an ambitious President wish than the appointment and control of a commission which fixes the rates of freight and of passenger traffic on every interstate railway in the United States?

Unless the other departments of government, whose office it is to check executive usurpation, are backed by an effective public opinion, the executive has always the means of setting them aside or compelling them to subservience. The courts will not interfere with the President or the other executive officers of the government in the execution of their ordinary official duties, even when those duties require an interpretation of the law.1

The men who framed the Constitution and the state delegates who adopted it were disgusted with the feeble–ness which had been shown under the Confederation,

1 Miller v. Raum, 135 U. S., 200; Oil Company v. Hitchcock, 190 U. S., 316.

and they went to the other extreme in making the President the most powerful ruler, as it has turned out, in the world to–day. They were undoubtedly influenced by the fact that everyone looked to George Washington as the first President, and they little foresaw the terrible power which would be centered in the President when the United States would consist of forty–six states, extending from the Atlantic to the Pacific and embracing 3,500,000 square miles of territory, besides many dependent colonies. "The President," says Mr. Bryce, "enjoys more authority, if less dignity, than a European king."1 "Within the sphere of national administration," says Mr. Fairlie,2 "his" (the President's) "effective personal authority is of more value than that of most constitutional monarchs of Europe or even of their prime ministers."

The French President is chosen for seven years by the national assembly, consisting of the Senate and Chamber of Deputies. He is given the power to execute the laws and the appointment of the officers of the government; but when the Ministry fails to receive the support of the Chamber he simply calls upon some member of the opposition to form a Ministry, and the Chamber of Deputies rules France through its ministers as the House of Commons rules England. Casimir–Perier resigned his office as President of the Republic of France within a few months after his election, saying that the President of the Republic exercised so little real power as to be entirely overbalanced by the omnipotence

1 American Commonwealth, p. 62. 2 National Administration of the United States, p. 41.

of the French Chamber of Deputies. The power of the President of the French Republic has been steadily declining, while the power of the Chamber of Deputies has been as steadily growing. The President is not

responsible for his official conduct, his acts being countersigned by one of his ministers. He usually does not even attend cabinet consultations in which the policies of government are discussed. Sir Henry Maine described the French President as follows: "The old kings of France reigned and governed. The constitutional king, according to M. Thiers, reigns but does not govern. The President of the United States governs but does not reign. It has been reserved for the President of the French Republic neither to reign nor to govern."1

The King of Italy appoints the ministers when the ministry ceases to have the confidence of the popular branch of the legislature. His sanction is necessary to the validity of a law passed by the legislature, but he never refuses that sanction. Even the treaties which he makes, especially treaties of commerce, require the assent of both chambers. No act of the legislature becomes valid unless countersigned by a minister, and in Italy, as in France, the popular branch of the legislature actually carries on the government, the king himself being subject in most respects to their control.

The German Emperor, aside from his position as king of Prussia, does not possess powers so extensive as the President of the United States. The laws enacted by the Bundesrath and the Reichstag are enforced in the several states of the empire by local officers, and 1 Popular Government, Lowell, p. 251.

the German Chancellor rather than the Emperor has general supervision over their enforcement. The direct appointments to office by the German Emperor and his Chancellor are thus fewer than those of our executive department. Aside from his direction of the army and navy and the charge of foreign affairs as Emperor of Germany, he acts as the delegate of the confederated government in about all other matters under the direction of the Bundesrath. He has no veto. The German Emperor appoints and dismisses his ministers and they are accountable to him, not to the legislative power, just as the members of the cabinet are accountable to the President. They are the ministers of the king as the cabinet are the ministers of the President, and not at all, as in England, France, and Italy, the ministers of the parliamentary majority.

In Switzerland, the President of the Swiss Confederation is little known to the people and his powers are very limited. The federal laws are carried out generally by the authority of each canton, and even the army is under the management of the cantons, the central government, however, making the regulations, appointing the superior officers, and having the command in the field.

Kings have ever been the bugaboo of our American people; but the President of the United States to–day, in the legitimate exercise of his authority, exercises a greater power than any constitutional sovereign on the face of the earth, his power in Europe being exceeded only by that of the czar or the sultan. All the bulwarks of liberty were reared not against the English Parlia– ment but against the English king. The same is true of all modern parliamentary governments. "Do not make me a king," said Cromwell, "for then my hands will be tied by all the laws which define the duties of that office, but make me director of the commonwealth and I can do what I please; no statute restraining and limiting the royal prerogative will then apply to me."

The President of the United States may approach the execution of his powerful office in the spirit of being a simple instrument of Providence, but if he is not endowed with the clearest head and most eminent common sense he will become so intoxicated by power as to imagine that he has become Providence itself. Inasmuch as all of his duties are not defined, and the exercise of those defined is discretionary, he can commit innumerable violations against the Constitution, and commit them in such a manner as to deprive the United States Supreme Court of all jurisdiction over the matter. There is no remedy but impeachment. For these reasons usurpations of power by the President are much more dangerous than by the Legislature. The command to the Roman dictator was to take care that the state received no harm; such indefinite commands and discretionary duties open endless avenues for the advancement of absolutism. But, say those who exalt the power of the President and contend that there is no danger to the people from his usurpations, he is restrained by the people, he is "the servant of eighty million sovereigns, whose soul–inspiring purpose is to serve his fellow–citizens."

Let us see if this fact is a safeguard against usur pation. Louis Napoleon was elected President of the French Republic in December, 1848, by a large majority. In 1850 a law was passed restricting the suffrage and disfranchising about 3,000,000 voters. This law, as I remember, was passed with his tacit consent, but the wily President wished to be emperor. In order to be emperor he must appear as the champion of popular rights, so in 1851 he called upon the Chamber to repeal the disfranchisement law of 1850, and to restore the franchise to the 3,000,000 voters. They refused. Within about a month the Coup d'Etat of December 2d took place, the chief statesmen and generals of France were arrested in their beds, dragged off to prison, and his usurpation was

approved by 8,000,000 electors. He was confirmed as emperor in November, 1852, by an overwhelming vote, and even so late as a few weeks before the Franco–German war his imperial rule was ratified by a large majority. During the whole of his reign the members of the Chamber of Deputies were elected by universal suffrage, and yet the rule of Louis Napoleon was a despotism.

"A bold President," says Mr. Bryce, "who knew himself to be supported by a majority in the country, might be tempted to override the law and deprive the minority of the protection which the law affords it."1 "The gloss of zeal for the public service," says Edward Livingston, "is always spread over acts of oppression, and the people are sometimes made to consider that as a brilliant exertion of energy in their favor which, when viewed in its true light, would be found a fatal blow to 1 Bryce, The American Commonwealth, vol. i, p. 64.

their rights. In no government is this effect so easily produced as in a free republic; party spirit, inseparable from its existence, aids the illusion, and a popular leader is allowed in many instances impunity, and sometimes rewarded with applause, for acts which would make a tyrant tremble on his throne."l The people who elect the President can make and unmake constitutions, and it is natural for a strenuous, ambitious President, when sustained by the people, to feel that he is endowed with powers beyond the constitution.

Article XXX of the Massachusetts Constitution of 1780 runs thus: "In the government of this commonwealth the legislative department shall never exercise the executive and judicial power, or either of them; the executive shall never exercise the legislative and judicial power, or either of them; the judicial shall never exercise the legislative and executive power, or either of them, to the end it may be a government of laws and not of men." The same principle of a separation of these three departments is emphatically asserted in the constitutions made during the Revolutionary War in Maryland, North Carolina, New Hampshire, Virginia, and Georgia. The first resolution concerning the Constitution of the United States passed by the Constitutional Convention stated:

"That a national government ought to be established, consisting of a supreme legislative, executive, and judiciary." Six states voted for the resolution, Connecticut voting against it, and New York divided.2

Thomas Jefferson, in a letter to William C. Jarvis,

1 Bryce, The American Commonwealth, vol. i, p. 63, note. 2 Elliot's Deb., vol. v, p. 134.

written with reference to the stability of our Republic many years after he had retired to private life, said:

"If the three powers of our government maintain their mutual independence of each other it may last long, but not so if either can assume the authority of the other." Madison said: "If it be a fundamental principle of free government that the legislative, executive, and judiciary powers should be separately exercised, it is equally so that they be independently exercised."l Montesquieu wrote: "There is no liberty if the judiciary power be not separated from the legislative and executive powers." And Chief Justice Chase, speaking for the United States Supreme Court, says: "It is the intention of the Constitution that each of the great coordinate departments of the government, the legislative, the executive, and the judicial, shall be, in its sphere, independent of the others."2

In a speech made at Harrisburg on October 4, 1906, the President of the United States said: "In some cases this governmental action must be exercised by the several states individually. In yet others it has become increasingly evident that no efficient state action is possible, and that we need, through executive action, through legislation, and through judicial interpretation and construction of law, to increase the power of the Federal government. If we fail thus to increase it, we show our impotence." This statement is but a reiteration of similar statements made again and again by the President. He has made no secret of his desire to increase the powers

1 Elliot's Deb., vol. v, p 337.

2 United States v. Klein, 80 U. S., 129, 147 of opinion.

of the central government through "judicial interpretation and construction of law."

Mr. Elihu Root, as the Secretary of State, holds the department first in importance in the national government and the one in which the President of the United States has always taken greater part than any other. He also occupied the position of Secretary of War under President Roosevelt during his first term of office. He and the President are warm personal friends. Mr. Root has been regarded as the nearest to the President of any of the members of his cabinet. On December 12, 1906, Mr. Root, speaking in New York, after noting "the gradual passing of control" into the hands of the national government and summarizing "other projects tending more and more to obliteration of state lines," declared: "It may be that such control would better be exercised in particular instances by the government of the States, but the people will have the control they need either from the States or from the national government, and if the State fail to furnish it in due measure, sooner or later constructions of the

Constitution will be found to vest the power where it will be exercised — in the national government." Now what condition of affairs have we when the President expresses his opinion that we are impotent if we do not increase the power of the national government through executive action, through legislation, and "through judicial interpretation and construction of law," and the Secretary of State, presumably speaking for the administration which he represented, declares that if the states fail to furnish this power in due measure, "sooner or later constructions of the Constitution will be found to vest the power where it will be exercised — in the national government."

The President appoints the judges of the Supreme Court of the United States and of the District and Circuit courts. During his term of office as President he has appointed three of the nine Associate Justices of the Supreme Court, seventeen of the twenty–nine United States Circuit Court Judges, and forty–five of the eighty–two Judges of the United States District Court. Mr. Bryce says: "Yet even the Federal Judiciary is not secure from the attacks of the two other powers, if combined. For the legislature may by statute increase the number of Federal justices, increase it to any extent, since the Constitution leaves the number undetermined, and the President may appoint persons whom he knows to be actuated by a particular political bias, perhaps even prepared to decide specific questions in a particular sense."1 Professor Dicey, speaking of our Federal Judiciary, says: "Judges, further, must be appointed by some authority which is not judicial, and where decisions of a Court control the action of government there exists an irresistible temptation to appoint magistrates who agree (honestly, it may be) with the views of the executive."2 Daniel Webster, at the Whig Convention at Worcester, Mass., in 1832, speaking of Jackson and his attitude toward the United States Supreme Court, said: "The judicial power cannot stand for a long time against the executive power. The judges, it is true, hold their places by an independent tenure, but they are mor–

1 Bryce, The American Commonwealth, vol. i, p. 298. 2 Dicey, The Law of the Constitution, p. 174.

tal, and the vacancies will be filled by judges agreeing with the President in his constitutional opinions."

The President has taken a most solemn oath to "preserve, protect, and defend the Constitution," and having taken that oath he boldly declares that we need to increase the power of the government through "judicial interpretation and construction," and his Secretary of State tells us that it will be increased by such "constructions." A deliberate attempt on the part of the President or the Supreme Court to amend the Constitution by construction, when the Constitution distinctly provides the only legal method of amendment, is an attempt to take away the sovereignty of the people and to vest the power of amendment in a department of the government where it does not belong, and is nothing short of a flagrant usurpation of power.

Is there doubt that the President desires to accomplish this through the United States Supreme Court? If there is, the doubt can be. removed. The President, in 1906, said: "I cannot do better than base my theory of governmental action upon the words and deeds of one of Pennsylvania's greatest sons, Justice James Wilson. He developed, even before Marshall, the doctrine (absolutely essential, not merely to the efficiency, but to the existence of this nation) that an inherent power rested in the nation outside of the enumerated powers conferred upon it by the Constitution, in all cases where the object involved was beyond the power of the several states and was a power ordinarily exercised by sovereign nations. Certain judicial decisions have done just what Wilson feared: they have, as a matter of fact, left vacancies, left blanks between the limits of actual national jurisdiction over the control of the great business corporations. Many legislative actions and many judicial decisions, which I am confident time will show to have been erroneous and a damage to the country, would have been avoided if our legislators and jurists had approached the matter of enacting and construing the laws of the land in the spirit of your great Pennsylvanian, Justice Wilson — in the spirit of Marshall and of Washington. Such decisions put us at a great disadvantage in the battle for industrial order as against the present industrial chaos."1

The President here declares that in all cases where the object involved was beyond the power of the several states and was a power ordinarily exercised by a sovereign nation, the United States Supreme Court ought to hold that it is an inherent power vested in the nation, outside of the enumerated powers conferred upon it by the constitution. This Court has ever held that there was no such inherent power in the national government and their latest decision reiterates that holding.2 Notwithstanding this, the President, the head of a separate and distinct department of the government, of which the Judges of the United States Supreme Court should be absolutely independent, declares their holding to have been erroneous, and a damage to

1 Article written by Lucius H. Alexander, of Philadelphia, on James Wilson and the Wilson Doctrine. North

American Review of November 16, 1906, pp. 984, 985.

2 Kansas v. Colorado, 206 U. S., 89; New York R.R. Co. v. Bristol, 151 U. S , 556, Passenger Cases, 7 Howard, 470.

the country, and does not seem to see the impropriety of such a statement.

But the President has not stopped even there in his criticisms of the Federal Judges. In his annual message to Congress of December, 1906, speaking of a recent decision of a United States District Court judge, he said: "I have specifically in view a recent decision by a District Judge, leaving railway employees without a remedy for violations of a certain so–called labor statute. It seems an absurdity to permit a single district judge against what may be the judgment of an immense majority of his colleagues on the bench to declare a law solemnly enacted by the Congress to be unconstitutional." The Judge referred to was Judge Walter Evans, and the decision referred to was in the case of The Order of Railway Telegraphers against the Louisville &Nashville Railroad Company. Judge Evans decided in favor of the railroad on the ground that Section 10 of the Act of Congress of June 1, 1896, on which the suit was brought, was void. The President referring to this decision made the above remarks, in which he tells us that an "immense majority" of the colleagues of Judge Evans may not agree with him as to the decision in that case.

Now what is the natural effect of such criticism on the part of the President of the United States of District Court judges? Those judges are ambitious for advancement. The President is able to appoint them to vacancies occurring in the Circuit Court, or even to vacancies which may occur upon the United States Supreme Court. Those District Court judges are in close relation with his administration. He has appointed many of them to the position. Can there be any doubt that the criticisms of the President who can advance them, made in a message to Congress, read by all the people, and the fear of such criticisms on their own part, will affect their independence? The Representatives in Congress are, however, seeking to clothe the President with the dangerous power of removing Circuit and District Judges without formulating charges, without a hearing, and whenever in his judgment the public welfare will be promoted. In January, 1907, Mr. De Armond introduced such a bill in the House of Representatives.1 The President has invoked James Wilson as authority for his construction of the Constitution, yet

1 IN THE HOUSE OF REPRESENTATIVES. JANUARY 14, 1907.

Mr. DE ARMOND introduced the following bill, which was referred to the Committee on the Judiciary and ordered to be printed.

A BILL

To make additional provision for the retirement of judges.

1 Be it enacted by the Senate and House of Representatives of
2 the United States of America in Congress assembled. That
3 whenever, in his judgment, the public welfare will be pro–
4 moted by the retirement of any judge of the United States
5 the President shall, by and with the advice and consent of
6 the Senate, nominate and appoint a suitable person pos–
7 sessing the qualifications required by law to the office to
8 be vacated by such retirement, and thereupon and thereby
9 the incumbent shall be retired and the judge newly ap–
10 pointed shall enter upon the duties of and hold the office,
11 agreeably to the provisions and requirements of the law
12 and subject to be retired as herein or otherwise provided.
13 The reasons for retirements hereunder shall be stated in
14 making nominations.

James Wilson, in the Pennsylvania Convention for the adoption of the Constitution, said: "I believe that public happiness, personal liberty, and private property depend essentially upon the able and upright determinations of independent Judges." Chief Justice Marshall, in the Virginia Convention, in 1829, well said: "The judiciary department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not in the last degree important that he [a judge] should be rendered perfectly and completely independent, with nothing to control him but God and his own conscience? I have always thought, from my

earliest youth until now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."1 Will the independence of District judges continue if they are subject to attacks by the President who appoints them? Am I not justified in saying that the executive, in view of his appointive power, should never either by words of approval or disapproval make himself a reviewing power of their decisions?

The Star Chamber, created by the King and filled by judges who were his servile tools, developed such tyrannical abuses that the English people destroyed not only the Court but Charles I himself for such tyranny. Our people should demand the fundamental constitutional right for the federal judiciary to unquestioned independence, free from any interference from the ex–

1 Miller, The Constitution of the United States, p. 341, note 1.

ecutive either by influence in advance of a decision or by attack after a decision. If federal judges are not already affected by the opinions of the President, how long will they continue to resist such strenuous assaults upon their action? The consequences of such attacks on the Supreme Court of the United States by the President ought to be so plain as to alarm the dullest comprehension. The Emperor Tiberius, according to Tacitus, was in the habit of taking his seat in the law courts, and by his presence overawing them, thereby gradually destroying the freedom of the courts. His methods were not less calculated to influence the action of the judges than those of our President.

But it is not alone that the independence of a separate branch of the government is thus imperiled by the President's action; it is of the highest importance that the people believe that the United States Supreme Court decides its cases, if not always wisely, at least without being– influenced by another branch of the government. Should the members of that court be put under the embarrassment of having it appear that their action is influenced by the words of the President? "Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner that will beget no suspicion of the judge."1 And Lord Campbell declared "that tribunals should take care that not only in their decrees they are not influenced by overpowerful interests, but to avoid the appearance of laboring under such influence." 2 How can the judges of the

1 Oakley v. Aspinwall, 3 New York, 549.

2 Dimes v. Grand Junction Canal, 3 House of Lords Cases, 793.

Federal courts avoid the appearance of laboring under the influence of the overpowerful executive if he continues in his exhortations that the Executive and Congress possess inherent powers and that the Supreme Court should so decide? How can these courts retain their independence if, after they have made decisions, they are subject to animadversion in the annual messages of the President to Congress? Such conduct, I submit, tends clearly to impair the usefulness of the judiciary as an independent department of the government and merits condemnation.

It is not alone the courts which the President apparently has attempted to influence in their action, but he persistently seeks to control the action of the Senate and, to some extent, the House of Representatives. It is the intent of the Constitution that Congress, made up of the representatives of the people, shall be the judges of what laws are required by the public welfare. If the President brings power to bear upon Congress to affect legislation, even though the people wish the legislation, he is still encroaching upon the field of an independent department of government. During the last few years many measures have been enacted under stress of executive pressure which otherwise would have stood no chance of passage. In the South American countries, congresses and courts employ themselves in registering executive decrees. If present conditions continue the same condition will exist in our own country. People desiring legislation well know this, and again and again we read in the newspapers of applications being made by the great railroad interests of the country to the President, not to the Congress, to institute and affect legislation. The United States Senate has come to realize that no fight is thoroughly equipped unless the President is in it. He longs to take a hand in legislation. The newspapers for several years have been representing him with his "big stick " going after the United States Senate and House and compelling them to pass laws. In the passage of the Elkins Bill in the Senate; in the passage of the Rate Bill, and practically all the leading measures which have come before the two Houses of Congress, the President has had his innings and his party in the Senate and House have consulted with him and have carried out his instructions. The American people are coming to look upon the President as the real power behind legislation. When the Rate Bill was in the Senate of the United States, Senator Aldrich, of Rhode Island, and other Senators sought to amend it by providing for a

judicial review of the action of the Inter–state Commerce Commission, but the President's party opposed this action. James Wilson, whom President Roosevelt invokes as authority upon the Constitution, in his lectures upon Law in 1791 before the then College of Philadelphia, said: "The independence of each power (or Department of Government) consists in this, that its proceedings and the motives, views and purposes, which produce these proceedings should be free from the remotest influence, direct or indirect, of either of the other two powers." The practice, it is said, of wearing hats during the sessions of the House of Commons is an expression of the early feeling of the English Commons against an ap– pearance of servility; they would not uncover before Speaker or King.1

In 1783, when Fox brought in his famous bill for organizing the government of India, a great outcry against the bill arose. It was alleged that the object of the bill was the centralization of the immense patronage of India in the hands of a few old Whig families. George III, seeing the people aroused against the Ministry, asked Lord Temple to let the members of the House of Lords know that any peer who should vote in favor of the bill would be regarded as an enemy of the King. Four days later the House of Commons by a vote of 153 to 80 resolved that: "To report any opinion, or pretended opinion, of his Majesty upon any bill or other proceeding pending in either House of Parliament, with a view to influencing the votes of the members, is a high crime and misdemeanor, derogatory to the honor of the Crown, a breach of the fundamental principles of Parliament and subversive to the Constitution of this country."2 Now observe that this represented the spirit of English liberty one hundred and twenty–four years ago under George III, whose tyranny was the bugaboo of the makers of the Constitution, the most powerful King in England during the eighteenth century, and perhaps it would not be an exaggeration to say the most powerful King of England for the last two hundred years; yet George III, in all his power, was thus reprimanded.

1 MacMaster, History of the People of the United States, p. 105.

2 John Fiske, The Critical Period of American History, p. 43 To–day usurpation has become so common upon the part of the President that we think little of it, yet an interference by the Kaiser with the action of the Reichstag, even when it is done indirectly, creates widespread indignation. Before the opening of the sittings of the Reichstag, the court chaplain preaches a sermon in the chapel of the imperial palace before the members of the Reichstag and the German Emperor. Dr. Faber, who now occupies that position, in preaching the usual sermon before the recent opening of the chamber, said: "The Reichstag ought to consist entirely of loyal Deputies who are looking to and following the Kaiser with perfect faith, casting aside all doubt and all questionings. If we had such a Reichstag we could safely leave the control of our destinies to God and the Emperor." These words are said to have created almost a revolution in Berlin. The members of the Reichstag indignantly resented such teachings. But while Congress is in session, our newspapers each day give much space to describing how the President is guiding the Senate, championing the rights of the people, how the Senate is defiant, how the President insists upon the recognition of the people's rights, and the play goes on, and the American people seem oblivious to the portentous meaning of such usurpations of power.

Mr. Root assumed, in his speech before the Pennsylvania Society, that the people of the states are neglecting to perform their duties. He tells us that "the instinct of self–government among the people of the United States is too strong to permit them long to respect anyone's right to exercise a power which he fails to exercise,"

and "if the states fail to furnish it in due measure, sooner or later constructions of the Constitution will be found to vest the power where it will be exercised — in the national government." This assumption is without foundation. The states have long exercised their powers with much greater vigor than has the national government. Thirty of the states and territories of the Union had established commissions or passed laws to regulate the railroads, before Congress in 1887 passed the Inter–State Commerce Law, establishing the Inter–State Commerce Commission. Years of agitation were required before Congress passed the law allowing the creation of the Inter–State Commerce Commission, and then it was the Granger movement, from 1871 to 1887, in the Northwestern States, which finally brought about its passage.4 For many years past the regulation of railroads by State Railway Commissions has been frequently reviewed in the United States Supreme Court.2

The state governments are much better adapted than the national government for the enforcement of laws regulating railway rates. The legislatures of the several states have original power to pass all laws affecting state interests, with no limitations, except those imposed upon their action by their respective constitutions, while the United States government has only the powers delegated to it by the states. The Federal courts have no criminal

jurisdiction at common law, their criminal law

1 Lloyd, Wealth against Commonwealth, p. 371. 2 143 U. S., 344; 154 U. S.. 362, 397; 169 U. S . 546, 176 U. S., 174; 35 Federal Reporter, 866; 176 U. S., 167; 186 U. S.,
257, 264.

is technical, and there are great difficulties in those courts in enforcing the statutes punishing crimes. The difficulty with enforcing railway rate bills and regulations of commerce in state courts has been found in the fact that whenever an attempt was made the United States Courts interposed upon the plea that they affected Interstate Commerce. If the United States government would relinquish this right, the state courts could much more easily protect their people from the injustice of outrageous rates on the part of the railways.

That the states have exhibited diligence in attempting to control the rates of freight and passenger traffic during the last year is apparent from the very fact that, during the winter and spring of 1907, the heads of railways were going in rapid succession to Washington to see the President, and to invoke, as we are told by the newspapers, his aid for national rather than state control of railways. More than one captain of the railway industry has expressed the wish within the last year that the states might be prohibited from legislating even with reference to railways that lie wholly within their borders, but which are feeders of trunk lines. There is reason to believe that the President's activity and anxiety in the matter is to take over the whole control of the railways of the country to the national government upon the urgent request of the railroad managers.

Another evidence that the states are more progressive than the national government is found in the fact that amendments are frequently made to state constitutions, and that many of their constitutions provide for a Constitutional Convention at the end of each period of twenty years. The Constitution of the United States has been amended but twice since the first ten amendments in 1789 until the stormy reconstruction days; and the strange feature of the case to−day is that neither the President nor any of the men who are urging the courts to construe the Constitution in such a manner as to enlarge the powers of the national government, mention the conferring of such power upon the national government by such amendments. In short, the people have the power to amend the Constitution, but instead of procuring their action to that end the President and his advisers prefer to seek power by judicial construction.

Eight states, Ohio, Indiana, Illinois, Wisconsin, Nebraska, Pennsylvania, Missouri, and West Virginia, passed laws during the last winter fixing the passenger fare of their states, while the legislatures of New York and Virginia passed similar acts, and the governors of those states vetoed them. During the last two years the legislature of the state of New York passed laws ordering a life insurance investigation, the New Life Insurance Code, a law prohibiting corporations from contributing to campaign funds and expenditures, tlie Eighty−cent Gas Bill for New York City, the Elsberg Rapid Transit Bill, and the Public Utilities Bill. According to the report of Senator Thomas C. Platt of the United States Express Company to its stockholders in April, 1907, twelve of the twenty−six states in which the company was doing business in the year 1907 had passed statutes enlarging the powers of the railroad commissioners over the actions of his company. Insurance investigation along the lines of the Armstrong Committee Bills in New York has been passed or considered by the legislatures of at least two thirds of the states of the Union during the last year. The only railroad under national control, the Union Pacific, had its Credit Mobilier;

and the District of Columbia, controlled by a United States commission, has as corrupt government as can be found in the United States, with laws, says Congressman McCall, for the creation of corporations which "would make a Jerseyman blush." The State of New York and many of the other states of the Union have recently passed rigid laws requiring the publication of all election expenses, but Congress is unable to pass a similar bill governing national elections.

The state easily makes and unmakes its laws, and if it makes mistakes they can be soon corrected; while the national government, with all its checks and balances, its ponderous machinery, the liability of one department to represent one party and another department to represent another party, brings about changes only after years of delay. Ten years passed after the Presidential election of 1876 before Congress attempted to remedy the defects in the Constitution which made necessary the Electoral Commission. Our rigid currency system, based upon national bonds, and our half dozen or more different kinds of currency, have continued for fifty years, during all of which time students of finance have observed its inelastic condition, and the danger of the system in times of panic, when it is impossible to increase the amount of currency until the panic is over, and still Congress has allowed it

to continue with but slight changes. Even the Sherman Anti−Trust Law was not enforced against the Northern Securities Company, until the governors of the states through which the Great Northern and the Northern Pacific railways passed held a meeting to consider how to prevent the merger becoming effective, and passed a resolution asking for the enforcement of the law. And then the national government had to be reenforced in its action by the opinion of the Attorney−Generals of two states through which the roads passed, declaring the combination illegal.

The national government, we have seen, has failed in many respects to perform its functions under the Constitution. What would be thought if the states attempted to perform these neglected functions according to their standard of right and justice? The idea, supported by the President and others, that the national government should take over the affairs of the state governments is not only a violation of the Constitution of the United States, but it is absolutely impracticable. "No political dreamer," said John Marshall, "would ever be wild enough to think of breaking down the lines which separate the states and of compounding the American people into one common mass."1

James Wilson, upon whose teachings the President relies for his theory of inherent powers in the national government, in the debates on the adoption of the Constitution before the Pennsylvania Convention, said:

"To support, with vigor, a single government over the whole extent of the United States would demand a system of the most unqualified and the most unremitted 1 McCulloch v. the State of Maryland, 4 Wheaton, 316.

despotism."1 In the convention to frame the Constitution, he said: "The state governments ought to be preserved. The freedom of the people, and their internal good police, depend on their existence in full vigor."2 Hamilton, who more than any other delegate believed in a strong central government, said in the New York Convention while discussing its adoption:

"I insist that it never can be the interest or desire of the national legislature to destroy the state governments. It can derive no advantage from such an event;

but, on the contrary, would lose an indispensable support, a necessary aid in executing the laws, and conveying the influence of government to the doors of the people. The Union is dependent on the will of the state governments for its chief magistrate, and for its Senate. The blow aimed at the members must give a fatal wound to the head, and the destruction of the states must be at once a political suicide. Can the national government be guilty of this madness?"3

The United States Supreme Court is not only under a high obligation not to deprive the states of their reserved rights, but it has again and again declared that its obligation requires it to protect those rights as sacredly as it would protect the rights delegated by the states to the national government. Chief Justice Chase, speaking for the Court, said: "It may be not unreasonably said that the preservation of the states and the maintenance of their governments are as much

1 Elliot's Deb , vol. ii, p. 427.

2 Elliot's Deb., vol. i, p. 399.

3 Elliot's Deb., vol. ii, p. 353.

within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible states."1 Mr. Justice Miller, in his work on the Constitution, prepared after his retirement from that court, said: "In my opinion the just and equal observance of the rights of the states and of the general government as denned by the present Constitution, is as necessary to the permanent prosperity of our country and to its existence for another century, as it has been for the one whose close we are now celebrating."2

The states, in delegating a portion of their powers to the national government, did not create an arbiter of their own selection to guard their reserved rights. Although the states must rely entirely upon the impartiality and justice of the United States Supreme Court for the protection of their reserved rights, the members of that Court are appointed by the President with the consent of the Senate. The Supreme Court, in its most recent decision,3 supports the states by declaring that the national government has no legislative powers affecting the nation as a whole except those enumerated in the grant of powers; and that the tenth Amendment to the Constitution, reserving all powers to the states not expressly granted to the nation nor prohibited to the states, "is not to be shorn of its

1 Texas v. White, 7 Wallace, 725; see also 11 Wallace, 125;

199 U. S., 453

2 Miller on The Constitution, p. 24.

3 Kansas v. Colorado, 206 U. S., 89, 90, 91 of opinion.

meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

It would unduly extend the discussion in this chapter to fully enumerate the many attempts on the part of the President during the last three years "to increase the power of the Federal Government through executive action" Some of these usurpations have been carried on through the heads of departments responsible to him for their action. A few only of the numerous usurpations will be mentioned.

A bill was introduced into the House of Representatives in the winter of 1904 by Mr. Sulloway, a member of the House from the State of New Hampshire, which proposed that any person who had served ninety days in the army or in the navy during the war of the Rebellion, and who had reached the age of sixty−two years, should become entitled to a pension of $8 a month;

that everyone who had become sixty−six years of age should be entitled to $10 a month, and everyone who had reached the age of seventy years should be entitled to a pension at the rate of $12 a month. This measure the House declined, or at least failed to enact, whereupon the Secretary of the Interior, by an order dated March 15, 1904, decreed that its terms should nevertheless govern the Pension Office, and millions of dollars have been paid out of the Treasury without any other warrant of authority than this order or decree of the Interior Department. Five hundred years before the adoption of our Constitution it was the law of England that the Commons had the exclusive right to originate money bills and to determine the purposes for which moneys appropriated should be used, and the king could not use the public moneys except they were expressly appropriated by the Commons for a specific purpose. In 1640 the House of Commons declared:

"We have had uninterrupted possession of this privilege (the privilege of the undisputed control over the taxation and finances of the country) ever since the year 1407, confirmed by a multitude of precedents both before and after, not shaken by one precedent for these three hundred years."1 For an attempted violation of this right of the Commons, Charles I was sent to the scaffold. In 1678 the House of Commons declared that "it is the undoubted and sole right of the Commons to direct, limit, and appoint, in such Bills, the ends, purposes, considerations, conditions, limitations, and qualifications of such grants."2

"All bills for raising revenue shall originate in the House of Representatives," says the Constitution; and power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States," is given to Congress. Now it is to be observed that a pension bill to provide for particular classes of persons had been introduced into Congress, and Congress had either declined or had failed to enact the law. "A minister," says Mr. Lecky, "who has asked and been refused the sanction of Parliament for a particular policy, and who then proceeds to carry out that policy by other

1 Stead, Peers or People, p. 28. 2 Stead. Peers or People, p. 29.

means without parliamentary sanction, may be acting in a way that is strictly legal, but he is straining the principles of constitutional government."1 Now we have here a case of an executive officer who took from the Treasury of the United States millions of dollars and appropriated them to a purpose contemplated by this rejected law, without any law or warrant whatever from Congress. It is true that when the question was raised of his right to thus draw money from the Treasury of the United States without a law authorizing it, he declared that he was entitled to use the money under a prior statute. But he had been administering that same statute for years upon a totally different interpretation, and only resorted to the new interpretation when the proposed law of Mr. Sulloway was not passed by the Congress.

About February 1, 1905, the President of the United States agreed with the Dominican Government on a treaty or a convention whereby a Protectorate of the United States over San Domingo was created, and San Domingo agreed to permit a receiver of its customs duties, selected by the United States, to collect the customs and divide the collections. Forty−five per cent was to go to the support of the Dominican Government, and the remaining sum was to be applied by the United States, or its receiver, in payment of the foreign indebtedness of San Domingo. A considerable portion of this indebtedness was held by English bondholders. They had about £750,000 of bonds for which the Republic of San Domingo had received all told £38,000. 1 Lecky, Democracy and Liberty, vol. ii, p. 57.

This treaty with San Domingo was sent to the United States Senate for confirmation. A majority of the

Committee on Foreign Relations were unfavorable to the treaty, and it was not reported to the Senate. With the treaty before the Committee on Foreign Relations, and no action having been taken upon it, the President, on April 1, 1905, entered into an agreement or protocol with the government of San Domingo embodying practically the same provisions as existed in the original rejected treaty. The original treaty provided that the United States was to grant to the Dominican government, aside from the collection of its revenues, "such other assistance as the former (the government of the United States) may deem proper to restore the credit, preserve the order, increase the efficiency of the civil administration, and advance the material progress and welfare of the Dominican Republic." If a treaty containing this provision had been confirmed by the Senate, the President would have been left the discretion to take any steps which he deemed proper "to restore the credit, preserve the order, increase the efficiency of the civil administration " of San Domingo, and advance its material progress and welfare. It is the exercise of just such discretionary powers that turns a constitutional officer into a dictator.

The government of the United States, without any treaty, through its receiver, actually collected the customhouse duties of San Domingo from April 1, 1905, until the year 1907, when at last, after several modifications, the treaty was finally approved by the Senate. Under what clause of the Constitution did the Presi dent receive the right to appoint a receiver, take possession of the customhouse of San Domingo, collect customs and turn a portion of the amount collected over to the foreign creditors of San Domingo? As executive he can enforce only existing laws. Without any authority whatever, but still in the name of the United States, he, as its President, appointed a receiver of these customs, and became the collector for foreign nations for two years without one syllable of law to justify his action. There is not a precedent for such action in the history of any modern constitutional country. There is no power given to the President from which the right to do this can be possibly inferred. He had a right to make a treaty with San Domingo with the consent of the Senate, but he had no right to act upon any proposed treaty until it had become a treaty, and his action during the whole period of two years was a usurpation of power. If, in a time of peace with no crisis or emergency at hand, the President can exercise such powers, what will such a President do when a great crisis arises and violent passions are excited as in the time of our Civil War?

An act of Congress passed June 28, 1902, authorized the President of the United States to obtain by treaty control of the isthmus or territory known as Panama, a separate state of the Republic of Colombia, for the purpose of building a ship canal across it between the Atlantic and Pacific Oceans. This act provided that if the President should be unable to do so within a reasonable time and upon reasonable terms, that then he should proceed to acquire the necessary territory from Costa Rica and Nicaragua. This act appropriated $10,000,000 to be used by the President toward the undertaking. It also authorized him to pay for the canal $40,000,000.

Pursuant to this authority. Secretary Hay entered into a treaty with Colombia, which was ratified by the Senate on March 17, 1903. The Congress of the Republic of Colombia, when this treaty was brought before them, refused to ratify it upon the ground that they could not alienate a portion of their national domain without an amendment to their constitution. Congress was not in session when this treaty was rejected by the Colombian Government. The representatives of the old Panama Canal Company and of the new Panama Canal Company were in New York City, watching closely the action of the Congress of Colombia; and it scarcely had rejected the treaty before a scheme was concocted in a law office in New York City to raise a sham revolution in Panama, to protect it by United States troops, and to make a new republic of Panama with which to deal. On November 2, 1903, the gunboat Nashville, under directions of the Navy Department, reached the Isthmus, and on the same day an order was sent from the Navy Department to the Nashville, the Boston, and the Dixie, containing these instructions: "Prevent landing of any armed force with hostile intent at any point within fifty miles of Panama. Government forces reported approaching the Isthmus in vessels. Prevent landing if in your judgment landing would precipitate conflict."

Our rights in Panama were procured by a treaty on December 12, 1846, between our own government and New Granada, to whose rights, under this treaty, the Colombian Republic had succeeded. In that treaty we guaranteed to New Granada the rights of sovereignty and property which she possessed in Panama and agreed that "if the complete and absolute sovereignty and independence (of New Granada) should ever be assailed by any power at home or abroad, the United States will be ready, cooperating with the Government and their ally, to defend them." But when Panama, a state of Colombia, sought to secede, we, who had fought a four years' war to establish the doctrine that a state had no right to secede, sent our gunboats to the shores of a friendly country

which we had agreed to protect if it was ever assailed by any power at home or abroad and to always recognize its sovereignty, we, in such a crisis, sent our gunboats to aid in dismembering it.

Now observe the hand of preparation. On November 2d our gunboats had reached Panama. On the next day Assistant Secretary Loomis, of the State Department, cabled from Washington to the Consul of the United States at Panama: "Uprising on isthmus reported. Keep department promptly and fully informed." The uprising which was contemplated, however, had not come off on time and the Consul General at Panama cabled this reply: "No uprising yet; reported there will be to–night." According to the plan the insurrection did come off at night pursuant to the telegram. In this way a valuable portion of a friendly state was wrested from the Republic of Colombia. Our gunboats and troops held at bay the forces sent by Colombia to suppress this insurrection, and this was all done under the direction of the President or his Secretary. Suppose Great Britain, before the commencement of the Rebellion, had sent her war vessels to our shores, not only inciting the South to an insurrection but aiding– them to carry it out, what would we have thought of the justice of such an action? We would have met such a step with force and fought Great Britain, as well as the South, in the resentment of such an insult.

The President in all this acted in disregard of the act of Congress which directed him, in case he could not obtain control of the Isthmus of Panama in a reasonable time and upon reasonable terms, then to acquire the necessary territory for the canal from Costa Rica and Nicaragua. If the demands of a high civilization require that we appropriate Panama to our own uses, will not that high civilization also demand that we pay Colombia for the part of her territory which we have deliberately taken without giving her any return whatever? How does this unwarrantable seizure of Panama differ materially from the annexation of Texas? the expedition of General Lopez against Cuba in 1851? the spirit of the shameless Ostend Manifesto? the countenance of the government to the filibustering expedition of William Walker to Nicaragua in 1857? or the later attempts to acquire Cuba in 1851–59? And we continue as we did in these other shameless attacks upon the rights of the weak, to measure honor by inclination and justice by expediency.

About midnight of August 13 and 14, 1906, shots were fired in the village of Brownsville, Texas, where the Twenty–fifth Infantry, composed of negro troops, were on duty in Fort Brown. A police officer was killed, and when the attention of the government was called to the suspicion that these shots had been fired by members of the Infantry, Major Blocksom, of the United States army, was sent to Brownsville to investigate. He took the .statements of twenty–one witnesses, eight only of whom claimed to be eyewitnesses of the matter. Major Blocksom made his report to his superior, General Garlington, of the regular army, that the soldiers of the Twenty–fifth Infantry he had interrogated had denied any knowledge whatever of the shooting or of the absence of their comrades from the fort on that occasion.

When this report came to the attention of the President he sent General Garlington to Fort Reno, where the members of the Infantry were encamped, and General Garlington there informed the soldiers that unless they frankly and fully disclosed any knowledge which they had as to who of their comrades had committed the offense, that they would be discharged from the army and debarred from ever again entering the service. Even under this threat all the soldiers denied having anything to do with the shooting or any knowledge whatever of who did it. General Garlington made his report to the President and recommended that Companies B, C, and D of the Twenty–fifth Infantry, comprising 167 soldiers and officers, be discharged without honor and be forever debarred from enlisting in the army and navy of the United States, as well as from employment in any civil capacity by the Government.

Upon the back of this report the President wrote: "Let this recommendation be executed." General Garlington, in his report, said: "In making this recommendation I recognize the fact that a number of men who have no direct knowledge as to the identity of the men of the Twenty–fifth Infantry who actually fired the shots on the night of August 13, 1906, will incur this extreme penalty."

It is conceded that only a small number of the soldiers had anything to do with the affray. No one of these 167 men were summoned before a court–martial or given any opportunity whatever to examine or cross–examine witnesses, nor were they represented by counsel, nor did they have a legal hearing in any way whatever. Twelve men, consisting of the Sergeant of the Guard, the men on guard, and other noncommissioned officers in charge of the quarters, the guns, and the gun racks on the night of August 13, and who must have known of the absence from the fort of a part of the three companies, if they were absent, and must have been implicated to some extent

in the matter if it occurred, were arrested by the state authorities. An investigation covering three weeks before the grand jury at Brownsville took place, and they were finally dismissed by the grand jury on the ground that there was no evidence whatever upon which to convict them. It is elementary and fundamental law that in times of peace a soldier or officer accused of crime who denies its commission cannot be dismissed without honor and deprived of the right of reenlistment and the right to hold civil office under the government of the United States, without charges being formulated and a hearing given him before a court–martial. The President had not the slightest legal right to discharge these men and inflict upon them the penalty which was inflicted without such a hearing.

The President is the Commander in Chief of the army and navy of the United States, but Congress is given the power to make rules for the government and regulation of the land and naval forces, and Congress, in 1895, prescribed the conditions under which a soldier in the regular army might be discharged without honor. The Articles of War then enacted by Congress under sixty–one separate provisions prescribes the different offenses for which a soldier may be brought before a court–martial and punished, and the sixty–second provision of these Articles of War provides that all other cases must be punished as a court–martial may direct. By the advice of the Department of War, charges against the twelve men whom the Texan authorities sought to indict were prepared under this sixty–second section of the Articles of War, with specifications and lists of witnesses, and apparently with the intent to bring each of the twelve before a court–martial. But because the President had exercised his alleged power to discharge, the apparent inconsistency of such an arraignment with his act brought the matter to an end without a court–martial.

Notwithstanding all these provisions the President, without a hearing, discharged these men without honor and debarred them from reenlistment or from holding any civil office under the United States. General Ains–worth, the Military Secretary of the War Department, said in the report which he made to the President: "A protracted examination of the official records has thus far resulted in the failure to discover a precedent in the Regular Army for the discharge of these members of three companies of the Twenty–fifth Infantry who were present on the night of August 13, 1906, when an affray in the city of Brownsville took place." It would seem that the President knew that he had no right to discharge these men without their conviction by a court–martial, for in March, 1903, to a question relative to the retention in the army of a man accused of murder, he said: "In this matter, even if this man is a murderer, I am helpless. I have absolutely no power to dismiss anybody from the army in time of peace."1 The President is not above the law; he is the sworn servant of the law. His act in this case was known to every citizen of the land. There is no greater menace to our country to–day than the prevalent disregard of the orderly enforcement of the law. Between the years 1885 and 1904 inclusive, 2,286 executions for murder, after trials and convictions, have taken place. During the same period 2,917 suspected men, mostly negroes, have been lynched, and a considerable number of them were publicly burned and tortured. When the President, contrary to law, deprives 167 men of their livelihood and their right to employment by the national government, he sets a dangerous example to every person in the land.

Like usurpations have been numerous. Let us, however, observe one more. The constructive recess of three years ago was conceived by the President to permit the 1 North American Review, January 18, 1907, p. 217.

retention in office of certain officials to whom it was believed the Senate was opposed. This recess lasted only from the falling of the gavel in the hands of the President of the Senate, marking the close of the first session of the Fifty–eighth Congress, and the rapping to order which immediately followed the opening of the second session of the Fifty–eighth Congress. And it is to be remembered that the House of Representatives attempted to recognize this as a real recess by voting to themselves $190,000 mileage for attendance on the second session of the Fifty–eighth Congress.

What excuses are offered for these usurpations? Simply that the President thought such usurpations were for the welfare of the American people. Good intentions never justify usurpations of law. Tiberius Gracchus, conscious that his tribuneship had been of great value to the Roman people, and believing that the tribune who would succeed him could not be relied on to carry on his policy, offered himself, notwithstanding the law forbade it, to the Comitia for reflection. He reasoned just as our President reasons, that his tribuneship had brought great blessings to the Roman people; that the poor needed his protection; that the interests of the country demanded his reflection, and that to break the law for a good cause could be atoned for by the fruits of his administration for the second year. Noble as were his purposes, beneficial as might have been his rule, his illegal act resulted in armed

resistance, and he and three hundred of his friends were killed at the polls and their bodies flung into the Tiber. The Constitution was given us as a guide of our action. It is beyond the ingenuity of man to invent a justification for its violation. The example of a President obeying its mandates would contribute a thousandfold more to the general good than ever can come from any supposed benefit in its violation.

When it was moved in the Constitutional Convention that a single person should act as the executive of the nation, a profound silence followed, continuing for several minutes, until Washington, the presiding officer, asked what was the further pleasure of the Convention. In the conventions called for the adoption of the Constitution in all of the Southern States and in Massachusetts and New York, much alarm was expressed at the powers of the President and the danger of his perpetuating himself in office. Little did the people at that time contemplate that such vast power would attach to the office by reason of the growth in size of our country, its rapid industrial advancement, and its enormous increase in wealth. The precedent of Washington, followed by his successors, of refusing to accept the office for a third term, has made it unwise, if not practically impossible, for the President to seek it. But the all−sufficient reasons which preclude the President himself from seeking a third term, equally preclude his use of the great power of his office to bring about the nomination of any certain person as his successor. Jackson, to his discredit, dictated his successor as arbitrarily as he settled the question of the national bank. If it is permissible for the President to seek to control the nomination of his successor, then he can bring about the nomination in his party of the man he prefers, and thus perpetuate his rule, although he has ceased to act as President.

The Roman law wisely provided that no one should be a candidate for the Consulship unless he presented himself for the office from a private station in life. If the President is determined to select his successor, he has only to appoint him to a cabinet position of great power, and to vest him with patronage and influence, to make him an overmatch for any man aspiring to the office from private life. If the unwritten law of the land precludes a President from continuing in the office beyond two terms, let us make it also the unwritten law that the occupant of that high office shall not use the almost omnipotent power which he holds from the people in any manner whatever to select his successor. In short, let the American people insist that the exalted office of the President shall lift him far above the use of his power to place any man in the presidential chair, or to obstruct any man from seeking that exalted position from the walks of private life.

IV

PATERNALISM AND IMPERIALISM "The French government having assumed the place of Providence, it was natural that everyone should invoke its aid in his individual necessities."

DE TOCQUEVILLE.

"The mischief begins when, instead of calling forth the activity and powers of individuals and bodies, government substitutes its own activity for theirs; when, instead of informing, advising, and, upon occasion, denouncing, it makes them work in fetters, or bids them stand aside and does their work instead of them. The worth of a State, in the long run, is the worth of the individuals composing it."

JOHN STUART MILL.

"Foreign politics recede into the background with the growth of civil and political freedom, while they are the main prop of autocracies."

ANON.

CHAPTER IV. PATERNALISM AND IMPERIALISM

THE public newspapers a few months ago told the people of the country that a delegation from the New York Federation of Churches had that day called at the White House to lay before the President the facts about the waning of religious zeal and the decrease of church extension in New York. They desired the President's "aid toward arousing greater interest in religion." In the days of the birth of the Constitution the fathers lifted their thoughts to Heaven and to God for religious help, and they hardly anticipated a time when the President, for whose election they were providing, would be looked to by the American people for religious guidance. Noble Robert Collier was wont to tell the story of an old clergyman in Scotland who, when the scorners gathered around the church while services were going on, would leave the pulpit, catch the unrepentant sinners, and drag them before the altar of mercy. Perhaps the delegation from the New York Federation of Churches hoped that the President with his "big stick " would compel the people to attend church.

The value of this simple and trifling incident is found in that it is a typical illustration of the unfortunate condition of our people. Labor Unions, Boards of Trade, National Banks, and like bodies are constantly turning to the President of the United States, asking him to arbitrate strikes, coerce corporations, and deposit government surplus, and generally to carry on the domestic affairs of the states. The present Secretary of the Treasury has deposited upward of $200,000,000 of the surplus of the government with the banks, issued $50,000,000 of three per cent certificates, and sold them to aid the banks, under the law that they may be issued when necessary to meet public expenditures, and sold $50,000,000 of the Panama bonds in advance of the need of the money, in order to relieve the money stringency. In the spring of 1907 we saw the strange spectacle of presidents of railways hastening to Washington to invoke the President to protect them from state legislation. A commission known as the Keep Commission recently has reported a plan to be submitted to Congress, providing that the government shall compel all its employees to make provision out of their salaries for annuities after retirement for age. The government on its side is to set aside, as part of the same fund, the sum of $725,000 for the first year, and this sum is to be increased during a period of thirty years, when the system is intended to be self–supporting. The maximum appropriation is to be $1,746,561. Wiser words were never spoken than those of President Cleveland that "it is not the business of a government to support its people, but of the people to support the government."

The peculiar thing about the condition of our government to–day is that the President is supposed by the people to determine everything. Shall a trust be prose cuted? Ask the President, not the Attorney General. Shall we have further legislation with reference to railways? Ask the President and not Congress. All the affairs of government must be determined upon the President's idea. It is simply a personal matter with the President. In a healthy democratic republic, measures, not men, attract the attention of the people. But with us, the President, appointing so many officers, controlling the army and, to a considerable extent, the navy, is, to use a vulgar phrase, in the center of the stage with all eyes upon him.

In Switzerland, the most democratic government in the world, a President of the Confederation is reported as once saying that if anyone were to question ten Swiss, all of them would know whether their country was well governed or not, but that nine of them would not be able to give the name of the President, and the tenth, who might think he knew it, would be mistaken.1 When will the American people learn that an all–powerful executive, constantly posing before them, toying gigantic schemes in their sight, dazzling them with his power and the grandeur of his views, keeping their attention upon the world's politics, using the navy to collect from the weaker and smaller countries their indebtedness to European countries, advising his own people upon their domestic and social questions, is a menace to that liberty which never can continue unless it continues by reason of discussion of measures, not men. By too much trust in government the people are ceasing to trust

1 Lowell, Government and Parties in Cont. Europe, vol. II, p. 327.

themselves. The state cannot aid men without enfeebling their energies and imperiling their self–reliance. Such a condition goes on for a century or so, and by and by the people, who gradually have been losing independence and self–initiative, become an easy prey to the man on horseback.

Now let us see how these lamentable conditions have been brought about. In more than 200 addresses and messages and communications to Congress, during the last six years, the President has ever been holding before

the people the one great theme — the power, the ability, and the willingness of the chief magistrate and of the national government to care for all the wants of the people. There is no subject, from football to race suicide, from simplified spelling to Constitutional construction, within the whole scope of human knowledge which has not been exploited more or less and held up to the people in these speeches and messages.

At Sioux Falls, on April 6, 1903, the President tells his audience culture, and this proposition was voted down. Notwithstanding this, hundreds of millions of the people's money have been used for the ostensible purpose of promoting agriculture. For years Congress has been purchasing seeds at ordinary seed stores and scattering them among the farmers of the country. During President Cleveland's second administration, Stirling G. Morton, Secretary of the Department of Agriculture, attempted to put a stop to this, and a representative from Louisiana arose in the House and declared that the distribution of seed was the only relation left him with his constituents, and now the Secretary of Agriculture was about to destroy that relationship.

In the President's message of December, 1906, he assures the people that "much is now being done for the States of the Rocky Mountains and great plains through the development of the national policy of irrigation and forest preservation." In a recent case l it is distinctly held that Congress has no power to devote the public money for carrying on irrigation in the states, but that possibly the power exists to devote the public money to the irrigation of public lands in the territories. The irrigation laws, the geological survey, the ten or fifteen divisions of the Agricultural Department given over to investigations of all kinds, using up hundreds of millions of dollars of the people's money, induce the people to look to the national government. These lavish appropriations are made with this express purpose in view. Every appropriation is a fresh draft from the exhaustless resources of a paternal govern–1 Kansas v. Colorado, 206 U. S., 91, 92.

ment, but not a dollar was ever yet spent by the government which was not taken out of the pockets of the people. The appropriations of Congress in the year 1898 were $485,002,044; in 1906 they were $820,184,624, nearly double the amount for 1898; and in 1907 they were about a billion dollars. In the year 1907 there was appropriated by the River and Harbor Bill alone, $83,816,138, a sum larger than the total cost of all government in the United States in any single year prior to 1860.

In the President's message in December, 1906, he devoted much attention to technical and industrial training, treating the whole matter as though the national government had power to establish schools in the different states, to instruct carpenters, blacksmiths, mechanics, textile workers, watchmakers, and all the members of the several industries of the country. Mr. Wadsworth, Chairman of the Committee on Agriculture, in the last Congress commented at length upon the tendency of the Department of Agriculture to usurp the powers of the state governments. The occasion of his speech was the consideration of what was known as the Nelson Amendment increasing the agricultural appropriations. Mr. Wadsworth said that the agricultural appropriations as a whole presented a serious menace to local control of education; that they included bills to extend aid to state normal schools, agricultural schools, mechanical schools, and city high schools; and that if appropriations were made for such purposes by and by they would be extended to the grade schools and then "you will have federal control and supervision of your schools." Mr. Tawney, Chairman of the Committee on Appropriations, said: "If we continue this system of paternalism much longer it will not be long until the Congress will be swept off its feet and called on to account for from $25,000,000 to $50,000,000 annually for the construction and maintenance of good roads."

The late Secretary of the Treasury, Leslie M. Shaw, for the purpose of aiding the national banks, allowed bonds other than government bonds as prescribed by the statute to be used to secure circulation; purchased bonds in advance of their becoming due with the intent of easing the money market; and deposited the moneys received by the government for internal revenue, to the amount of $20,000,000, with the banks in the east and in the west, after it had been taken into the Treasury vaults, a power never exercised before by any Secretary. He also deposited the government moneys with importing banks, during the transit of gold from London, Paris, Berlin, and Amsterdam, to save the cost of interest in transit; offered government deposits to banks which would buy the Panama Canal bonds at two per cent; deposited the Treasury surplus from time to time in different banks to ease the money market; advised that the matter of the amount of the reserves required by law to be held in the national banks be left for the Secretary of the Treasury to determine; and finally announced that if $100,000,000 were given him as Secretary of the Treasury to be deposited with the banks or withdrawn as he might deem expedient, and that if he also was clothed with authority over the reserves of the banks and power to direct the circulation of the national banks, he could prevent financial crises in the United States and all Europe, thus becoming the

saviour of Europe as well as of the United States. The President, in commendation of the services of his Secretary of the Treasury, at the time of his resignation, wrote him: "People tend to forget year by year that the Secretary of the Treasury stands between them and business disaster. This report of yours shows how every year some crisis has occurred which might have had a most serious effect if it had not been met just as you have met it."

These are only a few of the attempts of the government to direct the attention of the people to it for the remedy of every evil. The Treasury of the United States has been opened wide by distributing money into every part of the country for purposes with which the national government has nothing to do, with the intention of directing the attention of the people to the all–wise providence of Congress and of the Executive. A hundred years ago our people asked no favors from government, but only for a fair, square deal, each man confident in his ability to win by his own brain and his own hand. To–day, under this paternal rule, everybody is in the habit of looking to the President and Congress for relief from every evil. Thus residents in the southern states recently sent a request to the Secretary of the Department of Agriculture that he rid them of the pest of the boll weevil, while the men of old Massachusetts, wherein personal independence in revolutionary days was most developed, send to Washington for help to drive the brown–tailed or gypsy moth from the bor ders of their State. Just as at Rome, the leading men desiring the plaudits of the people provided them with a circus, just as Caius Gracchus proposed a provision that the grain at Rome should become state property, and that the government should sell wheat to the people at a ridiculously low price, so to–day President Roosevelt and some of his predecessors have used vast sums of money collected from the people through protective tariffs, internal revenue, and other means to bestow bounties here and there all over the land, and thus attach the people of the different states to the all–powerful, all–bounteous providential national government.

Now such government is destructive of public virtue. The function of democracy is not alone to make government good, but to make men strong by intensifying their individual responsibility. The belief that the President or government has the power to make everybody comfortable or happy, and the inclination of the people to depend upon our government as the people of France and Germany depend upon theirs, is a tendency destructive of liberty and individual initiative. Paternalism is the dry rot of government, and as surely brings paralysis through all its members as the law of gravitation controls the universe.

But even these are not the worst evils of paternalism. The greatest curse which it has brought upon the country is its teaching that all evils are political in nature, and that it is within the scope of the state to destroy the social miseries which inevitably exist. We are teaching the people that a law of Congress is a sovereign specific for every evil. The President of the United States is constantly calling to the attention of the people in his messages and speeches the benefits to be derived from new laws, yet every student of history knows that better conditions cannot be brought about except through a change in the personal character of the people and their exercise of individual virtue and vigor. The exercise of arbitrary power by the President is bad because arbitrary power, whether it be political or industrial, has always had but one tendency, and that is to make good citizens bad citizens. The citizens who are contented to rely upon a paternal government never rise through one emancipation after another into a higher liberty. Social evolution progresses actually with the importance of the citizen above the state, and decreases exactly in the proportion of the importance of the state over the citizen. A good despotism is an absolutely false idea. The more civilized the country, the more noxious such a government.

The people must fight their own battles for better conditions. Every time they call upon that great central deity, the Government, to fight an evil, they surrender their God–given right to grow strong by fighting it themselves. By and by, if recent tendencies continue, they will surrender all their duties and all their rights, so dearly bought, to their rulers. By and by the government, like that of Germany, will dog the citizen's footsteps at every turn, provide him with old–age pensions, recompense him for all injuries received through negligence, destroy his manhood while alive, and bury him when dead. Let us go on at the same rate we have been during the last five years, and the sole idea of our country will be a divinely inspired President whose authority, as guardian of the people, insures their general felicity. This evolution will consist in erecting an absolutely central power over the ruins of state and local life. All will be looking to Congress more and more for the righting of wrongs, for the control of commerce and industry, and for the curbing of the predatory railways and trusts. The command of the people to the President will be the command to the Roman dictator to take care that the state receives no harm, leaving the means and the methods entirely to his wise discretion. Then when evil conditions come, as they came recently to the wine growers in the south of France, through perfectly natural causes, our people in vain will turn

their faces to the government to relieve them even as the French peasants sought government aid, and then rose in arms against a government that could find no cure for their ills.

Upon no subject has the President spoken with so much power as upon the decadence which race suicide is bringing upon the country. The conditions which the President laments are a menace to our national greatness, but no amount of severe language against married people who have no children will avail. Better a hundred times to find the reasons for race suicide and remove them. If the President does not know what those reasons are he has not carefully reflected upon existing conditions. The high price of the necessaries of life, whereby a large part of our people are reduced to a condition where the daily wage barely supports the family, more than any other cause brings the condition which the President so wisely laments. The masses of men will be what their circumstances make them. If the present prices of the necessaries of life and of rent continue, the average laboring man with a family will be unable from his wages to support his family and to lay aside a dollar for his old age. He pays for the rent of the tenement in which he lives from twenty−five to fifty per cent more than he would pay for it were it not for the customs duties upon iron and steel, wood, nails, glass, cement, and everything that goes into the making of that tenement, whereby the domestic manufacturer is protected from foreign trade and allowed to deprive the poor man of his scanty earnings.

The tariff schedules of to−day carry duty on more than 4,000 articles. Nearly every duty on these 4,000 articles permits the domestic producer of the same article to impose a higher price for his product, and that price eventually falls in greater part upon the shoulders of the poor and deters them from marriage and childbirth. Superintendent Maxwell, of the New York City schools, two or three years ago said: "There are thousands of children in our city schools who cannot learn because they are hungry." And they are hungry, in part at least, because of that protective tariff which allows the wealth of the country to make every poor laboring man in this land pay tribute to increase its wealth. In 1,000 villages and cities, from one end of this country to the other, the wife of the poor man will be found in the market, the hard earnings of her husband in her gnarled hands, purchasing the necessaries of life; and from every dollar's worth she buys, she is obliged, because of the tariff, to make a personal contribution to men who already have their millions. In the fifty years since the end of the Civil War, the protective tariff has brought to the hands of a few thousand manufacturers more wealth than was acquired by the French nobles through privilege in five hundred years prior to the revolution. In the President's Jamestown speech he said: "We combat every tendency toward reducing the people toward economic servitude." The way to combat it effectually is to remove the tariff which reduces the poor to economic servitude to the trusts. So reduced have the people become, that one has but to observe their condition closely each day in the crowded cars and thoroughfares of New York City to see that they are losing their faith in the opportunity to improve their condition and their courage to battle against the odds of life. Vitiated air, bad sanitation, and squalid homes drive them forth to the cheerfulness of the saloon, and, by and by, if a crisis comes, impel them to the commission of crimes.

A few months ago the J. &P. Coats Co., Ltd., thread manufacturers, declared a large dividend upon their capital of $15,000,000. This is a foreign corporation owned at Paisley, Scotland, but doing business in this country to take advantage of our tariff. Its stock, which is $50 per share, had a market value of $677.50 at the time this dividend was declared. The tariff duty upon sewing thread is six cents per dozen spools of 100 yards each. Race suicide, as a deplorable condition in our country to−day, is explained by such instances as the sewing woman; robbed by the high price of the necessaries of life, with a burden upon the cost of her thread, driven by desperate competition, she succumbs under all this stress and strain. This increased cost of living is a merciless drain upon the whole body of poor people. Robbed of their earnings by the monopolist, the unmarried do not marry, and the married do not bring children into the world, and the problem exists. Alexander Hamilton well said: "Give a man power over my subsistence and he has power over the whole of my moral being." Government to−day gives to a few thousands the power over the subsistence of every one of the 20,000 post−office clerks whose salaries run from $600 to $1,000 a year, of all other clerks in the employ of the government on fixed salaries, and of every one of the millions of clerks upon fixed salaries in stores and business concerns in the entire country. And the result is race suicide, because we have reached a time in this country when a great portion of the people are unable to support a considerable family in the style they desire.

Yet the President, who deplores race suicide, a few years ago said: "Our experience as a people in the past has certainly not shown us that we could afford in this matter (of the tariff) to follow those professional counselors

who have confined themselves to study in the closet, for the actual working of the tariff has emphatically contradicted their theories." Of one of those professional counselors who confined himself, in great part at least, to study "in the closet," Mr. Buckle, in his worldwide known "History of Civilization in England," speak ing of the "Wealth of Nations," and summing up his estimate of the book, says: "Well may it be said of Adam Smith, and said, too, without fear of contradiction, that this solitary Scotchman has, by the publication of one single work, contributed more toward the happiness of man than has been effected by the united abilities of all the statesmen and legislators of whom history has preserved an authentic account." With the growth of the protective tariff, those who have watched public affairs with care can observe the waning of the old–time democratic simplicity in government, and can see its place being taken by rapid centralization of power and growth of paternalism in the general government. High protection, militarism, and paternalism have been advancing hand in hand since the Civil War.

Immediately after the announcement of the nomination of Mr. McKinley at the Republican National Convention at St. Louis, in 1896, a delegate raised upon the point of a flagstaff a cocked hat, such as one associates with portraits of Napoleon, and the Convention cheered to the echo this Napoleonic emblem. Little did the delegates think that during the administration of Mr. McKinley would occur a war and the acquisition of territory, containing over 10,000,000 of people, in a distant part of the world, and that changes would come in the form of our government, leading to new habits, modes of thought, and conditions of life among the people which are inconsistent with a free democratic republic. We need spend little time in discussing the facts and conditions of our getting possession of our different colonies. We have them. and it is well for us now to study how these new conditions will affect our home institutions.

A republican form of government based upon a written constitution cannot exist where the republic is the sovereign of widely scattered colonies. The tendencies to usurpation from imperialism are so great as necessarily to break down the guarantees to liberty found in the written Constitution. The Philippine Islands became the property of the United States April 11, 1899, and it was 1901 before Congress took them into its charge. During all this period these Islands were governed by the President simply as the Czar might govern Siberia, or as the German Emperor did govern Alsace–Lorraine for some years after the Franco–German war. He not only executed the laws, but he made new ones. Without any authority from Congress he sent to the Philippines a Commission of five men who legislated for them and reported their laws to the President through the Secretary of War. Before the transfer by the treaty the President governed as military commander, but after the Philippines had become domestic territory, he ruled without any authority whatever. Even if Congress had attempted to delegate the power to the President to govern the Philippines, there is grave doubt if any power exists under the Constitution to permanently rule colonies as subject people.

Even after Congress assumed charge of the Philippines the government continued a mere despotism. Shortly after Mr. Root resigned his position as Secretary of War, and in the early part of 1904, at a banquet of the New York University Law School, he said: "It has been my province during the last four years and a half to deal with arbitrary government. It has been necessary for me not only to make laws and pronounce judgment without any occasion for discussion — except in as far as I would choose to weigh the question involved in my own mind — affecting 10,000,000 people. And not only to make laws and pronounce judgment, but to execute judgment with overwhelming force and great swiftness." Here Mr. Root well describes the government of the Czar, the government of Germany and Belgium in Central and South Africa, the government necessarily of all countries which rule subject provinces. How would our own people be ruled at home if they knew no more about their own affairs than they know or care about the affairs of the Philippines?

When it was known that the Treaty of Paris provided for the taking over of the Philippines at a cost of $20,000,000, many of those who were opposed to the treaty declared that the Philippines were of little value and would be a curse to our country. The action, however, of our government was acclaimed by a considerable proportion of the people. We have invested in the Philippines up to the present time at least $1,000,000,000. And now from every side we hear thoughtful men asking that we get rid of them, saying that they are a useless incumbrance, saying that our trade with them has not increased, and that no benefits will come to the country from holding them. Senator Raynor, of Maryland, recently speaking in New York, said: "The Philippines, I will guarantee, would not sell for a dollar and a half in the market of the world. Who wants them? Where is the bidder? Not a nod of the head will you get from the nations of the world."

The important question for the American people to−day, however, is the effect of our imperial system upon our government. Sixty years ago William H. Seward declared the great principle that we could not live half slave and half free. With equal truth it can be said to−day that we cannot deprive the people of the Philippines or the people of our other colonies of their liberties, without the self−same act destroying the safeguards of our own. Imperial aspirations draw, by obvious necessity, an imperial rule. As our government becomes imperial, foreign politics come to the front and the growth of political freedom among our people goes to the rear. He reads history to little purpose who does not find in its teachings many illustrations of the truth that a free people cannot rule subject peoples and preserve their own government free.

At Waukesha, Wis., April 3, 1903, the President said to his audience: "We cannot help playing the part of a great world power. All we can decide, is whether we will play it well or ill." But one of our greatest jurists and at the same time a most ardent lover of liberty, Mr. Justice Harlan, of the United States Supreme Court, speaking a few years ago, said: "Let us hope that this great instrument " (referring to the Constitution) "which has served so well, will weather the storms which the ambitions of certain men are creating in the effort to make this country a world power." Imperialism necessarily brings to the front politics, schemes of empire, while the ordinary interests of our people will be overlooked. Mr. Cleveland, in his first administration, carefully examined the private bills which were sent to him from Congress, and vetoed 127 of them. Of these, 124 were special pension bills. So far as I am able to ascertain, President Roosevelt, absorbed in world politics, has found little, if any, time to examine bills and has vetoed only a single bill, correcting a war record, during his whole administration. Perhaps I should not speak with confidence upon this matter, because he may have vetoed bills of which no public mention was made. But at least he has vetoed no important measure and apparently has given but little attention to the bills which came to him from Congress.

Playing the part of a world power — what does it mean? It necessarily means the predominance of the questions affecting foreign affairs in the politics of a nation, and the predominance of the questions of foreign affairs means a weakening of party government, a weakening of the opposition to the party in power, and the strengthening of the executive. The party which is carrying out an imperialistic policy always appeals to the pride of the people, to the national spirit, to jealousy against other great powers, and brands every man who opposes the squandering of the public money as stingy, mean, unpatriotic, and a friend of foreigners. Since we adopted a policy of imperialism the power of the President of the United States has been increasing with leaps and bounds. Like the Kaiser, who sent an army under Count Von Waldersee to China without consulting the Reichstag, the President to−day sends our navy or army in time of peace anywhere over the world, on any mission he pleases, without ever referring to Congress.

But imperialism, because of the heavy taxation which it brings upon the people, is the cause of discontent, of socialism, and all of the evils that follow in their train. France commenced the building of her colonial empire in the eighties. At that time her socialist party was of little account. First she invaded Tunis in 1881;

then Indo−China; then Madagascar and Dahomey, and finally the Fashoda collision with England occurred in 1899. During this period France added subject territories to her domain amounting to many times her whole area, but the expenditures of government were enormous. Increased burdens were put upon the people, and as the life of the ordinary man became harder and harder, socialism grew rapidly. To−day it is sufficiently influential to practically control legislation in the Chamber of Deputies. In 1871 the socialists elected but three members to the Reichstag in Germany. A few years later Bismarck commenced pushing his scheme of planting German colonies in all lands. In Africa, in China, in every part of the world, Germany increased its territory. To−day the socialists number in the neighborhood of 3,500,000 voters and have a large number of delegates in the Reichstag. In 1892 the socialists polled about 27,000 votes in Italy. Crispi, as the Prime Minister of Italy, commenced at that time to carry out his policy of imperialism, and with the growth of that policy socialism has grown, until to−day it has a large representation in the popular chamber of the legislature.1

Since we have become a world power, as described by President Roosevelt, the characteristic conditions of imperialism have been appearing in our own country. Sir Henry Campbell−Bannerman, a master observer of events in England, a few years ago described the characteristics of imperialism, and the description fits perfectly the conditions which are seen everywhere in this country to−day. Sir Henry, being asked what were the methods and characteristics of imperialism, answered:

"I will recite some of them. It magnifies the executive power; it acts upon the passions of the people; it

conciliates them in classes and in localities by lavish expenditure; it occupies men's minds with display and amusement; it inspires a thirst for military glory; it captures the electorate by false assertions and illusory promises;

and then, having by this means obtained a plebiscite and using electoral forms in the servile Parliament thus created, it crushes opposition and extinguishes liberty. And the irony of the thing is this — that all this is done in the name of the people themselves, and under the authority of their voice, so that the people, while boasting of their supreme power, are enslaved."

Let us take, clause by clause, this admirable description of imperialism and see whether these conditions exist in our own country. "It magnifies the executive power — it inspires a thirst for military glory." The minimum strength of the army is now, according to law,

1 Cook, Am Acad. of Political and Social Science, Pamphlet No. 316.

68,951, exclusive of 5,208 Philippine scouts and the 574 men of the Porto Rico regiment. Its maximum strength is about 100,000 to 104,000, according to the Reorganization Law of 1901, which gave the executive the right never before possessed, namely, to increase or decrease the army within that limit as he saw fit. He can increase the various regiments to war strength at any time without waiting for Congress to act. Prior to the war with Spain the strength of the regular army was 25,000 men.

On January 21, 1903, the President approved the United States Militia Bill passed by both Houses of Congress. This bill was one of the great triumphs of Mr. Root's supervision of the War Department. Under the old act the state militia was arranged in divisions, brigades, battalions, troops, and companies, "as the legislature of the state may direct." Under the new law the President was authorized in time of peace to fix the minimum number of enlisted men in each division, brigade, battalion, troop, and company. Under the same law the Secretary of War was authorized to provide for participation of the organized militia of any state or territory in the encampments, maneuvers and field instruction of any part of the regular army at or near any military post or camp or lake or seacoast defenses of the United States. And to induce the state troops to mingle with the regular army, the law provided that the organized militia so participating should receive the same subsistence and transportation as is provided by law for the officers and men of the regular army. This was held out as an inducement to the men of the militia to visit the camps and to mingle with the soldiers or the regular army, that the spectacles of war might fire their ambitions for military glory and arouse a military pride among the people. Then provision is made that officers of the organized militia may pursue a regular course of study at military schools or colleges of the United States, and receive there the same allowances and quarters to which officers of the regular army are entitled. They are to receive pay at the rate of $1 per day while in actual attendance. To make sure of the control of the national government over the state militia, the adjutant general is required to make frequent reports directly to the Secretary of War, and he is empowered to appoint a board of officers who shall examine those desiring commissions in the state militia as to their qualifications for the command of troops or of performing staff duties, and this board of officers is required to certify to the War Department its judgment as to the fitness of the applicants for command. Every means which ingenuity could devise whereby the state militia could be attached to the national government and made dependent upon the national government is found in this statute.

With twenty modern battle ships, a great fleet of older battle ships, armored cruisers, monitors, and torpedo boats, our navy is becoming, after England, one of the most formidable in the world. "Two thirds of the whole revenues of the government are devoted to the payment," says Senator Hale, "of inheritances from past wars, like pensions which nobody can stop and expenditures in view of future wars. Of all the taxes that are laid, and all the revenues that are collected, nearly two thirds are expended for the military in a broad way."

"It magnifies the executive power," says Campbell–Bannerman. While our people have seen the President sending our cruisers and gunboats to Panama to aid in wresting that state from the Republic of Colombia, to San Domingo to establish a receivership of the customs duties of that Island, and about all over the rest of the world to keep up the appearance of a world power, the people "while boasting of their supreme power," in the language of Bannerman, "are enslaved." Their earnings pay for all this splendor, and this glamour is created to divert their attention from the burdens which they bear, and from the danger to their liberties which such conditions create. In the meanwhile the President keeps the people interested, gives them something new to think about, and helps to put off the day of reckoning for these abuses. "Gild the dome of the Invalides," was Napoleon's cynical command when he learned that the people of Paris were becoming desperate, and when murmurs of discontent arise in our

own country the President orders the war ships to the Pacific.

"It conciliates them in classes and in localities by lavish expenditure." The total amount voted by the first Congress of President Harrison's administration was about $1,000,000,000, and this vast expenditure, astounding the people, was one of the principal causes of his defeat for the Presidency in 1892. Yet the last Congress appropriated nearly $2,000,000,000 of the people's money. At the first session was appropriated $880,000,000 ($80,000,000 of which was for canal expenses), being $300,000,000 more than the first year of the McKinley administration, an increase of sixty per cent. In the last Congress about 30,000 bills and resolutions were introduced in the House of Representatives. Six hundred and twenty–eight private pension bills were passed in the last days of the session in an hour and twenty–five minutes, being the highest record in the passage of pension bills in that body. Labor unions and all kinds of social societies, every class that controls votes in the community, anything in the shape of an organization in these days can procure favors and appropriations from Congress, but the great body of the people who are unorganized pay the bills. Lavish expenditure to conciliate the classes in localities is seen best in the agricultural appropriations, in those for irrigating arid lands, for the geological survey, and the hundred other means of absorbing the people's money. No nation in all history has ever scattered with so lavish a hand the hard earnings of its people as the United States in the last three or four years; and the President, who is the sworn protector of the Constitution and the law, with every obligation upon him to protect the people from such plunder, has not vetoed a single bill, so far as I can ascertain, voting away the people's hard–earned money.

"It captures the electorate by false assertions and illusory promises," says Campbell–Bannerman. The President, in an address delivered at Fargo, April 7, 1903, says of the administration of justice in the Philip–pines:1 "The administration is incorruptibly honest. Justice is as jealously safeguarded as here at home." Mr. Root says, as quoted above, that while Secretary of War he made the laws and executed judgment, and yet while he was doing this the President was declaring at Fargo that justice in the Philippines was as jealously safeguarded as here at home. Trial by jury does not exist in the Philippines in either civil or criminal causes.2 In criminal causes the Spanish system was retained.3

"It occupies men's minds with display and amusement," says Campbell–Bannerman. Can anyone fail to see the changed attitude of the government in recent years? The German Kaiser supervises the opera, painting, sculpture, and about every profession in that country. The censure of the Kaiser destroys the artist. The eyes of all his people are upon the Kaiser — what he does and what he says. He seizes every possible opportunity to declare his sentiments upon every conceivable subject of government in Prussia. He identifies himself personally and publicly with every act of his government, and makes every act of his administration appear to be his own. Just so in this country. The President has taken over the supervision of about the whole of life. Though not a lawyer, he criticises the decisions of the United States Supreme Court and the lower courts. He keeps the eyes of all the people turned toward the theater of his action, and he is always

1 Lodge, President's Addresses, p. 157.

2 Dorr v. United States, 195 U. S., 138. 3 Keppner v. United States, 195 U. S., 100.

in the center of the stage. He identifies himself personally and publicly with every act of the government which he believes will be popular, and never loses an opportunity to declare his sentiments on every question of government. He regards himself as commissioned to govern the state, and also to lead the people in religion, morals, and ordinary affairs of life. Every social subject brings forth comment from him. Whether football shall be played in the universities and colleges and how it shall be played, whether it is a wholesome physical exercise, the morals of the game; what should be taught and what should not be taught in the schools;

everything in the scope of human life and human action is within the ken of our President. If any class of men have a grievance they are induced by his action to look to him tor redress, and the kaleidoscope is kept moving, ever moving, with the central figure ever upon the stage. Kampici, the Chinese Machiavelli, in telling the secret of absolutism twenty–two centuries ago, said:

"Amuse the people, tire them not, let them not know."

Under these conditions the customs and forms which prevail in monarchical countries are being adopted here. Secret–service men swarm about the person of our President. Platoons of police are called in for guards; cavalry are frequently employed. Court forms are adopted at the executive mansion, and efforts too numerous to detail are made to exalt the person of the President and to accustom the people to the change of government which has been

rapidly going on. A choice collection of epaulets, with flag flying and band playing, have escorted the Secretary of War to and from the depot at Washington. Everywhere in every direction we are putting on the airs and adopting the customs of a monarchical form of government, and we are doing this because we have become an empire and because our people are given over to the spirit of materialism, and are forgetful of the sturdy industry and simplicity which marked our fathers and which always accompanies true greatness.

A few months ago a writer who represents in his ideas those of many people, wrote a letter to the New York World containing this statement: "Why not abolish the States and have Departments like France, only more simplified? Retain the State boundaries and names as now, but abolish Governorships and Legislatures. Leave the Congressional Districts and elect two United States Senators from each Department by popular vote." 1 Adopt the government of France in the United States! Let us see what it is. The revolution of 1789 destroyed all the existing local divisions except the Commune, and they were replaced by artificial districts so that the Commune is the only true center of local life.2 The whole country is divided into eighty–six departments, at the head of each of which is a prefect appointed and removed at pleasure by the President of the Republic. Although appointed in form by the President, he is in reality nominated by the Minister of the Interior, who represents the Ministry, and has the real power of appointment. The office of the minister is political, and the prefect who rules each department under him is a po–

1 N. Y. World, June 24, 1907. 2 Lowell, Governments and Parties in Cont. Europe, p. 36.

litical officer. He is the agent of the Minister of the Interior and tne central government in regard to all matters. He has independent authority over all those things in the department which in our country are controlled entirely by the people of the locality. He can dissolve the local assembly, either directly or through the President of the Republic, and can veto many of its acts. The local assembly is largely a formal body, the deputy or prefect acting for the general government ruling the department. The Mayor of each Commune is, to a certain extent, an agent of the central government, and is absolutely under the orders of the prefect. His acts in regard to many local matters, such as police, public health, and many others, may be annulled by the prefect, who also has the power to issue, as to those matters, his own direct orders. The prefect may suspend the Mayor of the Commune from office for a month; in short, as the agent of the central government, the prefect is practically the governor of each Commune. It is not uncommon in France for the Minister of the Interior to dismiss the prefect after election, because "he failed to carry his department." Paris is absolutely under the control of the central government.

Representative government in any true sense would be impossible in the United States if we attempted to legislate for all the affairs of life for over eighty million people composed of all races, all religions, and all grades of intelligence, scattered throughout the different communities and states over a territory of over three and a half million square miles. Any such attempt to control this country from Washington would involve a more extensive bureaucratic government than has ever been known in the history of the world. Such a government is always autocratic and often corrupt, and yet it is toward such a government that we are rapidly tending.

With the imperialistic reign has come arbitrary methods and manners on the part of our President. President Roosevelt, referring to the Constitution of Cuba, an instrument which our government had helped to frame, on September 28, 1906, telegraphed Secretary Taft with reference to an adjustment of Cuban affairs:

"I do not care in the least for the fact that such an agreement is unconstitutional." The ancient maxim of benevolent despotism was, "Let my subjects say what they like so long as I do what I like," but even this privilege is not granted the people of the United States, for we have learned in many different cases that he who differs from our President finds himself involved in great difficulties. The President's language with respect to the South American republics; the general resolution of Congress ordering Spain out of Cuba within thirty days;

the summary ejection of people from the White House;

the constant interference in the affairs of other countries; the dismissal of Miss Rebecca Taylor because of her expressions about imperialism; the executive orders retiring naval officers; the promotion of inexperienced naval and military officers over the heads of their superiors ; the suspension in several cases of the Civil Service Law — all these point to so changed a condition of affairs that we sometimes think it is all a dream.

The conditions which we have described are exactly the conditions which have preceded a change from de mocracy to empire and despotism ever since the world began. The building up of great fortunes; the growth of a moneyed aristocracy; the passing of wealth into the hands of the few; the separation of the people into classes;

the establishment of vast monopolies extorting money from the people; the universal desire for national

grandeur and glory, together with the spirit of restlessness in our people — these are dangerous omens. If such usurpations as I have described should pass unchallenged by the American people, they would soon acquire the force of precedent. Now is the time and we are the people to watch with jealousy such beginnings, to indignantly attack them and, if possible, to destroy them.

V

CONGRESSIONAL USURPATION "The tyranny of the Legislature is really the danger most to be feared, and will continue to be so for many years to come. The tyranny of the executive power will come in its turn, but at a more distant period."

JEFFERSON.

"I know not how better to describe our form of government in a simple phrase than by calling it a government by the Chairmen of Standing Committees of Congress."

WOODROW WILSON.

"Every foreign observer has remarked how little real debate, in the European sense, takes place in the House of Representatives. The very habit of debate, the expectation of debate, the idea that debate is needed, have vanished except as regards questions of revenue and expenditure, because the center of gravity has shifted from the house to the committees."

JAMES BRYCE.

CHAPTER V. CONGRESSIONAL USURPATION

THERE is no more striking and significant fact in the public life of our country than the predominance in recent years of the United States Senate over the House of Representatives, the popular branch of Congress. Claiming to be more democratic than European countries, the whole trend and current in the United States recently has been toward the consolidation of power in the Senate and the President to the destruction of the equipoise of the checks and balances of our Constitution. The tendency of modern life during the last thirty years, outside of the German Empire and the United States, has been steadily toward increasing the power of the legislative body elected directly by the people.

The members of the French Senate are elected in each department in France by the electoral college composed of the deputies, the members of the general councils, the members of the special councils, and the delegates chosen by the councils and by the communes or towns. Each department in proportion to its population is entitled to from two to ten senators, who are elected for a term of nine years, one third retiring each three years. The legislative power of the Senate and Chamber of Deputies is the same except as to revenue bills, which are originated by the Chamber of Deputies in the same manner as provided by our Constitution. Notwithstanding that the French Senators are elected in very much the same way as in our own country, with a longer term of office, and with equal legislative powers, and would naturally be a more influential body than the Chamber of Deputies elected by the People, yet Mr. Lowell, in his admirable work on "Governments and Parties in Continental Europe," says: "In reality it is by far the weaker body of the two, although it contains at least as much political ability and experience as the other House, and, indeed, has as much dignity, and is composed of as impressive a body of men as can be found in any legislative chamber the world over. The fact is that, according to the traditions of the parliamentary system, the cabinet is responsible only to the more popular branch of the legislature, and in all but one of the instances where the cabinet in France has resigned on an adverse vote of the Senate, the vote was rather an excuse for the withdrawal of a discredited ministry than the cause of its resignation." 1

The Italian Senate is composed of the princes of the royal family, of members appointed by the king for life, of bishops and high officials, civil and military and judicial, and of deputies who have served three terms or six years. It has the right to originate legislation except revenue measures, which must be first presented in the Chamber of Deputies. It has judicial functions, and sits as a court to try ministers impeached

1 Lowell, Governments and Parties in Cont. Europe, vol.

i, pp. 21, 22.

by the Chamber of Deputies, to try cases of high treason and attempts upon the safety of the state. Clothed as it is with legislative initiative like the Chamber of Deputies aside from revenue bills, its members being selected from the higher walks of life, one would expect it to be the more powerful. But Mr. Lowell says: "As a matter of fact, the Senate has very little real power, and is obliged to yield to the will of the Lower House." 1

In Switzerland the Council of States corresponds to the United States Senate, and its members are elected by the local legislature of each canton, while the members of the National Council are elected directly by the people. We see in Switzerland the exact copy in this respect of our own government. The members of the Council of States represent their cantons. The delegates in the National Council represent the people. The power and influence of the Council of States has steadily declined while the power of the National Council has steadily increased, and it is said that ambitious young Swiss seek it in preference to the Council of States. With us a term or terms in the House of Representatives is a stepping–stone to the Senate. In Switzerland a term or more in the Council of States is a stepping–stone to the National Council.

In like manner we might pass over each European country, with the exception of the German Empire, and find that for many years the Chamber whose members are elected directly by the people has been the govern–

1 Lowell, Governments and Parties in Cont. Europe, vol. i, P. 156.

ing body of the country, while the power of the upper house has been steadily waning. In the German Empire, however, the power of the Kaiser, as King of Prussia and Emperor of Germany, is practically consolidated with the power of the Bundesrath, which corresponds to our American Senate, and these united powers entirely

overwhelm the Reichstag, or popular branch of the legislature. The German Emperor, like the President of the United States, selects his Chancellor and his ministers, and they are accountable to him only. Through the Bundesrath, in which the Kingdom of Prussia has a controlling influence and in which the Chancellor is all powerful, the German Emperor controls to a great extent the legislation of the German Empire. The conditions of Prussia and of the German Empire to–day are much more similar to those in the United States than those in any other country in the world. We need not call to the reader's attention that Great Britain is ruled by its House of Commons, and that the House of Lords, while it occasionally refuses its assent to a bill, eventually gives way to the House of Commons.

The causes for the decay in power and prestige of our House of Representatives are easily ascertainable. Though its members are elected directly by the people it is one of the most undemocratic bodies in the world. For all practical purposes there is no House of Representatives. The Speaker and the Chairmen of Committees practically control all the legislation of the House, and control it by methods so arbitrary and despotic that they would not be tolerated even in Russia.

The Constitution simply provides that the House shall choose its Speaker and other officers, but says nothing of their powers and duties. In legislative bodies of other countries, the speaker is selected without any reference to partisan bias, and he presides over the chamber with absolute impartiality. In our House of Representatives, however, he is selected because of his many years' experience in the House, his knowledge of its rules, and his ability to use those rules and his place to further the political interests of his party. He appoints the members of sixty–two committees, among whom the legislation in the House is parceled out for examination. He selects the chairman also of each committee. If he knows what particular measures may be brought to the attention of the House, he is able to arrange the committee to which those measures will be referred so as to secure action in accordance with his own views of the subject under consideration.

Except when the friends of measures presented to the House of Representatives are allowed to be heard upon them, the committee meetings are secret. The House never knows, nor do the constituents of a member of Congress ever know, what his action in a committee was upon any particular bill; and if a member of the committee should disclose it in the open House, or anywhere else, it would be a matter of reproach. So we have sixty–two different committees, composed in greater part of about eleven members each, secretly passing upon the advisability of legislation. With no public discussion, with the seal of secrecy upon committee action, the whole matter of passing a public statute is unknown to the constituents of each representative, in fact, unknown to all the people of the United States.

Responsibility is absolutely impossible under such conditions, but general corruption is altogether probable. A great corporation, or combination of capital, seeking special legislation, would be unable to control a majority of the House of Representatives where the merits of the legislation were known and openly discussed. But a committee is easily controlled because its action is secret, and the constituency of a member would never know what his action had been. Occasionally such corporations can reach the chairman, who practically controls the action of his committee. If unable to control the chairman, it can influence two or three members of the committee, who, by what is known as "log rolling " with other members, can bring about the approval of an obnoxious bill.

The greatest benefit of open discussion of public business is the enlightenment of public opinion, but by this method of legislation the public is kept in ignorance of what occurs in the committee, and it comes to take little interest in legislation. Not even the representatives of the newspapers can ascertain what is taking place in these committees. With no public discussion of the merits of the bills, there is no public interest in their passage, and no opportunity whatever for public opinion to bring either commendation or condemnation to bear upon a bill.

Now let us observe the number of bills referred to these committees. Between the first Monday of De cember, 1905, and February 17, 1906, 15,000 bills and resolutions, covering every conceivable subject of legislation, were introduced into the House of Representatives and referred to the appropriate committees.1 Thirty thousand bills and resolutions were introduced into the House of Representatives in the Fifty–ninth Congress. Three hundred and seventy–five members of that House had little if any knowledge of any one of those 30,000 bills and resolutions before they were reported by the committee.

Now what opportunity have they to know anything about a proposed law after it is reported by the committee? The chairman of that committee is usually awarded one hour for the discussion of his bill. The chairman selects

the members of the committee who are to speak upon the bill, and fixes the limit of time for each. He even has the power to determine whether an amendment may be offered. Within the time given to him he demands the previous question, and in the large majority of cases the bill is simply jammed through by a party vote which knows not and cares not for its effect upon the public welfare. Thousands of bills in recent years have been passed by the House of Representatives, of the contents of which the greater part of the members voting for them necessarily knew nothing.

The ablest men in the House are selected for the Ways and Means Committee, having charge of the

1 Address of Speaker Cannon of February 17, 1906, before the Union League Club of Philadelphia. Annual Report of Club, p. 113.

raising of revenue, and for the fifteen or more committees having charge of appropriations. The appropriation bills are the most important bills passed in our day by the House of Representatives. To understand fully the wisdom of an appropriation, the members must be thoroughly versed in the technical details of those departments of government asking for the appropriations. Thus the attention of a large number of the ablest members of the House is continually diverted from the consideration of general legislation by the absorbing obligations of the committees on appropriations.

The ordinary bill, outside of appropriations, if reported to the House without objection in the committee, is usually passed without any opposition. The larger part of all the legislation is made practically by the committees in secret so far as the House is concerned. On January 11, 1907, the House had 700 private pension bills on its daily calendar, and 628 of them were passed in one hour and thirty–five minutes. On, one day in January, 1905, 459 bills were passed in the House of Representatives in eighteen minutes. In 1899 the River and Harbor Bill, carrying appropriations amounting to $30,000,000, was passed in the House of Representatives after a debate of ninety minutes.1 The whole governmental policy of our country toward our dependencies, including our relations to Cuba, was determined by the amendments to the Army Appropriation Bill of 1901, measures to

1 Reinsch, American Legislation and Legislative Methods, p. 69.

which the House gave up but a single hour of discussion.1

We have assumed above that a bill which had been reported with approval by a committee would be entitled at least to a hearing in the House. This is not so. The Committee of Five on Rules, selected by the Speaker and of which he is chairman, at any time may report a rule which makes impossible the hearing or passage of any particular bill. This committee can even go so far as to propose for the consideration of the House a measure not yet reported, and may discharge a committee from any matter pending before it. It can fix the hearing of any bill for any particular day by special order. It has the practical control of the entire course of business in the House, determining how much time shall be given to any subject and in what order business may be brought before it. It can provide that a bill returned from the Senate be taken up and passed at once without debate. It can provide and has provided that points of order, as objections, should not be allowed to intervene against the consideration of an appropriation bill.2

Although the Speaker, through the Committee on Rules, exercises practically omnipotent power over legislation, such power is apparently insufficient for his ambitions. He has, in addition, what is known as the power of recognition, or, what would be more truly

1 Reinsch, American Legislation and Legislative Methods, p. 119.

2 Reinsch, American Legislation and Legislative Methods, pp. 57, 58.

descriptive, the power of nonrecognition of members, although he is aware that they are making a motion. If a member asks for the unanimous consent of the House to suspend a rule and pass a bill, the Speaker's acuteness of hearing depends upon the member asking, and whether the Speaker desires that unanimous consent shall be given. He refuses recognition to any member attempting to speak upon a bill whose name has not been given him by the chairman of the reporting committee. He frequently refuses to have any bill heard before the House to which he is opposed, and takes it from its order upon the calendar, placing it where it will not be reached. He practically controls all the legislation of the House, and controls it by methods so arbitrary that to submit to them is degrading. In 1881 an indignant member declared upon the floor of the House:

"When this Republic goes down ... it will not be through the 'man on horseback' or any President, but through the man on the woolsack in this House, under these despotic rules, who can prevent the slightest interference from individual members; who can, if he will, make and unmake laws like an emperor, hold back or give the sinews of

war and the salaries of peace."l Bourke Cockran, speaking in the House in April, 1904, said: "Again, sir, by our rules no Member can challenge the judgment of the House on anything. He cannot even address a petition or offer a resolution from his place on the floor. He must go around to a basket, out of the notice of the House, and drop his application, his resolution, or petition silently and secretly into a recep−1 Cong. Record, Forty−sixth Cong., 2d Session, 1207.

tacle, as though he was engaged in an act of doubtful propriety to be performed surreptitiously."

Let us see now some of the direct results of this kind of legislation. In the Fifty−seventh Congress the House passed 3,430 bills and resolutions. During the second session of the next Congress there were reported by the various House Committees 4,904 measures. During the same session 3,992 acts were passed by both Houses, 1,832 of which were public acts, 2,160 private laws, and 40 joint resolutions.1 To note a decided contrast, during the years between 1899 and 1905 the English Parliament, legislating for 42,000,000 people, passed only 46 general and 246 special laws.

Twenty years or more ago, when the Pension Department was refusing to approve many pensions, Congress commenced passing private pension bills. And now many members of the House, having no opportunity to distinguish themselves in debate, for the House "has ceased to be a deliberative assembly," are engaged exclusively in procuring the passage of private pension bills and of measures making appropriations tor their own districts. Representative Curtis, now United States Senator from Kansas, among others, kept directories of applicants for pensions, with thousands of names and notes as to the status of each claim. Members accept all kinds of bills and present them to the House as an accommodation to their friends and constituents. The result is that, notwithstanding all the powers possessed by Congress are enumerated in seventeen short sections, it passes more bills in each two

1 Reinsch, American Legislation and Leg. Methods, p. 300.

years than are passed in the same period by all the other national legislative bodies in the whole world. No bill should ever be sent to a committee until after open discussion in the House, and then it should be sent there only for the purpose of correction and amendment, later to be reported, discussed, and passed in the full House. No private pension bills nor special bills should be considered by Congress. The Pension Bureau and Court of Claims are quite sufficient to care for those.

Striking out the private bills, the House should not consider over 200 bills, outside of the appropriation bills, in a single Congress, and those should be discussed in open session with no limits upon discussion. With 30,000 bills before a single Congress, few bills can receive any attention. Both chairmen and members of committees, having no chance to procure fame and honor by manly efforts in discussing public matters in open session, turn naturally to gaining favor by seeking to confer benefits through legislation and thus to attach a large number of their constituents firmly to themselves.

Because it is impossible for the House with such a large body of legislation before it to give careful attention to measures, and because the chairman and members of each of the sixty−two committees are struggling to increase the power of their committee by reporting many bills, the cost of government is multiplied many fold. The Fifty−first Congress, in 1890−91, made appropriations to the amount of about $1,000,000,000, or $170,000,000 more than ever before had been appropriated by any Congress. Between 1890 and 1902 Federal expenditures increased nearly one hundred per cent. The appropriations of Congress for the year 1898 were $485,002,044; in 1906, the first session of the Fifty−ninth Congress, they were $820,184,624, or nearly double the amount of eight years before. The last Congress appropriated to the River and Harbor Bill alone, $83,816,138, a sum larger than the total cost of all government in the United States in any single year prior to 1860. The expenses of government are fast approaching those of the Civil War with over 1,000,000 men in arms.

By this method of committees with each member seeking to attach to himself many constituents through lavish disbursements of public money, legislation has increased so rapidly that it has become impossible to secure any careful consideration for any measure except the most important, and it is only the important which should be considered and passed at all. None of the bills which pass the House are discussed in a deliberative way. Frequently only two or three members vote on many of them, and most of them are rushed through by unanimous consent without any discussion whatever. The gavel passes the law, the clerk records it. So hasty and careless are the methods of legislation that the Dingley Tariff Bill, which filled 163 printed pages and imposed duties upon more than 4,000 separate articles of import, introduced at the opening of the session in the House on March 15,

1897, in less than two weeks was passed and transmitted to the Senate, only twenty−two pages of it having been considered and discussed upon the floor of the House. So carelessly and hastily was the work done that the sections relating to tobacco rebates were omitted, and the President actually signed a different bill from the one passed by Congress. Hidden away in the free list were provisions providing for a duty on anthracite coal and petroleum, and when the matter became public not a member of the House would admit that he knew there were any such provisions in the bill. Within twenty−four hours after President Cleveland's message in the Venezuela matter Congress unanimously approved his action and declared defiance to Great Britain. It eventually turned out that Great Britain was right, and that it was a matter which should have been carefully investigated. On December 14, 1907, thirteen days after the opening of the present Congress, the dispatches from Washington tell us that 123 of the proposed bills thus far introduced at the present session of Congress are already laws, of the existence of which apparently their proposers are ignorant.

The House of Representatives and the Senate to−day are governing the Philippines, the Canal Zone, and Cuba through the War Department; Hawaii, Alaska, and the territories within the United States through the Interior Department; and Guam and Tutilia through the Navy Department, while Porto Rico is left neither as a state nor a territory. Does such confusion of government bespeak wisdom? Is it strange that the chaplain of Congress is said to close each succeeding session with the general confession: "We have done those things we ought not to have done; we have left undone those things we ought to have done. Spare us, good Lord, miserable sinners."

But the worst feature of such lawmaking by the Speaker of the House is found in its effects upon the members. The tendency upon the individual member is to destroy his self−respect and his sense of responsibility to his constituents. All his aspirations for fame are quenched by these despotic methods. There is no longer any opportunity in the House for an honorable career through the manly art of oratory, or the ability to discuss wisely public questions. The Speaker cracks his whip over the members, keeping them continually in subjection by their desire for the one avenue of prominence — appointment to an important committee. Take hope and opportunity for advancement away from a man and you destroy all the springs of effort. Napoleon well understood this when he said that every French soldier carried a Marshals baton in his knapsack. And the Catholic Church has always appreciated it, for it can be truly said that every son of the Church carries the red hat of a Cardinal in his cowl.

Speaker Reed was well aware of the one ambition of the members, so when the Dingley Bill had been sent to the Senate in March, 1897, he postponed the appointment of the committees, holding them in abeyance over the members until the return of the bill and its passage. It was not until the 24th day of July, when the Dingley Bill had become a law, and when the measures in it objectionable to the Speaker had been abandoned, that he finally consented to make up the committees. He well knew that until he appointed those committees the future of every member of the House was in his keeping, and therefore the member to some extent would be subservient to his will, and knowing this, he kept himself in a position where he could coerce the whole House and thus become the real legislating power.

Limit the number of bills which can be introduced in the House; permit each bill to be openly and fully discussed, and the members, once liberated from autocratic rule, would become eager to understand the merits and demerits of a bill and to achieve a record for able discussion of public matters. The people would become interested in the legislation of the House, the newspapers would give prominence to its discussions, and it would become again a democratic body reflecting the feelings, opinions, emotions, and impulses of the whole country. Democratic government is either a failure, and should be abandoned, or such an institution should be destroyed in order that the people once more may become an active part of the government. A democratic republic cannot live without discussion.

At the time of the Constitutional Convention, in 1787, in the ten states in which there were two chambers in the legislature, the basis of representation in the Senate was the possession of taxable property, and in most states a considerable amount of wealth was required, in order to entitle its owner to vote for a state senator. The great weight of opinion in the Convention framing the Constitution favored the selection of the Senate in such a manner as to make it representative of property. Gouverneur Morris, embodying that sentiment, said:

"The Senate should be composed of men of great and established property, not liberty but property is the main object of society. The savage state is more favorable to liberty than the civilized state, and was only renounced for the sake of property." 1

Under Augustus no man was eligible to the Roman Senate who possessed less than a sum equal to $250,000.

The most of our United States senators have amassed considerable fortunes in trade, commerce, or manufactures, and desire above all things for themselves and for their families social position. Senators who have prospered during recent years naturally are allied closely with the economic conditions of our time, and are opposed to any change, however unjust the conditions may be toward the mass of the people.

A considerable number of senators have for many years been largely interested in industries dependent upon protective tariffs and special laws, and are to−day financially interested in trusts dependent upon special legislation. The English House of Commons, in the reign of Charles I, by resolution prohibited persons who were the owners of interests in monopolies from sitting in the Commons, and made it the duty of each member if he knew of a fellow−member who belonged to a monopoly, to publicly name him in the house so that he might be expelled.2 The power of the Senate also consists in its

1 Elliot's Deb., vol. v, pp. 278, 279.

2 Resolved, "That all projectors and monopolists whatsoever;

or that have any share or have had any share, in any monopolies; or that do receive, or lately have received, any benefit from any monopoly or project; or that have procured any warrant or command for tine restraint or molesting of any that have refused to conform themselves to any such proclamations or projects; are disabled by order of this House to sit here in this House, and if any man here knows any monopolist, that he shall nominate him; that any member of this House that is a monop− compactness. A small House is apt to possess more firmness than a large one, and is apt to feel its interests distinct from those of the great body of the people.

Besides, the Senate is closely allied with the President in the exercise of the greatest national powers existing to−day, the confirmation of treaties with foreign powers, which has come to mean the making of treaties by the Senate, and confirmation of the appointments of the President, which likewise has come to mean appointments by the different Senators. George Mason, in the Virginia Convention for the adoption of the Constitution, said: "It has been wittily observed that the Constitution has married the President and Senate — has made them man and wife. I believe the consequence that generally results from marriage will happen here. They will be continually supporting and aiding each other:

they will always consider their interest as united. We know the advantage the few have over the many. They can with facility act in concert, and on a uniform system ; they may join, scheme, and plot against the people without any chance of detection. The Senate and President will form a combination that cannot be prevented by the representatives. The executive and legislative powers, thus connected, will destroy all balances." 1

While the character of representative government in Europe has become more and more powerful through the

ohst or projector shall repair to Mr. Speaker that a new warrant may issue forth, or otherwise, that he shall be dealt with as with a stranger, that hath no power to sit here "

(See The English Patents of Monopoly, by William Hyde Price, 1906.)

1 Elliot's Deb., vol. in, pp. 493, 494.

popular branch of the legislature, the United States Senate has become the strongest power in our government because of these vast executive powers conferred upon it, and because materialistic forces are so influential in our country. The House of Representatives has become only a checking body upon the power of the Senate, and a very weak one at that. Little by little for the last forty years the Senate has been increasing its power. The right to originate bills for the raising of revenue is conferred upon the House, and the Senate has only the power to propose or concur with amendments. This provision of our Constitution was taken from the English system, where for hundreds of years, in a single bill, the House of Commons provided for the raising of revenue, and in the same bill prescribed the specific purposes for which the revenue should be applied. Undoubtedly, this provision was intended to cover appropriation bills, as well as distinct measures for the raising of revenue; however, bills for the raising of revenue, and bills for the appropriation of public moneys, passed by the House, are often amended in the Senate by cutting out the main part of the bill, aside from the enacting clause, and then making a new bill.

The Senate made 634 changes in the House measure known as the Wilson Bill, in 1894. Nearly all of these amendments increased the duty on foreign imports. When the Dingley Bill of 1907 was returned to the House of Representatives, it contained 870 amendments, being practically a new bill. In 1872 the House passed a bill abolishing the duties on tea and coffee. The Senate amended the bill by imposing duties upon 4,000 or 5,000 different articles, and the House, instead of resenting this infringement of its rights, passed the bill upon its return.

In 1883 the House passed a bill for the reduction of a few internal taxes; the Senate amended it by imposing duties on thousands of imports, and returned it to the House. The protectionists in the House, by an adroit maneuver, succeeded in having the bill referred to a conference committee; and this conference committee, not the House, to which the Constitution had given the right, but a mere conference committee, imposed burdensome duties upon about 5,000 articles of import.

Jefferson said of the power of the Senate to refuse to concur with the President in appointments to office, that the Senate should only see that no unfit person was appointed. The Senate now, however, has reached the point where it dictates appointments to the President, and then ratifies its own appointees. Step by step it has reduced the members of the House of Representatives to a kind of vassalage. If a representative desires to procure an appointment of a man from his district to a public office he appeals to his Senator for aid, and in return he surrenders to some extent his independence. Not only is this true, but so weak is the ordinary member, especially the newer members of the House, under the despotic methods of the Speaker, that they frequently resort to the Senators from their states to procure appropriations for their districts, by amendment to an appropriation bill sent to the Senate from the House.

The Senate no longer confirms treaties; it reconstructs treaties made by the President. It rejected the OIney−Pauncefote Arbitration treaty, the Hay−Pauncefote Canal treaty, the Newfoundland Reciprocity treaty. It did not report upon the French Reciprocity treaty, and about ten other reciprocity treaties with different countries; and it allows no treaty to pass without modifying it so that it becomes practically a treaty made with the Senate.

By means of the power of dictating the President's appointments in their own states, by their control of the appointments desired by members of the House of Representatives, and by reason of their close relations with railways, monopolies, and the general corporate interests of the country, the Senators have built a gigantic machine in each state whereby they control the patronage of their state, create a following among the politicians, and grant favors to the corporate interests which they represent in both state and nation. In every state that department which proves in practice the strongest will push its jurisdiction farthest. These masters of the great political machines of their states sit in their seats in the United States Senate with a large part of the patronage of the government in their hands, as mighty a power and at the same time as corrupt a power as Walpole, master of bribery. The close bond between the President and the Senate is patronage. Through this the President, to some extent, is enabled to control the Senate; and the Senate, to a considerable extent, to control the President. The result naturally follows that the two powers act in concert; and together they destroy all equilibrium between the branches of the government, override the House of Representa− tives, and exercise more or less influence over the courts.

Now let us consider the checks upon legislation. A proposed law introduced in the House of Representatives may be killed by the committee to which it is referred. If it is reported by that committee it may be destroyed by the committee on rules. If it escapes the committee on rules it may be defeated by the Speaker. If it passes over all these obstructions and is passed by the House and sent to the Senate it may be defeated in one of the committees of the Senate− If it reaches the Senate with the approval of the committee it may be defeated by the Senate. If it passes both Houses it may be vetoed by the President. If then passed by a majority of two thirds of each House it may be declared null and void by the United States Supreme Court. Was ever a system so cumbersome, so calculated to defeat the will of the people, so great a shelter for corruption, created by the perverse ingenuity of man? The Nation says: "There is somewhere in the reports of our courts the history of a private claim of unquestionable merit, which was passed without opposition ten times by one House and fourteen by the other, and yet never succeeded in getting through both Houses of the same Congress."[1]

Until the Civil War, government in the House of Representatives was carried on by discussion. Men were elected in those days because they were able to present matters forcibly in debate and to discuss public questions upon their merits. With the corruption which 1 The Nation, xvi, 145.

came in at the time of the Civil War and the concentration of great interests in the hands of a few men, came the concentration of power in the hands of a few leaders in the House. It became the motto "to do things "; to handle a large amount of business; to pass acts without discussion; to accomplish results. With this tendency the prestige of the House has gradually disappeared. The Senate much more wisely has put no limits upon discussion and, notwithstanding its close alliance with corporate interests and its secret executive sessions, it is still a more democratic body than the House; but House and Senate will reform themselves from within or eventually there

will be a reform from without. If the House of Representatives is truly to represent the people its bills must be confined to ^public matters, it must not attempt to examine more than a few hundred measures during each Congress, and it must discuss these publicly. We wish no Spartan assembly with its contempt for talkers. Discussion is the life of free government and without discussion it will not long continue.

The kind of government which we have been reviewing is exactly the kind of government where the people can know but little about what is going on, and gradually will become indifferent to public affairs because of their lack of knowledge. Behind government by committees, which carry on their work in secret, have naturally arisen usurpations of government. Those usurpations have been going on so long as to have become a normal condition. In the President's message to the Fifty−seventh Congress, speaking of the Depart− ment of Agriculture, he says: "It has gone into new fields until it is now in touch with all sections of our country." Indeed it has gone into new fields. The Department of Agriculture dates from 1862 in the midst of the Civil War, a time of great usurpation. It consisted of the Commissioner of Agriculture, a statistician, a chemist, an entomologist, a superintendent of the propagating garden and experimental farm. In 1868 a botanist was appointed, and in 1871 a microscopist;

in 1877 a forestry division was created, then a division for the investigation of animal diseases; in 1884 a special bureau of animal industry was established, and in 1887 agricultural experimental stations were established throughout the country. In 1889 the Department of Agriculture was raised to the rank of an executive department, and its head became the Secretary of Agriculture and was given a seat in the President's Cabinet. From that time the department has grown rapidly. The weather bureau, a department having control of irrigation, a department having control of roads, a bureau of chemistry, a bureau of soils, a bureau of statistics, and the division of biological survey have all come into existence.

To−day it is carrying on a thousand undertakings and spending millions of dollars each year for purposes which cannot find a single line or word in the Constitution justifying their expenditure. There has not been in the history of our country such extensive and clear examples of usurpation as every department and every work connected with the Department of Agriculture furnishes, if we except alone its undertakings relating to interstate or foreign commerce.1 The Department of Forestry, engaged in a work of the greatest national importance and doing that work with the most admirable results for the country, and the Department having charge of quarantines against the importation of diseased cattle or their transfer from one state to another, may find some justification for their existence in the control of Congress over interstate and foreign commerce, but aside from these there is not a provision in the Constitution giving a foundation for even an inference authorizing the appropriations for agriculture. Chief Justice Marshall says:2 "The powers of the legislature " (referring to Congress) "are defined and limited; and, that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained. The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts followed are of equal obligation."

If there is no express grant of power in the Constitution which confers the control of agriculture upon the national government, surely everyone will concede that no such power exists. The thousands of different powers exercised by the Department of Agriculture are powers which would belong to the states, unless they were conferred by the Constitution, since they have to

1 American Law Review, vol. xxx, p. 787. 2 Marbury v. Madison, 1 Cranch, 137.

do with domestic affairs alone. Now such express powers cannot be found in the Constitution. In this connection it is interesting to see that the Convention which framed the Constitution discussed this very question. On August 18, 1787, it was proposed to vest in the national government the right "to establish public institutions, rewards, and immunities for the purpose of agriculture, trades, and manufactures," and this was rejected. At the same time it was proposed "to establish a university to encourage by proper premiums and provisions the advancement of useful knowledge and discoveries," and this likewise was rejected.1 It was also proposed to authorize Congress to grant charters of incorporation in cases where the public good might require them, and this also failed. Thus the precise power which the Department of Agriculture exercises was rejected in the Constitutional Convention, and still, in the Civil War, a little over seventy years later, we find the government establishing this bureau.

Let us see the kind of work which is being done by this department. In a bulletin issued by the Chief of the

Division of Publications on January 19, 1907, this department calls to the attention of the farmers its publications on about a thousand different subjects, including the cost of raising calves, the feeding of chickens, the control of coddling moths, the cooking of meats, the cooking of vegetables, the growing of cucumbers, the control of the boll weevil, the use of skim mnk for feeding calves, the feeding of ducks, the remedy for flies on cows, the growing of peanuts, the building of hogpens,

1 Elliot's Deb., vol. i, p. 247.

the feeding of hogs, the clearing of flies from houses, the making of jellies, the shearing of lambs, the management of pigs, the raising cost of pigs, the making of preserves, the use of skim milk in breadmaking, and hundreds of other like matters.

Under the provisions of an act of Congress of June 30, 1906, $82,500 was appropriated to enable the Secretary of Agriculture to undertake experimental work in eradicating ticks which transmitted southern cattle fever. Inspectors were sent out in groups of about a dozen on horseback, with lassos like cowboys, to rope and examine the cattle in Texas, Missouri, Arkansas, Louisiana, Kentucky, and other states. The report of the Secretary of Agriculture says: "They covered their territory systematically, roping and examining cattle wherever found, and informing the owners of infested cattle of the most practical method of getting rid of the ticks."1 The fecundity of sows was another object which this department investigated in the year 1905−6. An investigation of fifty−five thousand litters was made and the Secretary of Agriculture assures us that the investigations are to be followed with a statement of the inheritance of fecundity.2 Investigations with a view to developing a strain of chickens with increased egg−laying capacity were also carried on extensively in that year. Experiments as to animal nutrition, as to feeding cottonseed products to hogs, as to the production and handling of milk, as to the making, maturing, and storing of cheese, were extensive and costly. The pear

1 Report of December, 1906, pp. 20, 21. 2 Report of December, 1906, p. 24.

blight, the peach blight, the growth of melons, and hundreds of other such subjects were investigated at the cost of hundreds of thousands of dollars in that year. Extensive experiments were made with tobacco wrappers for the aid of the Connecticut valley tobacco interests.

This prolific department seems to be ambitious to encourage the production of tea in this country, for it carried on in that year extensive investigations in South Carolina for the purpose of determining the possibilities of the commercial production of tea. Seven million packages of miscellaneous vegetable and flower seed were bought in the general market and sent out during the year to farmers. Waters used as beverages were examined, and one hundred and fifty−four samples of cattle food were analyzed to determine the quality of cattle foods sold upon the markets. The subject of tanning and the effects of different tanning materials upon the character, quality, and durability of leather were investigated, apparently for the benefit of the leather trust. At Fresno, Cal., in the Yakima Valley in Washington, and in the Yellowstone Valley in Montana, extensive experiments were made in soaking the alkali out of the land and studying the drainage system. The damages caused by the rabbit pest in orchards, by the boll weevil in cotton, and by the gypsy moth in Massachusetts, were also investigated. The United States likewise has taken hold of the question of good roads, and it appears that during the year 1905−6 seventeen roads were built in eleven states. Now I undertake to say with all positiveness that no good authority for any of these works can be found in the Constitution, and yet the United States government, for the year ending June 30, 1907, devoted to the Agricultural Department upward of $10,000,000, besides several hundred thousand dollars of what are called emergency appropriations.

The United States Supreme Court in a recent decision has held that no powers are conferred upon the national government to expend money in irrigation for the several states.1 Justice Brewer, writing the opinion, says: "Turning to the enumeration of the powers granted to Congress by the 8th Section of the 1st Article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands." On June 17, 1902, Congress passed an act authorizing the construction of irrigation works by the national government in California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, North Dakota, Oregon, Washington, and several other states. The project contemplated the forming of a water−users' association in all of these states, and the sale to them by the national government of water from its reservoirs. The moneys received from the sale of public lands was devoted to the purpose of erecting the tunnels and dams for a large number of irrigation works, and on September 30, 1906, $15,456,900.13 had been expended in their creation, while $39,155,161 had been allotted for their erection in sixteen different states and territories.

The Secretary of the Interior, in his last report, says:

"One of the important points which has already developed is that greater protection must be offered by law 1 Kansas v. Colorado, 206 U. S., 87–90.

to the works when finished. There is no Federal statute which can be invoked to protect these works, and the local statutes vary in different states and territories." 1 Why is it that no Federal statute can be invoked to protect these works and that local statutes are the only protection? The answer is simply this: The United States government has no authority in the Constitution to spend a dollar for the erection of these plants, or to enter the business of gathering water and selling it to farmers, and if a Federal statute was passed to protect such works, any attempt to punish a man under it would result in the courts declaring it unconstitutional. The government has entered upon this enterprise simply for the purpose of attaching to it millions of farmers scattered through these states, well knowing that every dollar of the public moneys used in this way is wrongfully diverted from the public treasury and wrongfully converted by Congress.

Congressman Wadsworth, Chairman of the Committee on Agriculture in the last Congress, commented at length on the tendency of the Department of Agriculture to usurp powers of the state governments. The House was considering the Nelson Amendment, increasing the agricultural appropriations, and Mr. Wadsworth said that the practice presented a serious menace to local control, when considered in connection with bills now pending before the Committee on Agriculture. He stated that those bills included aid to state normal schools, district agricultural colleges, mechanical and state high schools; and he added that, if appropriations 1 Report, December, 1906, p. 102.

were made for such purposes, by and by they would be extended to grade schools and then "you will have Federal control and supervision of your public schools." Mr. Tawney, Chairman of the Committee of the House on Appropriations, said: "If we continue this system of paternalism much longer, it will not be long until Congress will be swept off its feet and called upon to account for from $25,000,000 to $50,000,000 annually for the construction and maintenance of good roads."

In the last Congress there was considerable discussion about creating a new Department of Hygiene, and giving the head of this Department a place in the cabinet. At the rate we are going, within twenty years most of the powers of the states will be usurped by the general government. In like manner the government is devoting large sums of money to the advancement of memorial and historical associations, to the maintenance of a Bureau of Education, to the aid of communities suffering from extraordinary catastrophes, and for numerous similar objects. It simply usurps this power because the people are quiet and do not protest.

On March 8, 1898, ten days before the President sent to Congress the report of the Naval Board of Inquiry on the destruction of the Maine, the House of Representatives at a single sitting and with no debate whatever, by a unanimous vote of 313 gave to the President of the United States $50,000,000 to be expended "For the national defense and for each and every purpose connected therewith to be expended at the direction of the President and to remain available until January 1, 1899." On the next day, March 9th, the bill was passed in the Senate in one sitting and without a word of debate, by a unanimous vote of seventy–six. This was said to be the third occasion since the Civil War on which Congress had been unanimous about anything.1

Such a vote of public money probably was never known before in the history of constitutional government. Congress certainly had no power to vote the money in that manner. The grants of money by Congress must declare in the bill granting them the specific ends and purposes of the grants; an express appropriation of this money to a particular purpose was essential to the very validity of the grant. This has been the practice of Congress during the whole period of our constitutional history, and the practice of the English House of Commons for five hundred years. Yet, notwithstanding this. Congress invested the Chief Magistrate with absolute discretion in expending this money. The framers of the Constitution believed that specific appropriations should be made, because they feared if it were otherwise the executive would possess an unbounded power over the public purse of the nation. This act, turning the money over to the President, is simply an example of the recent acts of Congress, placing in him the widest discretion and giving him the opportunity to exercise the most arbitrary power. A more dangerous exercise of power could not be conceived.

The suspension of the operation of statutes by the heads of departments is becoming common in our

1 Bradford, Lessons of Popular Government, vol. ii, pp. 508, 509.

day. The late Secretary Hitchcock, of the Department of the Interior, permitted the withdrawal from allotment

of nearly 4,000,000 acres of land, belonging to the five tribes in the Indian Territory, for the purpose of creating a forest reservation, notwithstanding the statute forbade such action. The motive for doing this was undoubtedly excellent. The Secretary of Agriculture, upon consulting with the Head of the Department of Forest Reserves, in furtherance of the highest public interests had asked that this be done. It is just because such unauthorized powers are exercised for good purposes that they become dangerous to the public welfare. Early English kings frequently exercised this power of suspending the observation of statutes, not alone in favor of certain individuals, but for the entire nation.

Another exercise of arbitrary power is found in the passage of laws by attaching them as riders to appropriation bills. During the Fifty−seventh and Fifty−eighth Congresses, 574 acts of public permanent legislation were passed, of which 176 or thirty per cent were carried through as riders on appropriation bills. The original act conferring jurisdiction over navigable waters on the Secretary of War, and giving him absolute and unlimited control over wharves, bridges, and other structures in all navigable waters, by which he can exercise almost autocratic power affecting hundreds of millions of dollars' worth of property, was passed some years ago by Congress as a rider on an appropriation bill. It never was reported separately by the committee, and probably its existence as a rider was unknown to most of the members of Congress voting for the appropriation bill.

The prolific source of much of this legislation is the eighteenth subdivision of Section 8, Article 1, of the Constitution, which provides that Congress shall have power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Thomas Jefferson, in April, 1800, writing to Edward Livingston, discusses this clause as follows: "The House of Representatives sent us yesterday a bill to work the Roosewells' copper mines in New Jersey. I do not know whether it is understood that the legislature of New Jersey was incompetent to do this, or merely that we have concurrent legislation under the 'sweeping clause.' Congress is authorized to defend the nation; ships are necessary to defense; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning who ever played at 'This is the House that Jack Built'? " The Congressmen who devise statutes to increase the power of the Agricultural Department are endowed with quite as great powers of implication and inference as the members of that House of Representatives who provided for the working of the Roosewells' copper mines in New Jersey.

The exercise of such powers as we have seen in the Department of Agriculture are found in Russia, in the German Empire, and in every autocratic government. They are powers which are moving us rapidly toward a form of state socialism in this country. It will not be long before compulsory insurance of workmen by the state against accident, sickness, and old age will be urged upon the attention of the people; before we will have an inheritance tax, adopted for socialistic and disciplinary reasons, to reduce swollen fortunes, and thus to maintain equality between classes. By and by no one will imagine that any important affair can be properly carried on without the interference of the state; our national government will assume the place of Providence, and all will be invoking its aid for individual necessities.

The absorption by Congress of the legitimate powers of the states ought to cause great discontent among the people. If they are not indignant at such usurpation of the rights of their states, they need not complain if eventually the whole country is ruled from Washington, and that means one central government administering the laws for a continent of 3,500,000 square miles, and a people of 100,000,000 population together with millions of colonists. Such a bureaucracy has never been known. To accomplish this result the people must be kept deluded with the old idea that we are not only in advance of all other countries in all matters, but that we are the only country in the world which has any considerable liberty. To avert such a thing the people must be brought face to face with the facts. They must become candid and willing to see the faults of their government and themselves, even while they hug their virtues. Jealousy and distrust of centralized power will be found to be the sentinels of the people's liberty.

VI

THE UNITED STATES SUPREME COURT THE ABSOLUTE POWER "The execution of the laws is more important than the making of them."

JEFFERSON.

"Let everything that is in favor of power be closely construed; everything in favor of the security of the citizen and the protection of the individual comprehensively, for the simple reason that power is power, it is able to take care of itself and tends by its nature to increase, while the citizen needs protection."

LIEBER.

"If Parliament changes the law the action of Parliament is known to every man, and Parliament tries in general to respect acquired rights. If the courts were to apply to the decision of substantially the same case one principle to−day and another principle to−morrow, men would lose rights which they already possessed; a law which was not certain would in reality be no law at all."

PROFESSOR DICEY.

CHAPTER VI. THE UNITED STATES SUPREME COURT THE ABSOLUTE POWER

MARTIN VAN BUREN once said in the Senate:

"There exists not upon this earth, and there never did exist, a judicial tribunal clothed with powers so various and so important" as the Supreme Court of the United States.1 The judges are appointed to the office during good behavior, and their fixed salaries cannot be diminished during the term of their office. The United States District and Circuit Courts can be abolished and their powers conferred on other courts, but the United States Supreme Court, a coordinate branch of the general government created by the Constitution, cannot be legislated out of existence nor can its judicial powers be limited in any respect whatever by Congress. The highest courts of all other countries are dependent upon their parliaments, whose supreme power and authority they must respect, but the United States Supreme Court is practically independent of the whole nation. The Supreme Court can declare a statute, passed by both branches of Congress and approved by the President, void as a violation of constitutional guarantees. Or if an act, vetoed by the President, has been re−1 Elliot's Deb., vol. iv, p. 485.

passed by a two−thirds majority of each House, the Court still can declare the act repugnant to the Constitution. History presents but one example of the exercise of such power other than by an absolute monarch. The tribune at Rome, elected for a year, had an absolute veto upon any enactment. This powerful officer is said not even to have had a house in which to administer his duties, but sat upon the benches in the open. In all simplicity, standing for the great mass of unprotected Roman citizens against the power of the aristocracy, he had the power to declare the one word which would annul every proposed law of the great Roman Senate.

Though not elected by the people and independent of the nation, with a permanent tenure of office, in the last instance the Supreme Court has the right to prescribe the rules for the control of the other coordinate departments of government. It is the constitutional judge of the powers of Congress as well as of its own powers. "You have made a good Constitution," said a friend of Gouverneur Morris after the adjournment of the Constitutional Convention. "That," replied Morris, "depends on how it is construed." 1 This saying of Mr. Morris is true, because the exclusive right to interpret includes the power to change. Says a leading writer on Constitutional Law: "It is one of Blackstone's maxims that in every constitution a power exists which controls without being controlled, and whose decisions are supreme. This power is represented in the United States by a small oligarchy of nine irremovable judges. I do 1 Gordy, Political Parties in the United States, vol. 1, p. 114.

not know of any more striking political paradox than this supremacy of a nonelected power in the democracy reputed to be of the extreme type." 1

Mr. Dicey says of this power conferred upon the Supreme Court, "That in a confederation like the United States the Courts become the pivot on which the constitutional arrangements of the country turn is obvious. Sovereignty is lodged in a body which rarely exerts its authority and has (so to speak) only a potential existence ; no legislature throughout the land is more than a subordinate lawmaking body capable in strictness of enacting nothing but by−laws: the powers of the executive are again limited by the constitution; and the interpreters of the constitution are the judges. The Bench therefore can and must determine the limits to the authority both of the government and of the legislature; its decision is without appeal; the consequence follows that the Bench of Judges is not only the guardian but also at a given moment the master of the constitution."2 That branch of government which is its own judge in determining authoritatively for the people what are its own powers over the people, is absolute in its nature.

Leading writers on law have denied the power of the United States Supreme Court to declare acts of Congress unconstitutional.3 The power in the Court to

1 Boutmy, Studies in Constitutional Law, pp. 117, 118, Eng. Trans.

2 Dicey, The Law of the Constitution, pp. 170, 171.

3 Chief Justice Gibson, 12 Sergeant &Rawle, 330, 356; Professor Trickett, Judicial Nullification of Congressional Acts, declare a national statute unconstitutional was first asserted in the masterly discussion in Marbury v. Madison by Chief Justice Marshall, but there the conclusion was reached by implication, and no claim was made of express authority in the Constitution.1 Professor Lowell, in his work on "Democracy and the

Constitution," says:

"The Supreme Court of the United States could never have acquired its power of declaring a statute unconstitutional in any other country, at least in any other than an Anglo–Saxon country." 2

The English Parliament may change the powers and prerogatives of courts and even abolish them.3 It is doubtful whether the Federal tribunal of the German Empire, its only great appellate court, has power to inquire into the constitutionality of a statute passed by the Reichstag and the Bundesrath and promulgated by the Emperor, or even to inquire into the constitutionality of an act passed by one of the states. Professor Lowell, speaking of this court, says: "It is certain that the courts have not in fact exercised any general power of refusing to apply statutes on constitutional grounds."4 In Belgium, jurists are said to claim that a law violating the Constitution ought to be treated by the court as void; still, during the whole period of Belgium's inde–

North American Review, August 16, 1907; Mr. McMutry, Judicial Power and Unconstitutional Legislation, Coxe, pp. 30–41; Judge dark, Yale Law Journal, December, 1906, pp. 75–79. 1 Coxe, Judicial Power and Unconstitutional Legislation, pp.

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2 Lowell, Democracy and the Constitution, p. 72.

3 Dicey, Law of the Constitution, p. 153.

4 Governments and Parties in Continental Europe, p. 283.

pendence, judgment has never been pronounced upon the constitutionality of an act of its Parliament.1 Both the German Constitution and the Belgium Constitution impose limitations upon the powers of the government.

The French Constitution is not found in a single document, but in a series of distinct laws describing the fundamental rights which the state is enjoined to respect. An act passed by the Chambers and promulgated by the President will be held valid by every tribunal throughout the Republic.2 The Federal tribunal in Switzerland is bound by the Constitution to treat all federal legislation as valid. The Kingdom of Italy has a written Constitution limiting the powers of the government and the monarch. It is the original Constitution of Sardinia expanded into the Constitution of the Kingdom of Italy. It has a Supreme Court, but this court cannot consider the constitutionality of a law which involves the construction of the Constitution.3 Although the Austrian Constitution puts limitations upon the power of the Emperor and of the government, still the Federal Court has no power to question the validity of a statute which has been properly promulgated.4

The origin, however, of the theory that a court could declare an act unconstitutional was found in the history of our charter colonies. Their rights and powers, like the ordinary corporation, were determined by their charter, and when they passed a law in excess of the legal

1 Dicey, Law of the Constitution, p. 131.

2 Dicey, Law of the Constitution, p. 130.

3 Lowell, Gov. and Parties in Cont. Europe, p. 151, Note 1.

4 Lowell, Gov. and Parties in Cont. Europe, vol. ii, p. 84.

powers conferred by their charter, its illegality could be determined by their local courts, with the right of appeal to the privy council of England. After the establishment of the state governments and before the formation of the Constitution, legislative acts in two states, Rhode Island and North Carolina, were declared unconstitutional. By an act of the general assembly of Rhode Island, passed in May, 1786, provision was made for the emission of paper money. In June the Legislature prescribed that any person who should refuse to receive the money in payment for goods on sale at the face value of the goods, or who should make two prices for such goods, one in paper and the other in silver, on conviction should be fined £200 for the first offense. In August, 1786, the Legislature of Rhode Island passed a law that the offenses under this act should be tried by special courts without a jury, by a majority of the judges present according to the law of the land, and that three members thereof should be sufficient to constitute a court.

John Trevett tendered this money to John Weeden, a butcher, for meat, and when Weeden refused to accept the money, Trevett sued for the fine. It was objected that the trial by jury was a fundamental right in the State of Rhode Island, that the Legislature had no power to enact a law depriving a citizen of that right, and that the court could declare the act invalid. The court overruled this defense, and an appeal was taken to the Supreme Court of the state. But Rhode Island, unlike all the other states but Connecticut, had no written constitution in the modern sense, having con tinued after the Revolution under its colonial government. So the question before the higher

court involved the invalidity, of the statute because of its repugnancy to the provisions of the common law securing to the citizen the right of trial by jury. While the five judges were considering this act, the excited people in the streets were breathing forth their threats against them if they declared it invalid. Notwithstanding, they all agreed that the act was void. The legislature threatened impeachment and refused to reeled them. No opinion was written, but when the judges appeared before the legislature in October, 1786, on charges of treason and misconduct, some of them gave as a reason for their decision that the defendant was entitled to trial by jury according to the law of the land.1 Here we have a case where an act was declared invalid because it deprived the defendant, not of a constitutional guarantee, but of a right secured to him by the common law.

The law of North Carolina provided for the sale, by a commission appointed by the legislature, of lands in that state belonging to the loyalists, and the payment of the money into the state treasury. The purchaser received a certificate from the commissioner making the sale in behalf of the state, stating the time of sale and the payment; and if sued in ejectment he was entitled under the law of the state, upon making affidavit that he held the disputed property under a sale from the commissioner of forfeited estates, to dismiss the suit on

1 Coxe, Judicial Power and Const. Legislation, pp. 234, 246, 249.

motion. Mrs. Bayard, the plaintiff in a suit, was the heir of one Cornell, whose estates had been confiscated. The defendant had purchased her lands from the commissioner, had received the certificate, and, when sued, presented the certificate to the court and procured a dismissal of the action. A large number of other suits involving the same question were pending, and the constitutionality of the act was duly brought to the attention of the court on a motion to set aside the dismissal. The court in May, 1787, the same month when the Convention to frame the Constitution of the United States was gathering at Philadelphia, held this act unconstitutional, saying: "By the constitution every citizen had undoubtedly a right to a decision of his property rights in a trial by jury. For that if the legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without trial by Jury, and that he should stand condemned to die without the formality of any trial at all," etc.1 And they declared that the act must ~~It was assumed by many of the members of the Constitutional Convention, as appears by their declarations at that time, that the United States Supreme Court would have the power to declare acts unconstitutional.~~

~~1 Coxe, Judicial Power and Constitutional Legislation, p. 249; Bayard v. Singleton, Martin's Reports, N. C., 50, 52.~~

~~Section 2 of Article 6 of the Constitution states that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." We first observe that the laws referred to are declared to be the supreme law of the land only when made in pursuance of the Constitution. The provision continues by declaring that "the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." The words "the supreme law of the land " had a meaning established by five hundred years of English history, and from that meaning it well may be inferred that a law in pursuance of the Constitution bound the states and individuals and courts, and all laws not in pursuance thereof were void.~~

~~With great reluctance the United States Supreme Court approached the question of declaring a law enacted by Congress unconstitutional. Only two such statutes were declared unconstitutional prior to the Civil War.1 In two other cases the Court refused to perform duties imposed upon them by law which were not judicial in their character, but it was not until after the Civil War that the power of declaring a law of Congress unconstitutional was freely exercised. It is too late now to urge that this power, exercised for over a hundred years, does not exist. It would be rash, indeed, to contend that this supreme mandate, which renders the United States~~

~~1 Marbury v. Madison, 1 Cranch, 137; Dred Scott v. Sanford, 19 Howard, 393.~~

~~Supreme Court the most absolute power in existence, is without foundation. The danger attending the exercise of this power, however, is great. It matters not that the court calls it a judicial power, it is quite as much legislative in its nature. The grounds upon which it has been based, as stated in the opinions declaring laws unconstitutional, have been largely economic, political, or sociological. Public policy likewise has been invoked again and again by learned Judges of the United States Supreme Court as a reason. In every opinion holding an act unconstitutional, you can find expression after expression tending to show that the views of the writer as to government, political power, economic truth, or the effect of the act upon the public interests, have greatly influenced the decision. In about twenty- five cases the Supreme Court has declared a United States statute repugnant to the Constitution, but~~

in only a very few have the judges been unanimous. In about two hundred cases they have declared the statutes of states forbidden by the provisions of the national Constitution.

When Marshall became the Chief Justice of the United States Supreme Court, there had been only two decisions involving the question of the constitutionality of a state or national statute. During his term of office, from 1801 to 1835, the constitutionally of fifty- one acts was passed upon, and the great Chief Justice wrote the prevailing opinion in the greater number of these cases. His powerful mind, his terse, logical, graphic statement of a legal proposition, his strong personality, his acute intellect and masterful character, directed the current of opinion in that court toward a liberal construction of the powers of government. Never has a judge spoken from any court in this country, or probably in the world, with such a clear ringing voice for the vindication of what he deemed the powers of the court over which he presided. John Marshall's construction of the Constitution made the United States in truth one nation. He, indeed, forged the trenchant blade with which Abraham Lincoln slew the dragon of secession.

Our American people are given to believing that a law of Congress or of a state legislature is a sovereign specific for all evils, and in like manner they always have had the utmost confidence in courts. We have been in the habit of ascribing to courts a sort of supernatural power to regulate aright the affairs of the people, to restrain excesses, and to protect everyone in life and property. It is only occasionally, when some decision comes down, which the common man by instinct knows to be violative of his rights, that murmurs of discontent are heard.

The courts were not always looked on in this way. When, in 1794, the United States Supreme Court, in Chisholm v. Georgia, held that a state could be sued by a citizen of another state, the states were aroused, and proceeded quickly to bring about the passage of the eleventh amendment to the Constitution for their protection. Judge Samuel Chase, a very able but partisan Judge, appointed by President Washington as Associate Justice of the Supreme Court in 1796, was impeached in 1804 at the instigation of John Randolph for arbitrary and oppressive conduct. He was tried in 1805, but was acquitted. In 1803, Judge Calvin Pease, Judge of the third Circuit Court of Ohio, held that an act of the legislature of that state, conferring jurisdiction upon a justice of the peace to try without a jury an action where judgment was asked for more than $20, was unconstitutional because of the provision for a jury trial in the seventh amendment to the Constitution of the United States. His decision was affirmed. Not only Judge Pease, but also Judge Todd of the appellate court, who voted for an affirmation of Judge Pease's decision, was impeached by the assembly of the State of Ohio. Each of them was arraigned before the Senate and tried upon the impeachment, but both were acquitted.1 The case of Green v. Biddle2 created so much opposition in Kentucky, that an attempt was made to impeach the judges of the state courts who had followed that decision in other similar cases.

But the practice of deifying the courts and regarding the Constitution as sacred commenced early in the nineteenth century. As President Woodrow Wilson says, "The divine right of kings never ran a more prosperous course than did this unquestioned prerogative of the Constitution to receive universal homage." 3 The people modified their state governments to correspond with the national government. But the tendencies of democracy were so strong that gradually they elected their governors and judges by popular vote instead of by the legislature as in Revolutionary times. From time to time they also amended their constitutions, thus keeping in

1 Cooley, Constitutional Lim., p. 194, note. 2 Green v. Biddle, 8 Wheaton, 1.

3 Wilson, Congressional Government, p. 4.

touch with the progressive tendencies of society, although the national Constitution continued from 1804 for over sixty years without a change. Well would it be for the people if they were more watchful of the action of courts to- day, instead of permitting absorption in their own affairs to make them oblivious of how their dearest rights are guarded. This era of gross materialism, when men are thinking only of becoming rich, is an era of danger to our institutions. A hundred times more dangerous than the wildest excesses of angry men is the benumbing, deadening influence of materialism on the patriotism of the citizen.

Of all systems of government the most difficult to establish and render effective is the federative system. Apparently simple, it is in practice the most complex, for it has to apportion the degree of independence and local liberty which should remain in the states with the amount of power delegated to the central government, and to nicely adjust these relations. The United States Constitution creates no rights for the citizen, but simply provides for the apportionment of those which he ever has had. The United States Supreme Court derives its judicial power from the Constitution, and can exercise no power which is not conferred or necessary to the powers conferred,

while the highest courts of the states have original common- law jurisdiction over all domestic affairs, unless prohibited by the United States Constitution.

It is to be observed that the state governments, in approving the Constitution, consented that the United States Supreme Court should have the final power to determine all questions when their rights should come into conflict with the provisions of the Constitution, or the laws made in pursuance of it. In short, they have delegated to a court, created by the national government, the right to determine between their interests and the interests of that government; and it must be said to the credit of this august court that, until recently, it has exercised that power with great discretion and commendable impartiality. Mr. Justice Miller, in 1872, referring to the rights of the states and their relations to the national government, very truthfully said: "But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions require, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution or any of its parts." 1 This statement was undoubtedly true at the time it was made, but since then the decisions of the United States Supreme Court, as to the power conferred upon Congress to control interstate commerce, have been steadily destroying the powers of the states. This tendency culminated in the Lottery Case2 which practically held that the national government, through the control of commerce, possessed the police power of destroying a pernicious lottery. Mr. Root tells us that this tendency will be carried still farther, and that sooner or later constructions of

1 Slaughter House Cases, 16 Wallace, 82. 2 188 U. S., 321.

the Constitution will be found to vest the unexercised powers of the states in the national government. As the only binding constructions of the Constitution are those given by the Supreme Court of the United States, we assume that Mr. Root refers to that court as the power which sooner or later will make the constructions necessary to vest the power sought in the national government. It was just such a use of the power of construction that some of the Conventions which adopted the Constitution feared. The Convention of the State of New York, while adopting the Constitution, among other declarations, said: "That the jurisdiction of the Supreme Court of the United States or of any other court to be instituted by the Congress, is not in any way to be increased, enlarged, or extended by any fiction, collusion, or mere suggestion."l

Resorting to fiction to bring about a change of law has ever been a favorite method with courts. Interpretation which changes the law is just as effective as a constitutional amendment, and surely the sworn guardians of the law ought not to attempt to bring about such a change by construction. Yet we know what human nature is and what history has taught us. Where the Constitution is interpreted by a court from which there is no appeal, and which by its own decision can increase its own power, it is apt to invoke implied powers with considerable latitude. A strict construction of the Constitution is the constant security of the people against tyrannical government. The rule which allows the United States Supreme Court to hold a 1 Elliot's Deb., vol. i, p. 329.

statute unconstitutional requires that before it is so held it must be plain beyond a reasonable doubt that the law considered is repugnant to the Constitution. Yet its decisions as to the unconstitutionality of national statutes have generally been made by a divided court. Roman lawyers, taking the twelve tables as a basis, worked out by the means of implication and construction, and analogy therefrom, the extensive system of law codified in the reign of the Emperor Justinian. The impelling forces to- day in our country are almost identical with those of the last fifty years of the Roman republic and the earlier years of the empire. It must not then be put down to idle fear or ignorant suspicion, if intelligent men look with apprehension at the tendency in our day of the highest courts to first conclude what they wish to decide, and then find reasons for the decision. The means which they use to accomplish this is implication of powers, always so dangerous because unbounded. If admitted at all it is capable of the utmost extension. If the United States Supreme Court desires sooner or later to find constructions of the Constitution which will vest the power, spoken of by Mr. Root, in the national government they can easily accomplish the result.

This all- powerful Court as yet has not manifested a fixed intent to construe the Constitution so as to rob the states of their reserved rights, but they have alarmed the people in several cases where they seem to have divided in their decision of legal questions upon preconceived opinions of public policy. Section 8 of Article 1 confers upon Congress the power "To borrow money on the credit of the United States; ... To coin money, regulate the

value thereof and of foreign coin, and fix the standard of weights and measures." By the Articles of Confederation, the general government had been allowed to issue bills of credit and to make them legal tender in payment of debts. The states at the same time possessed concurrent powers, and, between the Federal government and the several states, millions of dollars of paper money had been issued which had become of little or no value. This condition precipitated the very crisis which brought about the Constitution and thus deprived the states of such powers. When these clauses were inserted the members of the Convention were agreed, with two exceptions, Mercer and Martin, of Maryland, that the opportunity had come to destroy forever the power of both the national and state governments to make a bill of credit, issued by either, a legal tender in payment of a debt. The question was thoroughly discussed whether an express prohibition to make such paper a legal tender was necessary, and, inasmuch as the government which they were creating was one of enumerated powers, they all agreed that it was sufficient to withhold the power, since the Federal government could not exercise it unless expressly permitted by the Constitution. "Thus," says Madison in his narrative of the proceedings, "the pretext for a paper currency, and particularly for making the bills a tender either for public or private debts, was cut off."1

From the day when the Constitution was finally 1 Fiske, The Critical Period of American History, p. 296.

adopted by the states until the Civil War all the leading statesmen and jurists, like Marshall, Webster, Story, and Curtis, had again and again declared the absence of power in the national government to make anything but gold and silver coin a legal tender in the payment of debts. When in the Civil War the banks suspended payments, Salmon P. Chase, Secretary of the United States Treasury, recommended to Congress the issue of United States notes, to be made receivable for all loans to the United States and all government dues except duties on imports. He said: "The Secretary recommends, therefore, no mere paper- money scheme, but on the contrary a series of measures looking to a safe and gradual return to gold and silver as the only permanent basis, standard, and measure of value recognized by the Constitution." Congress had the power to prescribe that these notes should be accepted in payment by the government, and in many ways could have aided in giving them value as a circulating medium without making them legal tender.

On February 7, 1870, the United States Supreme Court, in the case of Hepburn v. Griswold, announced from the Bench its decision that the legal- tender acts of 1862 and 1863, as regards the payment of debts existing before their passage, were unconstitutional. Chief Justice Salmon P. Chase, Justices Nelson, Clifford, Greer, and Field concurred therein and Justices Swayne, Davis, and Miller dissented. By an act passed during President Johnson's administration, the number of judges of the Supreme Court was reduced from nine to seven, for the purpose of depriving him of the right to fill the vacancies which were about to occur. Soon after President Grant's inauguration a new act restored the number to nine to take effect on the first Monday of December, 1869. On February 7, 1870, the day on which the decision affecting the legal- tender act was handed down, two vacancies existed. On February 18, 1870, the President appointed William Strong, of Pennsylvania, to fill one of said vacancies, and on March 21, 1870, Joseph P. Bradley, of New Jersey, to fill the other.

Of these appointments President Woodrow Wilson says:1 "In December, 1869, the Supreme Court decided against the constitutionality of Congress's pet Legal Tender Acts; and in the following March a vacancy on the bench opportunely occurring, and a new justiceship having been created to meet the emergency, the Senate gave the President to understand that no nominee unfavorable to the debated acts would be confirmed, two justices of the predominant party's way of thinking were appointed, the hostile majority of the court was outvoted, and the obnoxious decision reversed." Mr. Rhoades reaches the conclusion that there is no circumstantial evidence to show that the appointments of Judges Strong and Bradley were made with the intention of reversing this decision,2 and he tells us that the appointments were sent to the Senate by the President on the very morning of February 7, 1870, before 1 Congressional Government, p. 38. 2 Rhoades, History of the United States, vol. vi, pp. 268- 273.

burn v. Griswold, however, was made in conference November 27, 1869; and this might well have been known by Attorney- General Hoar, who cherished a bitter feeling toward Chief Justice Chase, and who was, we are told, instrumental in bringing about the new appointments. Upon the appointment of the new judges, the Attorney- General immediately moved that two cases involving the constitutionality of the legal- tender issue be taken up and argued, notwithstanding the prior decision of the court. The court, by the five judges who thereafter voted for reversal, instead of rebuking the Attorney- General ordered that these cases be heard.

On May 1, 1871, the two cases having been brought on for hearing before the court as reorganized, a decision

was announced reversing the prior decision, and on January 15, 1872, the opinions were read in open court.1 The five judges who voted to hear the re- argument all concurred in this decision of reversal. Mr. Justice Strong, one of the new appointees, wrote the prevailing opinion, Mr. Justice Bradley, the other, writing a concurring opinion. Mr. Justice Greer, who had sat in the prior case of Hepburn v. Griswold, had retired from the court; but Chief Justice Chase and Justices Nelson, Clifford, and Field dissented from the decision. The prevailing opinion held that the power to issue these notes could be inferred from the powers which grow out of the aggregate of powers conferred upon the government by the Constitution, or out of the sovereignty instituted by it.

Legal precedents in law become rules of property 1 Legal Tender Cases, 79 U. S., 457.

and muniments of personal rights. It is a well- established rule that a court never should overrule its decision in a case affecting private rights of property which has been followed for some period of time, because it has been relied on by people in exchanging values. "No man," said Sir William Jones, "who is not a lawyer would in many instances know how to act, and no man who is a lawyer would in many instances know how to advise, unless the courts were bound by authority as firmly as pagan deities were supposed to be bound by the decrees of fate." The people had relied upon the lack of power in the government to issue irredeemable paper money as a legal tender, from the formation of the Constitution until the passage of the Legal Tender Acts. The case of Hepburn v. Griswold was decided in February, 1870, and until May 1, 1871, business had been conducted upon the basis of that decision. The price of gold had steadily declined, notwithstanding the decision in the case of Hepburn v. Griswold, until May, 1871; and Mr. Rhoades tells us:

"Had the country acquiesced in the decision of the court, and had Congress supplemented it by legislation permitting the Secretary of the Treasury gradually to contract the greenbacks, specie payments would have been reached by 1873 and the financial panic of that year postponed."1

But the United States Supreme Court did not stop with this decision. Once started in this course it was easy to go to the end, and so in a case,2 decided in

1 Rhoades, History of the United States, vol. vi, p. 266. 2 Juilliard v. Greenman, 110 U. S., 447- 449.

March, 1884, the court finally determined that the reissue of the greenbacks, under an act passed in 1878, in a time of peace, there being no necessity for their reissue, should be upheld as an attribute to that sovereignty which appertains to all governments at all times. So by construction they finally arrived at the conclusion that the power to coin money included the power to stamp paper and declare it a legal tender in a time of peace. The reasoning on which this opinion rests is of interest, for if it be good the Constitution has no limitations, and it will avail nothing to examine carefully as to the powers delegated by the states and the people to the national government. The court said: "The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary." And from this the power was implied to make government notes a legal tender in payment of private debts, as one of the powers belonging to the sovereignty of other nations and "not expressly withheld from Congress by the Constitution."

Until the time of this decision it had been supposed that the only sovereignty which the national govern ment had was conferred upon it by the express grants of the Constitution, together with such powers as were necessary and proper to carry those express grants into execution. Until this decision it had never been suggested that the power of Congress arose from what was "expressly withheld from Congress by the Constitution," but rather arose from what was expressly granted to Congress by the Constitution. Still this learned court, eight judges concurring, deliberately invoked the sovereign powers of the Austrian Empire as the basis for inferring a like sovereignty in the United States;

and then emphasized the fact as an important one that the power to issue such notes was "not expressly withheld from Congress by the Constitution," when in the Constitutional Convention the very question was discussed, with the result that those great lawyers and constructive statesmen determined it to be unnecessary to prohibit the United States from issuing paper money and making it a legal tender in payment of debts, since the Federal government could not exercise a power unless it was expressly granted in the Constitution.1 If this kind of judicial reasoning is to prevail in the courts there is nothing to hinder the United States Supreme Court from

holding that the government has inherent powers. That doctrine once established the Constitution at one blow is reduced to blank paper, and then our judges may commence to examine the exercise of power by absolute governments in the history of the world, as a basis for ascertaining what power is vested in Congress.

1 Fiske, The Critical Period of Amencan History, p 296, Legal Tender Cases, 79 U. S., 652- 656 of opinion by Field.

Subdivision 1 of Section 8, Article 1, of the Constitution, empowers Congress "To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Subdivision 4, Section 9, Article 1, provides that "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration " directed by the Constitution. Another provision of the Constitution prescribes that representatives and direct taxes shall be apportioned among the several states according to their respective numbers. The Wilson Bill imposed a tax of two per cent upon all incomes of more than $4,000, the tax to remain in force until January 1, 1900. This clause was passed in the House of Representatives by a vote of 204 to 140, and the whole bill was passed by a vote of 182 to 106, sixty- one members not voting. Income taxes had been passed from time to time in the history of the country, especially during the Civil War, when eight of such laws were enacted.

The constitutionality of this act, so far as it imposed a duty upon incomes, was contested in the United States Supreme Court in a suit in equity by one Pollock against the Farmers' Loan and Trust Company,1 to prevent a threatened breach of trust by the defendant in the misapplication or diversion of its funds by the illegal payment from its capital of the income tax on its profits. Pollock was a stockholder of the defendant, and he alleged that they threatened to pay the tax and thus 1 Pollock v. Farmers' Loan and Trust Co., 157 U. S., 429.

impair his interest, and, as the payment would result in a multiplicity of suits, that he asked an injunction from the Equity Court enjoining the defendant from paying the tax. It was the claim of the plaintiff that the income tax was a direct tax, and therefore must be apportioned among the several states according to their respective numbers, and could not be imposed as a duty, impost, or excise uniformly throughout the United States upon annual incomes.

By the Act of June 5, 1794, Congress laid a tax upon carriages for the conveyance of persons, and the question whether this was a direct tax within the meaning of the Constitution was decided at that time by the United States Supreme Court.1 Mr. Justice Wilson, who was one of the most prominent members of the Convention framing the Constitution, Mr. Justice Chase, one of the ablest jurists of his time, Mr. Justice Patter- son and Mr. Justice Iredell, sitting in that court at that time, each expressed the reasons for their conclusions holding that the tax was an indirect tax or duty. Mr. Justice Patterson, who read the principal opinion, said:

"I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land." This case had been cited by every text- book writer on the Constitution from that time until the Pollock case, as holding conclusively that a direct tax within the meaning of the Constitution was only a poll or capitation tax or a tax directly upon real estate; and that all 1 Milton v. United States, 3 Dallas, 171.

other taxes were indirect taxes, duties, imposts, or excises. For over a hundred years the United States Government had thus construed the law.

Commencing with 1798, and extending down to 1816, five income taxes had been imposed, and in every one of those cases the government had followed the decision in the Hilton case, the assumption being that that decision had settled the law for this country. From 1861 to 1870, eight different statutes imposing taxes on income arising from both real estate and personal property had been enacted. Literally, hundreds of millions of dollars had been taken from the taxpayers through income taxes of the same nature as the provision in the Wilson Bill. In Springer against the United States, a case decided in 1884, the question of the validity of one of the Civil War income taxes was involved.1 Springer was assessed on his professional earnings and on the interest of United States bonds. He refused to pay, and, his real estate consequently being sold, the suit involved the validity of the tax as a basis for the sale. The United States Supreme Court held the tax valid.

Notwithstanding this hundred years of unbroken history in its courts and in all of the departments of government, recognizing that a direct tax meant only a poll tax or tax on real estate, the United States Supreme Court by a majority of five to four declared the provision in the Wilson Bill unconstitutional. On April 8, 1895, a

~~partial decision of the case was made, in which the court, consisting of eight members only, was evenly divided as to the constitutionality of the tax imposed upon an in- 1 Springer v. United States, 102 U. S., 586.~~

~~come from personal property, but a majority of the court determined that the tax was unconstitutional as to the provision on incomes from real estate and municipal bonds. A final decision on the constitutionality of the law as regards personalty was deferred owing to the absence from illness of Mr. Justice Jackson. A few weeks later the court rendered its decision, but in the meantime Mr. Justice Shiras, who on April 8th had been favorable to the constitutionality of the law as to personal property, had changed his opinion; so on May 20th the whole act was declared unconstitutional, Justices Harlan, Brown, Jackson, and White dissenting. In the early part of the last century the Irish courts relied for precedents upon the decisions of the House of Lords and the other appellate courts of England. Mr. Plunket, the greatest of the Irish barristers of those days, was addressing Lord Manners on a question of law, when the following colloquy took place: "Are you sure, Mr. Plunket," said Lord Manners, "that what you have stated is the law? " "It unquestionably was the law a half hour ago," replied Mr. Plunket, pulling out his watch, "but by this time the packet has arrived with a new batch of decisions and I shall not be positive."1~~

~~"The Constitution," says Mr. Cooley, "is not to be made to mean one thing at one time and another at some subsequent time, when the circumstances have so changed as perhaps to make a different rule in a case seem desirable." Yet this was just what occurred in the Income Tax case. The meaning of a direct tax having been established by the men who framed the Consti- 1 Shiel, Sketches of the Irish Bar, p. 158, note.~~

~~tution and their contemporaries, and that construction having prevailed for over a hundred years, during which time the government took from private persons hundreds of millions of dollars upon that construction, a majority of the United States Supreme Court deliberately overruled all their predecessors, basing their decision very largely upon the definition of direct and indirect taxes, as laid down by Adam Smith and other political economists. The United States Supreme Court has practically reversed itself in many other cases in recent days.1 Again and again we find the Justice of that court who writes the prevailing opinion reasoning upon the result of a contrary decision, and invoking the rule of inconvenience and the effect of such decision upon the public interests.2 These considerations which are purely questions of public policy, and not of law, are to be considered by legislative bodies and not by courts, still they have been influential in shaping judicial action.~~

~~The result of the income tax decision was to withhold the burdens of taxation from a few hundred thousand wealthy men, and to place a considerable proportion of~~

~~1 S. Carolina v. U. S., 199 U. S., 439, practically reversing Collector v. Day, n Wallace, 113; and Income Tax Case so far as it held that the provision affecting municipal corporations was unconstitutional; Haddock v. Haddock, 201 U. S., 562, practically overruling Atherton v. Atherton, 181 U. S., 155;~~

~~Leisy v. Hardin, 135 U. S., 100, practically reversing the License Cases, 5 Howard, 504.~~

~~2 Opinion of Mr. Justice Miller in Slaughter House Cases, 16 Wallace, 589, 599; Pine v. City of New York, 185 U. S., 93;~~

~~S. Car. v. U. S., 199 U. S., 455; Maxwell v. Dow, 176 U. S., 590;~~

~~Lottery Case, 188 U. S., 321.~~

~~those burdens, through the indirect taxation of the tariff, upon the heads of families working in factories, and upon farms all over the country. Ofttimes judges and great lawyers speak of the lack of intelligence and of the prejudice and passion of juries, but these are not half so powerful as the preconceived opinions and the influence of social relations upon the action of judges. The instinct of a great body of men of even a low grade of intelligence frequently carries them not only to the popular but to the right side of a public question. Leading Englishmen, before the War, justly derided us for continuing the terrible evil of slavery so long in a democratic republic. But when the South marshalled her forces in rebellion without a ship on the ocean, and with Jefferson Davis but just elected as President of the Southern Confederacy, England recognized them as belligerents, and the sympathies of her men of wealth and social standing were with the South from the beginning to the end of the war. At the same time millions of poor English workingmen, out of work and starving because of the cotton famine which resulted from the war, gave their sympathies to liberty and to the Northern cause.~~

~~France has recently adopted an income tax; and today all the leading countries of the civilized world, with the exception of the United States, Russia, Belgium, Hungary, and Portugal, are depending upon this means of raising money for the support of government. The President, in his Jamestown speech, has recently given utterance to words which indicate that he hopes that the income tax decision of the United States Supreme Court will be~~

reversed. Mr. Hannis Taylor, author of "Jurisdiction and Procedure of the United States Supreme Court," recently wrote of this decision: "Because by a single vote the Supreme Court decided some time ago against the validity of a proportional income tax levied in a certain form, there is no reason to believe that the Court, as it is now, or as it will be constituted in the near future, will attempt to annul acts drafted in the proper form, imposing graduated taxes upon both incomes and inheritances." Is it possible that anyone contemplates that the United States Supreme Court will again reverse itself? Better a hundred times amend the Constitution, and make it clear beyond doubt that the government has the right to impose an income tax. The Dred Scott decision shattered the faith of thousands of honest and intelligent men in the United States Supreme Court. Every consideration of public policy requires that that Court shall not again reverse itself.

But other changes are going on in this august court, much more worthy of the careful examination of the citizen than either the legal tender or the income tax cases. In Downes v. Bidwell,1 Mr. Justice Brown uttered these significant words: "We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference "with them, and what may be termed artificial or remedial rights which are peculiar to our own system of Jurisprudence." A later case exemplifies what the learned judge meant by such a distinction.2 That case was a petition by one Man-

1 Downes v. Bidwell, 182 U. S., 282. 2 Hawaii v. Mankichi, 190 U. S., 197.

kichi for a writ of habeas corpus to obtain his release from imprisonment in Hawaii upon conviction for manslaughter. He alleged that Hawaii had been incorporated into the United States; that, by the joint resolution of its incorporation, the administration of the criminal law, as it existed at the time of the joint resolution, was to be continued only so far as it was "not contrary to the Constitution of the United States "; that he was arraigned only upon an information of the Attorney- General of the territory, and not on an indictment for manslaughter; and that he was tried by a common- law jury, but that only nine of the jurors were in favor of his conviction, the other three dissenting.

It appears that, under the procedure existing in Hawaii at the time of the joint resolution incorporating it into the United States, a person could be held for a capital or otherwise infamous crime on the information of the Attorney- General, without any presentment or indictment of a grand jury, and that he could be convicted upon the verdict of nine of the twelve jurors voting guilty. The jury trial mentioned in the Sixth Amendment to the Constitution requires the unanimous verdict of the twelve jurors,1 while the Fifth Amendment provides that, "No person shall be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury." These provisions apply in full force to the courts of Hawaii.

Mr. Justice Brown, of the United States Supreme Court, wrote the opinion of the Court on this appeal, and an extract from his opinion will disclose the most danger- 1 Springville v. Thomas, 166 U. S., 707, 708.

ous law ever laid down by a court of justice: "It is not intended here to decide that the words 'nor contrary to the Constitution of the United States' are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: 'Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation, remain in force after an annexation of the territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?' We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

If the right when upon trial under the United States statutes, whether in the District of Columbia, or in Hawaii, to be held only on a presentment or indictment of a grand jury, and to be convicted only by a unanimous verdict of a jury of twelve men, is not a right fundamental in its nature, then it would be difficult to select any right prescribed in the first eight amendments to the Constitution which is fundamental. The first eight amendments to

the Constitution embody the Bill of Rights and, in the main, are principles of English liberty which existed three to five hundred years before the making of the Constitution. The people made those amendments to the Constitution because of their fear that the national government in its courts would not recognize these bulwarks of liberty. And now the Supreme Court has taken upon itself to determine that a person being tried for a crime in a territory of the United States, annexed with such a provision as we have recited, shall not have the protection which the fifth and sixth amendments of the Constitution secure to him; namely, that he shall be held on the presentment or indictment of a grand jury and shall be tried by a common- law jury, which means a jury of twelve men, and convicted only upon their unanimous verdict.

Where does the United States Supreme Court get the power to decide what portions of the first eight amendments shall be extended to criminals being tried in our territories, and what portions shall be withheld? By what power does it distinguish between those guaranteed rights, according as it may deem them fundamental or not fundamental in their nature? Is such a discretion as that reposed in the United States Supreme Court? If the court, as now constituted, can allow a man charged with crime to receive the benefit of some of the amendments and withhold from him others, how long will it be before some court will regard all of these amendments as not fundamental in their nature? The presiding Justice of the Court and three of the Associates, Justices Harlan, Brewer, and Peckham, dissented from this startling doctrine.

The court, in a more recent case,[1] declared that the Philippine Islands have not been incorporated into the United States; and that, therefore, the provisions of the amendments to the Constitution are not extended to those Islands; and it results that an inhabitant of those Islands could be convicted of treason on circumstantial evidence, or on the testimony of one witness, notwithstanding the Constitution provides to the contrary. The property of an inhabitant likewise could be taken from him without due process of law and confiscated for public use without compensation. There is not a right secured to the citizen of the United States to- day of which the people of the Philippines could not be deprived without protection from the fourteen amendments to the Constitution, because, forsooth, we have not incorporated the Philippine Islands into the territory of the United States. We acquired the Philippines through treaty, and the right to make the treaty and to acquire them came from the Constitution. But although we acquired these Islands through the Constitution, still the rule of the Constitution does not extend to them. We are in possession of the Philippines; we make the laws that

1 Dorr v. United States, 195 U. S., 138.

control them, impose taxes upon them, fix the duties to be paid on the admission of imports to them, pass laws controlling their lives as completely as the life of the citizen in this country, and still we have not incorporated them so that the Constitution, through which we acquired them, protects them.

In every country the value set upon human life and liberty is the measure of the degree of its civilization. It is perfectly evident that the value of the lives and the/liberties of that great proportion of our people who are either poor or in moderate circumstances, has been decreasing with great rapidity in recent years. The thing which the people prize most dearly will be most sacredly protected by the law, and the lawyer must be blind and deaf who is not aware that property is much more carefully protected to- day than life or liberty. Because of this worship of wealth it is practically impossible to convict a man of great wealth of a crime. Just as in the Netherlands, in the time of Philip II, it took fifty witnesses to convict a Bishop; and just as in England, in early times, the privilege of the clergy protected learning, just so here to- day wealth and social position are regarded as so sacred that it is impossible to execute the criminal laws against millionaire criminals. Along with this condition and as a direct result of this view of life, the courts, state as well as Federal, have been gradually impairing and destroying the barriers which our fathers erected against the exercise of tyranny.

What would men in the days of the birth of the Constitution have thought had courts attempted to distin- guish between guarantees in the Bill of Rights as fundamental and not fundamental? What would they have thought had the United States Supreme Court in their day held that certain of those guarantees of liberty should be applied to protect citizens and that others should not be applied? There simply would have been a revolution, and that straightway. The disregard of those guarantees in the Alien and Sedition Laws practically brought about the destruction of the Federalist party, root and branch, and put the Democratic party in power for forty years. Even seventy years later the Dred Scott decision, practically deciding that the Missouri Compromise was unconstitutional and that there were no limitations in our territory upon the use of the slaveholders of their property, brought about another revolution. But the worship of wealth and the universal maddening struggle for its attainment in our day has stilled the feelings of jealousy in men at the impairment of their liberties. If this tide

of materialism should ebb, and there should be an awakening to what is taking place, serious results would follow.

In no direction have our Federal courts extended their power so far in recent days as in the indiscriminate use of the granting of injunctions. The right to a temporary injunction formerly always rested upon the inadequacy of a remedy at law, and the irreparable injury which would result from its not being granted. Where the act, which was sought to be enjoined, was a criminal act only, the injunction was not granted. The right to an injunction was always based on apprehended injury to the property belonging to the person asking for the writ.1 In the numerous cases where the employers have procured temporary injunctions against employees or labor unions, the right of property was the right to continue the relation of employer or employee, or assume or create such relation with any particular person or persons, or to carry on business of a particular kind or in a particular place, and the courts construed such a right as a property right and as a basis for the injunction. For the purpose of sustaining the writ in the Debs Case,2 the United States Supreme Court held that the United States had a property interest in the mails, and that the stoppage of trains would injure this property right, and would also be an interference with interstate commerce. Obstruction of the mails and a conspiracy against interstate commerce is a crime.3 It has also held that the receivers of a railroad company actually may enjoin their employees for refusing to haul cars, or from even leaving the receivers' employ so as to cripple the road, or by any device to hinder its operation.4 The intent to hinder the management of a railroad by the receiver has been held sufficient to authorize the issuing of a temporary injunction.5

In states where the legislatures have enacted statutes declaring saloons to be public nuisances, and then existence and continuance a crime, injunctions have been issued at the instance of the state, and the Supreme

1 Northern Pacific R R. v. Whalen, 149 U. S. , 162

2 In re Debs, 158 V S , 581.

3 U S. Revised Statutes, Sect 3 995, Act of July 2, 1890 4 In re Lennon, 166 U S , 548, Arthur v. Oak, 63 Fed. Rep , 310.

6 In re Doohttle, 23 Federal Reporter, 544.

Court of the United States has sustained the doctrine.1 To find any authority for such writs it would be necessary to go back to the days of the Court of Star Chamber, in the disorderly times that followed the War of the Roses.2 The result is that the punishment for crimes is gradually being transmuted into contempt proceedings, based upon mere affidavits, in the different branches of the United States Supreme Court. And even when it is the duty of the United States to prosecute criminally, it uses its obligation as a foundation of the equitable remedy of a temporary injunction, thereby subverting the right of trial by jury.3

The execution of the laws has well been said to be far more important than the making of them. Respect for the courts is of the highest public importance, and any line of action on their part which will tend to create a bitter feeling on the part of the people toward them, should not be treated as of little importance, since our hope is not only in having laws honestly and ably interpreted by the United States Supreme Court, but in having the people believe that they are honestly and ably interpreted. In view of this fact, it is of great importance for the court to avoid such an arbitrary exercise of its power as will arouse great opposition. Such opposition has come from the free use of injunctions and will come again.

In many of the District and Circuit Courts of the United States some large corporate interest of a public

1 Ellenbach v. Plymouth, 134 U. S , 31.

2 1 Spence, Eq. Juris , 350, Gneist Eng. Const , 507 and note.

3 Professor Langdell, Harvard Law Review, vol. xvi, pp. 552, 553.

nature, under the claim that the state laws fixing rates are confiscating its property, in the first instance procures preliminary injunctions staying the execution of these laws. In the State of New York, a few years ago, the legislature appointed a committee to investigate the cost of gas furnished by a single company to the whole City of New York. That committee was represented by most eminent counsel. A most thorough examination into the cost of gas was made, and a report sent to the legislature, which passed a law fixing, as a maximum price for gas in that city, eighty cents per thousand cubic feet. That act was approved by the governor, but its execution was stayed by a preliminary injunction procured from a United States Judge, based upon affidavits, and the question of facts was referred to a single Master in Chancery, according to whose opinion the price fixed amounted to a confiscation of the defendant's property. This finding is presumably correct; but it is, however, a significant fact that on June 24, 1907, the day the Master filed his report, the Boston Consolidated Gas Company reduced the

price from eighty- five to eighty cents per thousand cubic feet, that being the fourth reduction the company had made during the last two years. The important consideration, however, is that such proceedings, practically annulling state laws in the first instance upon mere affidavits, without a hearing or witnesses, and the reference of questions of fact involved to a single Master of Chancery, where hundreds of millions of dollars are at stake upon his decision, will in time become intolerable to the people of every state where it occurs.

In Alabama, North Carolina, and in other states, the United States Circuit or District Judges, in the first instance, have granted such injunctions. The state authorities in North Carolina have practically set at defiance such action. As the matter becomes discussed more and more, unfortunate conflicts between the state and national governments are liable to arise. I submit with all candor that the practice of granting such temporary injunctions upon mere affidavits will become in- tolerable and will provoke unseemly and dangerous conflicts, and that Congress should enact a law forbidding its exercise.

The review by the Federal Courts of the official action of state legislatures and of the Interstate Commerce Commission, where they have passed upon questions of fact, will be found in practice to be most difficult and most unsatisfactory. Chief Justice Cooley, as the Chairman of the Commission appointed by President Cleveland in 1887, said that the fixing of freight rates for the whole country by the Commission would be a superhuman task. If the fixing of freight rates by a commission the members of whom give their wholes attention to the investigation of such questions, and who hear the witnesses and judge of their credibility, is a . superhuman task, how much more difficult is the task oof the court which sees the witnesses upon paper only? In a case years ago, Mr. Justice Brewer, in discussing the fixing of value of railway property and the justic»e of rates imposed by a state commission, said:

"No more difficult problem can be presented than this."1

1 Ames v. Northern Pac. Ry. Co., 64 Fed. Rep., 165, 173.

Will the Federal Courts, with only the records before them, without hearing the witnesses, without the advantage of the thousand little indications of truth and falsehood that can be appreciated only by those present during the entire investigation, attempt to determine values? Well may it be said that such a task is beyond the ability of any court to perform with justice.

Usurpations of power on the part of the executive and of Congress have been growing more frequent in recent days. The Constitution has conferred such vast powers upon the United States Supreme Court that it would seem that it should be satisfied to construe its powers so strictly, that the states, who have no authority over its action and who have surrendered to it the final arbitrament of all their rights, should find no real cause for discontent with its decisions. Still, every lawyer, acquainted with its decisions, especially in recent years, is alarmed at the advancement of centralization. "For thirty years," said Senator Bailey, of Texas, in the United States Senate on April 10, 1906, "the people of this country have been accustomed to see the courts exercise arbitrary and extraordinary power: and a new generation of lawyers have come to the bar who think it treason and who call it anarchy to restrain those powers." The Supreme Court should be placed by its exalted position far above party strife and far above the desire to exercise arbitrary power. Its careful observance of constitutional limitations would be a beneficial example not only to the other departments of government but to the highest courts of all the states.

VII

TREATY POWER AND STATE RIGHTS

"Above all nations is Humanity."

GOLDWIN SMITH.

"The peace of the nation and its good faith and moral dignity indispensably require that all state laws should be subject to the supremacy of treaties with foreign nations. ... It is notorious that treaty stipulations were grossly disregarded by the states under the Confederation. ... It was probably to obviate this very difficulty that this clause was inserted in the Constitution; and it would redound to the immortal honor of its authors if it had done no more than to bring treaties within the sanctuary of justice as laws of supreme obligation."

STORY.

CHAPTER VII. TREATY POWER AND STATE RIGHTS

MUCH has been written recently with reference to the rights of the Japanese pupils, in the public schools in San Francisco, under the treaty of 1894 between our country and Japan. The San Francisco affair is but one of many incidents growing out of treaty rights, and is not so material as the general question of the rights of emigrants from other countries which have treaties with the United States, securing to their people the privileges of the citizens of this country. At the rate of about 1,000,000 a year such people have been coming to our country for many years and will continue to come. In the main they are the most helpless of our population and are the most in need of the protection of our laws. No change in our country is so apparent as the difference between the way these poor immigrants were looked upon thirty or forty years ago and to–day. Frequently in our courts one is strongly impressed with the inability of many of the people from foreign lands, especially from Italy, Hungary, Russia, and China, to procure protection for their rights. What rights they have under treaties, and whether those guarantees in the treaties can be violated with impunity by state authorities, should be carefully examined and de–termined. Such a careful examination leads to the conviction that all treaties between the United States and a foreign country, securing to the citizens of the foreign country upon emigration to our shores the rights which we accord to our own citizens, is as much a part of the law of every state of the Union as though the constitution of each state had secured the same rights to such immigrants.

The provision of the Constitution which secures this right is found in Article 6, subdivision 2, as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Mr. George Ticknor Curtis says of this provision: "It is a remarkable circumstance that this provision was originally proposed by a very earnest advocate of the rights of the States — Luther Martin. His design, however, was to supply a substitute for a power over State legislation, which had been embraced in the Virginia plan, and which was to be exercised through a negative by the national legislature upon all laws of the States contravening, in their opinion, the Articles of Union or the treaties subsisting under the authority of the Union. The purpose of the substitute was to change a legislative into a judicial power, by transferring from the national legislature to the judiciary the right of determining whether a State law supposed to be in conflict with the Constitution, laws, or treaties of the Union should be inoperative or valid."1

In construing constitutions and their provisions it is an elementary rule that you can consider the history of the times when the constitution was formed and the evils which it was intended to correct to ascertain the meaning of the language.2 Even under the Confederation the exclusive right to make treaties was in the Federal government, and at the time the Constitution was formed the states had not been accustomed to act as sovereign commonwealths in international affairs. The treaty of peace of Paris in 1883, between the United States and the English government, provided that the American loyalists, whose property had been confiscated by various state governments, should be not only indemnified for their losses but should be secured in the future; and it also provided that all impediments to the collection of private debts from Americans to British creditors should be removed, and that those debts should be paid by the American debtors in pounds sterling. The people were indignant that their government should have made these stipulations in the treaty. Clergymen cried out against the tories from their pulpits; bills in different states were passed disfranchising them and confiscating their estates; ironclad oaths were required of them. A trespass act in New York allowed the patriot owners of property who had left the

1 George Ticknor Curtis, Const. History of the U. S., 2d ed., p. 554.

2 Rhode Island v. Mass., 12 Peters, 723; ex parte Williams, 114 U. S., 422; Maxwell v. Dow, 176 U. S., 602.

state during its occupation by the British, to recover from the loyalists who had occupied their property damages for its use in an action of trespass. The different states not only refused to obey the treaty, but after its adoption, as well as during the Revolutionary War, they passed acts in their legislatures allowing a debtor to deposit the paper money of the time, of little value, in court, or in some states with the Commissioner of Loans or Claims, to the amount of his debt to a British creditor; and the law provided that upon such deposit a certificate

should be given to him which should be regarded as a satisfaction of his indebtedness. If the British creditor procured a judgment against the debtor, collection upon execution was made impossible by stay laws.

The treaty had provided that they should recognize the rights of loyalists to their property, but instead some of the states passed confiscation laws. In every way of which the people of the states could conceive they robbed the loyalists of their property, drove them from the country, resisted the payment of debts to English creditors, and made a nullity of the treaty. It was because of such action that the British refused to surrender the forts which they occupied on our frontier. The performance of a treaty depends upon the honor and the honesty of the nations which enter into it, as there is no vindication of the rights of the parties making it except through damages for its violation or by war.

When we consider these facts we can see that the statesmen of those times, in framing the Constitution, naturally would have made provisions whereby treaties made by the nation could not be violated by the states. That they did make such provision is very clear. On March 21, 1787, about two months before the meeting of the Convention to frame the Constitution of the United States, Congress passed a resolution which reads: "Resolved, That the legislatures of the several states cannot of right pass any act or acts, for interpreting, explaining, or construing a national treaty or any part or clause of it; nor for restraining, limiting, or in any manner impeding, retarding, or counteracting the operation and execution of the same, for that on being constitutionally made, ratified, and published, they become in virtue of the confederation, part of the law of the land, and are not only independent of the will and power of such legislatures, but also binding and obligatory upon them."1

On April i3th, one month and one day before the meeting of the convention to draft the Constitution of the "United States, the representatives of the states, in Congress assembled, prepared a letter to the states asking each of them to enact identical laws of the following frame: "Whereas certain laws or statutes made and passed in some of the United States are regarded and complained of as repugnant to the treaty of peace with Great Britain, by reason whereof not only the good faith of the United States pledged by that treaty has been drawn into question, but their essential interests under that treaty greatly affected. And whereas justice

1 Journals of Congress, ed. of 1801, vol. xii, p. 24, March 21, 1787.

to Great Britain as well as regard to the honour and interests of the United States require that the said treaty be faithfully executed, and that all obstacles thereto, and particularly such as do or may be construed to proceed from the laws of this state be effectually removed. Therefore, Be it enacted by ... and it is hereby enacted by authority of the same, that such of the acts or part of acts of the legislature of this state as are repugnant to the treaty of peace between the United States and his Britannic Majesty, or any article thereof, shall be and hereby are repealed. And further, that the courts of law and equity within this state be, and they hereby are directed and required in all causes and questions cognizable by them respectively, and arising from or touching the said treaty, to decide and adjudge according to the tenor, true intent, and meaning of the same, anything in the said acts, or parts of acts, to the contrary thereof in any wise notwithstanding."l The letter which accompanied this proposed law stated that it was drafted in a general form, repealing all acts or clauses in said laws repugnant to the treaty, because the business of determining what acts and clauses were repugnant to the treaty would be turned over to the judicial department, and "the courts of law would find no difficulty in deciding whether any particular act or clause is contrary to the treaty."

Now Madison, who more than any other member of the Constitutional Convention guided its action, when a member of Congress was instrumental in bringing about the passage of this resolution of March 2ist and drafted 1 Journals of Cong., ed. of 1801, vol. xii, p. 35.

the proposed law of April 13th for the states. Gorham was not only a member of that Congress, but he was one of the framers of that very clause of the Constitution of the United States which we have cited above, and also a member of the first committee of five which reported the original draft of the Constitution. Johnson, the Chairman of the second committee of five, and Hamilton and King, members of the committee which reported the revised draft of the Constitution, were also members of the Congress which in March and April passed the above resolution and prepared the proposed law.

The original clause adopted by the Constitutional Convention with reference to the treaty–making power is as follows: "This Constitution, and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the several states and of their citizens and inhabitants, and the judges in the several states shall be bound thereby in their decisions,

anything in the constitutions or laws of the several states to the contrary notwithstanding."1 The second committee of five, which gave us the final draft of the Constitution, struck out the words "several states and of their citizens and inhabitants," and left the law reading, "shall be the supreme law of the land." The words "supreme law of the land or a part of the law of the land " is an expression taken from the law of nations; and was especially used in the common law, with reference to treaties, as a law which could not be affected by the law of the legislature, but prevailed as 1 Elliot's Deb., vol. i, pp. 265, 266.

the superior law throughout the extent of the nation entering– into the treaty. Every lawyer in the Constitutional Convention was undoubtedly familiar with Blackstone's words, "In arbitrary states this law " (i. e., the law of nations) "whenever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend execution of the old, therefore, the law of nations " (whenever any question arises which is properly the object of its jurisdiction) "is here adopted in its full extent by the common law and is held to be a part of the law of the land."l

In the case of Trevett v. Weeden the "law of the land " of Rhode Island was involved. Rhode Island had no written constitution, yet her legislature had declared that the refusal to accept the paper money issued in 1786, in payment for goods purchased, should be regarded as a crime; and that the persons charged with such crime should be tried before three magistrates without a jury, and that they might be found guilty by a majority of the judges present according to the laws of the land. The Supreme Court of that state held that this was not according "to the law of the land," as the right of trial by jury was a superior right which no statute of a state could destroy; and this was held in a state which had no written constitution in the modern sense at the time the law was passed and the decision made.

In the next year, at Newbern, N. C., in the case of Bayard v. Singleton, the supreme court of that 1 Blackstone, vol. iv, ch. v, p. 67.

state held that the act which permitted a purchaser of confiscated estates from the Commissioner of the State, when action was brought against him by the real owner to recover possession of the lands, to present his certificate of purchase from the Commissioner and move that the case be dismissed upon his affidavit filed, was not "the law of the land," because it failed to give the plaintiff the right of trial by jury which was part of the "supreme law of the land." Eight of the different states in their written constitutions expressly mentioned the "supreme law of the land " as being superior to any law which could be passed by the legislature.

On January 16, 1788, General C. C. Pinckney, speaking in the South Carolina Convention for the adoption of the Constitution, contended that even the Articles of Confederation bound the people of the different states by a treaty as well as does the Constitution of the United States, saying: "Indeed, the doctrine that the king of Great Britain may make a treaty with a foreign state, which shall irrevocably bind his subjects, is asserted by the best writers on the laws and constitution of England — particularly by Judge Blackstone, who, in the first book of his Commentaries (ch. vii, p. 257), declares 'that it is the king's prerogative to make treaties, leagues, and alliances with foreign states and princes, and that no other power in the kingdom can legally delay, resist, or annul them.' If treaties entered into by Congress are not to be held in the same sacred right in America, what foreign nation will have any confidence in us? Shall we not be stigmatized as a faithless, unworthy people, if each member of the Union may, with impunity, violate the engagements entered into by the federal government? Who will confide in us? Who will treat with us if our practice should not be conformable to this doctrine? . . . I contend that the article in the new Constitution, which says that treaties shall be paramount to the laws of the land, is only declaratory of what treaties were, in fact, under the old compact. They were as much the law of the land under that Confederation, as they are under this Constitution; and we shall be unworthy to be ranked among civilized nations if we do not consider treaties in this view, . . . Burlamaqui, another writer of great reputation on political law, says: 'that treaties are obligatory on the subjects of the powers who enter into treaties; they are obligatory as conventions between the contracting powers; but they have the force of law with respect to their subjects.'"1

The delegates from the different states in the Constitutional Convention well understood that this provision in the Constitution as to treaties was to be the paramount law of the whole land, binding the citizens and the legislature of every state just as effectively as it bound the national government. In the New York Convention, Lansing, who was a member of the Convention framing the Constitution, portrayed the dangers of putting– such a power in the hands of the executive and the Senate, and offered this resolution: "Resolved, as the opinion of this committee, that no treaty ought to operate so as to alter the constitution of any state ;

nor ought any commercial treaty to operate so as to
abrogate any law of the United States."2

1 Elliot's Deb., vol. iv, pp. 278, 279. 2 Elliot's Deb., vol. ii, p. 409.

Foreign treaties, as a rule, for reasons which will be apparent on reflection to everybody, always have been intrusted to the king, the president, or the head of the nation. John C. Calhoun, in the House of Representatives on January 8, 1816, referring to our obligation to act with the rest of the world through a single head, said: "The enumeration of legislative powers in the Constitution has relation, then, not to the treaty–making power, but to the powers of the states. In our relation to the rest of the world the case is reversed. Here the states disappear. Divided within, we present, without, an exterior of undivided sovereignty. The wisdom of the Constitution appears conspicuous. When enumeration was needed, there we find the powers enumerated and exactly defined; when not, we do not find what would be vain and pernicious to attempt. Whatever, then, concerns our foreign relations, whatever requires the consent of another nation, belongs to the treaty power — can only be regulated by it; and it is competent to regulate all such subjects, provided — and here are its true limits — such regulations are not inconsistent with the Constitution."1 This is the language of the great expounder of state rights; but in it we see not a word about the United States having the right to make treaties only so far, and upon only such subjects as are delegated by the people to Congress. The only limitation which he states is that the treaty regulations must not be inconsistent with the Constitution.

That Mr. Calhoun, who championed the cause of 1 Elliot's Deb., vol. iv, p. 464.

state rights, did not believe for one moment that a treaty was not a law controlling the different states and all of their inhabitants as effectually as it controlled the national government itself is well seen in the following statement of his views. According to his opinion, the only limitations on the treaty–making power were as follows: First, It is limited strictly to questions of inter alios, "all such clearly appertain to it." Second, "By all the provisions of the Constitution which inhibit certain acts from being done by the Government or any of its departments." Third, "By such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary." Fourth, "It can enter into no stipulation calculated to change the character of the Government, or to do that which can only be done by the Constitution–making power; or which is inconsistent with the nature and structure of the Government or the objects for which it was formed."1

From the above discussion we reach the conclusion that the treaty power, as expressed in the Constitution, is unlimited, except by those restraints which are found in the Constitution against the action of the general government or its departments, and those arising from the nature of the government itself. We could not by treaty change the character of our government, cede a portion of our territory, or make any fundamental changes thereof. But with these exceptions every provision of a treaty made with a foreign government is as binding upon the citizens of each state as a provision 1 People v. Gerke &Clark, 5 Calif. Reports, § p. 384.

of their own constitution, or an act of their legislature authorized by their constitution.1

The recent contention of the State of California, wherein it is claimed that the reserved rights of the states cannot be affected by the treaty power, has not a particle of foundation. Of course the power of making treaties comprehends only those objects which are usually regulated by treaties and cannot be otherwise regulated. But within that limitation the provisions of a treaty fixing the rights of immigrants from foreign lands is as binding upon the people of every state, and upon the states themselves, as would be the constitution of the state or the laws made pursuant thereof by the legislature. And the whole talk which we have seen in the newspapers in recent days over the reserved rights of California, and her right to disregard a treaty of the United States, has not a particle of foundation. If any question was ever put beyond doubt by a uniform course of decisions in the United States Supreme Court, almost from the date of the Constitution down until the present day, it is the above proposition.

The word "treaty " at the time of making the Constitution had a distinct and well–defined meaning, and covered the agreement between the sovereign powers of two governments regulating, among other things, the status of their citizens emigrating from the country of the one to the country of the other. That power had always been exercised by the king, or president, or the single supreme one–man power of any government, or, when such a power did not exist, by its legislature. 1 Geofroy v. Riggs, 133 U. S., 258, 267.

The whole of the treaty–making power was conferred upon our national government, for the Constitution provides that "No state shall enter into a treaty, alliance, or confederation."

As early as 1796 the question arose as to the effect of the treaty of peace with Great Britain, made under the Confederation in 1783, upon laws enacted prior as well as subsequent to the treaty by the State of Virginia. At the time of the making of that treaty the merchants of Virginia were largely indebted to British creditors. Most of those debts arose prior to the commencement of the Revolutionary War, and the war suspended the running of the statute of limitations. The treaty of 1783 recognized the legality of such claims, and provided that they should be paid, not with the paper money of the colonies, but with gold and silver, the currency of the world. Virginia, among other states, passed a law permitting the debtor to pay the amount of the debt in paper money to the Commissioner of Loans, whereupon he should be given by the Commissioner a certificate of payment, which the law provided was satisfaction of the debt. A defendant, Hil–ton, had complied with this statute and procured his certificate, and the sufficiency of that certificate as against the treaty was directly involved. The United States Supreme Court,1 with only one dissenting Judge, held, that under the Confederation, as well as under the Constitution, the treaty was the supreme law of the land, and that the statute of Virginia was void, saying:

"A treaty cannot be the supreme law of the land, that 1 Ware v. Hilton, 3 Dallas, 211.

is, of all the United States, if any act of a state legislature can stand in its way." The creditor was allowed to recover the full amount of his claim, notwithstanding the payment by the debtor of the full amount thereof in paper money to the Virginia Commissioner.

Then followed a large number of cases in which, by the statutes of the different states, an alien was prohibited from taking title by descent and sometimes by devise; other cases also, involving the rights of loyalists and their devisees to lands in the different states where the states had confiscated their titles. All these matters, as the reader will see, were matters entirely of domestic law, the control of which the states had reserved absolutely to themselves. No grant of power to the national government covers a single one of them, and they were matters peculiarly within the control of domestic legislation. And yet the Federal co–urts and the state courts, in numerous cases, held that treaties giving to aliens, or to grantees, heirs, or devisees of a loyalist, rights to real estate, in the very teeth of state statutes to the contrary, were controlling.1 In Hauen–

1 State of Georgia v. Brailsford, 3 Dallas, 1; Fairfax v. Hunter, 7 Cranch, 603; Craig v. Radford, 3 Wheaton, 5 94; Orr v. Hodgson, 4 Wheaton, 453; Shirac v. Shirac, 2 Wheaton, 259;

Pollard v. Kibbey, 14 Peters, 353, 412, 415; Spratt v. Spratt, 1 Peters, 342; People v. Gerke, 5 Calif., 381; Watson v. Donnelly. 28 Barber, 653; Maiden v. Ingersoll, 6 Mich., 373; Rebassess Succession, 47 La. Ann., 1,452, Chy Lung v. Freeman, 92 U. S., 275; in re Parrott, 6 Sawyer, 349; Baker v. The City of Portland, 5 Sawyer, 566; Yeaker v. Yeaker, 4 Metcalf (Ky.), 33, also 81 American Decisions, 530–534; Baker v. Shy, 9 Heisk, 85, 89;

Wunderle v. Wunderle, 144 Ill., 40; Monroe v. Merchant, 28 N. Y., 9, 39; in re Becks Estate, 31 N. Y. State Reporter, 965; stein v. Lynham,1 the United States Supreme Court said:

"It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity," citing many cases.

Mr. Butler, in his work on The Treaty–Making Power, summarizes the holding of the cases as follows:

"First, That the treaty–making power of the United States, as vested in the central government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that government as an attribute of sovereignty, and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several states of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the states from exercising the treaty–making power in any manner whatever and vested that power exclusively in and expressly delegated it to the Federal government. Second, That the power to legislate in regard to all matters affected by treaty stipulations and relations is coextensive with the treaty–making power, and that acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the states, are constitutional and can be enforced

Ho Ah Kow v. Nunan, 5 Sawyer, 552; Kull v. Kull, 37 Hun, 476; Opel v. Shoup, 100 Ia., 420; Cornet v. Winton, 2 Yerg., 143. 1 Hauenstein v. Lynham, 100 U. S., 490.

even though they may conflict with state laws or provisions of state constitutions. Third, That all provisions in state statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of Congress based on and

enforcing the same, even if such provisions relate to matters wholly within state jurisdiction."

There are certain cases which do not seem at first sight to be in accord with the cases cited. Thus, Chief Justice Taney says1 that the treaty–making power of the United States, in order to be legitimately and constitutionally exercised, must be employed in full recognition and subordination to the constitutional powers of the several states; although the treaty–making power, in carrying out the purposes and designs of the framers of the Constitution, excludes the states from all intercourse with all foreign nations, still this power is of no higher order than any other power of the Federal government, and that all must be exercised in full recognition and subordination to the constitutional rights of the several states.2 But all these remarks will be found unnecessary to the decision of the particular case before the court, and, in view of the many authorities to the contrary, the rule would seem to be that if the subject of the treaty be a subject of international diplomacy, it not only may contravene the statute of a state but it

1 Holmes v. Jennison et al., 14 Peters, 546, 569. 2 Mayor of New Orleans v. U. S., 10 Peters, 66; License Cases,

5 Howard (513) per Daniel J.; Passenger Cases, 7 Howard, 783

(507).

becomes the absolute law of that state. Treaties are entitled to a liberal construction in favor of those claiming under them.1 If, therefore, the people of any other country are secured privileges and immunities in our own country by virtue of a treaty, the provisions of that treaty, if admitting of two constructions, the one narrow, the other liberal in its nature, the latter is always to be preferred.

In March, 1891, a number of Italian criminals in New Orleans murdered the Chief of Police of that city. He had been especially active in following them up in their crimes, and in revenge therefor, at a given signal in the night time given by an Italian boy, he was shot and killed. Nine of the Italians supposed to have been guilty of the offense were brought to trial. The jury acquitted six of them and disagreed in the case of the other three. On the night following the end of this trial a mob broke into the prison, took out the Italian prisoners and shot them. The Italian government, through its minister, demanded that the lynchers should be punished and that an indemnity should be paid. Mr. Blaine, who was at that time Secretary of State, in answer to this demand took the position that the United States government had no local jurisdiction in Louisiana, but that the courts of that state were open to the Italian government for prosecution. He assured the Italian minister that the national government would urge the state government to institute criminal proceedings against the leaders of the mob. The Italian minister,

1 Tucker v. Alexandroff, 183 U. S., 424, 437; Chew Keong v. United States, 112 U. S., 540 of opinion.

Baron Fava, not satisfied with this answer, left Washington without any notice to our government and returned to Italy, and the American minister at Rome left Italy. It was afterwards ascertained that only three of the nine Italians killed were subjects of the King of Italy, the rest having been naturalized in this country, and the matter was adjusted by the payment of $25,000 to the relatives of the men killed.

This attitude of our government was alleged to have been taken because Congress had passed no statute making the offense a crime and prescribing the punishment therefor. Chief Justice Marshall, in Foster v. Nielson,1 says: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to acts of the legislature, whenever it operates of itself without the aid of any legislative provision." Undoubtedly the relatives of the murdered Italians could have enforced a civil remedy in the United States court, and in the courts of Louisiana, against the persons connected with their murder. The difficulty with enforcing a criminal proceeding on the part of the national government is that the national courts have no common–law jurisdiction of crimes, their jurisdiction depending absolutely upon national statutes prescribing the causes for which convictions can be obtained, and also the punishments which may be inflicted There is no question but that the United States government can pass a statute making such an act a crime and enforce it.2

1 Foster v. Nielson, 2 Peters, 253. 2 Baldwin v. Franks, 120 U. S., 678.

The national government, however, has never shown any great anxiety to enforce the treaty rights of its alien population. Its attitude toward the State of California in the recent matter was by no means so strenuous as was shadowed forth in the message of the President. In many states there exists a bitter feeling on the part of the people toward the alien population. It is easy for demagogues to fan that feeling into a flame of passion, and it is a most common occurrence for the aliens' rights to be violated. The reason of this impotency is very apparent to one who appreciates the importance to political parties of securing the votes of the people of the states. The voting

population of the state is generally hostile to the alien population. Some of them regard aliens as taking away their jobs. They are turned away from them in many cases by their customs and manners of life. They regard them as merely transient people ready to return to their own country when they have accumulated any property. Injustice toward them under such circumstances is very common.

The United States government, in support of treaty rights, can easily pass statutes prescribing the acts which are criminal on the part of the citizens of states against their alien population and fixing the punishment upon conviction, if it would. It likewise has the power to protect their rights with national troops. In the Debs Case, Mr. Justice Brewer, speaking with reference to the United States government depending upon the states for the enforcement of the national laws, said: "There is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers ; and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce, or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

Notwithstanding that the national government has this power, our alien population, protected fully by treaties, quite frequently are assaulted by mobs and their rights destroyed or imperiled, and little opportunity is given in the United States courts for redressing the wrongs. These alien laborers, in the last twenty years, have constructed thousands of miles of railway, and tens of thousands of miles of roads and streets. In the main, they are ignorant of our language, ignorant of our laws, subject to imposition, and helpless in the enforcement of their rights in the courts. We owe it to them, and we owe it still more to ourselves, to protect them. The national government ought to see to it that laws are passed protecting them from injuries. The Queue Case in California, the imprisonment of a considerable number of Chinamen in Boston a few years ago for the purpose of ascertaining if each of them had certificates, the ruthless treatment extended to Italians, Hungarians, and Chinamen all over our country, are a disgrace to us, an injury to us in foreign countries, and demand immediate remedial action on the part of the national government.

The school law of California passed in the year 1903 provides that "The trustees shall have the power to ex–elude all children of filthy or vicious habits, or children suffering– from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent; when separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school."1 The school board of San Francisco, pursuant to this statute, passed an order under date of October 11, 1906, requiring all pupils of Mongolian descent in the city to attend the oriental school on Clay Street, in the burned section of the city. The Secretary of Commerce and Labor, in his report to the President of November 26, 1906, said: "If the action of the Board stands, then, and if no schools are provided in addition to the one mentioned, it seems that a number of Japanese children will be prevented from attending the schools and will have to resort to private instruction."

It is said by United States Senator Fulton, of Oregon,2 that the Japanese excluded from the public schools provided for white children in San Francisco were very largely adults who, because they were beginners, necessarily entered the primary grades, and, in consequence, were brought into intimate association with the young white children of those grades. This is urged as a reason why the school board had the right in their discretion to relegate to the oriental school on Clay Street ninety–three Japanese students who attended the various schools in that city from July, 1906, until the following October. There is considerable force in this contention. The state

1 School Law of California, Art. X, Section 1662.

2 North American Review, December 21, 1906.

is under no legal obligation to create schools even for its native children; and it has been held that it is within its power and discretion, and not in violation of the Fourteenth Amendment to the Constitution, to create separate schools for negroes, affording them the same opportunities for education in those schools as it does the white children.1

The treaty provides that "As respects rights of residence and travel, the possession of goods and effects of any kind, the succession to personal property and the disposal of property of any sort, the citizens or subjects of each country shall enjoy in the other the same privileges, liberties, and rights as, and to be subject to no higher imposts

and charges than, native subjects or citizens of the most favored nation." It would seem that the rights of residence, without any limitation under this provision, secured to the children of Japanese immigrants the same privileges, liberties, and rights in the schools as were enjoyed by the children of our own citizens. But Mr. Richard Olney, who as Secretary of State in Mr. Cleveland's administration negotiated the treaty, contends that the final clause reserved a right and discretion in the state authorities of California to do exactly what they did do with reference to Japanese pupils. This clause provides: "It is, however, understood that the stipulations contained in this and the preceding article do not in any way affect the laws, ordinances, and regulations in regard to trade, the

1 Roberts v. City of Boston, 5 Cashing, 598; King v. Gallagher, 93 N. Y., 438; Ward v. Flood, 48 Calif., 36; Coryet v. Carrier, 48 Ind., 327; Claybrook v. Owensboro, 16 Fed. Reporter, 297.

immigration of laborers, police, and public security, either in force or which may be hereafter enacted in either of the two countries." The word "police " when used in connection with the word "powers " is an apt phrase, well defined in law as covering all of the powers reserved to the states by the Constitution. In the connection in which this word is used, this would probably be a reasonable construction of the word, and it may be that the action of the Board of Education of the City of San Francisco was within the reservation of rights provided by the treaty.1

It is certain, however, that the founders of our Republic did not contemplate for a moment the acquisition, through the war power by treaty, of extensive countries in Asia peopled by millions of people, and their rule by Congress, not pursuant to the Constitution, but as subject people. Gouverneur Morris, to his great discredit, writing to his friend. Henry Livingston, at the time of the purchase of Louisiana, discloses the fact that in wording Article 4, Section 3, subdivision 2, giving Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, he intended to use language which would allow the United States to acquire such territory and rule such people as subject people. "But," he says, "candor obliges me to add my belief that had it been more pointedly expressed a strong opposition would have been made." He apparently understood the views of the other members of the Convention, and he knew if such a purpose 1 The Japanese Immigrant Case, 189 U. S., 86, 97, of opinion.

was suspected that the provision would be rejected, so he resorted to a subterfuge to inject into the Constitution a clause which the United States Supreme Court in our day has construed as enabling us to rule tens of millions of human beings as subject people.

Speaking of the war power John Quincy Adams, in the House of Representatives in 1836, well said: "This power is tremendous. It is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty and of life." We protected slavery in our Constitution, nourished it for over seventy years, and destroyed it only by a terrible war which brought in its train evils that still threaten the very life of our Republic. We are sowing seed of the same kind in the acquisition of colonial territory, and in the rule of millions of people according to the principles of Russian and Asiatic despotism. The treaty power is a power which can be exercised with such dangerous results, that well might it be guarded most jealously by the American people against the ambitions of men who would make of our people a world power, even at the expense of destroying the spirit if not the letter of the Constitution.

VIII THE INTERSTATE COMMERCE CLAUSE "The difference between liberty and slavery may turn upon a little thing, but it is not a little difference."

ANON.

"An irreducible minimum of compulsion is the very essence of good government."

ANON.

"If the day should ever arrive (which God forbid!) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington and when the self−government of the States shall have been so far lost as that of the departments of France, or even so closely limited as that of the counties of England — on that day the political career of the American people will have been robbed of its most interesting and valuable features, and the usefulness of this nation will be lamentably impaired."

JOHN FISKE.

CHAPTER VIII. THE INTERSTATE COMMERCE CLAUSE

IT is not my purpose to attempt to vindicate the rights of the states as against the national government, nor to vindicate the rights of the national government as against the states. There is no danger from the development of the commerce clause, if that development is within the lines of the constitutional grant. The exercise of Federal powers beyond this grant is always dangerous because such exercise is undefined and therefore unlimited. The exercise of Federal power within this grant is not only permissible, but it is commendable for the national government to stand upon its rights and enforce the powers given it. For the same reason it is not only permissible for the state to insist that its rights shall not be infringed, but it is commendable for the state so to do. The extension, in recent days, of the exercise of powers claimed to belong to the national government has resulted largely from the existence of evils by reason of the abuses of trusts and railways.

Those who have urged the extension of national powers over these abuses have uttered hardly anything worthy of a logical discussion of the question as to whether Congress had power under the Interstate Commerce Act to pass the recent enactments. They have started with the assumption that abuses existed, that the states could not correct them, and that therefore the national government ought to correct them whether it possessed the power or not. President Roosevelt, in his Massachusetts speech a few months ago, said: "State rights should be preserved when they mean the people's rights but not when they mean the people's wrongs; not, for instance, when they are invoked to prevent the abolition of child labor, or to break the force of laws which prohibit the importation of contract labor to this country; in short, not when they stand for wrong or oppression of any kind or for national weaknesses or impotence at home or abroad. . . . The states have shown that they have not the ability to curb the power of syndicated wealth, and, therefore, in the interests of the people, it must be done by national action."

State rights, we submit, should be preserved whether they mean the people's rights or not. National rights should be preserved whether they mean the people's rights or not, because it is the written law. State rights should be preserved whether they have shown their ability to curb the power of syndicated wealth or not, because they are secured by the Constitution of the United States, and the national government and Congress and the President are directed by that instrument "not to deny or disparage " those rights. The United States Supreme Court has declared, again and again, "that the maintenance of the state governments is as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible states."[1] The President has taken an oath "to preserve, protect, and defend the Constitution of the United States," and he is under as sacred an obligation to protect the reserved rights of the states as he is to vindicate the rights of the national government.

Before the national government was formed the states existed. It could not have come into existence but for the delegation of powers to it from the state governments, and it cannot exist without the existence of the states exercising all the vigor of their reserved rights. "I believe," said Senator Edmunds, "that the safety of the Republic as a nation, one people, one hope, one destiny, depends more largely upon the preservation of what are called the rights of the states than upon any one thing."[2] I am contending not for state rights, as the reader has seen in the chapter on The Treaty Power and State Rights, but I am contending, with all conviction, that of all the men in this nation it most ill becomes the President of the United States to say "that state rights should be preserved when they mean the people's rights," when he is under a sworn obligation to preserve them because the Constitution demands that they should be preserved. Of all men the President, his advisers, and the officers of government are under the most solemn obligation to obey the Constitution. They are its sworn g–uardians, and for them

1 Texas v. White, 7 Wall., 725.

2 Speech in the Senate, March 27, 1890, Cong. Rec., vol. xxi, p. 2727.

of all men to renounce that obligation argues recreancy of duty and presents an evil example to all the people of the land.

The construction of the fundamental law on which the liberties of the people rest should never be made on grounds of supposed necessity or convenience. It is just such statements as we have quoted on the part of the President which have led the people to overlook and forgive usurpations of power, thinking that those usurpations

are necessary for the public welfare. It is well to observe at the very start of the discussion that the states are not dependent for their rights to intercourse upon the Federal Constitution, but, in the language of Chief Justice Marshall, commerce "derives its source from those laws whose authority is acknowledged by civilized man throughout the world."1 The states had this privilege unimpaired before the making of the Constitution, and they possess it to−day except so far as they have delegated it to the national government.

The Constitution "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."2 Now if the Constitution speaks to−day with

1 9 Wheaton, 211.

2 S. Car. v. U. S., 199 U. S., 437 of opinion by Justice Brewer quoting from Dred Scott v. Sanford.

the meaning and intent of its makers, there is no way more effective in ascertaining that intent and meaning than to turn to the history of the time when it was framed to learn the conditions then existing, and the mischief which it sought to correct.1 The Constitution probably would not have come into existence, for many years at least, had it not been for the abuse by states of their right to control the importation of goods from foreign markets, and their abuse of the right to impose duties and imposts upon the importation of goods from other states of the Confederation.

Congress, before the treaty of peace with Great Britain and again after the making of that treaty, had sought the power from the states to impose duties upon foreign imports and to control interstate commerce. The right of the states to impose duties upon foreign commerce was of great value to some of them. Rhode Island had one of the best harbors of that day at Newport, and by imposing duties upon imported goods which she sold to Massachusetts, New Hampshire, and Connecticut her people were able to meet the expenses of the state government. The great harbor of New York, midway between Connecticut and New Jersey, enabled her to lay duties on foreign importations, from which she secured each year from f6o,ooo to f8o,ooo. As a portion of these imports were taken by Connecticut and New Jersey, they were obliged in this way to support the government of New York. But this was not all. She compelled every sloop which came down

1 Rhode Island v. Mass., 12 Peters, 723; ex parte Williams, 114 U. S., 422; Maxwell v. Dow, 176 U. S., 602.

from Hell Gate, and every market boat from New Jersey, to pay an entrance fee and obtain clearance from her customhouse, and the people of those states could not get a load of wood or a dozen eggs into New York without paying− duties on them. New Jersey retaliated by laying a tax of $1,800 per year on the lighthouse property off Sandy Hook, and the people of Connecticut, after submitting for some time, finally voted to suspend commercial intercourse with New York.

Pennsylvania imposed duties upon exports from New Jersey and Maryland. Virginia, by reason of her duties on both foreign and domestic imports, secured a considerable part of the revenues necessary for the payment of the cost of her government. The port of Charleston afforded an opportunity to the people of South Carolina to exact tribute from Georgia and North Carolina. As a result of all these duties upon imports from foreign countries, and imports from adjoining states, animosities had arisen between the states, and the need that the national government should have power to stop these obstructions to commerce was the very cause of the meeting at Annapolis and of the Constitutional Convention.

We have shown the circumstances leading to the framing of the Constitution, and the only apparent causes, existing at that time, for delegating to the national government the power to regulate commerce with foreign nations and among the several states. Now the question naturally arises was it the intent, in view of those causes, to give to the national government. any greater power than by regulation to prevent such obstructions from being imposed by the states upon interstate commerce. In regard to foreign commerce, the general government stands in the place of every state and represents it for every national purpose, yet when the states surrendered the right to control interstate commerce, having in view the abuses which had grown up, it was undoubtedly their intent to confer only the power to make commerce free between the states.

In the Lottery Case, Chief Justice Fuller says: "It is argued that the power to regulate commerce among the several states is the same as the power to regulate commerce with foreign nations and with the Indian tribes. But is its scope the same? As in effect before observed the power to regulate commerce with foreign nations and the power to regulate interstate commerce are to be taken diverso intuitu, for the latter was intended to secure equality

and freedom in commercial intercourse as between the states, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the states."[1] This was the opinion declared by the writers in The Federalist. It was the desire for freedom of commerce among the states which inspired this provision as to interstate commerce in the Constitution, and all the early cases so indicate.

Mr. Justice Field, in a case[2] decided before the at–

1 Lottery Case, 188 U. S., 373, 374.

2 Sherlock v. Alling, 93 U. S., 99.

tempt to extend the meaning of the word "regulate " had been undertaken, said: "On examination of the cases in which they were rendered, it will be found that the legislation, adjudged to be invalid, imposed a tax upon some instrument or subject of commerce; or exacted a license fee from parties engaged in commercial pursuits; or created an impediment to the free navigation of some public water; or prescribed conditions, in accordance with which commerce in particular articles or between particular places was required to be conducted. In all these cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license in its pursuit in particular channels, or conditions for carrying it on. Thus, in the Passenger Cases, the law in New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In Pennsylvania against Wheeling Bridge, the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the river Ohio. In the case of Sinnott against Davenport, the statute of Alabama required the owner of a steamer navigating the waters of a state to file, before the boat left the port of Mobile, in the office of the Probate Judge of Mobile County, a statement in writing, setting forth the name of the vessel and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the state in addition to those prescribed by Congress. And in all the other cases where legislation of a state has been held to

be null and void, for interfering with the commercial power of Congress, as in Brown against Maryland, State Tonnage Tax Cases, and Weldon against Missouri, the legislation created, in the way of a tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom." In fact it will be found that, within the conception of the fathers, the control which they gave over interstate commerce was intended to cover only coastwise shipping from the port of one state to the port of another state. Mr. Justice Bradley, in a case,[1] said: "No doubt commerce by water was primarily in the minds of those who adopted the Constitution, although both its language and spirit embrace commerce by land and water as well."

But there is an abundance of evidence found in the acts of the Constitutional convention, and in the construction of the Constitution by the early Presidents, to show that it was not the intent of the framers of the Constitution, under the power to regulate interstate commerce, to clothe Congress with the power to prohibit commerce, or to own and operate canals and post roads. On September 14, 1787, a motion was made by Franklin in the Constitutional Convention that Congress be given power "to provide for cutting canals," and the motion was defeated. Edmund Randolph, who presented to the Constitutional Convention the Virginia plan, while Attorney–General under the administration of Washington, gave his opinion to Washington, February 12, 1791, on the extent of the power in Congress to regulate commerce, saying that its extent was "little more than to 1 The B. &O. Railroad Co. v. Md., 21 Wall., 456.

establish the forms of commercial intercourse between the states, and to keep the prohibitions which the Constitution imposed upon that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports, preference to one port over another by any regulation of commerce or revenue, and duties upon the entering or clearing of the vessels of one state in the ports of another."[1] Gallatin, in his report on internal improvements submitted April 6, 1808, said: "It is evident that the United States cannot under the Constitution open any road or canal without the consent of the state through which said road or canal must pass."

When Madison was President, Congress passed a bill to construct national roads and canals, improve water courses, and make internal improvements, but Madison vetoed the bill. At a later date, when it was sought to set apart and pledge as a permanent fund for internal improvements the. bonus of the national bank, and the share of the United States in its dividends for the purpose of building roads, Madison vetoed the bill, saying: "The power

to regulate commerce among the several states cannot include a power to construct roads and canals, and to improve the navigation of water courses, in order to facilitate, promote, and secure such a commerce, without a latitude of construction departing from the ordinary import of the terms, strengthened by the known inconveniences which doubtless led to the grant of this remedial power to Congress." And he declared "that it was a dangerous assertion of national power . . . seeing that such a power is not expressly 1 Prentice, Fed. Power over Carriers and Corporations, p. 102.

given in the Constitution, and believing that it cannot be deduced from any part of it without an inadmissible latitude of construction."1

Monroe vetoed an act granting money for the preservation and repair of the Cumberland Road in May, 1822, on the ground that the government had no authority to devote money for such purposes.2 Jackson vetoed a bill authorizing the subscription of stocks in the Maysville–Washington–Paris and Lexington Turnpike Company.3 In the Civil War the United States Government granted Federal aid in the construction of the Central Pacific Railway, but this was done under the war power at a time when usurpations of power were common, and the road was needed to move troops and to control Indian outbreaks. The track was laid over government lands, and the language of the act expressed the necessity to "secure the safe and speedy transportation of the mails, troops, munitions of war and public stores of the United States." In view of all these facts, can there be any doubt as to the lack of power in Congress to incorporate railways and build post roads?

But the times have changed and the customs have changed. To–day government goes roaming at will upon a boundless sea without chart or compass, seeking power wherever it can find it, with little reference to the limitations of the Constitution. Senator Beveridge proposes a bill forbidding the transport, or acceptance for

1 Elliot's Deb., vol. iv, pp. 468–470.

2 Elliot's Deb., vol. iv, p. 525.

3 Elliot's Deb., vol. iv, pp. 525–527.

transport, of the products of any factory or mine in which children under fourteen years of age are employed or permitted to work. The President proposes a national license law giving him the right to grant a national license in his discretion to such corporations as he thinks are good enough to engage in interstate commerce. The Department of Commerce and Labor is created to investigate the organization, conduct, and management of any corporation or joint stock company engaged in commerce among the several states, to examine their books, and to make recommendations to Congress for legislation. A bill providing for the Federal registration of automobiles, and to establish a uniform system throughout the entire country as regards the requirements demanded of their owners, is before Congress. An interstate commerce board is created to fix the rates to be charged on nearly 220,000 miles of railway. Under the guise of controlling interstate commerce, the police power of the states as to the control of food/ drugs, lotteries, importation of teas, and many other matters which heretofore have been entirely within the control of the states, is taken over by the national government.

In short, the national government, with few delegated powers, is going back to the old world views of the functions of government, and, through the interstate commerce act, is establishing a Federal police power which follows the footsteps of every citizen by licenses and restraining laws into every avenue of life, and practically supplants the police powers reserved to the states. 1 Crossman v. Lurman, 192 U. S., 189.

If the United States Supreme Court sustains all these powers, the national government will become omnipotent. An ambitious President, through his right to execute the laws, can perpetuate his power in spite of the people. But the President seeks powers still greater than these. He asks Congress to confer upon the Interstate Commerce Commission the right to discriminate between good and bad trusts; to allow certain railways to form combinations; and to punish those which it desires, and to exempt those which it thinks it wise to refrain from punishing.

Such powers as the President desires were never conferred upon the head of a constitutional government in all the history of mankind. In his message to Congress he says: "The actual working of our laws has shown that the effort to prohibit all combination, good or bad, is noxious where it is not ineffective. Combination of capital like combination of labor is a necessary element of our present industrial system. It is not possible completely to prevent it; and if it were possible, such complete prevention would do damage to the body politic. What we need is not vainly to try to prevent all combination, but to secure such rigorous and adequate control and supervision of the combinations as to prevent their injuring the public, or existing in such form as inevitably to threaten injury —

for the mere fact that a combination has secured practically complete control of a necessary of life would under any circumstances show that such combination was to be presumed to be adverse to the public interest. It is unfortunate that our present laws should forbid all combinations, instead of sharply discriminating between those combinations which do good and those combinations which do evil. . . . No more scathing condemnation could be visited upon a law than is contained in the words of the Interstate Commerce Commission when, in commenting upon the fact that the numerous joint traffic associations do technically violate the law, they say: 'The decision of the United States Supreme Court in the Trans–Missouri Case and the Joint Traffic Association Case has produced no practical effect upon the railway operations of the country. Such associations, in fact, exist now as they did before these decisions, and with the same general effect. In justice to all parties we ought probably to add that it is difficult to see how our interstate railways could be operated with due regard to the interest of the shipper and the railway without concerted action of the kind afforded through these associations.' This means that the law, as construed by the Supreme Court, is such that the business of the country cannot be conducted without breaking it. I recommend that you give careful and early consideration to this subject; and if you find the opinion of the Interstate Commerce Commission justified, that you amend the law so as to obviate the evil disclosed."

Now what is the inference from this statement? The message expresses the opinion that it should be permitted to railroads to make pooling agreements, providing these agreements were sanctioned by the Interstate Commerce Commission. The President renewed this suggestion in his Indianapolis speech, saying: "The law should be amended so that railroads may be permitted and encouraged to make traffic agreements in the interests of the general public as well as of the corporations making them." Was any such proposition ever heard from the ruler of a constitutional government? Will the people quietly allow the government to take possession of such a boundless field of power as the right to discriminate between good and bad combinations? Such a power was never exercised in any but an autocratic government. It would be unsafe to vest such vast power in five men, however honest they might be. Allow a board of interstate commerce to discriminate in this manner, and you actually put every railway and all their wealth at the mercy of these men's discretion, and you give to government such a terrific power as men have never exercised with moderation and justice.

The men upon the Interstate Commerce Commission are undoubtedly good and honest men. They would intend to exercise this unlimited power justly, but good intentions have never restrained a government that is otherwise unrestrained. Even though such power was now exercised for the public benefit, there would surely come a day when it would be wielded unjustly. The liberties of the people can never be protected if they intrust such vast and indefinite powers to any board. Years ago when the early railways were being built in Hungary and Austria, great corruption prevailed. Mr. Lowell, in his admirable work on "Governments in Continental Europe," tells the story of the great Hungarian patriot, Francis Deak. "Deak once remarked in Parliament that as a boy he had a strong fancy for eating eels, until he discovered the foul kind of place in which they lived, when his feelings turned to disgust. In like manner, he said, his enthusiasm for railroads was checked when he learned the methods by which concessions for building– them were engineered through the Parliament. The honest old statesman never attended the debates on railroad bills thereafter; and if he chanced to enter the hall unawares when such a measure was under discussion, some of the members would cry, 'Eels! Eels!' and he instantly slipped out again."1

Let us take up one by one a few of the acts passed and others proposed under the interstate commerce provision of the Constitution. The act of Congress of June 11, 1906, is entitled, An act relating to the liability of common carriers in the District of Columbia and Territories and common carriers engaged in commerce between the States and between the States and foreign nations, to their employees. This act provides: "That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several States, or between any Territory and another or between any territory or territories and any state or states, or the District of Columbia, or with foreign nations or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death to the personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent 1 Lowell, vol. ii, p. 142.

upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect, or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works." It then provides in Section 2 that if the employee may have been guilty of contributory negligence, it shall not bar a recovery where his contributory negligence was slight, and that of the employer was

gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. The action can be brought in the United States District or Circuit Court. It is to be observed that this act applies to all the employees of such common carriers, including those who render no service in the transportation of interstate commerce, as, for instance, engineers of local trains, section hands, mechanics in car and machine shops, clerks in offices, and coal heavers for stationary engines. It embraces all kinds of injuries, and proposes to abolish the fellow−servant doctrine in states where it is recognized. This act has been declared unconstitutional by two United States District Court Judges, and has been held constitutional by a Circuit Court Judge. In one of the cases decided by the district court, an appeal was taken to the United States Supreme Court and argued in the early part of the year 1907. The attorney−general of the United States, at the request of the President, intervened in behalf of the plaintiff, a private party, and the government, through him, was heard in the Supreme Court of the United States, a precedent for which action can hardly be found in our ju− dicial history. The Court has not yet handed down a decision upon the appeal.1

The law of the state where an accident, because of negligence, occurs has always governed the cause of action for negligence between master and servant.2 The internal commerce of a state is just as much under its control as foreign and interstate commerce is under the control of the national government. The ordinary liabilities and duties of the citizens of a state are not affected in the slightest by the fact that they are persons engaged in foreign or interstate commerce. Again and again has it been held that "A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is amenable, according to the law of the state, for acts of nonfeasance and misfeasance committed within its limits."3 If he fail to deliver goods to the proper consignee, at the proper time and place, he is liable in an action for damages under the laws of the state in its courts; or if, by negligence in transportation, he inflicts an injury on the person of a passenger brought from another state, a right of action for the consequent damage is given by the local laws. It has been held again and again that rules prescribed by a state for the construction, management, and operation of railroads within its territory are strictly within the limits of local law, and are not per se regulations of commerce. Rules requiring certain efficiency in engineers, firemen, train hands, and telegraph operators,

1 On Jan. 6, 1908, this act was declared unconstitutional.

2 Thompson, Commentaries on Negligence, Sect. 3868, 3869

3 Smith v. State of Alabama, 124 U. S., 465, 477, 482, prescribed by the state, are legal notwithstanding such employees are employed in interstate commerce.1

But in this act, the employee, whether an engineer of a local train, a section hand, a mechanic in the car and machine shops, a clerk in the office, a coal heaver for a stationary engine, or any other employee of the railroad company who performs his entire labor within the state, is declared to be entitled to recover in the United States courts because of the right of Congress to regulate interstate commerce. His employment alone by a corporation engaged in interstate commerce, in the contemplation of the law, is sufficient to establish jurisdiction and to give judicial power to award him damages in the Federal courts.

If Congress can confer a cause of action upon an employee of a common carrier engaged in interstate commerce for the negligence of his employer, it can equally prescribe that his day's work shall consist of four hours. It can regulate every relation between that common carrier and its employee. By and by, in the language of Congressman McCall, it will come "that the most common thing will be the necessity of an affidavit for a citizen to move his goods from state to state." By and by, the very intention of shipping the products of the farm, or the shop, or of any productive industry by an interstate carrier, will give the regulation of such farm, or manufactory, or industry to Con−

1 Chicago, Milwaukee &St. Paul Ry. Co. v. Solan, 169 U. S., 133; Missouri, Kansas &Texas Ry. Co. v. Haber, 169 U. S., 613;

Atchison, Topeka &Santa Fe Ry. Co. v. Matthews, 174 U. S., 96.

gress. In the language of Mr. Justice Lamar in Kid against Pearson,1 "The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacturers, but also agriculture, horticulture, stock raising, domestic fisheries, mining, in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest and the cotton grower of the South plant and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the states, it

would follow, as an inevitable result, that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests — interests which in their nature are and must be local in all the details of their successful management. ... It was said by Chief Justice Marshall that it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the several states was to insure uniformity of regulation against conflicting and discriminating state legislation."

Under this employers' liability law. Congress has attempted to take from the cognizance of state courts their jurisdiction over a class of cases which they have exercised during the entire history of the country, upon the single ground that the man injured in the state is the employee of an interstate common carrier. All the transactions of men with common carriers thrcmgh express companies, accidents upon trains, and the hundred 1 128 U. S., 21.

other kinds of cases which might arise out of such relationships, by and by will be removed by a national statute from the state courts to the United States courts, simply because one of the parties is a common carrier of interstate commerce and the other party is dealing with him. In 1903 Mr. Justice Brewer said: "The Constitution is supposed to possess an elasticity which would make the manufacturers of India rubber choke with envy." Indeed, if the constitutionality of this act is sustained, all the relations which men have with common carriers of interstate commerce will be subject to the control of Congress.1

Senator Albert J. Beveridge, of Indiana, whose sympathy witty the poor and the afflicted will not be doubted by anyone who has read his two volumes entitled The Russian Advance, in which he sets forth all the beauties of the Russian autocracy, introduced in the Fifty−ninth Congress a bill for the regulation of child labor, prohibiting any railway, engaged in interstate commerce, from carrying as freight any article upon which children less than fourteen years of age had performed labor. Robert Hunter tells us that not less than 80,000 children, most of them little girls, are employed at present in the textile mills of the country. He tells us that in the South there are now six times as many children at work as there were twenty years ago. Surely the attainment of no more worthy object can be conceived of than the protection of such children in our factories.

The question, however, is, shall the United States

1 Field v. Barber Asphalt Co., 194 U. S., 618.

government attempt to remedy this evil through the interstate commerce clause, without the slightest authority for its action? This bill was rejected by Congress. It has the support, however, of the President. Mr. Bryan, in his debate with Senator Beveridge,1 says: "I have given to Senator Beveridge's bill (referring to the proposed child's labor bill) whatever support I could. It is right in principle, it is necessary, and it does not interfere with the reserved rights of the states." So between Senator Beveridge and the President and Mr. Bryan, this bill will undoubtedly appear again before Congress. The Judiciary Committee of the House of Representatives said of this bill: "It is not extreme or ridiculous to say that it would be just as logical and correct to argue that Congress can regulate the age, color, sex, manner of dress, height, and size of employees, and fix their hours, as to contend that Congress can exercise jurisdiction over the subject of woman and child labor. . . . The agitation of such legislation produces an uneasy feeling among the people, and confuses the average mind as to the power of Congress and the power of the state."

If Congress can regulate child labor in the factories, under the interstate commerce clause, because the owner of the factory contemplates selling his goods in another state, with just as much consistency it can regulate child labor upon the farm, in the wheat field, or in the cotton field, upon the ground that the farmer and the cotton grower intend to ship their crops to Liverpool. If it can regulate the age of children in factories because the product of those factories is carried by a common car−1 The Reader, April, 1907, p. 465.

rier to another state, why can it not regulate the ages of the farmer's children working in the wheat fields? A portion of all the products of the farm and the factory is carried beyond the confines of the state by common carriers, and if this fact is to control, there is nothing to prevent the regulation of the whole industries of the country by Congress, because, forsooth, the products of those pursuits are to become the subjects of interstate commerce.

There is not an evil in all the vast field of production which Congress cannot control if this proposed law is permissible. Such a pretension would result in the supervision of the means of production of all the subjects of interstate and foreign commerce which may be borne upon railways or canals, from point to point within the several states, toward their ultimate destination in another state or in a foreign country. Such a pretension would

put under the control of Congress every man, not only engaged in interstate commerce, but working upon the railways and the canals and the boats and ships which are used on the highways of commerce. Of course, the absurdity of such legislation is apparent to any intelligent man, but because it appeals to millions of philanthropic people, to millions who do not understand the powers of the national government. Congress is besought to pass such unconstitutional laws.

On April 2, 1907, Judge Edward H. Farrar, of New Orleans, communicated to the President a means of accomplishing all the results sought by the kind of legislation which we have been describing, through the power given to the national government in Paragraph 7, Sec– tion 8, Article 1, of the Constitution, which grants to Congress power to establish post offices and post roads. In this letter he assumes that because Congress has been given this power it can create a corporation to take over the whole railway system of the country, if necessary, and then lease those railways to the companies from which they have been taken. In this way Congress will be the owner of the property, using it for a public purpose, and can exercise the control necessary to accomplish all the reforms sought without an amendment to the Constitution.

A resolution empowering Congress to create a corporation was rejected in the Convention which framed the Constitution. The Pacific Railroads were chartered as territorial corporations, deriving their authority from the states within which they operated by state permission. Throughout the long history of the Cumberland Post Road the practice was uniform of securing the consent of the state to build the road. Mr. Prentice, in his admirable work on Federal Powers over Carriers and Corporations,1 cites an interesting instance of this in the Act of Congress of March 26, 1804, enacting: Section 4, "That whenever it shall be made to appear to the satisfaction of the Postmaster–General that any road established by this or any former act, as a post road, is obstructed by fences, gates, or bars, other than those lawfully used on turnpike roads, to collect their toll, and not kept in good repair with proper bridges and ferries, where the same may be necessary, it shall be the duty

1 Prentice, Fed. Powers over Carriers and Corporations, p. 150.

of the Postmaster–General to report the same to Congress, with such information as can be obtained, to enable Congress to establish some other road, instead of it, in the same main direction." So we see that the Constitution, as construed at that time, did not even confer upon the Federal government authority to remove obstructions either from roads or streams through a state. "1 How greatly have our modern rulers magnified this power.

But let us see what construction one of the Justices of the United States Supreme Court has put upon the words "to establish post offices and post roads." In the State of Pennsylvania against the Wheeling &Belmont Bridge Company,2 Mr. Justice McLean of the United States Supreme Court says: "The same power that would enable Congress to build a bridge over a navigable stream would authorize it to construct a railroad or turnpike road through the states of the Union, as it might deem expedient. This power may have been asserted in regard to post roads, but the settled opinion now seems to be that to establish post roads within the meaning of the Constitution is to designate them. In this sense Congress may establish post roads extending over bridges, but it can neither build them nor exercise any control over them, except the mere use for the conveyance of the mail on paying toll." One who follows the history of the Cumberland Road, from 1806 until Madison and Monroe had finally destroyed the road because of the lack of power to expend the public moneys for

1 Fort Leaven–worth R.R. Co. v. Lowe, 114 U. S., 525. 2 18 Howard, 442, of dissenting opinion.

such a purpose, can hardly doubt that it was the opinion in those days of both Congress and the President that the power did not exist in the national government to own and operate post roads through the several states. That is clearly seen by the fact that the consent of the states was procured, and that, when obstructed by a state, the government sought another road.

We are all well acquainted with what is known as the police powers of the state. The states originally possessed entire control of laws affecting public morals, public health, and all laws of a similar nature of so many descriptions as to be hardly capable of enumeration. It delegated none of these powers to the United States government. To put that fact beyond question the Ninth and Tenth Amendments to the Constitution, expressly reserving such powers, were passed. They provided that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people"; and that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." All police powers are vested in the state as securely as the ingenuity of man can devise language to vest a power in a state; or, to state the proposition more clearly, those powers were always in the states and were

never delegated to the national government, and, with a distrust and jealousy of power which we do not seem to feel, the states were determined to put it beyond question that such powers were not delegated, and therefore insisted upon the adoption of these two amendments.

By an act of Congress passed in 1895 it was made a punishable offense tor any person to bring into the United States from abroad for the purpose of disposing of the same, or to deposit in, or carry by the mails of the United States, or by any express company, any paper, certificate, or instrument purporting to be a ticket, share, or interest in and depending upon the event of a lottery, and the crime was made punishable by imprisonment for not more than two years, or by a fine of not more than $2,000. In Dallas County, Texas, one Champion delivered to the Wells–Fargo Express Company a certain box or package containing lottery tickets to be carried to Fresno, Cal. He was indicted for this offense, and the question arose whether a lottery ticket was a subject of commerce, and whether its delivery to an express company, to be taken from the state of Texas to the state of California, was an offense under this act. The United States Supreme Court, Mr. Justice Harlan delivering the opinion, held that a lottery ticket was a subject of traffic among those who chose to sell or buy it, and that, therefore, the carriage of such a ticket by independent carriers from one state to another was interstate commerce; that, under its power to regulate commerce among the several states, Congress had plenary authority over such commerce and might prohibit the carriage of such tickets from state to state; and that this legislation was not inconsistent with any limitation or restriction imposed upon the powers granted to Congress.1 Four Justices of that court concurred with this decision and four dissented. 1 Lottery Case. 188 U. S., 363, 364, of opinion.

Congress, before this decision, had enacted a law forbidding the transport of intoxicating liquors from a place without a state which prohibited the sale of liquors to a place within that state. It has since passed what is known as the Pure Food Law, regulating interstate commerce in impure foods and impure drugs, and probably it will continue to enact similar laws. The probable result of this decision is that eventually the national government will assume control of all such police powers of the states, and will attempt, under the commerce clause, to legislate upon many subjects which heretofore have been controlled only by state legislation. It therefore becomes a serious question whether such legislation is constitutional.

The object of this kind of legislation is clearly to control the morals and the health of the people of the different states. May Congress use the power granted for one purpose for the accomplishment of an entirely different purpose? Because it has been given the right to regulate commerce, that is, to prescribe the rules by which commerce is to be governed, may it use that right to destroy the exclusive powers which belonged to the states before the Constitution, which were not delegated to the national government, and which amendments to the Constitution expressly reserved to the states? Does not the national government disparage such powers of the states when it attempts indirectly to take the place of the states in enforcing them? "Should Congress," said Chief Justice Marshall, "under the pretext of exercising its powers pass laws for the accomplishment of objects not intrusted to the government, it would be come the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."1

The words of the prevailing opinion in the Lottery Case show clearly that the decision rested upon the fact that it was pernicious in nature and opposed to good morals, yet it attempted to control that lottery through the power over commerce delegated to Congress for the sole purpose of keeping commerce unobstructed between the states. Mr. Chief Justice Fuller, with three of the Justices concurring in his dissenting opinion, said: "That the purpose of Congress in this enactment is the suppression of lotteries cannot be denied. That purpose is avowed in the title of the act, and it is its natural and reasonable effect, and by that its validity must be tested." These dissenting judges held that the carriage of a lottery ticket from one state to another by an express company was not commercial intercourse;

that the ticket simply purported to create contractual relations, and to furnish the means of crea–ting a contract right, and came within the holding of numerous cases that insurance policies were not subjects of commerce.

Mr. Justice Fuller very pertinently inquires, "If a state should create a corporation to engage in the business of lotteries, could it enter another state which prohibited lotteries on the ground that lottery tickets were the subjects of commerce? On the other hand, could Congress compel a state to admit lottery matter within it contrary to its own laws? ... It will not do to say — a suggestion which has heretofore been made in this 1 McCulloch v. Maryland, 4 Wheaton , 423.

case — that state laws have been found to be ineffective for the suppression of lotteries, and therefore

Congress should interfere. The scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interests." The dissenting opinion concludes very properly that the object of the power granted to Congress to regulate interstate commerce was "to secure equality and freedom in commercial intercourse as between the states and not to permit the creation of impediments to such intercourse," and that this attempt to regulate morals and take over the police powers of the state through an act of Congress was unconstitutional. "I regard this decision," says the Chief Justice, "as inconsistent with the views of the framers of the Constitution, and of Marshall, its great ex−pounder. Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, the form may survive the substance of the faith."

This lottery case is the most important, as bearing upon the relations between our state and national governments and the powers vested in each, which ever has been decided by the United States Supreme Court. If it is to remain the law, the idea of "the founders that the power vested in Congress was simply to protect commerce from acts of interference by state governments has been wholly destroyed. The right of the national government to pass a pure food law, or a prohibitive tax on oleomargarine, an act to prevent the importation of teas below a certain quality or flavor,1 and proposed 1 Buttfield v. Stranahan, 192 U. S., 470.

laws for the regulation of insurance and hours of labor in various employments, are all dependent upon the soundness of this decision. Can it be that the power given Congress to regulate commerce between the states was intended to permit it to enter upon the reformation of society?1 That is precisely what was established in the Lottery Case. It is plainly stated in the law, the constitutionality of which was tested in the Lottery Case, that it was enacted to suppress lotteries. Mr. Justice Harlan, in his opinion sustaining the law, said:

"May not Congress, for the protection of the people of all the states and under the power to regulate interstate commerce, devise such means as will drive the lottery traffic out of commerce among the states?" The majority of the court held that it could.

A statute of Congress attempting to control the manufacture of illuminating fluids within a state, by making it punishable to sell such fluids inflammable at less than a certain specific temperature, was held, on an appeal from the conviction of one found guilty of violating the law at Detroit, as absolutely void because it was an invasion of the police powers of the states.2 In the act referred to, creating a board of tea examiners to report upon the quality or flavor of teas, and giving them power to reject all imported teas below a certain quality or flavor, we have the principle established which, carried to its ultimate end, means that it

1 Minnesota v. Barber, 136 U. S., 313; New York v. Miles, n Peters, 103; Passenger Cases, 7 How., 283; Yick Wo v. Hopkins, 118 U. S., 356.

2 United States v. Dewitt, 9 Wall., 41.

is within the power of Congress, under the interstate commerce clause, to prohibit the importation of any commodity under the pretense of guarding the public health.

But the Lottery Case established something still more important. This decision goes so far as to prohibit interstate commerce altogether wherever Congress may see fit. If it is good law, Congress may impose whatever terms it likes upon the privilege of carrying any commodity between one state and another, and if the terms are not complied with, may forbid it entirely. If such legislation is constitutional. Congress can acquire practical control over the operation of all production and manufacture, as well as over the distribution of the products of every industry in the United States. Already it has been proposed by the President that the executive be given the right to prohibit all producers who do not procure from the national government a license permitting them to engage in interstate commerce. Attorney−General Knox, on October 14, 1902, at Pittsburg, declared that "Congress may deny to a corporation, whose life it cannot reach, the privilege of engaging in interstate commerce except upon such terms as Congress may prescribe to protect that commerce from restraint."

In the Lottery Case the counsel for the defendant urged upon the court that to uphold the constitutionality of the lottery act would lead necessarily to the conclusion that "Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing of any kind or nature, or however useful or valuable, which it may choose, no matter with what motive — to declare that it may not be carried from one state to another."1 And the court,. instead of denying that the decision led to such a result, answered the objection as follows: "It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce

among the states."2 If the Lottery Case has not required the court to declare "the full extent of the power" of Congress, what limit is there upon the power of Congress? What is to hinder them from taking over the control of all the industries of the country under the power to regulate commerce?

It is not generally appreciated by the people that when Congress enacts a so–called regulation of commerce, affecting the domestic affairs of a state, that the law enacted by Congress controls exclusively the matters of the state which it affects. To illustrate, if the National Employers' Liability Act is held to be constitutional, in at least twenty–five states in the Union, it will amount to a repeal of the state laws as regards all persons injured while employed by railways engaged in interstate commerce. According to the statistics of the Interstate Commerce Commission, on June 30, 1904, there were 1,296,122 persons employed by such railways. Not over 250,000 of these could be required to cross state lines in the performance of their duties. The Employers' Liability Act would affect 46,037 general office clerks, 154,920 station employees, 46,272 machinists, 53,646 carpen–

1 188 U. S., 362 of opinion by Harlan, J. 2 188 U. S., 362 of opinion.

ters, 159,474 "other shop men," 326,653 section foremen and trackmen, 46,262 switchmen, and 30,425 telegraph operators. So that practically this act would supplant the state laws in the case of several hundred thousand men. The next bill to be passed probably will be an eight–hour bill, controlling the hours of labor of these employees, and then a telegraphers' bill, and then an arbitration bill. Step by step, the national government, at the rate it has been proceeding for the last ten years, finally will supervise all the industries of this country through the pretext of regulating interstate commerce. Ought not the people to have a clear understanding of the danger that will result from such action on the part of Congress?

If the commerce clause was construed as it was the intent of the fathers, to protect commerce from tariff acts and other acts of interference on the part of the states, great blessings would be conferred upon the people. Our national prosperity and wealth have come more from this provision of commerce, thus interpreted in the past, than from any other provision of the Constitution. Charles Sumner well said: "If there be any single fruit of our national unity, if there be any single element of the Union, if there be any single triumph of the Constitution which may be placed above all others, it is the freedom of commerce among the states, under which that free trade, which is the aspiration of philosophers, is assured to all citizens of the Union, as they circulate through our whole broad country, without hindrance from any state."

But how has it been used? Whenever terrible abuses have arisen, like those of the insurance companies of New York City, the President has prescribed the remedy of national control. He has prescribed this control, although the United States Supreme Court, again and again, has declared that insurance, when carried on by a company in New York with individuals in other states, was not commerce, but the mere entering into a contract between a corporation of one state and a citizen of another state.1 Would the supervision of Congress over insurance be so much more efficient than supervision by the states as to justify the change? Congressman McCall, on Lincoln's Birthday last, speaking in New York of the control by Congress of insurance, through its code, in the District of Columbia, said: "For instance, under this beneficent code there is an insurance company operating to–day which appropriates to its treasury or for expenses, ninety per cent of all the premiums collected."

Congress controls the number of passengers which each boat engaged in river and coastwise trade may carry. It has been given authority to require these boats to keep on board certain life–preserving and life–saving instruments of a great variety. Has it performed its duties? Do not the death of thousands of our people in recent years tell the tale of its incompetence? Is the ordinary public servant more honest because he is in the employ of the national government rather than in the employ of a state government? Is there any justification for the national government's attempts to take over the control of the affairs of the states on the ground that

1 Paul v. Virginia, 8 Wall., 168; Hooper v. California, 155 U. S., 648; N. Y. Life Ins. Co. v. Craven, 178 U. S., 389.

its servants are more faithful and honest than those of the states?

Bismarck, at the height of his power, was unable to procure the passage of a bill allowing a uniform administration of the railroads of Germany and the purchase by the government of certain lines. Mr. Lowell says:

"Bismarck had this project very much at heart, but the dread of increasing the power of the central government was so great among the smaller states, that he did not even venture to bring the matter before the Bundesrath and had to content himself with the purchase by Prussia of the roads within her own territory."1

The President not only consented that Mr. Edgar Howard Farrar should give to the press the letter in which the

latter had pointed out the way, through the power in Congress, to establish "post offices and post roads," for the national government to acquire the railway systems of the country, but in his Memorial Day address at Indianapolis he approved the idea. We have already an interstate commerce commission, which the President may appoint in vacation at will, and which is removable by the President at his pleasure, with the power to control the rates of traffic on two hundred and twenty thousand miles of railway for all the goods of about ninety millions of people. Such a gigantic power as that never before was placed in the hands of five men. A President, ambitious to continue in his office by the wrongful use of this power, could procure a nomination in spite of the people. And still the President is

1 Lowell, Government and Parties in Cont. Europe, vol. ii, p. 197.

not satisfied, but apparently seeks to control more directly the railways of the country. At the banquet of the Gridiron Club at Washington in 1907, the newspapers represented the President of 1917 as erasing the chalk boundaries between the states and leaving the central government supreme. Not only will he be able, if such powers are conferred upon him, to erase the lines which separate the states, but by reason of the vast executive powers in his hands, he will be able to make decrees which Congress will register as complacently as do the legislators their President's decrees in Mexico and many South American Republics to−day. Let the people beware of placing such vast powers in the President's hands. It matters not how honest the President and those who surround him are to−day. The time will come when such powers will be used for the destruction of the people's liberties.

IX

STATE CENTRALIZATION THROUGH COMMISSIONS AND COURTS

"As to government, all discontent springs from unjust treatment. Idiots talk of agitators; there is but one in existence, and that is injustice."

SIR CHAS. JAMES NAPIER.

"Every function superadded to those already exercised by the government, causes its influence over hopes and fears to be more widely diffused, and converts, more and more, the active and ambitious part of the public into hangers−on of the government, or of some party which aims at becoming the government. If the roads, the railways, the banks, the insurance offices, the great joint−stock companies, the universities, and the public charities, were all of them branches of the government; if, in addition, the municipal corporations and local boards, with all that now devolves on them, became departments of the central administration; if the employees of all these different enterprises were appointed and paid by the government, and looked to the government for every rise in life; not all the freedom of the press and popular constitution of the legislature would make this or any other country free otherwise than in name. And the evil would be greater, the more efficiently and scientifically the administrative machinery was constructed — the more skillful the arrangements for obtaining the best qualified hands and heads with which to work it."

JOHN STUART MILL.

"From these principles arose that venerable institution which none but a free and simple people could have conceived, trial by peers; an institution common in some degree to other nations, but which more widely extended, more strictly retained, and better modified among ourselves, has become perhaps the first — certainly among the first, of our securities against arbitrary government."

HALLAM.

CHAPTER IX. STATE CENTRALIZATION THROUGH COMMISSIONS AND COURTS

LOCAL self–government in the different states is the preparatory school in which the citizen acquires the rudiments of government, and always has been justly regarded as of the highest importance in maintaining the Republic. The people need not look to the constitution of their state for this right. They had the right before the constitution, which presupposes an organized society, law, order, property, and personal freedom. Usages, customs, maxims, modes of thought, the method of trying facts by juries, the mutual responsibility of neighborhood interests, the sentiments of manly independence and self–control which make good citizens, these are the sources of constitutional government; they precede constitutions, and without their existence a constitution would be a lifeless skeleton.

One great reason for the subversion of so many constitutions in France since the French Revolution is that the Constituent Assembly, for the purpose of destroying local self–government among the people, broke up the ancient divisions of the country and formed eighty–six departments, thus destroying all the traditions of the people as to local life. We are given to attributing our liberty to the securities of a constitution. No greater mistake could be made. The traditions of English liberty which the forefathers brought to this country, the local self–government which they established in towns and counties, their habits, customs, and usages have been the source of our liberties. The Constitution is simply the measure of the rights delegated by the people to their governmental agents, and secures them practically no rights which they did not have before its enactment. Jefferson, speaking of the benefits of local self–government, well said: "These wards called townships in New England are the vital principle of their governments, and have proved themselves the wisest invention ever devised by the wit of man for the perfect exercise of self–government and for its preservation." Professor Lieber says: "Self–government, general as well as local, is indispensable to our liberty." De Tocqueville declared:

"Those who dread the license of the mob and those who fear absolute power ought alike to desire the gradual development of provincial liberties. ... A centralized government is fit only to enervate the nations in which it exists."1

During the last twenty or thirty years we have been busily at work, through our legislatures, in hastening back to the kind of government that gave the guilds their privileges and sought to dictate as to the minutest details of life. The state, as in those days, has commenced the eternal intermeddling with the affairs of every locality through state commissions. It took a century or more to get rid of restrictive legislation and the state's habit of controlling all the domestic affairs 1 Democracy in America, chap. v, p. 99.

of man by law, and now we have commenced to return to the same conditions which required centuries of struggle to destroy. The growing absence of the habit of self–government can be seen in every village and hamlet in the land. The want of confidence of the people in their ability to build their roads and manage their local matters has been increasing under the new regime. At the rate we are going, it will be but a few years before state governments will have taken upon themselves all local affairs.

We have come in recent days to establish a kind of government known as government by commission. These commissioners are not nominated by the people, not elected by the people, not subject to the control of the people, and not even subject to the control of the executive, a portion of whose duties they perform. Their duties are prescribed by the legislature, and the governor has really no more control over them, although their duties are executive in nature, than he has over the action of a head of a distinct department of the government elected by the people.

Massachusetts was the first state to institute this form of government. In 1837 she established a state board of education; in 1852 a state board of agriculture ; between that time and 1895 thirty–two other commissions. The governor of Massachusetts, in 1885, appointed a commission of three men to take charge of the whole police administration of the City of Boston. He had no power to remove these men without the consent of the Council of State. They were not responsible to the legislature nor to the people of Boston, who were expressly excluded from all control. The power of granting licenses for the sale of liquor was also vested in this commission, and the fees therefrom were devoted to paying the expenses of the police. In 1894 a similar commission was appointed over

Fall River. In 1893 was established the state highway commission, consisting of three members appointed by the governor and council, which took charge to a considerable extent of the highways of the state.1

In 1891 Governor Russell, in his address to the legislature of Massachusetts, said: "With much truth Massachusetts has been described as a commission–governed state. Its great departments of education, health, charities, prisons, reform schools, almshouses and workhouses, agriculture, railroads, insurance, fisheries, harbors and lands, savings banks and others are governed by independent boards practically beyond the control of the people. Besides these there are commissions on gas, pharmacy, dentistry, civil service, arbitration, cattle, wrecks, pilots, State aid, and others for special and temporary purposes. Almost without exception the members of these boards are appointed by the governor, but only with the advice and consent of nine other men. Their tenure of office is usually for a term of several years, often without power of removal by anyone, sometimes subject to removal for cause or otherwise by the governor, with the same consent. The latter power in effect necessitates a trial upon formal charges, which seldom would be made or could be proved except for

1 Bradford, The Lesson of Popular Government, vol. ii, pp.
27–31.

flagrant malfeasance in office. The subordinate officials are generally appointed by the boards. These boards and their work are practically beyond the control of the people, or of anyone immediately responsible to them, except in the limited power of the governor occasionally to appoint a single member. The people of the state might have a most decided opinion about the management and work of these departments, and give emphatic expression to their opinion and yet be unable to control their action. The system gives great power without proper responsibility, and tends to remove the people's government from the people's control." In Massachusetts, however, many public–spirited citizens in earlier days served upon these boards without receiving any pay for their services, and the governor and his council have exercised rare good judgment in the selection of the members of the different commissions; so that it may be said that if there is any state in the Union where arguments can be found in favor of such government, it is in that state.

As early as 1857 New York established a commission for the regulation of the railroads. But the railroads, which even at this early date exercised the same kind of influence over the legislature which has been growing since, determined to do away with this commission. They knew that the opposition would come from the leading commissioner and so, to induce him to resign and make no opposition, they paid him $25,000. The attorney of the Erie Railroad, testifying before the Hepburn Commission in 1879, said: "I was the attorney of the Erie Railroad at that time " (refer– ring to 1857) ; "I specially used to attend to legislation that they desired to affect or oppose. ... I remember the appointment of that commissioner. . . . We agreed that if they" (the leading railroad commissioner) "would not oppose the repeal of the law we would pay $25,000, and have done with the commission; it was embarrassing."1

In the same year that the legislature created a railroad commission it also created a metropolitan police district, including the counties of New York, Kings, West–chester, and Richmond in a district to be called the Metropolitan Police District of the State of New York, and it authorized the Governor, by and with the consent and advice of the Senate, to appoint five commissioners of police, three from New York, one from Kings County, and one from Richmond and Westchester, whose terms of office were to be three years. This commission was given entire control over the police of that district. The constitutionality of this act was vigorously opposed but was upheld in the Court of Appeals.2

In 1857 the state board of charities was created in New York, and in 1880 the state board of health. State commissions have greatly impaired local self–government along many lines. They have taken over the control of the insane, of charitable institutions, and of reformatories. Commencing with 1880, when there were but three commissions existing, forty–one commissions came into existence by 1904. In the Comptroller's report of 1904 a statement is given showing that the payments made from

1 Lloyd, Wealth against Commonwealth, pp. 370, 371. 2 The People v. Simeon Draper, 15 N. Y.. 532.

the state treasury, on account of the salaries and other expenses of the new officers and commissions created since 1880, had amounted to $66,238,254.39.1 In 1897 the roster of state employees connected with these commissions occupied about 130 pages of the report of the Civil Service Commission and included about 5,000 persons. The state expenditures for commissions to–day are probably five or six times the entire expenditures of the counties and towns.

The cause of the great increase of state expenditures in New York is accounted for to some extent by the relations existing between state senators and assemblymen and these commissions. The members of a commission are always interested in getting as large appropriations for the work of their commission as possible. Therefore they resort to the process of lobbying with members of the committees having charge of appropriations. The chairman of a committee of the Senate or Assembly is always a man whose influence is to be sought and who must be brought to their way of thinking. For some years past a chairman of a committee of the Senate has been at the same time the counsel in litigation for one of these commissions and in one year has been paid about $9,000 as legal fees out of the appropriations reported favorably by his committee for this commission.2

In 1906, according to Attorney−General Jackson, over $300,000 was paid out in special fees to lawyers, as counsel for the various commissions and departments of government, many of those lawyers being at the same time

1 Comptroller's Report, 1904, pp. 702−707. 2 Albany Letter to the N. Y. Evening Post, March 4, 1907.

members of the legislature. During the same period the whole expenses of the Attorney−General's office were only $131,270. It is estimated that during the last ten years $3,000,000, at least, has been paid out to special counsel, most of whom were doing legal work for these commissions, and many of whom were either Senators or Assemblymen.1

The small state of Connecticut, besides its minor boards and commissions, some twenty in number, has fourteen paid commissions with a total of forty−seven members. They include insurance, railroads, highways, banks, school funds, building and loans, fisheries and shellfish, labor and labor statistics, dairies, cattle, taxes, barbers and saloon licenses. All these commissions but two are of a political or partisan character. These commissioners thronged the state capitol at Hartford, during the last winter, engaged largely in lobbying with legislators to accomplish legislation in behalf of railroads and other like corporations. The present Governor Woodruff of that state, in his speech accepting the nomination, pledged himself to remove this kind of evil. In his message to the legislature he commented at length upon the abuses in the state commissions, and he removed from office the state tax commissioner, because of his having been engaged as a lobbyist in the state legislature. Several years ago the abuses of the County Commission, which has charge of the granting of licenses, became so flagrant that a law was passed allowing appeals from its decisions to be taken to the courts. The Railroad Commission is

1 Special Correspondence to the N. Y. Evening Post, March 17, 1907.

notoriously corrupt, and most of the commissioners are regarded as holding sinecure places as spoilsmen, and as engaged in caucuses, conventions, and the lobby, in behalf of political aspirants and private interests.1

We are apt to attribute bad government in our country to the fact that a considerable proportion of the voters are recent immigrants unacquainted with our customs and habits. In Connecticut we have in the towns outside the cities many descendants of the early inhabitants of that state. In revolutionary days Connecticut was the most democratic and the best governed state of the thirteen, but to−day, governed, not by the cities, which are deprived of their representation through a rotten borough system, but by the towns, she has about the most corrupt government to be found in any state in the Union. In Rhode Island, the history and government of which is very similar to that of Connecticut, we find the city of Providence, with nearly one half of the entire population of the state, represented only by a single Senator in a Senate of thirty−eight members. Twenty small towns, containing but eight per cent of the population, are able to control the legislation of the state against ninety−two per cent of the population. Both these states are controlled by a representative system nearly as bad as that found in England before the Reform Act.

Similar conditions exist in New Hampshire. A correspondent of the New York Evening Post, under date of February 10, 1897, after describing vividly local self−government as it existed many years ago in that state, said: "All this has entirely either disappeared or is fast 1 Letter to the N. Y. Evening Post, March 4, 1907.

vanishing. In New Hampshire the highway and school districts have been abolished; state officials have been multiplied and their functions extended. 'The legislature,' says the Mirror, 'regulates our outgoing and our incoming, tells us in what pond we must not catch pickerel, and on whose land we may hunt chipmunks; it dictates what we shall eat and what we shall drink. Now the idea is steadily making headway that the state shall control and support the schools and build the highways.' "

South Carolina, after conducting a state dispensary for the sale of liquor throughout the whole state for a

period of thirteen years, has gone back to the old system, and local option gives to every county the choice between prohibition and a dispensary of its own conducted by local officials. The official investigation of two years ago showed great scandals connected with the administration of the dispensary law, and the whole scheme was brought into discredit.

Self–government is a matter of absolute right on the part of localities. The state cannot take it away, because the people, originally possessing the right, have not given the legislature, through their constitution, the power to take it away.1 The people of the counties, towns, and villages are entitled of right to determine who shall rule over them. They cannot be deprived of this right by the legislature or by the heads of departments. This right is the very basis of all government in this country. Notwithstanding this, there is nothing which affects the citizen from infancy to the grave which is not subject to regulation by these commissions. Nothing is left to the 1 Rathbone v. Worth, 150 N. Y., 459.

uncontrolled will of the individual citizen. He eats, he drinks, he lives in subordination to the control of a multitude of administrative officers, and, thus governed, he pities the people of Prussia and Russia for their subjection to the arbitrary government of a bureaucracy.

I am aware that much can be said in favor of commissions to control sanitation, education, the adulteration of foods, the destruction of game and fish, and especially the preservation of the forests. Much indeed can be said in favor of factory inspection, the arbitration of labor disputes, and the examination of banks and insurance companies. Many of the commissioners are men with scientific knowledge and fervent enthusiasm for the extension of public benefits through the departments over which they preside. Because a considerable proportion of the population of a state is found in its cities, and because of the great concentration of manufacturing industries, the control of many things, which were left to localities in olden days, can be better controlled now by the state than by the locality. In matters where the whole state is interested, arguments in. favor of state control can be adduced.

But these commissions have been multiplied unduly so that they interfere very largely with local self–government. They are exercising judicial and legislative powers which it was never contemplated for a moment that they should exercise. If they come to believe that extraordinary powers belong to them, they can prohibit the carrying– on of a business by refusing a license to it. The commissioners in no sense are responsible to the peo– ple, and are quite indifferent to public sentiment. Even if the people of the localities could not perform such duties as well as the commissioners, still in their performance they would retain their habit of controlling their local affairs, and that is of the greatest public importance. Long ago it was said: "A man can judge better in relation to his own affairs than seven watchmen on a tower." And the people of a town, or a village, or a small city, are, as a rule, much better judges of what they need than are these commissioners.

Another objection to the existence of these commissions is that they split up the executive power of the governor, and that each commission has a kind of administrative veto on laws simply by not enforcing them. There is no such thing as securing an honest and faithful administration of the laws when we have one governor and forty or fifty commissions dividing the executive duties between them. The people of a state can watch a governor, and they will condemn his action if wrong. But they cannot watch forty commissions, and but a few people will know anything about what they are doing. This means that the commissioners have a perfect opportunity to carry on matters in their own way. Government by commission is not responsible government. We provide a governor to execute the laws and administer the affairs of the state, and then permit forty or fifty commissions to divide the administration with him. We hold him responsible for their acts over which he has no control; and when he attempts to remove a commissioner, as Governor Hughes did in the state of New York, the Senate refuses to consent, and thus a governor is ham pered by the continuance in an important office of an unworthy public servant.

The truth is that public interests would be furthered by allowing the governor to select all the heads of departments in the state, and then hold him strictly accountable for the whole administration. In both the state and our larger cities it is impossible for the people to keep track of the heads of departments. The one way to enforce responsible government is to leave to the mayor of the city and the governor of the state the control and responsibility of all departments, by giving them the power both to appoint and remove such officials. This is a better kind of centralization than that involved in government by commission, where the people are unable to know and control conditions.

There has been no action upon the part of legislatures in recent days which has tended more toward centralization than attempts to control the local government of cities for partisan purposes. In March, 1901, the public authorities in the cities of Scranton, Pittsburg, and Allegheny were opposed to a certain section of their own party of the state republican machine in Pennsylvania. To get rid of the objectionable mayors and other officers of these cities the act of March 7, 1901, entitled an act for the government of cities of the second class, was passed by the Pennsylvania legislature. It changed the charters of each of the three cities of Pittsburg, Allegheny, and Scranton, and put them under special provisions, different from all other cities of the state, legislated out of office the mayor and other city officers, and placed the government of these cities in the hands of a high executive officer of the commonwealth residing at Harrisburg, thus doing away with local officers elected by the people whose terms of office had not expired. And the Supreme Court of Pennsylvania actually sustained that kind of legislation.1

In revolutionary days this great state of Pennsylvania had what was known as a council of censors, composed of two persons from each city and county in the state. They were elected for the first time in 1783 for a period of seven years. It was the duty of this body to inquire whether the Constitution had been violated, whether the public taxes had been justly levied and collected, and whether the laws had been duly executed. They had power to summon witnesses before them and to compel them to produce papers and reports. They had the power to order impeachments and to recommend the repeal of unconstitutional laws. They could call a convention for revising the Constitution, and one of the provisions which they were instrumental in putting into the Constitution would be a wholesome provision to limit the supply of politicians in that state to−day. This provision was as follows: "As every freeman to preserve his independence, if without sufficient estate, ought to have some profession, calling, trade or farm whereby he may honestly subsist, there can be no necessity for, or use in establishing offices of profit, the usual effects of which are dependence and servility unbecoming freemen in the possessors and expectants, faction, contention, corruption, and disorder among the people. But if any man is called into the public service to the prejudice of his 1 Commonwealth v. Moir, 199 Pa., 534.

private affairs he has a right to a reasonable compensation, and whenever an office, through increase of fees or otherwise, becomes so profitable as to occasion many to apply for it, the profits should be lessened by the legislature."1

A hundred and twenty years later we see the state politicians of Pennsylvania permitting a contractor, on a contract of $9,000,000 for the erection of a statehouse, to make a profit of from $4,000,000 to $5,000,000. Mahogany desks which cost this contractor $40 were sold to the state for $864, a profit of 2,060%. Clothestrees that cost $2 were sold for $73, a profit of 3,550%. Corruption and usurpation of power go hand in hand. The people of Pennsylvania do not need censors of morals, but they do need thorough regeneration.

For the last thirty years or more it has been a common practice with the legislature of New York to amend the charters of cities by creating police commissioners, and fire commissioners, and other commissioners, with the provision that these commissioners should be selected in equal numbers from each of the two principal political parties. Such amendments have been made to the charters of the cities of Buffalo, Utica, Syracuse, Elmira, Rome, Lockport, Yonkers, Watertown, and Albany. Finally, the Court of Appeals, in a case which arose in Albany, declared an act of this kind unconstitutional as an interference with the absolute right of the city to control the election of its local officers.2

1 American Academy of Political and Social Science, pamphlet No. 200, pp. 97, 98. 2 150 N. Y., 459, 510, 512.

In 1900 the state of Michigan had an experience with this same kind of legislation. Detroit had elected a Democratic mayor. The Republican Governor of the state, acting in connection with the defeated officials of his party in Detroit, secured the passage of a bill depriving the Mayor of his power of appointment of city officials and giving it to the City Council, and through this Council the state controlled the city. In 1905 the Massachusetts legislature passed an act uniting the City of Boston with the state in making certain improvements, but this bill was vetoed by Mayor Collins and did not become a law. A few years ago the City of Chicago was controlled by the legislature of the state of Illinois. Finally, the people of Chicago succeeded in procuring the right of a referendum for legislation affecting the city, and secured self−government for themselves.

The methods of state legislation are doing much to centralize power in the state. All legislation is carried on in the state legislatures in the same manner that I have described in the chapter on Congressional Usurpation. The

struggle on the part of assemblymen and senators is to secure an appointment on one of the leading committees. Behind the doors of the committee rooms is hidden the corruption which has done so much to discredit state governments. The chairman of a committee frequently will not bring a bill referred to that committee before it at all. Many of the proposed laws are never reported by the committees. Subcommittees, selected by the chairman, are often employed to strangle a proposed law. Special legislation affecting localities, once reported from a committee, is almost sure to pass the House with little or no discussion. The result is that the people are unable to procure information about what is going on in their legislatures. The division of the legislature into many small legislative bodies, the lack of discussion in the full body, and the power of the Speaker and the Committee on Rules, in the last days of a session, to jam through hundreds of bills without any discussion whatever, result in the passage of many measures which never could be passed if public attention was directed to them and public discussion encouraged.

These methods have brought a bad reputation to the state legislatures. Everywhere there are attempts to limit their meetings. Only six states now have annual sessions — Georgia, Massachusetts, New Jersey, Rhode Island, New York, and South Carolina. In Mississippi and Alabama the legislature meets only once in four years. We make laws in our state legislatures by the thousands to be laughed at. No other country in the world permits so many restrictive and sumptuary laws. Many of these laws, like those prohibiting the sale of liquor, are passed at the request of good people, the members well knowing that they will never be enforced. The usual result of such legislation is that police officials sell the right to violate the law and that its violation is approved by a large part of the people. The popular remedy for bad morals, social sins, and all kinds of human dereliction, is an act of the legislature. There is no surer sign of decadence than this mania for such law–making. During the five years from 1899 to 1904, 45,552 acts were passed by American legislatures. Of these enactments, 16,320 were public or general laws, while the remainder were special or local.1 The legislatures of the different states in our Union probably pass more laws each year than are passed during the same time by all the other legislative bodies in the world, outside of the Congress of the United States.

Pinckney, of South Carolina, Madison, Hamilton, and several other members of the Constitutional Convention urged that the National Legislature should have authority to negative all laws passed by the states which they thought were improper. This was advocated for several days and with great force before the Convention, but was finally defeated. Lansing, of New York, with little comprehension of the future, declared that such a scheme was impracticable. He said: "Is it conceivable that there will be leisure for such a task? There will on the most moderate calculation be as many laws sent up from the States as there are days in the year." In the ancient town of Locri, in Magna Græcia, the first written code of laws in the ancient Roman world was promulgated. One of its most wholesome provisions was that the proposer of a new law should stand forth in the public assembly with a rope about his neck, and that if the law was rejected its proposer should be strangled. Such a provision in our American states would be a wholesome preventive upon hasty legislation. Buckle has well said that for five hundred years all advance in legislation has been made by repealing laws.

Before the Civil War considerable honor was con–

1 Reinsch, American Legislatures and Legislative Methods, p. 300.

nected with the office of Member of Assembly or State Senator. In more recent days men of high character as a rule have not sought such positions. Many a lawyer has sought the office of Member of Assembly or Senator with no higher, purpose than to attach himself to industrial interests and thus procure a clientage. It is those kind of legislators who through secret committees get their clients special legislation. In Alabama, California, Kentucky, Louisiana, and Mississippi statutes have been passed in recent years exempting cotton or woolen manufacturers, beet sugar plants, or other manufacturing enterprises from local taxation for periods of from three to fifteen years. The legislatures of no less than sixteen different states have passed similar laws. In the Maryland Legislature of 1900 fifteen acts freeing bond issues from a state tax were passed. It would seem that all this line of legislation was clearly unconstitutional.

There is no abuse in our day, however, which tends more to centralization of state government than the frequent exercise of the discretion in state appellate courts of setting aside judgments, entered upon verdicts of juries as against the weight of evidence. The petit jury, in something like its present form, has existed since about the reign of Henry II (1154–1189). So highly was this right regarded that many of the original thirteen states reluctantly approved the Constitution without the existence of this safeguard, and by one of the first ten

amendments it was secured to litigants in United States Courts. Every one of the original thirteen states guaranteed this right to litigants in its courts. Every one of our states to–day secures this right by its constitution, and yet every lawyer with wide experience in the trial of cases is aware that the verdict of a jury has entirely lost its conclusiveness, and is treated as merely advisory to the court. Twenty years ago no principle of law was better settled than that a verdict of a jury could not be set aside unless it was so contrary to the preponderating proof as to be evidence that the jury had been controlled by prejudice, passion, or corruption.1 To–day it is a

1 Hospital Supply Co. v. O'Neill, 10 Misc. Rep., 656,657;

Morse v. Wright, 63 Barb., 21; Fleming v. Smith, 44 Barb., 554;

Beckwith v. R.R. Co., 64 Barb., 299; Cheney v. R.R. Co., 16 Hun, 415; Dollner v. Lintz, 9 Daly, 17; Duffus v. Schwinger, 92 Hun, 70; Swartout v. Willingham, 6 Misc. Rep., 179; August v. Fourth Nat'1 Bk., 15 St. Rep., 956; Polhemus v. Moser, 7 Robertson, 489; Cothran v. Collins, 29 Howard Pr., 155;

Heritage v. Hall, 33 Barb., 347; Hinckinbottom v. Del., Lack. &W. R.R. Co., 15 St. Rep., 13; Grassley v. McArdle, 74 Hun, 133; Coleman v. Southwick, 9 Johnson, 46; Strohm v. N. Y., Lake E. &W. R.R. Co., 32 Hun, 21; Peck v. N. Y. C. &H. R.R. Co., 8 Hun, 289; Gale v. N. Y. C. &H. R.R. Co., 13 Hun, 5;

Bierhauer v. N. Y. C. &H. R.R. Co., 15 Hun, 564; Minck v. City of Troy, 19 Hun, 253; Culver v. Avery, 7 Wend., 384;

Drennen v. Brown, 10 Ark., 138; St. L. S. W. R'y Co. v. Byme, 73 Ark., 377; Anisby v. Dickhouse, 4 Cal., 102; Bishop v. Per–kins, 19 Conn., 300; Burton v. R.R. Co., 4 Har., 252; Stewart v. Elliott, 2 Mackay, 307; Walker v. Walker, n Ga., 203; War–ner v. Robertson, 13 Ga., 370; Spurlock v. West, 80 Ga., 306;

Kincaid v. Turner, 7 111., 618; Muldowney v. R.R. Co., 32 la., 178; Cavender v. Fair, 40 Kans., 182; Milo v. Gardner, 41 Me., 549; Baker v. Briggs. 8 Pick., 121; Cunningham v. Magoun, 18 Pick., 13; Hicks v. Stone, 13 Minn., 434; Kansas, etc., R'y Co. v. Dawley, 50 Mo. App., 489; McGatrick v. Wason, 4 0. St., 566; Hall v. Hodge, 2 Tex., 323; Gibson v. Hill, 23 Tex., 77;

Campbell's Lessee v. Sproat, 1 Yeates, 327; Morien v. N., etc., Co., 102 Va., 622; Fearing v. De Wolf, 3 Woodb. &M., 185;

Gilmer v. City, 16 Fed., 708; Davey v. AEtna L. I. Co., 20 Fed., 494; Plummer v. Granite M. M. Co., 55 Fed., 755.

common occurrence in appellate courts, in about every state of the Union, to set aside the verdict of a jury when the court is not satisfied with its justice.

The judge who presides upon the trial of a case before a jury has an opportunity to observe the appearance of the witnesses, and to form a reasonably correct impression as to their credibility. Those impressions might well amount to a conviction which would justify his action in setting aside a verdict as against evidence. But an appellate court has no opportunity to see the witnesses except upon paper, and it has been well said that all witnesses look alike upon paper. They do not look alike to the jury. The manner in which a witness walks when called to the stand, his attitude in taking the oath, his face, which may be indictable at common law, all these things are seen by the jury, and their conviction as to the credibility of his testimony cannot well be reviewed in the higher court. Notwithstanding these reasons, apparent to anyone why verdicts should not be lightly set aside, it is becoming a most common occurrence for appellate courts to reverse such judgments. If the verdict of a jury may be set aside in any case where the court is not satisfied with it, if the court must be satisfied as well as the jury, then the jury trial ought to be dispensed with altogether. It has been held, in recent days, that if there has been three successive verdicts in favor of one party, the Appellate Court will not reverse the final judgment.1 But even this rule, which requires a poor man to get thirty–six

1 McCann v. New York &Queens County Ry. Co., 73 App. Div., 305; Lacs v. Everard's Breweries, 107 App. Div., 250.

jurors to agree that he has proved his case, has been declared by an appellate court as untenable, the court holding that, if in its opinion the verdict is not sustained by the evidence, it matters not how many times a similar verdict has been rendered in the case, the court should set it aside.1

Because of this manner of regarding verdicts, and because of the technical grounds on which judgments are reversed in higher courts, ordinary litigation now is frequently a matter of years of delay, and to poor plaintiffs is equivalent to the miscarriage of justice. Thirty to forty per cent of all appeals in the several states result in reversals. If any error exists as against the appellant, however slight, either in the admission of evidence or in the

charge of the trial judge, the presumption of prejudice to the defeated party requires a reversal. A large proportion of the decisions of higher courts are made by only a majority of the judges. In all the cases wherein the United States Supreme Court has held a national statute to be unconstitutional, before 1894 there were only six in which the Court was unanimous. Notwithstanding that a majority of an appellate court can reverse or affirm a judgment, the consent of every juror in most states is required in order to obtain a verdict. The result of this constitutional requirement is that there are delays and miscarriages of justice.

In manufacture, agriculture, and every other field of human industry or activity, in recent years there has been a steady advance movement. Thirty years ago,

1 Meinrenken v. New York Central Railroad Co., 103 App. Div., 319.

however, the trial of civil cases was more simple and expeditious than it is to–day. The whole tendency in recent times has been to obstruct the speedy conclusion of litigation by reversals upon technical grounds which do not go to the merits, or because appellate courts, which perhaps never read the whole of the evidence, are dissatisfied with the verdict. This results practically in depriving the citizen of rights secured to him by the Constitution, and is one of the most grievous conditions in our day. It would not take long to gather from the reports of the different states of the Union, hundreds of cases which have been running in courts for periods of from five to twenty years, and in which there have taken place from three to ten trials. In the law reports of England, for the period from 1890 to 1900, if appears that new trials were granted in less than 3½% of all the cases appealed.1 It has well been said by an able judge that "There is no scourge in the hands of the strong– against the weak like this scourge of new trials. It can wear out the strength and endurance of the weak, and it has been used for that purpose."2

To the delays in the administration of the law on its criminal as well as its civil side may be attributed the condition of lawlessness and lynching which is so prevalent in our country. In no other civilized country does such a condition exist. The jury system undoubtedly has imperfections, but compared with other human institutions to procure justice it has best borne the test of long experience. This system has done more among

1 American Law Review, vol. xl, p. 681. 2 Judge Chas. F. Amidon, Amer. Law Rev., vol. xl, p. 690.

English–speaking people to maintain freedom than all other causes combined. You hardly can find a lawyer of wide experience in the trial of cases before juries who does not believe that under the guidance of an intelligent judge the system brings justice in the majority of cases. There is no better proof of its wisdom than the fact that it did not exist among the continental countries of Europe until the nineteenth century, and that during that century it has been adopted by many of the most enlightened states, and that it always has been continued in any country where it has been adopted. In England, even James II was obliged to send the Bishops to trial by jury, and endure the mortification of seeing them acquitted.

The abuses that have come in jury trials are largely the result of the requirement of a unanimous verdict. Those abuses, to a much greater extent than generally has been believed, have been the result of tampering with one or two jurymen in important cases. That such a system is carried on in some cities is established beyond the slightest doubt. The people owe it to themselves to change the provisions of their state constitutions requiring a unanimous verdict, and to allow the verdict of nine jurors to determine the rights of the parties. No change in the fundamental law of the states could bring such wholesome results as this.

The state courts of Connecticut furnish us with an example of the results of doing away with jury trials in a certain class of cases. It has become the practice in that state in many actions in tort for the defendant not to interpose an answer to the complaint. By this device the amount of damages suffered by the plaintiff is determined by the court without a jury. The right of a plaintiff to have his damages assessed before a jury in such cases has been seriously contested. But the Connecticut appellate courts have decided that he has no such right.1 The result of this holding has been that in cases of serious injury, or even of death resulting from the defendant's negligence, the plaintiff frequently has received at the hands of the judge but slight damages.

The result of these delays and miscarriages of justice is that negligence has become a normal condition in our country. "Let it go at that," seems to be written all over the face of our railway management and industries. Between June 30, 1897, and June 30, 1900, war was being carried on between Great Britain and the South African Republic, but that war, with its sharp–shooting Boer farmers, was but slightly more deadly to the British forces than the negligence of the railways of the United States was to our people. During those three years ending June 30, 1900, 21,847 persons were killed on American railways. During the same time the British forces in South

Africa, including deaths from disease, lost 22,000 men. In thirteen years ending June 30, 1900, according to the official reports, 86,277 people were killed on the railways of our country. During the same period 469,027 persons were injured.

Away back in the days of carpetbag government in Louisiana the courts commenced the use of injunctions to control political parties. The first injunction granted

1 Seeley v. City of Bridgeport, 53 Conn., 1; Lennon v. Rawitzer, 57 Conn., 583.

in those days astonished lawyers. In our day, however, in the state of Colorado, the proceedings of the Star Chamber are quite outdone. Alvah Adams was elected on the face of the returns as Governor of Colorado. The Supreme Court of that state at General Term issued a temporary injunction staying the declaration of his election, found that there had been fraud in his election, punished some of the alleged wrongdoers for contempt of court, and, without a particle of jurisdiction, conducted the whole matter to a conclusion satisfactory to itself.

A year or two later a city election was held in Denver, and Supreme Court Judge Johnson, sitting at circuit, sought through injunction against fraudulent voting to follow this precedent and conduct the election in the same manner as the higher court had in the case of the Governorship. Thereupon the higher court issued its writ of prohibition stopping Judge Johnson from exercising the jurisdiction which it had exercised, although its power in the matter was the same as that of the Circuit Judge. In vain, counsel pleaded on the motion to dismiss this writ, that Judge Johnson was following the precedent of the appellate court, and that, as a court at special term, he was entitled to do exactly what the appellate court, which was given original jurisdiction, had done in the Adams case. But the appellate court held that it had exclusive right to supervise elections by the high prerogative writ of injunction, while the other courts of general jurisdiction throughout the state had no such power.

The state of Colorado has seen in the last few years a condition of open flagrant bribery, failure on the part of the state legislature to carry out the constitutional amendment prescribing an eight–hour day, the suppression of about every constitutional right of the citizen, the deporting of men and women from the state for the offense of agitation, and the forcing of the resignation of officers elected by the people by means of ropes about their necks. Nowhere in the civilized world, in recent times, have the constitutional rights of the citizen been so shamelessly violated by the executive and the Courts as in that state.

No person who has been observing with care the conditions existing throughout our country in recent years can help but see that there is a marked tendency to disregard the liberties of the citizen. For many years, in the city of New York, it has been common to arrest men without a warrant for misdemeanors not taking place in the presence of the officer. In fact, it has been a matter of common occurrence to arrest men at night without any written complaint or warrant, and to hold them to await the filing of a complaint. The public prosecutors for many years have been in the habit of arresting men on what are known as John Doe warrants, although in the case of John Wilkes, as far back as 1763, when the Secretary of State in England issued a general warrant for the persons of the authors and printers of the North Britain, it was held by the English Courts that such warrants were invalid,1 and since that time no court has sustained their validity. The prohibition of such warrants is found in the Fourth

1 Goldwin Smith, The United Kingdom, vol. ii, p. 201.

Amendment to the Constitution of the United States. Such a prohibition was found in the first constitutions of Massachusetts, Virginia, Vermont, Pennsylvania, and New Hampshire. Yet these seem trivial rights to our public prosecutors. In like manner the right of the defendant in criminal proceedings to a speedy trial is steadily disregarded in the state of New York.

Such violations of personal rights, continued for any considerable period of time, by and by will destroy constitutional guarantees. The Mexican Constitution, passed in 1857, is almost a copy of our own. It provides carefully for the rights of the defendant in criminal proceedings, yet by constant abuse it has come to mean nothing. A prisoner arrested is secluded for seventy–two hours after his arrest, during which time while in solitary confinement his statement is taken by the judge. The constitutional provision that he must be confronted by the witnesses is complied with by reading the testimony of the witnesses to the accused, and he is given an opportunity to cross–examine them only through the presiding judge. In one way and another about all the safeguards of the prisoner are destroyed by construction. Under the Magoon code in Panama the presiding judge, with two mayors selected by him, sit and try men on accusations of murder. Two votes of the three are sufficient to convict. The men who are in the employ of the United States government, constructing this great water way,

are subjected to that kind of government by the United States, which so carefully has secured to its citizens in criminal proceedings the safeguards of the English law. Under our present autocratic tendencies, with the growing disregard for personal rights, how long will it be before the same disregard will become permanent in our own criminal courts?

I have detailed these defects in our state governments because just such abuses give force to the cry that the national government should take the control of such matters from the states. Reverence for laws and courts cannot long exist unless the lawmaking power and the administration o! the law continue worthy of respect. Examples of justice in government are a thousand times more beneficial to the people than the unbounded charity of our millionaires. It is the hasty, careless, and corrupt enactment of laws, together with such execution of justice as I have described, which is bringing state rights into disrepute. Our modern state legislators are apt to mistake vexatious forms of coercion for legitimate regulation of domestic affairs. We are unnecessarily multiplying legal restrictions upon every form of human action, and if these are not enforced, the legislative, executive, and judicial powers are brought into bad repute. Whenever a cry goes up against some evil condition the legislature proceeds to enact a prohibitory statute or a penal law condemning it, and then very often it is left unenforced.

We are apt to protect with a high degree of care all property rights, but fail to defend the liberties of the citizen. All unreasonable restrictions upon his rights of action, speech, and public assembly are not only not in keeping with our own ideas of liberty, but indicate a tendency toward such conditions as exist in Prussia, Russia, and other absolute governments. The way to stop usurpation of the national government is to make our state governments what they should be, and endear them to the people by the justice of their laws and the freedom afforded to innocent action. Patriotism in our states, instead of demonstrating itself in the careful study of our institutions and in an attempt to improve their condition, finds its expression too often in vainglorious assertion and sentimental flag cheering. Manuals of patriotism for public schools prescribing patriotic exercises, and flag worship, and all that sort of a thing, will avail nothing unless the states give to their people a kind of government which arouses patriotism.

The national government has no powers but those delegated to it by the states. The states, on the other hand, are unfettered by any limitations whatever except through their constitutions, and their courts are especially adapted to deal with the great mass of questions relating to life, limb, health, and the security of property. When it appears that a corporation has procured its charter through bribery or corruption, our state courts can destroy the charter of that corporation, except so far as liens upon its property have passed into the hands of bona fide purchasers. The way to take care of combinations and trusts, which through bribery secure special legislation, is through state law. The Attorney−General should be given ample power to institute actions to declare such grants void. A simple remedy against the extortions of the trusts could be found in the power of the state governments to refuse permission to such combinations as are incorporated without a state to carry on business in that state. An agreement of this kind between many states would be found effective.

Laws should be passed in every state requiring political parties to disclose under oath the sums paid to party organizations on all occasions, the names of the persons paying them, and a full account of the matter. No measure could be more productive of good than the destruction of the committee system in our legislatures. The laws of each state should require that each bill and resolution, referred to a committee, should be reported by the committee within ten days after its reference. The minority of a committee should have the power to report a bill, although it has not been accepted by the committee for the consideration of the Assembly or the Senate. In no way can the tendency to centralization be so effectually lessened as by vigorous support of local self−government. The city, the county, the town, are the ones which suffer from special legislation. The functions of the town and the village and the county are impaired in every case where control of their local matters is taken over by the state government. The positive, unquestioned sovereignty of the states in every detail of their reserved rights should be actually used and jealously guarded. In this way more than any other can we avert the encroachments of the national government.

The National Republican party in 1860 expressly disclaimed any intention or any legal power to interfere with state rights. Its national platform contained the following: "Resolved, That the maintenance inviolate of the rights of the states, and especially the right of each state to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depends." The Republican party to−day and the Democratic party would both declare and adhere

to such doctrine if the people demanded it.

When Washington was President of the United States, so much dignity was attached to the position of Governor of New York that it was a point of etiquette whether Governor Clinton should first call upon the President, or the President upon the Governor. When President Washington visited Boston, the same question came up as to whether he should first call upon Governor Hancock or the Governor upon the President. The people in those days were most jealous of the dignity of their state officers and of the rights of the states. But all this has changed.

A few months ago, Governor Hughes, of New York, became involved in a contest with the Senate over the removal of Superintendent Kelsey of the Insurance Department. We, who are proud of our Governor and who know his fighting capacity, felt assured that he was right and that he was quite equal to the occasion. In the midst of that contest the newspapers were filled with reports that the President had interfered in the contest, and, as an indication of his feeling, was about to appoint a revenue collector at Rochester in the interests of Governor Hughes. A short time before, the President had addressed this telegram to Governor Guild, of Massachusetts :

THE WHITE HOUSE, WASHINGTON, June l0th. Governor Curtis Guild, Boston, Mass.:

Have been requested on behalf of certain parties in Boston to interfere with the execution of Tucker, it being alleged that it is my duty so to do inasmuch as I have the power under the Federal laws.

No showing has been made to me that I have such power, but, without regard to this, I desire to state to you that, in my judgment, your decision not to interfere with the carrying out of the sentence of Tucker seems to me entirely sound and commands my hearty sympathy. It seems particularly a case in which there should be no interference with the carrying out of the sentence.

THEODORE ROOSEVELT.

Instead of approving such action on the part of the President when it favors the interests we approve, we should condemn it with all vigor. It would be commendable in the President, as a citizen and an individual, to take an interest in the affairs of New York and Massachusetts, but as President his interference is not only uncalled for, but it is highly improper. The people of any state should resent such meddling in their affairs by the President of the United States. In no other way can they so well vindicate the sovereignty and the dignity of the states in which they live. If they will not vindicate those rights, if the words upon their lips, "I am a citizen of New York "; "I am a citizen of Massachusetts," are not words of pride, they ought not to complain that the national government is rising in power and the state governments are declining.

X

USURPATION IN ADMINISTRATIVE LAW "Administrative law is 'case law made not by judges but
by government officials.'"

DICEY.

"There is certainly danger in these delegations of preeminent trust."

HALLAM.

"Common report or private information was at once indictment and evidence, and accusation was in itself condemnation."

FROUDE.

"The history of both France and Prussia is the record of the building up of a consolidated and powerful state by means of a great bureaucracy, directed from a single centre and pursuing a uniform policy; and so, in both countries, the people became accustomed to look to that centre, to the monarch and his officials for guidance in all affairs. . . . Administrative law 'relates to the organization and working of the national executive
both central and local.'"

PROF. ASHLEY.

"The little band of 167 special deputies, agents, and inspectors on the pay rolls of the government ten years ago has been swelled to an army of more than three thousand."

SENATOR FORAKER, Cleveland, December 21, 1907.

CHAPTER X. USURPATION IN ADMINISTRATIVE LAW

IN no branch of law to–day is there so great necessity for clear and definite ideas as in administrative law. The numerous commissions described in the last chapter, their existence in every state of the Union, the rapidity of their growth, the complexity of modern commercial life, the power of interstate commerce commissions to fix the rates of railways, the multiplication of commissions in the national government, the imperial domain peopled by tens of millions of people, and the great consolidation of economic interests, together with the impatience of our people for quick results, are all forces which, unless checked, will increase the field of administrative law. Just in proportion as it is increased the rights and liberties of the citizen will be abridged.

The nature of administrative law can be better determined by a description of its sources and its operation than by a definition. Administrative law is made by the rulings of a multitude of commissioners, and the heads and officials of departments in both the national and state governments. It involves the administration of all these commissions and departments. Private law regulates the relations of individuals between themselves and is administered by the courts. Administrative law, in the main, regulates the relations between the individual citizen in the state and the state itself as represented by its officials. Of course this does not include criminal law nor constitutional law, but administrative law is the supplemental and detailed application of all laws passed pursuant to the Constitution, and includes the nature of the relations between the administration and its agents, on the one side, and the private citizen, on the other, whenever he comes in contact with mere administrative officers. The making of by–laws, the assessment of taxes, the fixing of rates by the Interstate Commerce Commission, the decisions of the Secretary of War requiring the removal or alteration of bridges upon the ground that they have become an obstruction to navigation, the decisions of each of the heads of departments, the determination of values of imported goods by the customs appraisers, the decisions of the superintendent of education, the boards of health, the boards of fish and game protectors, and of hundreds of commissions created under the national and state governments, these all afford illustrations of administrative law.

The number of commissions has been so great in recent years that it may be well said that we have government by commission. In 1903 alone, about 140 new permanent state boards and offices were created, as well as some 75 temporary commissions and 39 investigating committees.1 Scores of statutes are being passed every year giving to governmental agencies more power with the idea of remedying abuses. The worse the abuse sought to be remedied the greater the temptation to ex–1 New York State Library Bulletin, Review of Legislation, 1903.

ercise arbitrary power by the commissions. We look with interest to the Russian bureaucracy, but we fail to observe that we are drifting toward just such absolute government at home. We are a republic in the Occident ruled largely by commissions, and an empire in the orient ruled by military power. From year to year we are adopting precisely the same methods of bureaucratic government that have long existed in France, Russia, and Prussia.

One of the most terrible abuses of administrative law •in recent years was involved in the decision of the United States Supreme Court in the case entitled United States against Ju Toy.1 Ju Toy, in the year 1903, was a passenger on the steamship Dorick, returning from China to San Francisco. The immigration officers of San Francisco detained him as a person not allowed to enter the country under our laws. Ju Toy declared that he was born in the United States, had always lived here, and that they had no right to turn him over to the master of the vessel to be returned to China. Now observe the kind of a hearing he had. The rules of the Immigration Bureau require its officers to prevent communication between a Chinese immigrant and anyone aside from the immigration officers. They conduct a private examination to determine whether he has the right to land, the head of the commission designating the only witnesses who may be present upon the examination. Generally no opportunity is given to the person to procure counsel. After such a hearing as this, Ju Toy was held by the Commissioner of Immigration as not entitled to admis–1 198 U. S., 253.

sion. The only remedy for such a decision is an appeal to the Secretary of the Treasury.1 The person who has been tried and found not entitled to enter the country must take this appeal within two days after the decision. Within three days thereafter the record must be sent to the Secretary of the Treasury at Washington. The rules of

the Department require that every doubtful question shall be settled in favor of the government, and that the burden of proof in such a case rests upon the person claiming– the right of admission. The Secretary of the Treasury heard this appeal and affirmed the decision.

Then Ju Toy procured a writ of habeas corpus from a District Judge of the United States, alleging that he had been born in the United States, that he was a citizen thereof, that he had gone to China on a visit, and that he had returned to this country and had been denied admission by the head of the Commission of Immigration, that an appeal had been taken to the Secretary of the Treasury, and that the decision had been affirmed, and that he was wrongfully deprived of his liberty. The District Judge granted the writ of habeas corpus, and upon the return thereof the Court refused to dismiss the writ, but appointed a referee to take the testimony of the witnesses, and report his findings of fact as to whether Ju Toy had been born in this country and was a citizen. After a thorough examination the referee found, as a matter of fact, that Ju Toy was a citizen of the United States, and this decision was confirmed by the District Court.

An appeal was taken from this decision to the Circuit 1 United States v. Sing Tuck, 194 U. S., 161.

Court of the United States, and the Court, being divided as to the correctness of the decision, certified interrogatories to the United States Supreme Court. The important question certified was this: "Should the court treat the finding and action of such executive officers " (referring to the Immigration Commissioner and the Secretary of the Treasury) "upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive, unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or in some other way, in hearing and determining the same committed prejudicial error." The United States Supreme Court, Mr. Justice Holmes writing the opinion, found, as a matter of law, that it mattered not whether this man was a citizen of the United States or not, if this administrative tribunal, the Commissioners of Immigration, decided that he had not been born in the United States, and was not entitled to enter the country, and the Secretary of the Treasury upon the evidence taken confirmed that finding on appeal, that it was conclusive, and that there was no redress for Ju Toy. Justices Brewer, Peckham, and Day dissented, Justice Brewer writing a vigorous opinion.

So we have this condition: if a Chinaman is born in the United States and unquestionably is a citizen of this country, and goes back to China for a visit and returns, and is subjected to such a summary trial as to citizenship and found by the Immigration Commissioner not to have been a citizen, and the papers are certified to the Secretary of the Treasury who determines that the decision of the Commissioner is correct, the man must be banished from the country, although he is a citizen, because the finding of the Commission, under such circumstances, is conclusive upon him, and no court has the power to interpose and protect his liberties.

Outside of Russia and Turkey there is not a country in Europe to–day where it would be possible for such a wrong to occur. The result of such a decision is so far–reaching in its effects as to imperil the liberty of every citizen in this country. If the United States Supreme Court can make the decisions of such administrative bodies binding upon the citizen, under rules and regulations where it is practically impossible for him to protect himself, and he can be banished from the country and deprived of his constitutional rights in this manner, his liberty is not worth a fig. The learned Justice writing this opinion says: "If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial."1 Due process of law before a commission — without an opportunity to talk with anyone but the officers, without opportunity to procure witnesses, without chance to cross–examine witnesses, without any counsel, with the whole matter involving a right almost as dear as life itself disposed of summarily by administrative officials in a country where the Bill of 1 198 U. S., 263.

Rights, which has secured to Englishmen their liberties for hundreds of years, is made a part of the Constitution? The liberty of the citizen is indeed precarious if this is due process of law. Can a citizen of the United States be excluded from his country except in punishment for a crime? Dreyfus, under military rule in France, was tried by court–martial, found guilty, and banished to solitary confinement in a distant island of the Atlantic; and the conditions of his conviction showed more care for the rights of a citizen than existed in this case. The injustice done Dreyfus eventually created a great disturbance even in France, and our people and all other liberty–loving people jeered at the French for their disregard of the liberties of a citizen.

Again, Mr. Justice Holmes says: "It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis,

speaking for the whole court in Murray's Lessee v. Hoboken Land and Improvement Co., 18 How., 272, 280, to show that the requirement of a judicial trial does not prevail in every case." Yet the case cited by the learned judge was a mere distress warrant issued by the solicitor of the United States Treasury, involving simply the rights of property, and the court in that case said: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty;

nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination." Is that case a justification for banishing a man from his own country to avoid holding that a mere administrative tribunals decision was not conclusive. Thus Ju Toy was compelled to suffer banishment, and was not permitted to be relieved by a writ of habeas corpus even after a referee had reported that he was a citizen of the United States.

We are given to boasting of our liberties. We pity the Chinamen subject to arbitrary power. The Emperor of China is said to have the right, after examination and determination that one of his subjects has committed a crime, to drive bamboo splinters under the disrespectful finger nails of the subject, and then chop off his head to relieve the pain. Such exercise of power, however, is little more arbitrary than that which the United States Supreme Court approved in the Ju Toy case. We are told in these days that the law should be administered upon considerations "of what is expedient for the community concerned," and "that views of public policy should control "; and Mr. Justice Holmes, in the Youth's Companion, some time ago said: "A system of law at any time is the result of present needs and present notions and of what is wise and right on the one hand, and on the other of rules handed down from the earliest states of society and embodying needs and notions which more or less have passed away." The present notions of men as to what is wise and right is not law, and to allow it to subvert the constitutional guarantees of personal liberty endangers every man's freedom. If the security which the Constitution has afforded to the citizen is unnecessary, and the first eight amendments embody "needs and notions which more or less have passed away," then the people should be allowed to determine that question and not the courts. Amendment to the Constitution by judicial construction is simply usurpation, and is especially blameworthy because it is done by those who are the guardians of the people's rights.

The truth is that for the last fifteen years momentous changes have been going on of which the people take little note. During this period the rights of property, through the decisions of the courts, have been growing more and more sacred, while the liberties of the citizen, secured to him by constitutional guarantees, have been gradually impaired. Let us observe an illustration of this change. In January, 1891, the Appellate Supreme Court of Massachusetts, in the case of Miller against Horton,1 Mr. Justice Holmes writing the opinion, held that the decision of the Massachusetts State Commissioners on Contagious Diseases among Domestic Animals to the effect that the plaintiff's horse was affected by glanders and directing the Board of Health of Rehoboth to kill the horse, would not protect the Board of Health in so doing if it turned out upon the trial that the horse was not affected by glanders, and that the plaintiff in such a case could recover damages from the members of the board. Now a man's horse, of the value of perhaps a hundred or so dollars, was involved in that decision. A man's right to live in his own country and the country of his birth was involved in the Ju Toy decision. In the one case the decision of the Commission on Contagious Diseases is held not conclusive. In

1 152 Mass., 540.

the other case the decision of the Secretary of the Treasury is held conclusive, although the referee appointed by the District Judge, upon oral evidence taken with opportunity for cross–examination, had reported that Ju Toy was a citizen, and his report had been confirmed. Ju Toy has no legal remedy for this wrong. He cannot sue the Secretary of the Treasury, and his action being in tort is not cognizable before the Court of Claims.1

It was the rights of man which engaged the attention of the political thinkers at the time of the Declaration of Independence. It is the rights of property which absorb the attention of the courts to–day. Power when interpreted by the one who is to exercise the power is always construed with great latitude. The Immigration Commissioner and the Secretary of the Treasury, according to this decision, exercise exclusive power, and the tendency is to increase that kind of power. Such tribunals generally will have all the power that they choose to exercise. As expressed in the original Constitution of Massachusetts, "A frequent recurrence to the principles of the Constitution is one of the things absolutely necessary to preserve the advantages of liberty and to maintain a free government." We look upon our government as a thing established and capable of maintaining itself without any

personal efforts on the part of the citizen. The power to check, held by these commissioners, is often extended into a power to decree and to enact. Their exercise of power is purely arbitrary with apparently no limitation. If the people are not aroused to the danger of the exercise of 1 Goodnow, Comparative Administrative Law, pp. 156–161.

such power it will not be many years before their liberties are subverted.

Another illustration of the danger of government by the decisions of administrative officers is found in the provision allowing the stoppage of mail by fraud orders. Now it is undoubtedly true that the mails are frequently used for improper purposes, that obscene matter is sent through them, that rascals who should be in state prisons employ them to carry out their nefarious schemes for defrauding simple, credulous people, and that all the abuses exist which Postmaster–General Cortelyou set forth in a recent review article.1 Usurpations of power spring into existence to suppress just such wrongs as exist in the Post–office Department. Government always finds in the existence of similar abuses to–day excuses for usurpation. President Adams and Congress, in the passage of the Alien and Sedition laws, were seeking to correct real abuses. The conduct of the French immigrants, who had taken advantage of our gratitude to France, was such as to be worthy of punishment. It was the unconstitutional means of securing that punishment which aroused the American people, brought about the defeat of the Federalists, and placed in power the Democratic party for over fifty years. The danger of arbitrary power is always greater where the purposes for which it is exercised are good purposes, because the great majority of men do not see the danger from such exercise if it accomplishes good results. In no other way could arbitrary power take on a form more popular with good men than in attempts 1 North American Review, April 19, 1907.

to suppress obscene literature, or letters and pamphlets intended to swindle the unwary. Of course we all desire that such men should be punished, but if one is acquainted with human history and its lessons he will never wish even such evils suppressed by the exercise of arbitrary power.

In 1836 President Jackson recommended to Congress the propriety of a law to exclude from the mails anti–slavery literature of an incendiary character. Mr. Calhoun, condemning in the strongest terms such publications, insisted that Congress had no such power because it would abridge the liberty of the press. Daniel Webster acquiesced in this opinion. James Buchanan, at that time Senator from Pennsylvania, supported a bill of this character, on the ground that the power of Congress to carry mails necessarily involved the right to exclude such mails as it saw fit. This bill was voted down. The Post–office Department now proscribes the use of the mails for the carrying of obscene matter and letters or pamphlets intended to defraud; and also, without any provision of law sustaining its action, debars from the mails pamphlets criticising the acts of the national government.

Few Americans have ever given so much time to the reading and studying of political economy and other kindred subjects, upon which the welfare of mankind depends, as the late Edward Atkinson, of Boston. For thirty years or more before his death he never failed to espouse the cause of what he believed to be just, without any hope of reward except the consciousness of having done his duty. He believed that he saw in the im perialistic policy of President McKinley's administration a great danger to his country, and when Mr. Atkinson was satisfied that his purpose was a good one he was absolutely fearless in carrying out that purpose. The following is his statement of what occurred: "In the latter part of 1898 I privately printed a pamphlet containing two treatises: first, 'The Cost of a National Crime,' and second, 'The Hell of War and its Penalties.' ... In February, 1899, the President had submitted to the dictates of the conspirators against the liberties of the Philippine Islands, and had committed 'criminal aggression' upon them. These facts were exposed in a second pamphlet containing a third treatise entitled 'Criminal Aggression — By Whom Committed?' ... I then learned on apparently authentic information that the volunteers who had enlisted for the War with Spain and for service with Cuba had been sent against their will and against their convictions of right to the Philippine Islands and were there held in service after their terms of enlistment had expired, which to many of them was abhorrent. I also learned on apparently good authority that telegraphic messages from their relatives in this country were'not permitted to reach them. This outrage made me think it suitable to send copies of my pamphlets to these volunteers who were held against their will in order that they might know they had support in the maintenance of their rights in this country. To that end I addressed a letter to the Secretary of War asking the addresses of the different regiments, inclosing copies of the pamphlets and announcing my purpose to send them to these troops. I did not discriminate between the volunteers and the soldiers of the regular army, but should not have sent to the latter lest the soldiers themselves should be

embarrassed or exposed to hazard by their acceptance. After waiting a sufficient time for reply from Secretary Alger, I mailed eight copies as a test to Admiral George Dewey, Professor Schurman, Professor Worcester, General H. G. Otis, General Lawton, General Miller, and J. F. Bass, correspondent of Harper's Weekly. The Secretary of War did not answer my letter, but apparently he and some of his associates were alarmed by my action lest the volunteers held against their will should demand relief from the abhorrent service of slaughtering our allies, and at the instance of the Postmaster–General the Postmaster in San Francisco violated the United States mail and took these pamphlets from it without authority of law and in violation of the rights of citizens."

Now there can be no doubt that there was nothing in the pamphlet which Mr. Atkinson sent to the Secretary of War, and which he afterwards mailed to Admiral Dewey, Professor Schurman, Professor Worcester, General Otis, and the others, which could have been injurious to them. But that is not the question. He had the legal right, if men have any legal rights left under imperial government, to express his opinions and to send them through the mail to any man, and yet these pamphlets were taken from the mail and destroyed by the order of the Postmaster–General without the slightest authority in law.

Let us now observe the method through which a fraud order is issued by the Post–office Department.

Inspectors of the Department are assigned to various sections of the country, with the duty to investigate all cases in their districts in which it is alleged that the mails are being used in violation of the law. When a discovery is made by these inspectors (and what inspector or police officer ever lived that could not discover many things that do not exist?), in the language of Mr. Cortelyou: "When the character of the scheme to defraud is such that its continued operation, during this examination and consideration of the charges, threatens to result in losses to the public, temporary orders are at once issued to the Postmaster simply to withhold the mail pending the inquiry."1 So to start with, we have the mail of one of the patrons of the Post Office, possibly engaged in a large business, where the withholding of his mail, even for a few days, may result in the practical destruction of his business, having that mail stopped without any hearing and without any chance of explanation. The man who engages in lynching adopts the theory of killing the suspected person and then trying him afterwards. The Postmaster–General exercises the same power of destroying a man's business, and then giving him a hearing and ascertaining whether he is guilty.

Now having held up the man's mail, the inspector reports the facts to the Assistant Attorney–General for the Post–office Department and, as Mr. Cortelyou says:

"If these facts establish a prima facie case of fraud, the person or concern involved is at once notified of the pendency and the nature of the charges brought, and is 1 North American Review, April 19, 1907, p. 809.

then afforded an opportunity to appear before the Assistant Attorney–General for the Post–office Department, either in person or in writing, or both, making such answers and statements as it may be desired to have the Department consider in disposing of the matter." Now the victim of such action may be two or three thousand miles distant from Washington. He is given an opportunity to be heard by the Assistant Attorney–General, who has already passed upon the case. The examination is not one through witnesses, with examination and cross–examination, but is in fact a mere formal examination, and the decision of the Assistant Attorney–General confirmed by the Postmaster–General is absolute, as in the Ju Toy case, upon the rights of the accused.

The right to do business is a legal right. Upon this right is founded most of the injunctions against labor unions and laborers engaged in a strike. Their employers are carrying on the business of manufacturing or some other commendable enterprise. Their men strike, they attempt, possibly by forcible means, to prevent other laboring men from taking their places, and the employer applies to the court for an injunction, which is granted, because the right to do business is a property right, and the action of his late employees is destructive of that right. Now apply this law to the case of a man whose mail is stopped by a fraud order. Such an order practically destroys his business even before a hearing. It will avail him little to go before the Assistant Attorney–General, because upon the evidence of the detective he has already decided the case, and at least before the hearing could be had the man's business is destroyed.

In 1905 a man by the name of E. G. Lewis was carrying on in the city of St. Louis a business known as the People's United States Bank. A fraud order was issued against him, and proceedings were taken in the United States Court for the purpose of appointing a receiver of his corporation, and a receiver was appointed. The fraud order was issued against both the corporation and Lewis. All letters thereafter addressed to him personally were returned with the usual word "fraudulent " stamped thereon. A letter from his wife, from his attorney, from any

close friend in any part of the world, would have been returned with the word "fraudulent" stamped upon the outside. This fraud order actually shut him off from any intercourse through the mails with any human being and apparently for all time.

Mr. Cortelyou says about such cases:1 "It is particularly true, too, that comparatively little direct evidence can be brought into court against the majority of these fraudulent operators," and he tells us that it is very difficult to find evidence which will insure the conviction of such operators. We are also assured by him that there is much justification for the remark recently made that "the Post−office Department of the United States is the most effective agency in the world for the detection and prevention of crime and the apprehension of the criminal."2 Now what have we? The most effective agency in the world for the detection of crime

1 North American Review, April 19, 1907, p. 812. 2 North American Review, April 19, 1907, p. 816.

is unable to obtain little evidence against those it accuses, and yet it has issued since the enactment of the present legislation 2,400 fraud orders. I am credibly informed that in the case of Mr. Lewis and his People's United States Bank, upon liquidation by the receiver, it paid one hundred cents on the dollar with interest in full to creditors, together with dividends to the stockholders of eighty−five per cent.

In the second session of the Fifty−ninth Congress a bill was introduced into the House of Representatives providing that the mail addressed to the person or firm against whom the fraud order is issued, instead of being stamped "fraudulent" and being returned at once to the senders, should be held in the Post Office for fifteen days before being sent back. In that period the business concern was permitted to institute an action in the United States Circuit Court, on giving a bond to pay the entire costs of the action in case the fraud order was finally held to be valid. This bill passed the House without a division, but failed to pass the Senate. When the wisdom of the proposed act was being discussed before the Congressional Postal Commission, one of the speakers said:

"We are expected to live up to rulings, regulations, and decisions that we are unable to find and never heard of. The publisher is informed by mail that he has violated some rule, that his publications can be no longer mailed at a second−class rate, but the rule is new to him. His paper is held up until he can find out what is the matter. . . . And when he has his hearing he finds out that it is a purely arbitrary affair, surrounded by none of the safeguards which are allowed other American citizens who are contesting for their right to do business." Of course it is not surrounded by any of the safeguards allowed other American citizens, because their safeguards are secured to them by laws and by a regular judicial procedure. On the other hand, administrative tribunals, at least in our own country, have always been arbitrary tribunals depriving the citizen of his property and his good name without any of the safeguards prescribed by law.

In another case, where the publication had been stopped because of alleged obscene matter, an acquaintance of the publisher sought by repeated letters to discover what the precise matter in the publication was which the Post−office Department regarded as objectionable. Finally the only statement which he could procure from the officials was that it was "not practicable for the department to attempt to point out the offensive passages," and they practically refused to give any information as to what matter contained in the publications suppressed was regarded by them as offensive. In common−law courts the law requires the facts constituting the crime to be specifically stated in the indictment so that the accused may know exactly the offense with which he is charged. He is given the processes of the court to procure his witnesses, and must be confronted with the witnesses against him. How different is all this from administrative tribunals.

This proceeding on the part of the Postmaster−General is quite as arbitrary as any which we find in Russia, Prussia, or Austria. The Russian censor blots out the objectionable parts of the newspapers and permits the rest to go through the mails. But our censor suppresses the whole edition, the good along with the bad. In Austria the business of printing a newspaper cannot be carried on without a license from the government, and every number of the periodical must be submitted to the police before publication, so it may be confiscated if it contains anything contrary to law. The censor is said frequently to order portions of the columns of an article to be stricken out, and with these corrections it is allowed to go forth. All arbitrary governments seek to control the press. And with full knowledge of the results of such methods we are deliberately adopting them. As a general rule no man's liberty to print or publish ought to be restrained by government for any reason short of thereby protecting the liberty of other men. So important is the public discussion of questions that all assaults of arbitrary government upon liberty have first appeared in limitations upon the press.

Publications entered as second−class mail matter are said to be subject to no less than seven distinct rates.

Such discretion reposed in the officials of the Post Office is wide enough to allow them to suppress all periodicals which are found to be injurious to the interests that they cherish. Wilshire's Magazine was a few years ago excluded from the mail by the Post−office Department. The editor then took his magazine to Canada, where he had no difficulty in securing its entrance to the post office. Three years later a New York printer sought to contract for the publication of this magazine, and to procure its reinstatement in the mails of this country applied to Senator Platt, and the boss easily succeeded in securing at once what years of labor on the part of Wilshire had failed to accomplish. This instance shows the danger of conferring such arbitrary powers upon a department of the government. The Star Chamber, which was abolished in 1641, had as one of its special functions the right to try the offenses of the press. "Press law has long constituted," says Mr. Dicey, "and still continues to a certain extent a special department of French legislation, and press offenses have been, under every form of government which has existed in France, a more or less special class of crimes."1 Under Napoleon Bonaparte no one could print a paper without official authorization, and even to−day the government adopts preventive measures for guarding against the propagation of unsound or dangerous sentiments.

Yet even in France the arbitrary power exercised by our Post−office Department would not be tolerated for a moment. The Gaulois, a Parisian paper, speaking of President Roosevelt's action in excluding from the mails newspapers printing the details of the Thaw trial, said:

"That no sovereign in Europe unless it be the Czar and the Sultan had the power to do what the American executive had done." The Gil Bias, another paper, commented upon the same matter, saying: "Imagine President Fallieres interdicting and expurgating such an account." If publishers must run the gantlet of such secret and irresponsible postal supervision the freedom of the citizen would seem to be greatly impaired. In England, from whence we drew our principles of English liberty and where happily they still continue, the gov−1 Dicey, The Law of the Constitution, p. 248.

ernment has no authority to seize the stock of a publisher because it consists of books, pamphlets, and papers which in the opinion of the government contain seditious or dangerous matter.

There are many other instances of abuse of administrative law. One of these is found in the McKinley Act of 1890. Discriminations were being made in Germany against American meats. The act provided that sugar, tea, coffee, molasses, hides, and other articles should be admitted free of duty. In order to arm the government with means of retaliation, Congress conferred the power upon the President that whenever he should be satisfied that unjust discriminations were being made by any foreign state against the importation or sale of any American product, he might by proclamation impose duties upon sugar, tea, coffee, molasses, hides, or any other articles which, by the terms of the McKinley Bill, were admitted free from the country discriminating against us. Thus the President was given a legislative power belonging to the popular branch of the legislature, originally granted for the protection of the people against arbitrary power. The United States Supreme Court, however, held that this provision of the act imposed administrative powers upon the President and was constitutional, Justices Lamar and Fuller dissenting. Justice Lamar said:"It goes further than that and deputes to the President the power to suspend another section in the same act whenever 'he may deem the action of any foreign nation producing and exporting the articles named in that section to be reciprocally unequal and unreasonable'; and it further deputes to him the power to continue that suspension and to impose revenue duties on the articles named 'for such time as he may deem just.'"1

On March 9, 1897, Congress created a commission to regulate the importation of teas, and prohibit them, though in fact pure, when below the standard of quality fixed by the Secretary of the Treasury. That tea commission is now engaged in the exercise of that dangerous power of requiring the reshipment of teas which do not reach the quality which it prescribes, or, in case they are not reshipped, of destroying them. This act also has been declared constitutional.2

There is no such thing as reviewing the action of these administrative boards according to the decision just cited. A recent writer on administrative law observes that our procedure affords even less protection from the arbitrary action of these boards than the French law, though the Bill of Rights is unknown to the French Constitution.3 According to the statement of this same writer state courts have admitted the finality of the decisions of boards of health in respect to nuisances, so that without a hearing a board of health, in many of the states, has been declared capable of determining that a man's property is a nuisance and binding him by their decision. A different rule, however, prevails in the state of New York.4 In hundreds and even

1 Field v. dark, 143 U. S., 649. 2 Buttfield v. Stranahan, 192 U. S., 470. 3 Political Sc. Quarterly, Dec., 1906, Bowman, p. 615. 4 Copcutt v. Board of Health of City of Yonkers, 140 N. Y., 1. See also p. 12.

thousands of cases, where these boards are acting within the scope of the statute creating them upon the subject matter therein fully described, their decisions are final and are not subject to review in the courts.1 Mr. Wyman, who is enthusiastically favorable to these commissions, says, however: "Things are done in administrative adjudication which could never be done in judicial processes. Principles are violated in administrative processes which are fundamental in the courts."2

Ex parte proceedings seem to be just as binding as proceedings upon notice. Even these boards have extensive legislative power. So when a fish and game commission determine that the fish of any brook or stream of the commonwealth are of sufficient value to warrant the prohibition of casting sawdust into the stream where they are found, they may by an order in writing prohibit the same without giving the owner any hearing upon their action.3 Although the executive, legislative, and judicial departments are carefully divided in our form of government, still the legislative department can confer executive duties upon these commissions and their decisions therein are final.4 Judge Jackson, many years ago in the Kentucky and Indiana

1 Wyman, Administrative Law, §§ 112–136; Miller v. Raum, 135 U. S., 200; Oil Company v. Hitchcock, 190 U. S., 316.

2 Wyman, Administrative Law, § 119.

3 Wyman, Administrative Law, § 121, note; Salem v. Eastern R'y Co., 98 Mass., 431, 443 ; Nelson v. State Board of Health, 186 Mass., 330, 333.

4 Harvard Law Review, vol. xx, p. 121; Wyman, Administrative Law, § 121; in re Kollock, 165 .U. S., 526; Wyman, Administrative Law, § 133, Note 103 with Cases.

Bridge case, described these commissions as the referee of each and every Circuit Court of the United States.1 And it has been held that one of them may institute proceedings in the courts and become prosecutor and judge in the same case.

Congress voted, in 1898, the payment over to the President of $50,000,000, and under the power of administrative law he expended it in his own discretion without any check whatever. Under this power of administration in 1899, the Secretary of War sent troops into the state of Idaho, without even the petition of the state authorities; martial law was declared by the War Department, the writ of habeas corpus was suspended, not by the state authorities but by the general in command of the army, and without any warrant whatever he arrested hundreds of men and carried on government by his own will. Mr. Root, at a New York University Law School Banquet, described administrative law under his direction, as Secretary of War, as follows:

"It has been my province during the last four years and a half to deal with arbitrary government. It has been necessary for me not only to make laws and pronounce judgment without any occasion for discussion — except in as far as I would choose to weigh the questions involved in my own mind — affecting ten million people. And not only to make laws and pronounce judgment, but to execute judgment with overwhelming force and great swiftness." Under this administrative law the Philippine Commission on June 1, 1903, by Section 6 of an act numbered 781 of the

1 Harvard Law Review, vol. xx, pp. 123, 124.

Philippine Commission, provided for the very same kind of reconcentration of the native population for which we drove Weyler and his Spaniards out of Cuba.1

Under administrative law the Secretary of the Interior, by executive order in 1904, decreed that all persons who had served in the army or navy of the United States and had reached the age of sixty–two years, should be presumed to have incurred such disabilities as to entitle them to receive pensions under the Act of Congress approved June 27, 1890. It is under this power that the Interstate Commerce Commission is about to impose rates of traffic upon 200,000 miles of railway in the United States. It is under this administrative power that Secretary Shaw of the Treasury suspended the duties upon importations of coal; accepted, as believed by many, without legal authority, other securities than national bonds to secure the issues of national bank notes; deposited the surplus of the Treasury with national banks in the amount of many millions of dollars, and used all the powers at his disposal to protect and further the interests of these national banks. It is under this administrative power that in all the states of the Union hundreds of commissions are taking the control by license and otherwise of the affairs of men, many of which are not public in their nature.

In the case of the People ex rel Lodes against the Department of Health of New York City, Mr. Justice

1 North American Review, Jan. 18, 1907; Blount, Philippine Independence, p.145.

Gaynor, of the Supreme Court of New York, speaking of this condition, says:1 "Those who meditate a recourse to arbitrary power for a good purpose should pause to consider the consequences, for it is a vice which brings in its train all the vices and especially the detestable vices of official extortion and blackmail. Good men in good times should beware of setting bad precedents for bad men in bad times. The sale of impure milk or other food is bad, but far worse, and fraught with far greater evils, would be the growing exercise by executive officials of powers not conferred on them by law. If they were suffered to require licenses for the ordinary occupations of life, and refuse them to whom they willed, how long would it be before such licenses would be sold for money or for political favor or partisan fidelity? " Commissions of this kind, censors of all kinds, restrictive government, multiplication of penal laws, all these methods have been the methods of arbitrary governments. There is not a step in the decay of the Roman Republic and of the Empire which is not marked by a large amount of just such legislation as I have been describing. The endless repetition of legal commands is the unerring sign of impotence and decadence.

It is important to appreciate whither this administrative government is leading. It differs materially from administrative government in France and other European countries. In all these countries all relations between administrative officers and the citizens, growing out of the official duties of those officers, are regu−1 117 App. Div., 865.

lated entirely in administrative courts. The citizen of France is forbade from the bringing of any action against any administrative officer for an official act without the consent of the French Council of State. This does not apply to acts committed by officials not in the exercise of their authority, as, for instance, where the act is a personal fault or a malicious use of lawful powers. But for all other administrative acts of any name or nature the citizen has no recourse against the official committing the wrongful act under claim of authority, except in an administrative court, where there is scarcely hope of redress.1 These administrative courts are conducted by administrative officials with rules of procedure peculiar to themselves, and with no provision of trial by jury. Will administrative law bring us to the same unfortunate condition?

In Prussia the only remedy of the citizen against an official for a wrong, in the supposed execution of his duty, is to appeal to the authority who supervises the action of that official, or to bring an action before the administrative courts against the official or officials whose conduct is challenged.2 By reason of this fact a considerable part of all the litigation in Continental Europe is carried on before administrative courts dependent upon the head of the state,3 and therefore likely to be safe guardians of the rights of officials. The administrative courts in European countries resent with indignation any

1 Dicey, The Law of the Constitution, ch. xii.

2 Ashley, Local and Central Government, pp. 302, 303.

3 Lowell, Governments and Parties in Cont. Europe, vol. ii, pp. 83, 195.

attempt on the part of the regular law courts to interfere with their jurisdiction over administrative officials.

There are no strictly technical administrative courts in this country or in England. The public official is liable before our common−law courts for all his torts and wrongs, even though claiming to have performed them in his official capacity. If a board of health wrongfully has declared the property of a citizen to be a nuisance and destroyed it, they are liable in most of the states, at least for damages, in case it was not a nuisance. If they revoke the license of a milk dealer, without a hearing, and for a cause not prescribed by the laws or their written regulations, they are liable, and an equity court will enjoin their action.1 It may be true that in some cases the official can protect himself by a process which is regular upon its face, but in such a case his superior who issues the process, if void, is liable.

These commissioners will come, by and by, to believe that extraordinary powers belong to them; that they can prohibit a legitimate business by refusing to license it, entirely overlooking the fact that they are given the power to regulate business and not to prohibit it. The President, a few days ago, took away the license of a Mississippi steamboat pilot. It will not be many years, if existing conditions prevail, before the national government, through commissions, will be licensing every locomotive engineer and conductor engaged in interstate commerce, and will be licensing every state corporation doing an interstate business. These licenses will be rev−

1 People ex rel Lodes v. Department of Health of the State of New York, 117 App. Div., 856.

ocable at the will of the President or the head of the Department of Commerce, and hundreds of thousands, if not millions, of men, and all of the corporate interests of the country, will be at the mercy of the national government. So long as these commissions are allowed to exercise judicial and legislative powers, without the right of review on the part of the regular courts, the citizen's rights are in danger. There is to−day no menace to his rights so great as administrative decisions. Our English ancestors three centuries ago escaped from the administrative courts of England. Let us beware of the danger of returning in our day to that kind of arbitrary government.

XI

HOW TO RESTORE THE DEMOCRATIC REPUBLIC "To bid the political machines to do away with corruption in order to save the government is to bid them give up that which to them makes government worth saving."

ANON.

"No system of government . . . can ever pretend to accomplish its legitimate end apart from the personal character of the people, or to supersede the necessity of individual virtue and vigor."

GROTE.

"The durability of liberty owes its greatest security to the constant suspicion of the people."

HALLAM.

"Nothing, indeed, will appear more certain, on any tolerable consideration of this matter, than that every sort of government ought to have its administration correspondent to its legislature."

BURKE.

"The most far−seeing statesman will not so trust his own misgivings as to refuse to hope for the regeneration of the institutions into which he is born. He will determine that justice shall be done. . . . Constitutions are never overthrown till they have pronounced sentence upon themselves."

FROUDE.

CHAPTER XI. HOW TO RESTORE THE DEMOCRATIC REPUBLIC

No people in history ever relied so implicitly upon the making of laws, the creation of constitutions, and the protection of life and property through courts as the American people. Our people are really beside themselves in their belief in the efficiency of law for the correction of evils. Congress yearly passes three or four thousand statutes, and the state legislatures add about twenty–five thousand pages more. We permit the political bosses to select for our suffrages members of assembly, senators, and judges; then we make our choice between their candidates, go home from the polls and get so busy in our own affairs that no one is left to watch the men elected. It is a fundamental error, in our thinking, that evils admit of immediate and radical remedies through legislation. "If you would but do this or do that," we say, "the mischief will be prevented." No set of laws, however good, will bring good government unless honestly and intelligently administered, nor unless those responsible for such administration are held strictly accountable at all times for public abuses. The sore spot in our government is right here, do the people really wish good government? Is there sufficient public virtue among our citizens to demand and appreciate good gov– ernment? If the legislature passes a bad law you can repeal it, if the Constitution is defective you can amend it, but if the "people themselves are lacking in public spirit there is no remedy."

There is no such thing as remedying existing abuses, or amending our Constitution so as to bring it into harmony with our times and requirements, unless the people really believe that conditions are dangerous. The only way to keep government free is for each individual to presume that government is in the wrong, and that presumption will keep it upon its good behavior. We must become disgusted with the present conditions and desirous for something better before a great change will take place. We have been fed so long on comparisons of our own exalted condition with that of the oppressions of European people, we have been educated to such reverence for our Constitution, that we have arrived .at that condition of sanguine optimism where the worst phases of our life are believed by many people to be the evidence of our superiority. When a people settle down in serene confidence that law and social justice, the preservation of the state, and all such matters have been provided for them for all time through a constitution, and that all they have to do is to ride in the constitutional ship and devote their entire attention to private business, they need to be shocked into the consciousness that their liberties are in danger, and that their very optimism is a temptation to politicians to abuse their confidence.

The political partisan is never a critic. He and his associates are ever engaged in covering the sores of their party. What the people need is a large body of fearless men who ask no favors of government, and who are willing to stand up and ask disagreeable questions, and utter uncomfortable truths, and lay their fingers upon abuses, and attack the men behind those abuses. A people may prefer free government and still be unequal to the exertions necessary to preserve it. Down deep in the nature of the American man is the quality of always trying to avoid trouble and save time. If an American and an Englishman are traveling together in Europe, and a cabman or guide or hotel keeper attempts to extort money from them, the Englishman will say, "I will not pay it;

I will fight it out with him." But the American will counsel, "If we try to fight it out with him it will keep us here a week, and we cannot afford that; let us pay him." The one method destroys abuses at whatever cost when they first appear, the other permits evils to grow and grow until they become a part of the very life of government, and must be cut out at last, if at all, from the roots.

Goldwin Smith tells us 1 that as the body of William the Conqueror was being lowered into the grave, Ascelin Fitzarthur, a private citizen, stood forth and forbade the burial, saying that the ground was his, and that he had been wrongfully deprived of it. He was promised the full value of his land and allowed the burial to go on. Here we have that spirit of resistance against the infringement of one's rights which has preserved the right of property and liberty among men. There is no such thing as an individual securing his rights unless he is willing to insist upon them at all times; and there is no 1 The United Kingdom, vol. i, p. 41.

such thing as a people securing their rights unless they are ready to fight for them at all times. When you can slap a man in the face and he shows no spark of resentment, you can safely shelve that man as an unfit citizen;

and when a man can see a cruel injustice done in a law court or in society and not cry out against it, he is always an unfit citizen. "A wise man," said George Eliot, "more than two thousand years ago, when asked what would most tend to lessen injustice, said that every bystander should feel as indignant at a wrong as if he himself

were the sufferer."

The all−pervasive cause of present conditions is found in our maddening struggle for wealth and the commercial spirit of our countrymen. In 1883 Andrew D. White, in his noble address, The Message of the Nineteenth Century to the Twentieth, delivered at the reunion of his class at New Haven, put his finger upon this danger and advised the development of other great elements of civilization to hold the commercial spirit in check, saying: "The greatest work which the coming century has to do in this country, is to build up an aristocracy of thought and feeling which shall hold its own against the aristocracy of mercantilism. I would have more and more the appeal made to every young man who feels within him the ability to do good or great things in any of these higher fields, to devote his powers to them as a sacred duty, no matter how strongly the mercantile or business spirit may draw him. I would have the idea preached early and late. . . ." The evils of commercialism, comparatively slight when Mr. White said these words, have been increasing with maddening speed ever since. Failure to make a fortune is the unpardonable sin of our country. Wealth makes the man;

no person is accounted either great or honored without it.

History presents no country where the people gave themselves up to such commercialism that preserved its liberties for any considerable period of time. The reason for this is that when any such consuming passion takes possession of a people, it absorbs all other powers and grows by what it feeds upon, until it eats out the humanizing virtues and liberty−loving virtues of men. Art, literature, culture, religion, each feels its pressure and finally succumbs to its dominating spirit. The materialistic spirit of our day is atrophying the minds, the consciences, and the imaginations of men. The spirit of poetry, the beauties of mythology, and the delights of art are all sent to the rear by this triumphant force. We have to go back fifty years in our history to reach the time when the great body of our citizens admired poets, orators, philosophers, novelists, and historians. Clay, Webster, or Calhoun, in the United States Senate, were the delight of the people. Emerson, Bryant, Lowell, Holmes, Whittier, had their hundreds of thousands of admirers. Then the millionaire appeared upon the scene, scattering his money for charity, purchasing newspapers, furnishing campaign funds, buying legislators, making all political life a business, and all was changed.

Xerxes, after the battle of Thermopylae, while moving his troops to the south, was assured by Mardonius, the Greek, that the Peloponnesians, even at that moment, were occupied with the celebration of the Olympic games.

"What prize does the victor receive? " he asked. Upon the reply that the prize was nothing more than a wreath of the wild olive, a kinsman of Xerxes, in his presence, is said to have exclaimed, "Heavens! Mardonius, what manner of men are these against whom thou hast brought us to fight! Men who contend not for money but for honor! " To−day men do not contend for honor, because if they attain honor without wealth they are of little account. The steel king, the oil king, the railway king, the cattle king, the mining king, attract and absorb the attention of the people. The newspaper columns are filled with their doings because we reverence wealth, and hence reverence the men who have it.

If we wish to check the power of organized and unscrupulous wealth over government, one way will be to change our own personal standards of right and wrong, and our social customs, and through those to affect public opinion. This idea was admirably stated by John Sharp Williams in the House of Representatives in 1905, when he said: "Public opinion in administrative and financial circles is a man's environment: and the trouble is with public opinion itself. The trouble is with the American people. Down deep at the bottom of our hearts, God help us, nearly all of us somewhat respect and envy the fellow who has 'financed' five hundred thousand dollars. We are like Thackeray's snob was about the nobility when he exclaimed, 'I dearly love a lord.' ... if every Member of this House to−night should receive an invitation to dine with McCurdy or with McCall, nine tenths of you would cynically say, 'Is the wine good? Does he roast his ducks well?' And you would go, the most of you." We rail against the predatory trusts, but we envy the wealth of the men who are in the predatory trusts. We deal with them, flatter them, and refuse to treat their crimes as we treat those of the poor. Because we have made money our god we do not look forward to having our sons attain fame for learning or eloquence, but we all hope to see them secure wealth. "No home," says Mr. Lloyd in his Wealth Against Commonwealth, "is so low that it may not hope that out of its fledglings one may grow the hooked claw that will make him a millionaire."

So thoroughly has commercialism taken possession of our people that we do not appreciate the service of those who labor for the public weal with no expectation of receiving benefits therefrom. The ordinary legislative committee is a representative of public opinion, and the members of it will always listen with more attention to a

man of business, no matter how disreputable, than it will to a citizen who is seeking in no manner to further his own interests. We worship business and business success, and our whole theory of legislation is to give some man or some body of men, policemen, firemen, labor–union organizations, trusts, railroads, some advantage through laws. Our legislators care little about the great body of the people, because they are unorganized. They care little about the words of the man who represents unorganized public opinion. Legislation is directed to the security of private property and not to the protection of personal rights and liberties. The attorney who represents a great trust or corporation is looked upon by a legislative committee as a great man, while the man who is giving his whole life to the study of history and of political problems and policies, if he represents no trust or organized party, is considered of little account.

We wonder why our age does not produce such statesmen and orators as we had sixty or seventy years ago. It would produce them if they were appreciated. In the age of Pericles, when all Athenian statesmen met in public assembly and decided public affairs, great men came to the front. Pericles, in his famous funeral oration over the three hundred who died at Thermopylae, according to Thucydides, gave the reason for this. He said: "We call the man who cares not for the public weal a worthless nuisance, not merely an inoffensive citizen . . . for all citizens take a share of the public burdens and are free to urge their opinions on public affairs." An age of liberty is always an age of appreciation of high public service, and of scrupulous conduct on the part of public men.

After the Revolutionary War Washington turned his attention to improving the intercourse between the different parts of the State of Virginia, and especially between Virginia, Maryland, and the West. "In 1785," says John Fiske, "he became the President of a company for extending the navigation of the Potomac and James Rivers, and the legislature of Virginia passed an act vesting him with one hundred and fifty shares in the stock of the company, in order to testify to their 'sense of his unexampled merits,' but Washington refused the testimonial, and declined to take any pay for his services, because he wished to arouse the people to the political importance of the undertaking, and he felt that his words would have more weight if he were known to have no selfish interest in it." What a noble example for some of our public men to–day who do nothing unless there is something in it for them. Aristides, when made general receiver of Greece to collect the tribute which each state was to furnish against the barbarians, "was poor," says Plutarch, "when he set about it; poorer still when he had finished it." Henry Watterson, in The Compromises of Life, says: "Diogenes, seeking an honest man, might, in the history of the Irish Union, come upon a parallel case in poor old Hussey Bergh, who refused all the gold that England could offer him, abandoned the borough of Kilmainham, for which he sat, and which the British Ministry guaranteed him for life, voted against the bill which robbed his country of its freedom, and was found dead in his bed, with sixpence on the mantel, and a paper on which was scrawled: 'Ireland forever, and be damned to Kilmainham.'"

Is not such virtue better entitled to the homage of men an hundred times over than the accumulations of the millionaire? There is no immortality of glory connected with millionaire fortunes. Soon, very soon, all the achievements of these men will be forgotten. The Roman Empire in its glory possessed many men with fortunes nearly as great as those of to–day. The historian of those days describes their chariots, drawn rapidly through the streets of Rome, tearing up the pavements as they went. Probably not one man in a million can mention the name of one of those great millionaires of ancient Rome. It will be just so with our multi–millionaires two thousand years from now, while the memory of Abraham Lincoln, who died poor but wrought so wonderfully for his fellow–men, will still exist, tradition adding to his merits, his glory exempt from mutability and decay, and as immortal as the love of liberty.

It was the rights of man which engaged the attention of political thinkers and of the people at the time of the Declaration of Independence. The people at that time had had so much misery, because of the exactions of the ruling classes, that they were suspicious of power and government. The politician of to–day knows men, and he knows how to turn their weaknesses to account. He seeks out their little grievances and relieves them, and at the same time he nominates legislators and governors and judges who will carry out the policies of the men who furnish campaign disbursements, and thus put great grievances upon the people. The patriotism which will accomplish results to–day must come from careful study of our institutions, and must be enthusiastic for greater liberty for the masses of mankind. If mankind is to belong to itself, and not to arbitrary power, it must destroy the power of the boss. If the people of this country are to return to their own again we must cease to tolerate the shams which have always taken so great a hold on the American people. We must do away with the political imposture and quackery which, along with new and strange religions, have thriven in our country.

The destruction of public virtue results more from the oppressive conditions of life than from any other cause. In other countries men are accustomed to retire in middle life, and opportunity is thus given them with leisure to study conditions of government and public affairs. The tendency in our own country is to draw numbers of young men from the country to the city. There the cost of living is so great, and the opportunity for advancement so slight, that all the energies of their life are absorbed in the mere making of a living, and they naturally become bad citizens. So long as the trusts through high prices can absorb the wages of labor and keep men working until the end of life to support themselves and their families, they can manage government as they have in the past. Men must satisfy their physical wants before they will be able to think much about their political rights. The government which allows combinations of corporations to make the cost of living so dear that men must strain their energies to the limit to care for themselves and their families, has no chance of improvement. Free government cannot be reestablished in this country unless monopolies, special privileges, sumptuary laws, and restraints upon trade are abolished. Industrial freedom must come before political freedom can come.

Nor will conditions improve so long as that pernicious fallacy still continues to possess men's minds, that when they elect public officers the task of solving public questions is upon those public officers. Our President, our Governor, our Congressmen, our assemblymen, will never solve public questions correctly unless there is behind them a vigorous public sentiment demanding that a certain line of action shall be taken. The citizen who attempts to avoid his responsibility by saying that he has done his duty by electing a good man to office, little knows what forces are constantly attempting to influence the action of their public servants. These self−constituted politicians talk much about the dear public, but the thing they fear above all others is a real expression of public opinion. To keep the people quiet, to divert their attention from the sinister forces behind government, to hide their own action behind the doors of legislative committees, is the high art of the latter−day politician. If the people only knew the true conditions and appreciated to what ends they are leading, we almost would have a revolution.

The whole question of restoring democratic government is found in the single problem of how the people can control public men for the public benefit, instead of allowing them to be controlled by combinations for the benefit of those combinations. President Cleveland, in his inaugural address, put the whole problem in two or three sentences as follows: "Your every voter as surely as your chief magistrate, under the same high sanction, though in a different sphere, exercises a public trust. Nor is this all. Every citizen owes to the country a vigilant watch and close scrutiny of its public servants, and a fair and reasonable estimate of their fidelity and usefulness. Thus is the people's will impressed upon the whole framework of our civil polity — municipal, state, and federal; and this is the price of our liberty, and the inspiration of our faith in the republic." The citizen who keeps aloof from public affairs should receive the condemnation of everyone. To interest men in the discussion of public affairs, and to make that discussion widespread and earnest, is the only efficient means of restoring democratic government. No amendments to the frame of our government, and no laws which legislatures may pass, will avail anything in bringing about a real reform in the condition of our country, unless a change takes place in the performance of our duties as citizens, unless we all come to believe that a trust rests upon each of us individually, and unless the maddening passion of our commercial life is soon abated.

I will now try to indicate one by one some changes in laws and in our Constitution which will aid an effort for better government. The first step which the people of the United States should take is to call a convention through their legislatures in two thirds of the states for proposing amendments to the Constitution of the United States. This Constitution is the most undemocratic instrument to be found in any country in the world to−day. The conditions of its amendment are so difficult as to make amendment impossible unless the people are stirred to their depths over existing conditions. The constitutions of the states have been amended many times to meet the conditions of modern life. The Constitution of the United States, after the first ten amendments at the time of its adoption, was amended twice, and for over sixty years thereafter no amendment thereto was made. The usurpations in government to−day are largely the result of the rigid provisions of the Constitution and the great difficulty of its amendment. The President strenuously insists that additional powers should be exercised by the national government, and his Secretary of State says that, unless the states do as they ought to do, methods of construction will be found reposing− those additional powers in the national government. "A recent distinguished member," says Mr. Paul Fuller/ "of the department of justice, who has come to practice his profession in New York City, told a body of assembled merchants some time ago that the Supreme Court was a perpetual convention

for the amendment of the Constitution.'*

For sixty years Congress, with its committees behind closed doors, each member of which is seeking to get as many pension bills and private bills affecting his district passed as possible, has been appropriating hundreds of millions of dollars of the people's money, for which there was not the slightest authority in the Constitution. Is it not about time that the people put a stop to these things? The way to do it is to remove all doubt about the provisions of the Constitution by embodying the will of the people to−day in an amended Constitution. This cannot be done by a single amendment. The only way to stop usurpation is to remodel the whole Constitution, and that can never be accomplished until the right to amend it is less difficult to attain. Let the people arouse themselves to one supreme effort and change the method of amendment so that the legislatures of one third of the states can propose amendments, and a majority of the voters in a majority of the states can approve amendments.

(t The whole scheme of the American Constitution," says Mr. Bryce, "tends to put stability above activity, and to sacrifice the productive energies of the bodies it creates to their power of resisting changes in the general fabric

1 Fuller, Columbia Law Review, March, 1905, p. 193.

of the government."1 The object of a constitution in a democratic form of government should be to allow tlie opinion of a majority of the electors to act as freely and directly as possible upon public questions. Our Constitution checks and defeats popular control, and makes true party government impossible. The result is that a very few men control the parties to−day, and they control them largely for the private interests who furnish the money for political campaigns.

Washington desired to make his administration represent the whole people, and conceived the idea that in order to do this he must have in his cabinet the representatives of both parties. So he selected Jefferson, the leader of the Anti−Federalists, as Secretary of State, and Hamilton, leader of the Federalists, as Secretary of the Treasury. He found it impossible to carry on government with men whose views were so radically different. William III, of England, selected his first Ministry from both of the political parties, and the result was that he got into trouble with both. But between 1693 and 1696 he dismissed the Tories and confided the affairs of the state to the Whigs, who had a majority in the House of Commons. From that time the ministry has been selected from whatever party had a majority in the House of Commons, and that ruling party has been held responsible by the people for its measures. The leaders of the party in power have been in the habit of formulating the measures of government to be presented to the House of Commons for their approval, and they have had to take the responsibility for the wisdom of those measures. 1 Bryce, American Commonwealth, vol. i, p. in.

Those measures have been discussed fully in the open House, and the result has been the passage of comparatively few laws each year, those laws being of a general nature affecting the interests of the whole body of the people.

With us the House of Representatives may be Democratic while the Senate and the President may be Republican. This condition has existed for a considerable proportion of the time since the Civil War. Under such conditions neither party is responsible for legislation. Out of such conditions has grown up the extension of the committee system; and literally hundreds of thousands of private bills, and bills conferring special privileges, have been gotten secretly through the committees and then "jammed," in the last days of the session, through the House. Billions of dollars of the people's money have been appropriated for purposes unknown to the Constitution, or, if justified by the Constitution, for purposes without the slightest merit.

These conditions might be remedied by making a majority in the House of Representatives supreme in the matter of lawmaking, and giving to the Senate only a suspensive veto, subject to the second passage of a rejected measure through the House. The Committee on Appropriations and the Ways and Means Committee should be merged into one large committee, and given the control of both the amount of revenue raised and the amount appropriated. It should be provided by Congressional act, or by amendment to the Constitution, if necessary, that the head of each of the great departments of the government should occupy a seat on the floor of the House of Representatives, and that they should be present at least one day in each week, on the opening of the sittings of the House, to give information as to the needs of their departments, and to answer the questions of members of the House.

In the year 1881 a select committee of the United States Senate was appointed to consider a bill to provide that the principal officer of each executive department rplight occupy a seat on the floor of the Senate and House of Representatives. The committee consisted of George H. Pendleton, William B. Allison, Daniel W. Voorhees,

James G. Blaine, M. C. Butler, John J. Ingalls, 0. H. Platt, and J. T. Parley.1 The report of that committee, which was unanimous, included the proposed bill providing for this change.2 Under our present Constitution

* Bradford, Lessons of Popular Government, vol. i, p. 324.

2 Senate Bill, 227 (i88i).

"That the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Attorney–General, and the Postmaster–General shall be entitled to occupy seats on the floor of the Senate and House of Representatives, with the right to participate in debate on matters relating to the business of their respective departments, under such rules as may be prescribed by the Senate and House respectively.

"That the said Secretaries, the Attorney–General, and the Postmaster–General shall attend the sessions of the Senate on the opening of the sittings on Tuesday and Friday of each week, and the sessions of the House of Representatives on the openings of the sittings on Monday and Thursday of each week to give information asked by resolution or in reply to questions which may be propounded to them under the rules of the Senate and House; and the Senate and House may by standing order dispense with the attendance of one or more of said officers on either of said days."

the departments of the government are entirely distinct from the legislative body, and yet the needs of legislation are best known by the heads of departments. The ministers of parliamentary governments to–day are the heads of departments, and are required not only to be present in the popular branch of the legislature, but they are selected from the members of that branch. The separation of the House of Representatives and the Senate from the heads of departments, each working independently for a common end, is entirely out of keeping with modern parliamentary ideas.

Some means should be devised to stop the fifteen thousand bills which come into the House of Representatives in a single session of Congress. Three fourths of these bills would never have had a being had we adopted the modern parliamentary system of government, wherein the ministry representing the prevailing party prepares bills and limits their introduction. Open public discussion of proposed acts has practically ceased to exist in the House of Representatives, and the Congressman, with no opportunity for attaining fame, contents himself by getting on as prominent a committee as possible, and by gaining favor with his constituents through procuring for them private acts and special legislation. These measures are hardly ever discussed in the open House, they are simply an allotment to each member to aid him in procuring support in his district. As a result we have the most extravagant government in the world. Our River and Harbor Bill alone, in the last session of Congress, was greater than the total cost of government prior to 1860. Congress and the President expended about $2,000,000,–ooo of the people's money in the Fifty–ninth Congress, at least a billion more than should have been. The way to stop this vast expenditure is to provide that no private pension bill or any other kind of special legislation shall be passed by Congress. The claims for pensions can be adjusted by the Commissioner of Pensions. The other claims upon the government should be adjusted by the Court of Claims. General legislation should originate and be freely discussed in the open House, and tne autocratic powers of the Speaker, which we have described, should be taken away.

The true test of a good constitution is that it allows the voice of the people readily to be reflected in legislation, and that it calls into existence and keeps alive the political action of the people. Our Constitution does not permit this. Whenever a majority of the people can easily enforce their will upon the government, we shall have government by the people. With our present Constitution Republicans and Democrats fight a little in the open House, and then connive and collude behind the doors of the committees in aiding each other to pass all kinds of special and private bills requiring extravagant expenditure of the people's money. There is no sucli thing as reflecting the will of the people, except by real party government, such as does not exist in this country. The ideas of the ordinary Democrat or Republican in Congress upon public questions are hazy and indefinite. What we need in this country are parties that contend for principles, and not for plunder. What we want more than military or naval academies, are schools where men can learn something of constitutional law, international law, political economy, and principles of government. The ordinary Congressman has plenty of unverified convictions resting upon strong sentiment, and maintains them with perfect confidence, but seldom is he a master in knowledge of government and of public questions. When will the time come in our country that a large body of men, as in England, are able and willing to give thirty or forty years to the study of public questions, with true

devotion to the public welfare, and without any other recompense than the approval of their countrymen? In other countries, men born to wealth come into the world surrounded with traditions of public service. Here the only ambition our wealthy young men appear to bring from college is to make more money than their fathers, and to live more luxuriously.

Politics as a trade has been the curse of the United States ever since the Civil War, and will continue to be until a new line of men with new ideas of their duties to their countrymen are heard in the House of Representatives. Democracy will never be strong until it both has opinions on public questions and then has an opportunity to embody those opinions in legislation. Party government in our country will be the curse it has been for many years until our government is so constituted that party principles, reflecting the different opinions of the people, have a chance to come forward in public discussion before being embodied in legislation. Party government will exist only upon the surface so long as the public lives and acts of the members of Congress are hidden behind the doors of a secret committee. Corruption will find in these committees more and more its unfailing shelter, and usurpation will go on as it has unless the whole system of government is rearranged upon a basis where the people can know what is going on.

If the people wish to rid themselves of the rule of a small class of men who control the trusts and railroads in this country, let them make an end of this kind of government. Let all things in their public assemblies ,be done in the open. Let them insist that these tens of thousands of private bills shall be done away with absolutely. Let them have an opportunity to know what their representative is doing, and then let them put up an almighty fight against him whenever he goes amiss. This is the one hope for the existence of anything like free government. It is only when the political party in power is obliged to take upon its shoulders all the mistakes of government, and to become the target of all criticism against government, that there is any such thing as party responsibility. To–day the people know little about their representatives. They return them for being good fellows, and for their ability to get government jobs for their district leaders, but the merit of the public measures which they support is about the last thing on which their return depends.

Another change which would bring salutary results is to make the term of the President seven years instead of four, and take away the right of reflection. The President should also be given the power to appoint, without the advice and consent of the Senate, the ambassadors, consuls, judges, and other officials of the United States whom he now nominates. The result of requiring the consent of the United States Senate to these nomina– tions has been to make the Senators, to a certain extent, the masters of the executive, and to aid them through this patronage in building up party machines in their several states. The Senators of any particular state, where nominations are to be made, simply say to the President that their consent must be obtained to the nomination or that their associate Senators will not confirm it. In this way they destroy the intent of the framers of the Constitution that the Senate should consent to all the nominations of the President, except where the person nominated was an improper person for the position. This required consent of the Senate to the President's appointments has united the legislative with the executive department, and tends to destroy that separation of coordinate powers which was the desire and pride of the men who framed the Constitution. The President should be held responsible for appointments; if they are bad appointments he should not be allowed to divide responsibility with the Senate, if good he is entitled to all the credit of making them.

In connection with this change in the appointment of the officials of the United States, the term of all the inferior appointees, which is now four years, should be made indefinite in time; and the appointment of all officials of inferior grade should be transferred from the President to the heads of departments, to whom they should be responsible for the efficient conduct of their work. In all the higher grades of appointments, aside from those of ambassadors, public ministers, heads of Departments, and judges, a high–grade examination in law, economics, and public administration of law, such as is found in the civil service of Germany, should be adopted. There is no greater reproach upon our country than the kind of consuls which we send to foreign countries. If men were selected for those positions because of their acquirements and character they could be most efficient aids to the importers and exporters of our country. With indefinite terms of office established for all appointees, instead of four years, no officeholder ^should be removed from office except for misconduct. A statement in writing of the particular kind of misconduct complained of should be served upon him, and a real hearing with counsel and witnesses should be given him by the head of the department to which he belongs. A permanent public service of a higher grade could thus be brought about and the spoils system to a considerable extent eradicated.

Another amendment to the Constitution should provide for the election of United States Senators by a majority of the voters in each state. Eighteen states have already passed laws in favor of this measure. Five times has a bill proposing such an amendment passed the House of Representatives by an almost unanimous vote, and on each occasion it has either been lost in the Senate or disposed of without reaching a direct vote. Such an election would have many good results. It would entirely remove the deadlocks which have been seen in the legislatures of the states of Delaware, New Jersey, Rhode Island, and other states in recent years; also, it would remove the cause for corrupting state legislatures, which has been so conspicuous in recent elections in Colorado, Montana, and other states. Again, the election of the members of assembly in the different states, in years when a United States Senator is to be elected, is diverted from the real purpose of the legislature. The tendency of such a contest is to array the people in political parties, while about the only difference between the election of the Senator of one party and the Senator of the opposing party, under our present rigid Constitution, is the disposition of the spoils of office to the faithful henchmen who marshal the forces at the polls for the one or the other candidate. Give the people direct nomination of United States Senators, and submit their election to the great body of the voters of the state, and many a present representative in the Senate of the sugar trust, the steel trust, the railroads, the coal barons, the tobacco monopoly, and the express companies would be left in private life to continue his business as an attorney or trusty agent of these organizations.

The sessions of Congress should be so arranged that the second session will not occur after an election wherein a member who has been defeated continues to represent his district. Such a member has no motive, in such a session of Congress, to carry out the will of his constituents who have rejected him at the polls. He can avail himself, if he desires, of the secrecy of the committee to hide his action from the members of his district, and even if it is known, he cares but little, for the people have already declared against him. In the session of Congress of 1906–7, we saw a Representative from the state of New York who was not to return entertaining Congressmen at champagne dinners, thereby seeking the passage of the Ship Subsidy Bill. Another member from Ohio, whom the people had refused to nominate, sought to take the people's money in the amount of many million dollars and appropriate it to this private enterprise.

By an act of Congress under date of July 13, i866, a tax of ten per cent was imposed upon the note issues of state banks for the purpose of destroying them. How easily could Congress impose a tax of ten per cent upon the capital of monopolies, and thus end their existence. We suggest this to the attention of our President, who is so strenuous in his opposition to these monstrous combinations of capital, and we also urge upon his attenion that by simply removing the duties upon imports of like products to those manufactured by the trusts their power to rob the people would be greatly impaired. But in that case, to what source would the political parties look for the money necessary to carry on national and Congressional campaigns?

We have reduced the responsibility of members of the House of Representatives and of Senators to the lowest point. The Senators of Delaware, of New Jersey, of Rhode Island are responsible only to their own little states. A Representative from a district in the great state of New York is responsible only to his immediate constituents. The Senators from Nevada are permitted to participate in the government of all the rest of the United States, without the slightest responsibility or accountability to those states. As the country grows the separate interests of all the people diminish. The only way to increase responsibility is to cut up by the roots the whole system of private bills and special legislation, and to limit the legislation of Congress to general taxation, war, treaties, foreign and interstate commerce, postal service, bankruptcy, copyrights, patent rights, naturalization, and coinage, objects which are of common concern to all the people. The power to vote the people's money away in secret committee rooms has resulted in the most extravagant government ever known in all history, and hundreds of millions of dollars are used not only to build and maintain navies and armies, to promote agriculture in the separate states, to prosecute the business of building reservoirs and selling water to farmers, but to hide usurpation in a hundred other different ways. Will the people ever awake to the danger of such government and really assert their power and destroy the existence of the two political machines, not parties, that have so thoroughly betrayed their interests? There is only one way to do it, and that is to shut off the private and special bills, and limit legislation to the subjects over which the states have conferred power upon Congress. With such a limitation, and with legislation carried on in the open session where everyone can see and hear what is going on, there would be a probability of improvement in affairs.

The existence of political parties which really represent the opinions of the people and which act in vigorous

opposition to each other is the hope of the country. The parties of to–day do not represent the opinions of the people, but represent political machines which exist for the purpose of securing to the faithful henchmen the spoils of office. No man who really has convictions on public questions, and who hates corruption, can attain any party standing in any political party to–day. The party stands for graft and nothing but graft. The pity is that by and by the people will come to regard both parties as seeking spoils of office only, and will become so disgusted with them as to accept for a leader some unscrupulous demagogue, rich in promises and glib of tongue; or it may be that the President, with the consent of the people, will step in and take the entire control of the whole government. Let me give the reader an illustration. In 1894 an exposure was made before the Italian Parliament showing that Crispi, the Italian Prime Minister, had received corruption money from a bank at Rome. Thereupon a struggle commenced between Crispi and his opponents, with the result that parliamentary government was virtually suspended. The King of Italy paroled Parliament, and for a considerable time he imposed taxes without legislative sanction, the people, because of their disgust at the corruptions of the Chamber of Deputies, allowing this to be done without objection.

There is danger of such usurpation in our own country. The way to avert it is to destroy the spoils system, send the bosses and the cheap politicians to the rear, amend the Constitution as indicated above, select a higher class of Representatives and Senators, limit legislation to general subjects of common interest considered in open session, and make the political parties fighting parties upon public measures and not mere machines depending upon corruption and graft. We long have canonized our Constitution, we have regarded the man who condemned it as unpatriotic; let us now learn that a Con– stitution framed one hundred and twenty years ago must necessarily be imperfect to–day, that it must be treated like all such productions of man as becoming defective in time, and that it must be amended to meet existing conditions rather than to allow government to be carried on by usurpation of power.

The way to make a state strong is to increase the power of the people and make them partakers through the referendum in the control of important legislation affecting their state, and especially their cities. In the twenty years between 1874 and 1894, the Swiss Federal Assembly passed one hundred and seventy–five laws, nineteen of which were reviewed by the people under the referendum. Besides these nineteen laws, eight amendments to the Constitution were also reviewed under the referendum, and two more laws were brought forward by the initiative, so that in twenty years the people of the Swiss Confederation voted upon twenty–nine different questions. Sixteen of these laws and amendments were rejected and thirteen approved.

The most beneficial result of the referendum is that it separates public issues from men, and gets the people into the habit of considering the advisability of laws upon their merits. It keeps the representatives of the people in close touch with public opinion, because if public opinion is sufficient to petition therefor, the action of the representatives must be submitted to the will of the people. A strange result about the government of Switzerland is found in the fact that whereas in the German and Austrian Empire the people speaking different tongues have been quarreling over their language and their customs, yet in Switzerland, where the people are German, French, Italian, and Romansch, the separate nationalities in recent years have carried on the government with few conflicts. Liberty unites a people; oppression and usurpation divide them. Liberty gives birth to thought and action and develops men; usurpation suppresses individual initiative and destroys liberty. Break down the local and state governments, attempt to control these forty–six states from Washington, and you destroy the manhood of the people and create an intolerable despotism.

The way for the people of the states to protect themselves from the usurpations of the national government is to inaugurate in each state a vigorous state policy. They should resent with indignation every attempt of the nation to infringe upon their rights. They should see that good men are elected to office, and that the legislature does its duty. They should insist that all matters of great concern affecting their cities should be submitted on a referendum for the decision of the voters of each city. Year in and year out they should insist on the rights of localities to control their local matters, and on the rights of the states to govern their state affairs. In this way more than any other will they remove the excuse of the national government for the exercise of usurping powers. The passage of the Muller Bill by the Illinois Legislature, submitting the question of municipal ownership and the operation of city railways to the voters of Chicago, is said with one blow to have struck down graft legislation, and to have destroyed the corrupt organization of the prevailing party in Illinois at that time.

If the citizen would preserve the dignity and importance of his state government, which is the guardian of his

liberty, of his property, of all his domestic relations, and of everything which he holds dear in this life, he must be vigilant to see that it is constantly improved and worthy of the people's confidence. The state government, if honest and vigorous, can alleviate most of the evils of which the people complain, so far as law can alleviate evils. As Machiavelli well said: "There are no laws and no institutions which have power to curb a universal corruption." The state legislature creates corporations, and the same power which creates can provide that in case of disobedience to its laws the life of the corporation shall be forfeited. The state is under no obligation to allow a foreign corporation to carry on business within its confines.

But for the control of Congress over interstate commerce the states could destroy every oppressive trust in this land. The reason why trusts have become so powerful is that the national government always has insisted that the state should not forbid the bringing of the goods of the trust within the confines of the state, because it interfered with the nation's control over interstate commerce. Let the people amend the Constitution and take from the national government the power to control interstate commerce, then through their state laws they can make short work of the trusts. The attempt to control these lawless combinations under the interstate commerce clause of the Constitution will never prove effectual. The United States courts have no power except such as is given them by the Constitution, and cannot avail them selves of common–law powers. The state courts have unlimited power, except as withheld from them by the state constitutions, and can avail themselves of all the original authority of a sovereign state and of all the rules and customs of the common law. The result of these differences in their judicial power is that the national courts, in their criminal as well as in their civil jurisdiction, are greatly hampered by limitations, while the state courts with original and almost unlimited jurisdiction have the power necessary to root out evils.

But more effective than laws, more effective than courts, is the indignation of many strong men at abuses which the people's good–natured tolerance have allowed to wax great in power. Until that spirit of indignation is stirred to action all over our land and the people are ready to fight for the vindication of their rights, there is little hope of effective reforms. We need the spirit of old Peter Muhlenberg, who, in Revolutionary days, to the astonishment of his congregation, flung aside his surplice, disclosing a Continental uniform, and exclaimed: "There is a time for all things — a time to preach and a time to pray; but there is also a time to fight, and that time has come! "

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